



FESE submission on EC Consultation on a New Competition Tool

Friday 4th September

A. Introduction

On 4th June 2020, the European Commission initiated a public consultation process on a New Competition Tool which is one of the measures aimed at making sure that competition policy and rules are fit for the modern economy. The preliminary proposal for a New Competition Tool, including four policy options, is set out in the Inception Impact Assessment (IIA)¹. FESE welcomes the opportunity to reflect on the role that the European Union (EU) competition policy should have in a fast-changing world.

B. Is there a need for a New Competition Tool?

In FESE's view, it is far from clear as to whether there is a need for a 'New Competition Tool' when taking into account the wide-ranging powers that already enforce existing EU laws. These laws already prohibit anticompetitive behaviour and unilateral conduct that amounts to abuse of a dominant position, and give the power to conduct sector-wide inquiries (which can prompt further targeted competition investigations into specific companies). Given that these powers are enshrined in the Treaty on the Functioning of the European Union (TFEU) and in legislation based on the TFEU, FESE would encourage the Commission to conduct a detailed analysis of where exactly the existing tools are inadequate. FESE would also like to draw attention to the principle of proportionality² and the fundamental freedom to conduct a business³ which form the basis of the regulatory and economic architecture in the EU and opposes further regulation, which should only be considered if there is clear evidence of a structural market failure.

¹ Ref. Ares (2020)2877647 - 04/06/2020

² See Article 5(4) TFEU and the case law of the Court of Justice of the European Union. For instance, Judgment in *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, C-331/88, ECLI:EU:C:1990:391, para. 13: "the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

³ Article 16 of the EU Charter of Fundamental Rights recognises the freedom to conduct a business. According to the Court of Justice of the European Union, "[t]he protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition" (Judgment in *Schaible*, C-102/12, ECLI:EU:C:2013:661, para. 25; see also Judgment in *Sky Österreich*, C-283/11, EU:C:2013:28, para. 42).

C. Aspects to consider

In case the Commission opts to pursue changes to the current competition law framework, it should consider the following aspects:

1. It will be difficult, in our opinion, to develop a list of comprehensive tools while ensuring that the industry is not overly burdened at the expense of productivity and global competition. In particular, unintended effects (e.g. by changing the way companies might challenge each other) in the first step should be avoided wherever possible.
2. Markets are often global and there is, therefore, a need to recognise that European markets and European competition law should fit into a globally competitive model. Any adaptations or extensions of the competition law toolbox should not put European companies at a competitive disadvantage compared to companies operating primarily under non-European competition law frameworks. Overly onerous regulation carries the risk of burdening companies by binding resources (unnecessarily) at the cost of productivity in the EU and the EU gross domestic product.
3. A one size fits all approach, without a clear view of the competitive parameters of the respective relevant market, would in our view be flawed. FESE suggests that a tool which is targeted in scope would be more proportionate. Options 1 and 3 of the IIA should therefore not be pursued. Given the choice between options 2 and 4 of the inception impact assessment, FESE would argue in favour of option 2 which fits much better than option 4 into the existing competition law system.
4. As outlined in the Commission's IIA on this topic, "a few large platforms have become gatekeepers for many digital and non-digital products and services". The Commission continues by stating that "underlying this development are market characteristics such as extreme economies of scale and scope, strong network effects, zero pricing and data dependency, as well as market dynamics favouring sudden and radical decreases in competition ('tipping') and 'winner-takes-most' scenarios". In this context, it should be noted that there are significant differences distinguishing digital platforms (e.g. BigTech) companies from Exchanges, and using a 'one-size-fits-all' approach would be detrimental to the success of the Capital Markets Union. None of the features mentioned by the Commission above are sufficiently present in the markets in which market operators operating trading venues are active. In particular, competition is working rather well in the area of exchange trading and transparency with many new trading and execution venues developing. There is no evidence that would point to any market failure or barrier to entry for new trading venues within the EU market. On the contrary, trends over the past decade suggest that entry of alternative trading venues and the resulting competition for order flow have not been constrained. As of today, the ESMA register counts 137 Regulated Markets, 224 Multilateral Trading Facilities, 74 Organised Trading Facilities, and 225 Systematic Internalisers. In addition, exchanges, i.e. trading venues as defined by MiFID II, are subject to a dedicated legal framework which already contains an ample selection of specific requirements regarding the provision of trading services and market data by exchanges. Therefore, **FESE suggests that the scope of any potential New Competition Tool should solely apply to digital platforms.**

The Federation of European Securities Exchanges (FESE) represents 36 exchanges in equities, bonds, derivatives and commodities through 18 Full Members from 30 countries, as well as 1 Affiliate Member and 1 Observer Member.

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