POSITION – September 2020

EUROPEAN COMMISSION CONSULTATION ON A NEW COMPETITION TOOL

The European Commission is considering the creation of a **new competition tool** to ensure that markets are fair and competitive and address structural problems of competition that the existing tools (Articles 101 and 102 TFEU) could not resolve.

At the same time, as part the consultation on the digital services package, the Commission is studying the **opportunity of establishing ex-ante rules** to ensure real competition on markets where large platforms generate large networks effects and act as gatekeepers.

AFEP welcomes these Commission initiatives. They highlight the profound changes brought by digitalisation to the economy, and to which competition authorities must respond.

In this new context, Europe must be attractive, reactive and competitive - without being naive. The EU must adopt a holistic approach resulting in a "level playing field" between European and non-European actors. This includes the strengthening of the control of foreign investments in Europe and subsidies from third countries, adequate responsiveness to the agility of competitors from third countries, European capital to ensure European sovereignty in support of businesses and an updated competition policy (revision of the notice on the definition of relevant markets, DSA package, modernisation of EU merger control, etc.).

The President of the European Commission wants a recast of the EU competition rules to get "a more sectoral approach, adapted to the circumstances". Executive Vice-President Margrethe Vestager intends to better take into account data, which has become an integral part of the business model of many companies.

The Commission considers that the existing tools of competition law do not tackle structural competition problems in a timely manner. Creating this new tool could hence fill a legal gap in the implementation of these tools ("enforcement gap") to strengthen European competitiveness.

The diagnosis made by the Commission and the accompanying tools calls for the following comments from companies.

1. There is no demonstration of an "enforcement gap" that could be overcome by the creation of an NCT

AFEP member companies consider that existing tools have globally demonstrated on multiple occasions their **plasticity by adapting to economic developments.**

They ensured that cases considered in the NCT consultation are resolved on a consistent basis:

- competitive problems linked to “essential” infrastructures, to situations of tacit collusion or in connection with oligopolistic markets,
- a large majority of cases concerning the digital activities.

National authorities, such as the French Competition Authority, have been able to deal with various cases:

- The French Competition Authority (ADLC) demonstrated in 2018 the **adaptability of the legal framework** with a ruling on a merger involving two online platforms (decision 18-DC-18 of February 1, 2018) related to the sole takeover of Concept Multimédia by the Axel Springer group. To do so, it took into account the effects of crossed networks and the importance of data in this operation, based on a wide consultation of all professionals in the sector (portals, real estate agencies, federations), on

the analysis of numerous internal documents of the parties and, for the first time, on the results of an online questionnaire shared by the Authority with more than 30,000 real estate agencies.

- At the end of 2019, the ADLC sanctioned Google with a fine of 150 million euros for abusing a dominant position in the search advertising market.

Collaboration between national authorities and the European Commission

One of the first cases related to Booking.com was resolved in 2015 thanks to close coordination between various national competition authorities (French, Italian and Swedish) and the European Commission. Using existing tools, commitments were imposed on this company to modify the tariff parity clause and remove any clause imposing parity obligations on various players.

DG Competition:

The existing legal framework has enabled DG COMP to deal with many new and complex cases related to digitalisation. It notably imposed three fines on Google concerning its operating, price comparison and contextual advertising systems (Case AT. 39740 Google Search (Shopping); Case AT. 40099 Google Androïd, Case AT 40411 -Google AdSense).

In each of these cases, the existing toolkit enabled competition authorities to act, to adapt to new economic developments and to restore competition.

In addition, these same tools will be strengthened with the implementation of the ECN+ directive which, for example, gives national supervisory authorities a power of initiative (self-referral) for **interim measures**. The scope of such a tool, requested by these authorities, will enable them to fight more effectively against behaviours that could seriously damage the market and to respond to the competitive concerns diagnosed by the Commission.

2. A vast and worrying scope

The options considered by the Commission are worrying because they:

- target **non-dominant** companies holding power in a market without this concept being defined or in related markets without any abuse, such as oligopolistic market structures which are neither new nor objectionable per se,
- do **not clearly define the target market**: digital or non-digital / European or global.

Potentially, any economic actor in a non-abusive dominant position could be within the scope of this tool, based on the analysis of market structures. Its intrusive nature, based on an analysis which requires that many complex interactions are taken into account, is likely to call into question the building of real industrial strategies.

This tool would lead the Commission to impose behavioural or structural remedies against companies which have not committed any infringement, contrary to the legal principles according to which only abuse is reprehensible[1].

This results in a **strong legal uncertainty** for economic players, which limits their freedom of enterprise and their strategies for expansion and innovation on the European market. Such a tool is likely to have a negative impact on the economic recovery that the single market so badly needs in the context of the health crisis.

[1] See the decision of the French Constitutional Court of 2015 invalidating article 39 of law nº 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities (structural injunction without prior characterisation of an abuse of a dominant position "affects both the freedom of enterprise and the right to property, clearly disproportionate in relation to the aim pursued".)

Moreover, it remains unclear how such a tool would fit into the toolbox the Commission already has at its disposal. Article 103 TFEU, which would partly constitute the legal basis of the new tool, allows the adoption of legislation to "give effect to the principles set out in Articles 101 and 102", "to ensure compliance with the prohibitions" or "to define the scope of the provisions ". Any new tool based on Article 103 TFEU should therefore comply with the essential provisions of the Treaty as interpreted by the courts (concerning e.g. the burden of proof, the concepts of restriction of competition, dominant position, anti-competitive effects...). However, as the new tool is also based on Article 114 TFEU, the precedent value of Articles 101 and 102 TFEU is unclear, contributing to further legal uncertainty for stakeholders.

This new tool must not undermine a toolbox which has proven itself useful for many years and bring insecurity to the economy.

3. Prefer a more efficient tool: the introduction of an ex-ante regulation

Companies, however, agree with the Commission's analysis according to which large platforms ("gatekeepers"), by their structure and behaviour, have an impact on competition. They **recommend choosing the ex-ante regulation** contemplated in the package on digital services (Digital Services Act Package - DSA), to resolve problematic situations.

This ex-ante regulation will have the double advantage of:

- giving the Commission a new tool applying to key players in the digital sector, provided this concept is clearly defined,
- maintaining the legal framework known to companies operating in other economic sectors.

The measures aimed at defining a **list of prohibited practices** *per se* for large digital platforms will make it possible to correct the asymmetry with traditional players and prevent the effects linked to the vertical and horizontal integration policies of large structuring platforms.

A **clear definition of "gatekeepers**" is thus required beforehand to better classify the constraints weighing on economic players while targeting the most structuring platforms.

While digital technology is now everywhere, the behaviour of players in this area varies considerably. The mainstream use of digital as an exchange tool has radically different competitive impacts compared to those induced by built, structured players thriving on data control and possible anti-competitive behaviour (barriers to entry, effects of networks...).

The definition of these major platforms to which this regulation would apply should focus on the following objectives:

- **avoid limiting the emergence** of innovative platforms by placing them at a disproportionate legal risk,
- include the **main characteristics of the platforms** (network effects, dependence on third parties, data, creation of ecosystems, etc.),
- draw up a **blacklist of specific illegal practices** (in particular the proliferation of counterfeit products on Internet, self-preference clause) or other cross-sectoral practices specific to certain players hindering competition (management of online advertising, the imposition of abusive or discriminatory conditions on partners, etc.).

Such an ex-ante regulation would contribute to ensuring legal certainty, by guaranteeing predictability of the rules and its scope. A clear and predictable legal framework helps support the economy in general thanks to a secure policy of innovation (defence of patent and/or trademark rights holders) or facilitated industrial structuring (merger operations).

4. Further reflection

Should an enforcement gap between the existing competition tools and the ex-ante rules specified in the framework of the DSA appear, only then the use of a new tool could be considered to grasp the structural competition problems linked to the behaviour of the most structuring platforms. This would allow **for a case-by-case assessment** and tailor-made remedies through an adequate institutional structure ensuring **overall consistency with competition law.**

In such a case, it would be necessary to rethink the approach to such a tool, much too broad at this stage. Its scope would have to be reduced, to only target enforcement gap cases, namely the structuring platforms fulfilling previously defined criteria.

The new competition tool cannot target all sectors and markets of the economy, as it would risk undermining legal certainty and compliance with the principle of proportionality, which helps preserve the freedom to conduct business.

Conclusion

While it is desirable to reflect on the competitive impact of the behaviour of certain large digital players, it is **not justified to create a new transversal competition tool** likely to impact all economic players through very strict and insecure control.

Maintaining vigorous implementation of existing competition tools (including the use of interim and corrective measures when necessary) that have already demonstrated their flexibility should be encouraged. Should the existence of an "enforcement gap" be demonstrated, a more targeted intervention could be imagined, applying to only the most structuring platforms, the definition of which must be clear and coordinated with that of the DSA package.

The most worrying competition cases could this way be targeted without having a lasting impact on the emergence of dynamic European players.

Reflections on this highly impactful tool for the economy must therefore continue. A legal upheaval going beyond the situations primarily targeted should be avoided and problematic cases linked to the abusive behaviour of the most structuring large digital platforms should be focused on.

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ABOUT AFEP

Since 1982, AFEP gathers the largest companies present in France. The association, based in Paris and Brussels, aims to foster a favourable environment for businesses and to present the vision of its members to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve sustainable growth and employment in Europe and meet the challenges of globalisation is AFEP's priority. AFEP has around 113 members. More than 8 million people are employed by AFEP member companies and their cumulative annual turnover amounts to 2,600 billion euros.

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