

UPDATE OF THE NOTICE ON RELEVANT MARKET DEFINITION (REVIEW) – CALL FOR EVIDENCE

The European Commission has opened a call for evidence to support its work ahead of a public consultation in June 2022 on its draft revision of the 1997 Notice on the definition of the relevant market for the purposes of Community competition law.

This revision aims “to ensure that the Notice remains fit-for-purpose and is updated to reflect latest market developments and evolutions in the Commission’s approach to market definition”.

AFEP thanks the European Commission for continuing its discussions with stakeholders in order to update its original text to a review that is as close as possible to the current economic reality.

In October 2020, AFEP had already given the Commission its [full support](#) for this strategic modernisation of competition law. This evolution should lead to a revision of the market definition and to a broader competition analysis in order to:

- 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** within a **dynamic temporality**.
- 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.

In February 2022, AFEP reiterates its 2020 comments while stressing that welcome textual changes are now to be taken into account in the forthcoming revision of the Notice.

Indeed:

- The Digital Markets Act (DMA) - in the process of being finalised - strengthens the European Commission's capacity to fight against unfair competitive practices by the most important digital players: lists of obligations will constrain them in order to recreate certain competitive fairness in the digital world;
- The proposal for a Regulation to address potential distortive effects of foreign subsidies in the Single Market, currently under discussion in the Council and the European Parliament, aims to take better account of the competitive advantages enjoyed by companies outside the EU due to the support in the EU and on the markets from their home countries. It establishes the principle of horizontal control of any type of distortionary effect, control of subsidies that may distort competition in the context of mergers and control of subsidies that may distort competition in the award of public contracts. This text will thus contribute to providing the European Commission with finer analytical tools to assess the real market power of non-European companies and their impact on the Single Market.

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In addition to these orientations already initiated by the Commission, AFEP wishes to recall the main structural changes - developed in its October 2020 response - to be made during the revision of the 1997 Notice in order for competition policy to be a major asset in the EU's strategic interests.

1/ Review the basic principles of market definition

The objective here is to have efficient tools for a more dynamic competitive analysis in the long term and on a global scale.

A **new interpretation** of the competitive constraints underlined in § 13, 14 and 24 of the 1997 Notice is thus required to assess, from the **start of the analysis and in a non-cumulative manner**, the three sources of constraints that make it possible to determine the relevant market:

- **demand substitution**, focused on the price elasticity of demand, can no longer be the sole criterion of analysis: the weight of demand substitution side and the sole price indicator (example of the use of the SNNIP test) must be put into perspective 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 particularly those of the digital giants;
- **the analysis of potential competitors** likely to enter the relevant market has become strategic and must be read in a **realistic timeframe of at least 3 - 4 years**. The Commission's evaluation of the Notice had in particular identified the issue of fast-moving markets and the temporal dimension of market definition as points that should be better taken into account by the text¹;

2/ Broadening the definition of markets

Two new factors have emerged since 1997 and should be considered: the **globalisation of markets**, with the relevant markets now generally being worldwide, and **digitalisation**, which has profoundly changed supply and demand behaviour.

Consequently, markets definition must be able to take into account all current and potential competitors on a global scale and integrate the interaction of physical product markets and online sales markets in its product dimension.

- **Integrate the digital dimension into the product dimension as:**
 - consumers have integrated the Internet into their purchasing behaviour (comparison of upstream offers or the act of purchasing itself). Online sales exert real competitive pressure on sales in shops, which should be considered as equivalent sales channels;
 - free services ("zero pricing") in digital and the characteristics of two-sided markets are now consubstantial to the digital economy.
- **Review the scope of the geographic market dimension by:**
 - **widening the scope of the geographical market analysis**, currently limited to the national, EU or European Economic Area level (§ 28). The future Regulation on third-country subsidies should enable the Commission to take account of distortions of competition in third countries in its competition analyses and integrate the open or closed nature of certain third-country markets (existence of special or exclusive rights which reduce the possibility for foreign companies to establish themselves there). The place of geographic markets in the context of globalisation and import competition should be reviewed in the Notice.
 - **relativising the notion of geographical borders** in the face of digital behaviour which erases this notion and taking better account of potential competition for a prospective analysis of the operation.

¹ Commission's working document, "Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law of 9 December 1997", July 2021

3/ Include the digital dimension and economic changes into the calculation of market shares

- In some cases, the calculation of market shares based on sales does not reflect the real position and strength of operators, as digital services are often provided free of charge;
- The calculation of market shares in its international dimension should take into account the potential existence of a captive market abroad in order not to underestimate the market power of a competitor that would otherwise have few shares in the domestic market.

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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