



Paris, 8 July 2020

## **POLITICAL OPINION**

### **on the modernization of European competition policy**

The European Affairs Committee of the French Senate,

Having regard to the Treaty on the Functioning of the European Union, in particular Article 3 and Articles 101 to 109 thereof, as well as Protocol no. 27 on the internal market and competition,

Having regard to Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,

Having regard to Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings,

Having regard to Commission amended Regulation (EC) no. 773/2004 of 7 April 2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,

Having regard to Commission amended Regulation (EC) no. 800/2008 of 6 August 2008, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation),

Having regard to Commission Regulation (EU) no. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices,

Having regard to Commission Regulation (EU) no. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid,

Having regard to Commission Regulation (EU) no. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty,

Having regard to Regulation 2016/1037 of the European Parliament and Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union,

Having regard to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union,

Having regard to the Commission guidelines of 5 February 2004 on the assessment of horizontal mergers under the Council Regulation on the control of concentrations among undertakings,

Having regard to the Commission guidelines of 18 October 2008 on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings,

Having regard to the Communication from the Commission of 24 February 2009 - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,

Having regard to the Commission guidelines of 10 May 2010 on vertical restraints (currently under revision),

Having regard to the Commission guidelines of 14 January 2011 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements,

Having regard to the new Industrial Strategy for a globally competitive, green and digital Europe presented by the European Commission on 10 March 2020,

Having regard to the public consultations launched by the European Commission on 2 June 2020 on the Digital Services Act package to address the development of the internal market and clarifying the responsibilities of digital services, and the establishment of an instrument for the *ex ante* regulation of large online platforms with significant network effects acting as gatekeepers in the Internal Market,

Having regard to the public consultation launched by the European Commission on 3 June 2020 concerning a new competition tool,

Having regard to the European Commission White Paper of 17 June 2020 on the distortive effects of foreign subsidies on the single market,

Having regard to European Parliament resolution of 18 June 2020 on competition policy – annual report 2019 (2019/2131(INI)),

Having regard to Senate European Resolution no. 131 (2016 2017) of 8 September 2017 calling for a reform of the conditions for the use of the protective measures provided under Council Regulation (EC) no. 1/2003 on the implementation of competition rules,

Having regard to Senate European Resolution no. 42 (2017 2018) of 7 January 2018 on the screening of foreign direct investments in the European Union,

Having regard to Senate European Resolution no. 23 (2018-2019) of 16 November 2018 on the Proposal for a regulation of the European Parliament and Council promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final,

Having regard to member's bill no. 62 (2019-2020), adopted by the Senate, intended to guarantee free consumer choice in cyberspace,

Whereas the prohibition by European treaties of corporate practices and conducts or State aid tending to prevent, restrict or distort the free play of competition is one of the foundations of the proper operation of the internal market, which helps provide European consumers with innovative, good-quality products at a reasonable price;

Whereas the merger control regulations were introduced in 2004 to address the same concern;

Whereas the implementation of European competition policy by the European Commission under the supervision of the European courts, and the tools and practices thereof, have been the subject of changes intended to streamline procedures and encourage innovation whilst effectively protecting European consumer choice, competitive innovation, and the proper operation of the internal market;

Whereas the European Commission has been able to react quickly and effectively to the economic consequences of the health crisis by means of its 19 March 2020 adoption of a Temporary Framework for State aid measures aimed at providing support to the economy in the current context of the COVID-19 outbreak, as amended on 3 April 2020 and 8 May 2020,

Whereas the globalization of the economy and trade as well as the development of digital technologies nevertheless represent major challenges, requiring the prompt adaptation of this policy in view of its effective combination with the other drivers of European policy in terms of industrial strategy and commercial policy,

*On the need for systematic sectoral analysis of the state of competition*

Whereas the European Commission performs sectoral investigations only when mergers between companies are reported, or when anti-competitive practices develop within market segments;

Whereas such investigations do not address the state of trade flows or confirmed subsidy practices, do not account for the existence of systemic actors, and do not include enough forward-looking elements;

Whereas it is essential to improve the Commission's responsiveness toward distortions of competition, speed up the review of case files in regard to concentrations and State aid, and provide economic operators with greater predictability;

Whereas the various Directorates General (DG) of the European Commission do not intervene in a sufficiently coordinated manner in terms of competition case file review;

Recommends that the European Commission DG for Competition establish regularly updated *ex ante* maps in collaboration with the sectoral DGs by the end of 2020 showing the state of competition on the internal market based on generalized sectoral analyses, intended to serve as a working basis for the investigations conducted by the DG for Competition in the context of merger control and the identification of anti-competitive practices;

Considers that this joint assessment of the state of the markets should analyse the state of competition and concentration in the sector, accounting for the presence of systemic or quasi-monopoly actors and the prevalence of killer acquisitions; anti-competitive behaviours and unfair practices observed or suspected, in particular by identifying cases involving economic actors established in third countries; and the state of trade flows, placing particular emphasis on trade barriers and any existing or possible dumping and subsidy practices;

Recommends that, upon the Commission's receipt of a merger notification, or upon the launch of an investigation into anti-competitive practices, the DGs for Competition, Commerce and Internal Markets should be consistently brought together to examine the elements in the case file, based on the mapping work thus conducted;

*On the crucial importance of developing the notion of consumer well being*

Whereas European competition policy is based on efforts to promote consumer well-being, which leads the Commission to seek to prevent any interference resulting in an increase in prices, reduced product quality, or reduced market choice subsequent to a merger of companies, anti-competitive practices, or the provision of State aid;

Whereas "consumer well-being" is a vague and broad concept that covers concepts associated with price, choice and innovation, but does not give companies the ability to rely on a consistent precedent, and gives a very wide scope for interpretation to the DG for Competition in its review of case files;

Observes that this approach prevents the Commission from considering other criteria resulting from the broader objectives assigned to European policies, which must imperatively be taken into account since international competition has intensified and damage to the environment has increased;

Calls for a clarification of the components of "consumer well-being" and for the integration of new elements such as competitiveness, job retention, environmental protection, personal data protection or even strategic autonomy;

*On extending the time horizon to account for future potential competition*

Whereas the time horizon chosen by the European Commission in its analysis of potential harms to competition in a market is often too close to account for the probability of the entry of competitors into the European market in the medium term, in particular from companies benefiting from public support provided by third States;

Finds that the Commission therefore prevents the convergence of European actors apt to face this competition, or imposes upon them asset transfers (referred to as structural remedies) that weaken them in international competition and undermine the economic and industrial sovereignty of Europe;

Advocates, in the wake of the 2019 Franco-German manifesto for an industrial policy suited to the challenges of the 21<sup>st</sup> century, for an extension of the time horizon to at least five years, as practiced by other competition authorities, in particular in the United States, and a clarification of the European Commission's doctrine on the weight given in its analysis to future potential competition;

*On the urgent need to update the definition of "relevant market"*

Whereas the concept of "geographic market" has undergone considerable changes with the cross-border development of digital technology and international trade and the harmonization of technical standards, and the character of a "product market" has also been modified by the proliferation of products or services that a consumer can use digitally free of charge;

Requests that the European Commission promptly update its guidelines for the definition of "relevant market," which dates back to 1997, so as in turn to adjust the concepts of "product market" and "geographic market" to the changes in the economic situation;

*On the need to provide the European Commission with tools enabling it to effectively combat the abusive practices of non-European companies*

Whereas competition on the European market is distorted by abusive behaviour among companies established in third countries, due for example to unfair commercial practices such as dumping, public subsidies, or defective merger control;

Supports the proposals set out in the European Commission White Paper of 17 June 2020, which would permit it to prohibit acquisitions of European companies by companies receiving unfair advantage from foreign public subsidies, to impose remedies on companies such as remedial payments or structural or behavioural corrective measures when it has identified distortions of competition in a market linked to such subsidies, and to exclude from procurement procedures public tenderers benefiting from foreign subsidies that distort the competitive nature of the invitation to tender;

*On the need for increased flexibility in the application of European competition law*

Whereas delays in implementing procedures for investigating and sanctioning cartels and abuses of dominance can have destructive and irreversible effects on the maintenance of competition in the internal market;

Whereas interim measures provide an essential tool for the prevention of distortions of competition while investigations are being conducted that nevertheless remains unused by the European Commission;

Recommends that the Commission rapidly implement preventive measures during investigations to lock in the existing state of competition and that the conditions for implementing such measures be relaxed, removing the requirement of proof that the damage would be irreparable, and instead requiring proof only that a risk of serious and immediate harm exists; ease the requirement to make a *prima facie* finding of a violation, instead requiring only a finding that the practice observed may constitute such a violation; and broaden the field of protected interests justifying such measures by no longer addressing only infringements of competition rules but - as under French law - addressing harm to the general economy, the sector concerned, the interest of consumers, or the complainant company;

Whereas, when a concentration would generate competition issues, the Commission consistently gives priority to asset sales, rather than to commitments to change the business conduct of the parties to the transaction, which would not impose penalizing asset sales upon them but would seek instead to ensure the maintenance of effective competition in the specific market;

Whereas this practice is detrimental to European actors, who find themselves forced to sell assets to foreign competitors or to abandon their proposed mergers, which may have considerable effects on the competitive environment and the further development of the market, without any prior evaluations;

Recommends that priority be given to specific, exacting, and verifiable business conduct commitments, subject to revision when necessary, based on an in-depth analysis of the market and potential competition performed in collaboration with market actors when possible, and that the Commission set up thorough monitoring to verify that the commitments made are actually respected and ensure that they achieve the intended objective;

Calls for conduct commitments to also be established in case of anticompetitive practices, on an interim basis, as soon as such practices are identified, and then within the framework of the transaction procedure;

*On the integration of new analysis concepts suited to the digital environment in view of ensuring preventive monitoring of actors conduct*

Whereas the new practices of the digital economy present a challenge for economic analysis, particularly in light of the provision of certain services free of charge, network externalities, the presence of systemic actors, and the data economy, even if the platforms do not always occupy a dominant position within the meaning of competition law;

Whereas it therefore appears necessary to revise the classic concepts of competition (in particular the concept of "relevant market," since there are no longer homogeneous products in an economy of free goods), to make a change of scale to include the potential for worldwide competition, and finally to account for dynamic economic efficiency;



Recommends - particularly in the context of the revision of the E-Commerce Directive - that analysis of market power account for network effects, and that relationships between platforms (in particular those which are in a position to foreclose the market) and their users or competitors should be rebalanced by establishing an *a priori* monitoring of the collection and use of data (portability of personal data, interoperability, auditability, non-discrimination, fairness, etc.), which will allow corrective measures to be taken quickly in the event of a breach of these rules;

Holds that it is urgently necessary to define the key concept of gatekeeping platforms based on precise criteria, as proposed by the Commission in the consultation it launched recently (network effects, number of users and / or capacity of the service to obtain market data, etc.), and to identify the systemic nature of certain digital operators in order to be able to set up close monitoring, as well as to monitor the acquisitions of small innovative companies that generate little turnover and therefore do not exceed the current notification thresholds, thus ensuring that the proposed transaction is not likely to reduce competition, or even eliminate it (killer acquisitions);

*On the need for transparent retrospective evaluations of decisions made in regard to competition matters*

Whereas the remedies the Commission requests from companies in case of concentrations have far-reaching consequences that may be irreversible in the case of asset sales, and are based on complex concepts such as relevant market, potential future competition, time horizon or market power;

Whereas these remedies may in retrospect turn out to have been ineffective or even counterproductive, since certain markets evolve very rapidly, and detrimental to various EU interests such as consumer well-being, the proper functioning of the internal market, innovation capacity, and the competitiveness of European businesses;

Recommends the establishment of follow-up for Commission decisions to analyse the relevance of the corrective measures decided in light of the objectives assigned to them, in order to possibly review or remove business conduct remedies that prove irrelevant or constitute too heavy a burden for the company in question compared to the expected competitive gain; such monitoring would also allow the Commission to gradually refine its future decisions, market by market, sector by sector, while the economic changes in the competitive level of a market in certain sectors are particularly rapid (changes in market shares, new entrants, rising or falling prices, etc.);

Considers that, for similar cases in the future, such monitoring would also make it possible to modify the application of the various economic concepts, in particular the time horizon chosen in light of the speed of a market's growth, the probability of potential future competition in light of the public aid provided to a foreign competitor, the evaluation of efficiency gains, or the extent to which access to data is taken into consideration;

Proposes, for this purpose, that a European Observatory for the Evaluation of Competition Policy be created, to be placed under the authority of the European Commission and independent of the DG for Competition, which would be responsible for collecting information relating to the state and development of competition in the various economic sectors, in particular with the aim of updating sectoral maps and providing a basis for the evaluation of Commission decisions on competition; for compiling and keeping up to date a database of these decisions and the relevant case law of the Court of Justice of the European Union ; and lastly, for monitoring the application of the Commission's decisions on competition and performing an assessment of these decisions, based in particular on their impact on prices, consumer choice, trade flows, market concentration, business competitiveness, European employment, innovation capacity, environmental protection, and personal data protection.