

## EVALUATION OF THE EUROPEAN COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET

### AFEP's detailed comments on the consultation

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The European Commission submitted to stakeholders a questionnaire to assess the relevance of its 1997 notice on the definition of the relevant market for the purposes of Community competition law.

AFEP member companies welcome this initiative, for which they have been asking for many months. The Commission's approach also echoes [letters](#) from various Member States, including France, asking in 2020 to "modernise the European Union's competition policy". Reports commissioned by the Commission ([Report](#) on Competition Policy in the Digital Age) or drafted at national level have also underlined this need, such as the French [report](#) "Competition policy and the strategic interests of the EU".

This assessment is also part of the Commission's work on a future more pragmatic and efficient competition policy: the "DSA Package", a new system for monitoring and correcting the distorting effects of subsidies from third countries ...

In a world undergoing major economic (importance of digital) and structural (globalisation of markets) changes, the European approach to competition policy must evolve to better **support companies** operating in a **complex and fast-evolving globalised world**.

In addition to their response to the consultation questionnaire, AFEP member companies, which operate globally, wish to emphasize that the **modernisation of competition law is strategic and cannot be limited to the review of the relevant market**. It should also address the competition analysis carried out by the Commission, that should:

- Retain a **more comprehensive economic and legal analysis of the relevant market**. The three criteria of competitive constraints (substitution on the demand and supply side, and also the **potential competition** currently not taken into account) should be applied in a modulated but not cumulative manner and a **dynamic temporality** has to be integrated into this analysis. The Commission must also take better account of the potential external competition on the internal market from **non-European competitors** (extend the analysis to **3-4 years**);
- Integrate **digital and structural changes in the product and geographic dimensions** of the market and **the calculation of market shares**, such as free services, two-sided markets, barriers to entry and the market powers of the most structuring platforms.
- Include in the analysis the market power of the concerned **non-European companies** by taking better account of international competition and its impact on the internal market (captive markets, subsidies from third countries, etc.).
- Allow **better consideration of EU interests** (environment, digital, industrial policies...) and of **impacts in areas other than just competition**. It is therefore essential to **strengthen inter-**

service consultations within the European Commission upon notification of the transaction.

- **A necessary update of a text which remains useful**

For a long time, the 1997 Notice provided stakeholders (economic players as well as competition authorities) with a framework to analyse the market, offering **relative legal predictability**. However, in the light of the **2020 globalised context** in, the parameters mentioned in the 1997 Notice need to be reviewed.

The economy and its framework have undergone profound changes since 1997, in Europe (official common currency in nineteen of the twenty-seven countries of the Union, enlargement...) as in the whole world (extension, then weakening of the WTO, the growing influence of China, rising trade tensions, digitalisation of the economy). The uses and behaviour of consumers have changed, as have the conditions of competition for European economic players. As the latter must deal with a strong economic interconnection with new markets on the different continents, the Commission **must include these new dimensions** in its analysis.

The delimitation of the relevant market is essential by often having "decisive influence on the assessment of a competition case" (Notice - § 4). However, the assessment made by the Commission through the 1997 Notice is now sometimes out of step with the new economic reality.

Therefore, **structural changes** must be made in this notice (beyond changes in textual references relating to the treaty or to the merger control regulation).

- **Adopt a more comprehensive economic and legal approach: non-cumulative and modulated application of the three criteria (including potential competition) and a dynamic temporality**

AFEP does not question the different applications of the relevant market depending on the nature of the competition issue examined by the Commission (§12). However, particularly in merger control, there is a **dichotomy between the market definition phase and the ensuing analysis**. The definition, too static, undermines the relevance of the analysis which is by nature prospective. Both competition at the global level and the **potential future competition in time horizons consistent with economic reality** should be considered. The Commission should aim to obtain a **more dynamic and long-term** approach to competition, on a **global scale**, considering both the well-being of the consumer and the economic reality with which European players are confronted.

This leads to a **review of the basic principles of market definition** by modifying the interpretation of the competitive constraints underlined in §13, 14 and 24. While § 13 identifies "three major sources of constraints" to define the market, the Commission retains only that arising from supply-side substitutability when this has "effects equivalent to those of demand substitution in terms of effectiveness and immediacy" (§ 20 ) and does not take into account potential competition, except at a later stage (§ 24).

These three criteria must be used in an **overall analysis** of the competitive situation **as soon as the relevant markets are defined**:

- **demand substitution**, focused on the elasticity of demand to price, can no longer be the sole criterion of analysis. First, in the face of a globalised and digitised economy, new consumption possibilities are offered: digital platforms, distribution/delivery via the Internet or completely free services. These lead to price observation being not immediately so relevant. Secondly, a number of operations are linked to quality competition, which, to be maintained, requires significant investments, as well as a cross-assessment of quality and price in the long term. In both respects, to take into account this different consumer environment, § 13 must be revised to put into perspective the weight of demand substitution side and the sole price indicator by integrating possible competition through quality and the emergence of digital services.
- a **new balance between demand and supply** must help determine the relevant market, by giving a little more weight in the analysis to supply capacities. In particular, the significant industrial capacities of certain players such as digital giants and companies from certain third countries need also to be taken into account; therefore, the following modification must be made in § 20 “We must also analyse...”.
- the analysis of **potential competitors** likely to enter the market concerned has become strategic and must be undertaken in a **realistic timeframe** of at least 3 - 4 years after the economic analysis is carried out; thus, the wording of § 24 must assert its unavoidable nature by replacing “Potential competition.... is not taken into consideration “by” must be taken .... “. The specific nature of rapidly growing digital markets also calls for an adaptation of the concept. This analysis of potential competition must take into account the characteristics of the market, the lifespan of a product and the specific capacities (including subsidies) of potential competitors to enter the market, at least in the medium term. The Commission could also broaden the criteria of its analysis to other markets and products in comparable sectors, to forecast longer-term developments in a given sector.

In a now globalised (and digitalised) economic world, the **modulated consideration of these three criteria, which are not cumulative**, is essential. It must be done **from the start of the analysis** to allow more balanced restitution of the economic reality. This would avoid a too narrow definition of the relevant market, which could lead to the undue invalidation of certain merger operations.

This renewed analysis must be accompanied by better consideration of the **impacts of these operations in areas other than just competition** (competitiveness, employment, international trade, etc.), according to transparent and fair procedures. Inter-service consultation should be stepped up, upon notification and not only at the time of draft decisions, by fully involving the relevant Commission Directorates-Generals in the DG COMP investigation, in particular DG GROW, DG TRADE, and DG EMPL.

To strengthen this process, the competition analysis should also **integrate the significant positive contributions of mergers to European policies**, to ensure consistency with European digital, industrial and environmental strategies, and the capacity to innovate, following the example of the precedent existing in European texts encouraging IPCEIs. This EU interest should also be consistent with that which will be defined by the instrument for the control of international subsidies.

- Consider differently certain elements of the assessment contributing to the definition of markets: the product and geographic dimensions

It is essential to have a better and clearer geographic definition of the market, as they are now mostly global, and as digitalisation has profoundly changed the behaviour of both supply and demand. Therefore, the market definition must be able to capture all current and potential competitors on a global scale and integrate the interaction of physical and online markets into its product dimension.

- Integrate the digital dimension into the product dimension

Since 1997, the product offer has considerably evolved through the digitalisation of the economy. Paragraphs 25 to 27 must reflect this profound transformation to define the relevant market.

The Internet is now significantly integrated into the purchasing behaviour of consumers, both in terms of comparing upstream offers and the act of buying itself. They alternately obtain information in a physical store or online to make their purchase in an increasingly undifferentiated manner. Whilst the substitutability of the channels is not perfect, the French Competition Authority considered in 2016 that “it appears sufficient to consider that online sales exert such competitive pressure on in-store sales that these two channels should now be considered as part of the same market”<sup>1</sup>. In the case in question, the Authority concludes that “the competitive analysis must be carried out on the retail distribution market for brown and grey electronic products integrating both in-store sales and distance sales. ”

The notice must also better reflect **new free digital services** and the **characteristics of two-sided markets**. Indeed, market shares calculated based on operator sales alone are no longer always relevant when services are provided free of charge, which is common in the digital economy. The substitutability tools such as the SSNIP test are then inoperative. A better understanding of these non-transactional two-sided markets could therefore be introduced. It may thus seem necessary to distinguish in the notice the situation in which different sides of a two-sided market constitute a single market from the situation in which they constitute separate markets.

- Revise the scope of the geographic dimension of the market

- The analysis of the geographic market is limited in § 28 at the national, EU or European Economic Area level. But the Commission's competitive analyses should take into account **distortions of competition in third countries**. In particular, the takeover of European companies by non-European companies should be analysed especially regarding the status of the latter (public companies) or the aid/subsidies received in their country of origin.
- The notice must therefore be revised to integrate world markets into the Commission's analysis. The globalised economic reality shows more and more how much these markets are a source of strong competitive pressure on the markets referred to in § 28. This same analysis leads to the revision of the last sentence of § 32 to mention that “A process of

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<sup>1</sup> Decision n° 16-DCC-111 of July 27, 2016 relating to the acquisition of exclusive control of Darty by Fnac

integration of market... of larger geographic markets *must* (and not can) be taken into account... ”and to complete § 48 to integrate global markets.

- The rise of **digital technology now tends to relativise or even erase geographic borders**, whether for consumers who buy products (sometimes of foreign origin) on a foreign marketplace without knowing exactly with whom they are in transaction or for the European company for which the competition is borderless. Its importance in the Commission's analysis grid must be heavily weighted in § 45 and the following paragraphs. Taking past trips into account to understand a situation (§45) provides a static economic picture of a world that has become mobile and agile. To reflect the current economic reality, including competitors of a new type (search engines, platforms, etc.), the last sentence of this § must be replaced by a consideration of potential competition offering a prospective analysis of the operation ;
- The **importance of entry barriers** should be stated in these paragraphs in addition to legal barriers and those relating to transport costs. § 46 must be updated to incorporate the open or closed nature of certain third-country markets (administrative difficulties, standards, public contracts, etc.) creating real competitive imbalances in the accessibility of these markets. In addition, the massive public subsidy practices of certain States increase the speed of the arrival of certain companies on the internal market, whether they are already present or not, which should lead to putting into perspective the reality of barriers to entry on the market;
- The potential trade flows at the global level in the analysis of the competition playing field must be taken into account to better **appreciate the global dimension of the affected market** (§ 49). Likewise, it is necessary to take into account the **EU's free trade agreements** (or of other states) which are based on a similarity of markets which must be taken into account in the overall analysis;
- The obstacles and costs linked to the reorientation of orders (§ 50) must reflect **a more global approach to trade flows in terms of markets** (which have become global) **and tools** (digital pre-eminence).

- **Include these economic and structural changes in the calculation of market shares**

The paragraphs on the calculation of market shares (53 to 55) should better reflect the digital dimension. The analysis carried out by the Commission must take account of the fact that the market power of the main players is different from that of "traditional" players and transcends the notion of physical geographic dimension. While digital technology is now everywhere, the behaviour of players in this area varies considerably. The current use of digital as a tool of exchange has competitive impacts radically different from those induced by built, structured and thriving players on data control and possible anti-competitive behaviour (barriers to entry, effects of networks...).

In some cases, the calculation of market shares based on sales does not reflect the **actual position and strength of operators**. Indeed, as already mentioned, digital services are often provided free of charge (in exchange for data in particular).

Finally, the calculation of these market shares on an international scale should take into account the **potential existence of a captive market** abroad so as not to underestimate the market power of a competitor who would otherwise not have few shares in the domestic market.

- **Increased transparency on the constitution of evidence**

Paragraphs 33 and 34 are intended to facilitate the search for information/evidence on market limits by questioning various players, including competitors.

Constituting a form of market test, this approach is supported by companies. However, it can prove to be a source of bias: a competitor will most often be reserved on the planned merger.

To limit this bias, the consequences of which may be significant, the Commission should explain, in each case, how it has weighed all the evidence/information received.

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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.

Contact:

**Emmanuelle Flament-Mascaret** – Director of  
Business Affairs and Intellectual Property  
[concurrence@afep.com](mailto:concurrence@afep.com)

**Jérémie Pélerin** – Director of European Affairs  
[j.pelerin@afep.com](mailto:j.pelerin@afep.com)

**Alix Fontaine** – EU Public Affairs Advisor  
[a.fontaine@afep.com](mailto:a.fontaine@afep.com)