

GENERAL BACKGROUND ON ERT

- European Round Table for Industry ('ERT') is a network and interest group organisation the members of which are CEOs and Chairs of over 50 major European industrial companies. Companies led by ERT members include both EU and non-EU companies such as ABB, ArcelorMittal, BASF, BMW, Daimler, E.ON, Kone, L'Oréal, Néstle, Nokia, Royal Dutch Shell, Siemens and many more.
- ERT was founded in 1983, premised on the idea that 'European co-operation between industry, policy-makers and all stakeholders is essential to strengthen Europe's place in the world.'
- Competition policy is one of the eight publicly stated focus areas of ERT.
- The Chair of ERT is Mr Carl-Henric Svanberg, the Chairman of AB Volvo. The Chair of ERT's competition policy work group is Mr Nils S. Andersen, the Chairman of AkzoNobel.
- We organise regular meetings with ERT on the various ongoing policy files. For the ERT specific positions on these files, see the individual briefings below.

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DIGITAL MARKETS ACT (NEW COMPETITION TOOL + EX ANTE GATEKEEPER RULES) AND
DIGITAL SERVICES ACT

ERT'S POSITION ON THE DMA AND THE DSA

- European companies need competition policies that create a global level playing field and that are sufficiently responsive to changing global market conditions, without undue complexity and legal uncertainty.
- ERT welcomes any initiatives to maintain European competitiveness and recognises that:
 - a) The Commission could usefully increase the use of existing tools such as sector inquiries, interim measures, speedier and more targeted investigations to establish precedent in shorter timeframes;
 - b) EU competition tools may be sharpened but are fundamentally sound. If insufficient, the possibility of supplementing them with ex ante regulation (focussed on very large dominant gatekeepers) deserves to be evaluated first;
 - c) Quick but targeted enforcement against abusive practices of hyper- or super-scalers / super-dominant gatekeepers via an NCT (where it has been clearly identified that the current competition rules are not adequate in terms of powers or timing) should **only be implemented to the extent an enforcement gap is clearly established** subject to any proposed DSA ex ante regulation, and subject to two critical caveats: (i) that appropriate procedural safeguards are built in, and (ii) that the new rules do not introduce legal uncertainty in the broader economy.

KEY MESSAGES

- We thank ERT for its involvement in the Commission's policy-making activities, including the DSA and the NCT public consultations.
- Competition policy and rules are **generally fit for purpose** and are being reviewed to further increase the timeliness and effectiveness of competition enforcement.

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BACKGROUND

1. Why there may be a need for extending the competition toolbox

- The dynamic and evolving nature of digital markets poses challenges to antitrust enforcers and legislators in terms of changing business models and novel types of business conduct; strong network effects and economies of scale; and ubiquitous multisided

platform businesses. These market characteristics are not completely new, but sophisticated technology can amplify them. In particular, competition for the market may be important and dominance may easily emerge (tendency of digital markets to "tip").

- Nevertheless, the Treaty rules proved **flexible enough to take account of changing market realities**. Their core principles have remained unchanged, providing for legal certainty. Their application is subject to the scrutiny of the Union courts and the respect for the parties' rights of defence.
- Our enforcement actions during the last years proves that **targeted competition enforcement remains relevant and can complement or reinforce regulatory initiatives**, such as the conclusion of the Digital Single Market. Examples are the E-commerce Sector Inquiry and the ensuing enforcement action (e.g. consumer electronics), as well as investigations into the likes of Google, Qualcomm, Amazon and Apple.
- We intend to maintain the **leading role in antitrust enforcement notably in high-tech markets** among global enforcers and ensure that European companies can compete on equal terms.
- But we also need to **ensure that our rules stay fit for purpose**, notably in a fast changing world that is becoming more and more digital. The Commission is reviewing the effectiveness of the competition rules in many areas, including in antitrust. The goal is **clear rules and legal certainty that reflect today's business realities, including the impact of digitalisation**.
- We are reviewing the safe harbours and guidelines for **both vertical and horizontal agreements, and the Notice on Market Definition**. We encourage stakeholders, public or private, to take an active role in these important reviews to help us formulate sound policy options and give guidance to business.
- We also plan to **use to the full extent possible our existing toolbox**, for instance by using interim measures, as was done in the Broadcom case, or by launching sector inquiries such as the one currently ongoing into the Internet of Things.

2. The Digital Markets Act and the Digital Services Act

- On 2 June 2020, the inception impact assessment (IIA) as well as an open public consultation inviting comments was published to seek stakeholders view on the need for a possible new competition tool.
- A parallel impact assessment on platform-specific ex ante regulation, for which a separate stakeholder consultation was launched also on 2 June, covers the second pillar, while the DG COMP's stakeholder consultation deals with the third pillar. The regulatory initiative is part of the broader package for a Digital Services Act ("DSA"), for which another consultation was launched.
- During the three months when the consultations were taking place, we received an extremely large amount of contributions (around 3 000 replies).

A. The Digital Markets Act

Briefing for Executive Vice-President Vestager
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Chair of the European Round Table Committee on Competition Policy
11 November 2020, 14:30

- The **Digital Markets Act** would be a proposal combining the Commission's proposed ex ante regulation of digital platforms that have a gatekeeper role with a market investigation framework to examine digital markets prone to market failure (and based on the results of the impact assessment for a New Competition Tool).
- Ensuring the contestability and fair functioning of digital markets in particular - but also other markets across the economy - requires a holistic and comprehensive approach, based on three main objectives:
 - (1) the ***continued vigorous enforcement of the existing competition rules*** making full use of Articles 101 and 102 TFEU, including the use of interim measures and more prescriptive or restorative remedies, where appropriate;
 - (2) possible **platform-specific ex-ante regulation** to ensure fair trading conditions on all platforms, including possible additional requirements for those that play a gatekeeper role (e.g. a concise list of clear-cut obligations and prohibitions); and
 - (3) a possible **new competition tool** to deal with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules (e.g. preventing markets from tipping).
- The parallel open public consultations on the New Competition Tool (third objective) and the gatekeeper obligations (second objective, it is part of the Digital Services Act consultation and was complemented with a consultation on the responsibility of actors in the digital economy) finalised on 8 September at midnight.
- During the three months when the consultations were taking place, we received an extremely large amount of contributions (around 3 000 replies).
- In addition to the Open Public Consultation, the Impact Assessment for the New Competition Tool is also looking at the opinions of other stakeholder, including:
 - The European competition authorities are a fundamental pillar. We had several meetings in the context of the European Competition Network and we have launched a very extensive consultation with competition authorities across the European Economic Area to better understand the experience of others and understand how competition authorities perceive this debate.
 - We commissioned four studies prepared by well-known university professors.
 - All these materials were published on Friday 9 October 2020 on our website: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html
- These consultations yielded positive results, showing that there is overall support for EU action in order to ensure a borderless, fair, and contestable Digital Single Market where companies can thrive and where citizens have genuine choices and control.
- [Internal and confidential: the legislative proposal was initially scheduled for Q4/2020. However, the timeline may change after the negative opinion of the RSB. Moreover, following (ongoing) discussions with the LS the scope of the future initiative is likely to be very different from the initial expectations from NCAs who vouched for a horizontal tool also open to them.]

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B. The Digital Services Act

The Digital Services Act is a policy initiative meant to upgrade liability and safety rules for digital platforms. More specifically, the new Digital Services Act could modify the "safe harbour" of the year 2000 E-Commerce Directive. According to this safe harbour, internet service providers are only liable for illegal content uploaded by users if they do not remove it after being requested to do so. Given the breadth of the definition of "illegal content" (terrorist content, hate speech, child abuse, IPR infringement.....), a key question in the Digital Services Act will be for what types of "illegal content" platforms will face liability.

Within the Digital Services Act, the Commission does not intend to modify the core principles of the current framework, i.e. the country of origin principle, the limited liability exemption of online intermediaries or prohibition of general monitoring obligation, but rather to reinforce and clarify them.

Furthermore, the Commission plans to address issues related to platforms responsibility and accountability also in the context of the European Democracy Action Plan. Any new European rules will put freedom of expression safeguards at their very core. This includes protections from government interference in people's freedom of expression.

An open public consultations on the Digital Services Act finalised on 8 September at midnight. As a follow-up to this consultation and subject to the outcome of the impact assessment, a legislative proposal is scheduled for Q4/2020.

Contact:

Updated on 5 November 2020

REVIEW OF THE LEGAL FRAMEWORK FOR HORIZONTAL COOPERATION

ERT'S POSITION ON THE LEGAL FRAMEWORK FOR HORIZONTAL COOPERATION

- ERT expressed concerns that EU competition law can disincentivise companies from participating in horizontal cooperation. It sees a need for a more open minded and encouraging approach to such forms of co-operation coupled with greater legal certainty.
- Some of the suggestions it made in its response to the public consultation include:
 - The analysis of pro-competitive effects should for certain horizontal cooperation agreements already take place under Article 101(1) of the Treaty, and not only under Article 101(3).
 - The Commission should provide clearer guidance on the assessment of horizontal cooperation agreements in the Block Exemption Regulations (BERs) and in the horizontal cooperation guidelines. The Commission should also provide more informal guidance on a voluntary case-by-case basis.
 - Expanding the block exemption regulations: need to keep and update the existing BERs and add new ones covering standardisation, sustainability agreements, data pooling/data access and infrastructure sharing agreements. Also a new BER should be considered for industry wide cooperation agreements where parties seek to become competitive in the context of global actors or the be efficient in sustainability projects.
 - Reviewing the Horizontal Guidelines, to notably include further guidance on the application of Article 101(1) of the Treaty on arrangements between parent companies and their jointly controlled subsidiaries, joint bidding, information exchange, joint purchasing, sustainability and standardisation agreements.

KEY MESSAGES

- We thank ERT for its contribution to the Commission's public consultation in the evaluation phase of the review of the framework for horizontal cooperation.
- The two Block Exemption Regulations for horizontal co-operation agreements that exempt certain research and development agreements and specialisation agreements from the application of Article 101 TFEU will expire on 31 December 2022.
- The Commission launched the evaluation process of these texts, and the accompanying Guidelines on horizontal cooperation, through the publication of an evaluation roadmap in September 2019.
- The Commission is currently in the final phase of the evaluation of the legal framework for horizontal cooperation agreements. The next step in the evaluation process is the adoption of the Staff Working Document which summarises the findings. The Commission intends to publish this document early 2021 (timing to be confirmed).

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- In the course of this evaluation, the Commission has gathered comments on the current rules from:
 - o stakeholders - such as ERT - we received more than 80 replies to the public consultation which closed in February 2020;
 - o competition authorities of the Member States - all Member States contributed and we also got input from authorities in the United Kingdom and Norway
 - o external consultants that reached out to specific categories of stakeholders - we are expecting their final report in the coming weeks
- Issues raised by some of the contributors - and which were also raised by the ERT - include:
 - o the lack of a specific section on sustainability agreements in the guidelines
 - o the need for further guidance on information exchange arrangements
 - o the need to reflect the dynamics of the digital economy in the rules
 - o the general need to provide more legal certainty in the self-assessment of horizontal cooperation agreements
- The next step in the review process will start in 2021 with the impact assessment phase. There will be several opportunities for ERT and other stakeholders to contribute to this phase (timing to be confirmed).

NECESSARY FACTS AND FIGURES

Summary of main comments from ERT

ERT submitted a long paper with comments and suggestions on both block exemption regulations and the horizontal guidelines.

In summary their main concerns are the following:

Scope of the rules: The review should take in to account the global competition environment, technological developments and sustainability goals.

Definition of markets, market power and potential competitor not clear: traditional definitions of markets and market power are not adapted for example to digital markets or innovative services markets. Definition of potential competitor is too broad, not practicable and prevents pro-competitive collaboration. Potential competitor should be limited to ability and publicly announced intention to enter immediately the market.

Application of Art 101 between parent companies and their jointly controlled subsidiaries: article 101 should not apply to cooperation between parent and jointly controlled subsidiary if there is decisive influence under the subsidiary (and thus the doctrine of single economic entity should apply).

Joint bidding: additional guidance should be provided with the possibility of benefiting from the rules and exemptions on joint production and specialisation

Information exchange - also in the context of collaboration within ecosystems, platforms and data: current rules are too broad, information exchanges should not be automatically regarded as "by object" infringements. Flexibility with regard to information exchanged in the context of ecosystems, data pooling and data sharing.

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Joint purchasing: more guidance on buying alliances, aggregating volumes for reaching discounts and need to reconsider market share threshold (current 15% is too low, should go up to 30%).

Sustainability cooperation: proposes to include sustainability criteria among the key elements in the assessment of the legal and economic context under Article 101(1) and as cumulative criteria when evaluating horizontal cooperation under Article 101(3).

Reviewing the notion of "consumer welfare": there needs to be a shift away from focusing only or mainly on prices - considerations such as improvements in sustainability, infrastructure, standards, innovation (and other factors) are often equally critical to consumer welfare.

Standardisation: requests for clarifying the language, for instance regarding the fact that participants in standardisation are not necessarily competitors and that standards are developed rather than "set".

Expanding the block exemption regulations: need to keep and update the existing BER and add new ones covering standardisation, sustainability agreements, data pooling/data access and infrastructure sharing agreements. Also a new block exemption regulation should be considered for industry wide cooperation agreements where parties seek to become competitive in the context of global actors or to be efficient in sustainability projects.



Contact:

Updated on: 9 November 2020

WHITE PAPER ON FOREIGN SUBSIDIES

KEY MESSAGES

- On 23 September, the public consultation on the White Paper on foreign subsidies finished. The Commission has received 150 contributions, some very detailed, from a wide range of stakeholders, including third countries.
- I would like to thank you for the helpful contribution of the European Round Table to the consultation on the White paper, which we read with much interest.

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NECESSARY FACTS AND FIGURES ERT

position:

The Working Group on Competition Policy of the European Round Table for Industry (ERT) submitted a contribution to the public consultation of the White Paper in September 2020. It welcomes the proposal, which it considers an important contribution to securing the global competitiveness of European industries to the benefit of the EU economy and its people.

In ERT's view, a foreign subsidy regime should be aligned with the State aid framework, but should also allow taking into account whether a beneficiary has privileged access to its domestic market. Legal certainty, starting with clear definitions of key concepts needs to be ensured, and enforcement procedures must not be overly burdensome so that they can be completed in short time frames.

- As regards module 1, ERT favours a broad scope and the Commission as sole enforcement authority. Module 1 should include a complaint procedure.

- As regards module 2, ERT favours a limited scope, namely applying it to acquisition of control as set out in the EU merger control regulation. The Commission should be sole enforcement authority.
- As regards module 3, ERT favours the Commission assuming a bigger role, and subjecting SOEs to stricter supervision.

Background on White paper

On 17 June 2020, the European Commission adopted a White Paper, which launched a public consultation on ideas for future rules on levelling the playing field as regards foreign subsidies. Three so-called "Modules" aim at addressing the main distortive effects caused by foreign subsidies:

- i. in the Single market generally (Module 1),
- ii. in acquisitions of EU companies (Module 2),
- iii. in EU public procurement procedures (Module 3)

Module 1 could work on an *ex-officio* basis, while Modules 2 and 3 on a system of prior notification of foreign subsidies. These Modules are complementary to each other, rather than alternatives. The White Paper also sets out a general approach to foreign subsidies in the context of EU funding. The White Paper proposes a model of shared enforcement between the Commission and the competent Member States' authorities:

- For Module 1, both the Commission and Member States would designate supervisory authorities, which would coordinate their activities to ensure coherence (similar to the existing cooperation in antitrust).
- For Module 2, the Commission could be exclusively competent in a system of prior notification of acquisitions. By providing a 'one-stop-shop' across the EU for acquisitions above certain thresholds, it would reduce the overall burden on companies.
- For Module 3, Member States' contracting authorities (awarding the public procurement) and competent national supervisory authorities would assess a possible distortion, whose decision could be reviewed by the Commission.

The White Paper was open for public consultation until 23 September 2020. In light of the input received, the Commission aims to present appropriate legislative action in 2021.

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Updated on: 9/11/2020

REVIEW OF THE MARKET DEFINITION NOTICE

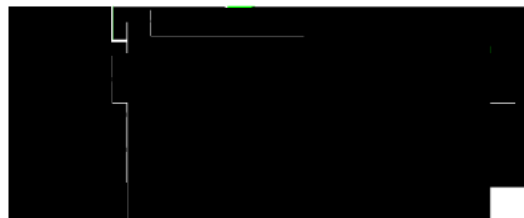
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- Public consultation went from June to October 2020 and everyone interested was invited to contribute. We received 86 submissions from stakeholders most of them businesses or business associations but also from others such as from government authorities. ■
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 - At the same time, it is important that the competition rules remain fit for a world that is changing fast and is becoming increasingly digital and interconnected.
 - As part of the public consultation, ERT submitted a position paper. The policy paper focused on four main topics:
 - (i) the importance of a clear market definition guidance;
 - (ii) market definition as a non-static exercise and based on evidence;
 - (iii) global geographic market alternatives should be considered;
 - (iv) gathering evidence should be accomplished without overburdening the companies.

An overview of the position of ERT and that of the Commission on those topics is provided on the next page.

SUMMARY OF ERT'S POSITION

ERT encourages the Commission to develop a framework that: (i) provides legal certainty to businesses, (ii) clarifies the precedent value of market definitions in EU Merger Regulation ('EUMR') cases for the antitrust self-assessment under Articles 101 (vertical or horizontal agreements) and 102 (in dominance scenarios) and (iii) includes practical examples.

SUMMARY OF COMMISSION'S POSITION



digital economy, requires a clear and up-to-date analytical framework for market definition. A broader and more dynamic assessment of market definition is needed.

Notice should take into account digitalisation of economy, non-EEA imports and other potential entrants as well as trends for regional and worldwide sourcing.

The importance of a clear market definition guidance

- Precedent value of market definition from EUMR cases on Article 101 and 102 cases and vice-versa?
- Market definition from a previous case is not necessarily binding.
- When possible, market definition should be left open.

Market definition is based on facts yet, it is not static

- Too much focus on price and Demand-Side-Substitutability. More focus should be given to other factors like quality, innovation and data as the currency.
- SSNIP test should be adapted to SSNIQ when faced with zero-price markets.
- Potential competitors should be included at the market definition stage.
- No speculation about products/services development and R&D should be considered at the market definition stage.

Gathering evidence

- **More streamlined RFIs:** The Commission should strive to reduce the burden of requests for information by making meetings and calls with the merging parties and third parties (followed by minutes) the norm. If a request for information is necessary, it should be short and self-explanatory, using clear and straightforward.
- **Weighted evidence:** The Commission does not intend to "follow a rigid hierarchy of different sources of information or types of evidence". The revised Notice should provide clarity by expressly recognising that pre-existing internal documents estimating market shares, particularly in the context of M&A activities, are often preliminary and sometimes inaccurate

KEY MESSAGES

- We highly appreciate the interest ERT is showing in the topic and its contribution to the Review of the Market Definition Notice.
- We agree with the ERT that it is important that the competition rules remain fit for a world that is changing fast and is increasingly digital.
- The purpose of the evaluation is to ensure that the guidance the Commission gives on market definition is accurate and up to date and that it sets out a clear and consistent approach to market definition, in a way that is easily accessible.

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BACKGROUND

The public consultation on the Market Definition Notice was launched on the Commission's website in late June 2020 and finished on October 2020. It was open to all interested individuals and organisations. The Commission also separately approached national competition authorities.

Earlier, the evaluation Roadmap was published on 3 April 2020. It is a short document explaining the main characteristics of the evaluation to the general public. The review itself was announced in December 2019.

The current Market Definition Notice dates from 1997 and may therefore not address all pertinent questions arising in market definition today. The Commission has gained a lot of experience in market definition since 1997, techniques have evolved and the EU courts have provided additional guidance. The best practices that can be distilled from these developments may need to be reflected in a revised Market Definition Notice, and the Commission is seeking stakeholders' feedback on this.

A Staff Working Document at the end of the Evaluation will summarise our findings on whether the current Notice pursues relevant objectives, whether it pursues them effectively, efficiently and coherently, and whether it provides EU added value. If the evidence shows a need to update the Notice, the review phase will be launched with the aim of adopting a new Notice in around 2 years.

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