

## AIM Position

### EU Commission consultation for a New Competition Tool

8 September 2020

#### Introduction:

AIM, the European Brands Association, represents over 2,500 consumer goods manufacturers who innovate, create and invest across the European Union. Fairness in trading practices and legal certainty are crucial aspects to ensure our members are able to deliver innovation and added value across the supply chain.

We welcome the opportunity to submit views in this consultation process on the European Commission's proposal for a New Competition Tool (**NCT**).

#### Key considerations:

- AIM welcomes the EU Commission's initiative to launch a debate and consult on the need to modernise EU competition law in the light of digitalisation and the increased need to have the right tools to keep markets open and competitive.
- Given the potential impact of any such investigation on the actors in a certain sector any New Competition Tool should be framed within a clear set of thresholds, safeguards, including oversight and judicial recourse.

#### We would like to submit the following aspects for this consultation:

1. **Fit-for-purpose:** The NCT is proposed by the European Commission to ensure competition policy and rules are fit for the modern economy, and to address gaps in the current EU competition rules. It is essential that the Commission clearly identifies such gaps requiring the introduction of any NCT.

In recent year's operators across a number of sectors, including the fast moving consumer goods industry in particular, experienced certain practices which authorities have not entirely been able to address within the current competition framework based on Article 102.

The elements proposed by the Commission seem to confer powers that are arguably significantly more interventionist in the economy than the ability to impose fines or prohibit a prospective merger. As the branded goods industry operates in highly competitive and dynamic markets, we call on the Commission to ensure that any NCT is fit for purpose, proportionate and clearly targeted. The modern economy evolves swiftly, and continuously, with new technologies and innovations available today that were unheard of even 5 years ago.

2. **Legal certainty:** This dynamism in and of itself is important to note in assessing the competition framework upon which all operators rely in Europe. One of Europe's most critical assets is the clear and established rule of law. The fundamentals of EU competition law (TFEU 101 – 102) need to be

guaranteed in a framework that guarantees predictability of enforcement actions of the Commission and an effective judicial review.

3. **Innovation and adaptation**: Consumer welfare is at the heart of the EU competition law framework, as much as it is at the heart of AIM's members serving consumer needs. Any NCT with a broad scope of application while not clearly setting out the theories of harm that need to be assessed risks having a chilling effect on the innovation pursued by many businesses which in turn leads to less choice of products, lower quality and higher prices. It is critical that any NCT will not stifle business goals on the various parameters of competition, such as innovation, sustainability and the ability to adapt to local market or consumer preferences.
4. **Points for clarification**: The elements provided by the Commission in this consultation give some indication of the Commission's intentions and possible application of any NCT but also raise a number of questions and concerns regarding the scope, procedures and safeguards. The following should be addressed before further steps are taken in drafting any new competition tools:
  - a. **Scope**: as any market investigation is likely to be highly intrusive on a given sector there should be a clear threshold and set of criteria that would form the framework to demonstrate when the Commission would launch a market investigation under any NCT.
  - b. **Market failure**: Any NCT should maintain a high level of evidential standards. There should be a clear indication of a market failure or imminent market failure before the Commission is able to start a market investigation under a NCT. This would include stakeholder consultations such as is the case in some markets where a similar system is in operation.
  - c. **Coherence with existing competition law tools**: it is important to ensure coherence between the existing competition rules (including the "non bis in idem" principle) and any NCT and the ongoing reviews (Verticals, Horizontals, DSA, Revision of the Relevant Market Notice).

Therefore, before acting under the NCT, the Commission should be required to demonstrate why other enforcement tools would not result in faster and more effective outcomes. Both a process and accompanying criteria should be established to determine which tool would be used in a given scenario (e.g. a NCT over the existing sector enquiry tool).

- d. **Gatekeeper issues**: We welcome the Commission's intention to address potential shortcomings of the current EU competition framework in respect of gatekeepers in the digital world and possibly beyond. Some AIM members, such as those in the FMCG sector, operate in highly concentrated retail markets: retailers in many EU Member States hold a gatekeeper position vis-à-vis their suppliers. In some instances there seems to be an enforcement gap under Article 102 TFEU, such as around the challenges raised by concentration and the significant bargaining power of retailers. The Commission could consider the role of a NCT in addressing such challenges.
- e. **Results of market investigations**: A coherent framework is needed on the market investigations the EU Commission will be able to launch under a NCT, especially in terms of the outcome of such market investigations, including regarding the data resulting from such exercises. It is important to ensure legal certainty and coherence with other instruments of competition law and avoid unnecessary procedural and administrative burdens for the private actors.
- f. **Recourse and access to full judicial redress**: such market studies/ investigations can have far-reaching effects on businesses, including in terms of business development and impact

on how investors perceive a company. Therefore, procedures in terms of recourse and access to full judicial redress should be included in the process before other actions that can have a negative impact on the future of the company.

- g. **Tipping markets:** It would be helpful, and indeed necessary, for the Commission to engage in a comprehensive exchange with stakeholders in order to best frame the concept of structural market issues that seems to play a key role in the application of any possible NCT. One such structural market issue could be the imbalance in power (e.g. between suppliers and the gatekeepers). In the same vein, the impact any NCT might have on potential follow-on private actions shall also be considered and understood.
  - h. **Market definition (1997 Notice):** It would appear that in order to address structural problems on the market, the Commission would need to review the provision of the current Market definition (1997 Notice). As per the 1997 Notice currently under review in open consultation<sup>1</sup>, market definition (§2) is the tool defined to proceed to the analysis of market power, itself implying the use of market share to assess it (§55), usually relying on sales (§ 55 value and volume), while however suggesting (without much detail §54) that there are other indicators to consider in such quantification. In the last 23 years, case law and research has largely expanded the considerations and indicators to assess market power in the relevant markets. The Notice would benefit from such review, especially we believe, on the notion of gatekeeper/systemic platforms as well as greater considerations on the barriers to entry to assess power on the market, reflecting on the competitive dynamics on a given market.
  - i. **Legal base:** The Commission indicated the possibility to base a NCT on Art. 103 TFEU and Art. 114 TFEU. As any NCT would be an ex ante tool which is not linked to anti-competitive conduct by undertakings, it cannot be regarded as intended to give effect to the principles set out in Art. 101 and 102 TFEU. Furthermore, Art. 114 aims at preventing the emergence of future obstacles to trade resulting from the diverse development of national laws. Any NCT does not seem to address a need for further harmonisation in the Single Market. Thus the tool or any measure in question would have to be designed to also prevent such obstacles.
  - j. **Remedies:** it would appear that the behavioural or structural remedies any NCT could impose would be similar to the current Commission “interim measures”. This amplifies that the Commission should carefully consider the need for any NCT and should ensure coherence with the on-going reviews and DSA *ex ante* regulatory initiative as mentioned in point [3]. At least some of the aspects that could be considered for a NCT may already be addressed by these ongoing reviews.
  - k. **Oversight:** As mentioned above, any NCT would also require in our view an oversight mechanism to enhance legal certainty. This could include the ECN.
5. **Conclusion:** Any New Competition Tool must be clearly defined, address obvious gaps in market malfunctions and not duplicate existing enforcement tools. The AIM members consider that a more comprehensive debate and deeper analysis are needed before fully understanding the potential use and effects of any NCT. Any NCT should be based on clear rules, a factual, data-based, independent approach, which would be clearly defined at the start of procedures based on NCTs. Any NCTs must offer legal safeguards and judicial means for companies to act upon following the Commission’s

<sup>1</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1187](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1187)

intervention or recommendations, allowing stakeholders to review the changes proposed by the Commission, and follow rules already defined in an impact assessment, as well as a cost benefit analysis.

**ENDS**

## About AIM

AIM is the European Brands Association representing brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives investment, creativity and innovation to meet and exceed consumer expectations. AIM's corporate members alone invested €14 billion in Research & Development in Europe in 2014, placing them fifth in the EU ranking of R&D investment.

### AIM's corporate members

AB InBev • Arla Foods • Bacardi Limited • Barilla • Beiersdorf • Bel Group • BIC • Chanel • Coca-Cola • Colgate-Palmolive • Coty • Danone • Diageo • Dr. Oetker • Essity • Estée Lauder • Ferrero • FHCS/Vileda • FrieslandCampina • General Mills • GlaxoSmithKline • Heineken • Henkel • Jacobs Douwe Egberts • Johnson & Johnson • Kellogg • The Kraft Heinz Company • LEGO Group • Levi Strauss & Co. • Lindt & Sprüngli • L'Oréal • LVMH • Mars • McCain Foods • McCormick • Mondelez • Nestlé • Nike • Nomad Foods Europe • Orkla • PepsiCo • Pernod Ricard • Procter & Gamble • Puma • Reckitt Benckiser • Royal Philips • Sanofi • Savencia Fromage & Dairy • SC Johnson • Signify • Unilever

### AIM's national association members

Austria Markenartikelverband • Belgilux BABM • Czech Republic CSZV • Finland FFDIF • France ILEC • Germany Markenverband • Greece EllhnikoV SundesmoV Biomhcaniwn Epwnumwn Proiontwn • Hungary Márkás Termékeket Gyártók Magyarországi Egyesülete • Ireland Food & Drink Federation • Italy Centromarca • MLDK • Netherlands FNLI • Norway DLF • Portugal Centromarca • Russia RusBrand • Spain Promarca • Slovakia SZZV • Sweden DLF • Switzerland Promarca • United Kingdom British Brands Group

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