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CEEP'S REMARKS ON THE COMMISSION'S CONSULTATION CONCERNING A NEW TOOL TO COMBAT EMERGING RISKS TO FAIR COMPETITION

CEEP, the organisation representing employers and enterprises providing public services and services of general interest in Europe since 1961, welcomes the opportunity to reply to the Commission's Consultation concerning the new tool to combat emerging risks to fair competition.

The role of public policy values in competition analysis has been discussed extensively in antitrust circles for several years. However, we believe that this issue remains unsettled and invite the Commission to take account in reviewing the new tool to combat emerging risks to fair competition. In this sense, we believe that it is important to adapt and extend the competition law toolbox regarding digital markets that pose numerous challenges.

The role of services of general interest

In general, we welcome the initiatives of the Commission to pay more attention to large digital players within the future Digital Services Act and the status of "gatekeeper" and revision of the European competition law.

In this context, CEEP could like to highlight in the following the need to include and protect the rights and special role of the public sector in this process.

In the past, public policy considerations have significantly influenced the outcome of competition decisions. As a result of the shift to a more economics-based approach to competition analysis, antitrust control has mainly focused on economic efficiency and the protection of price competition, casting aside issues concerning other public interest objectives. Though we support the view that competition assessments should be guided by robust economic evidence, we are concerned that the more economics-based approach may not have delivered what was expected. In fact, based on empirical findings, many warn that the economics-based approach may have harmed (rather than protected) consumer welfare.[1]

[1] See, for instance, Lina M. Khan & Sadeep Vaheesan (2017). Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents. 11 Harvard Law & Policy Review, 235. For a comprehensive overview of this issue see Marco Colino, S. (2018). The Antitrust F Word: Fairness Considerations in Competition Law. CUHK Research Paper No. 2018-09. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245865&download=yes

Nevertheless, it is not possible to subject services of general interest unconditionally to economic efficiency criteria without negative effects on quality and quantity. Therefore, services of general (economic) interest are in a special position in terms of competition policy because they have a fundamental role in the daily life of EU citizens and represent a democratically chosen tool for competent authorities at national, regional and local level to fulfil tasks of general interest. The importance of SGEIs is reflected in primary EU law through Article 14 TFEU and Protocol No.26 TFEU as well as in secondary law, as collected in the CEEP Acquis + for SGEIs.[2]

The Acquis+ for Services of General Interest EU's commitments in the area of SGIs and SGEIs have been clearly identified by CEEP in its Acquis+ analysis. It is of great concern to CEEP and its members that these principles need to be respected and included in the current reflection process about the role of competition policy:

- Member States (national, regional and local authorities) have the general competence and wide discretion to define, provide, commission and organise SGIs, as well as funding them, and European institutions should only control manifest errors thereof.
- For non-economic services of general interest, internal market and the competition rules do not apply.
- For SGEIs, the rules of competition and the rules of the internal market apply, only if those rules do not hinder the fulfilment of SGEIs' specific mission being achieved (Article 106 TFEU). The effective performance of a task of general interest prevails over Treaty rules in the event of a conflict.
- Furthermore, competent authorities are free to choose the modes of management. The European institutions are neutral regarding the ownership of undertakings providing SGEIs.
- For all SGEIs, the standards of quality, security, affordability, equal treatment, the promotion of universal access and of users' rights must be implemented, as foreseen by protocol 26.

The European Treaties thus guarantee and protect services of general interest. These services are particularly characterised by a subsidiary approach, giving the Member States a wide margin of manoeuvre in how and in what form they are provided. While this approach tends to be respected in traditional sectors and areas, we must observe that the acquis communautaire on services of general interest is not sufficiently recognised by the European Commission, especially in the context of its data initiatives. For a sustainable design of transformation processes, therefore, a more suitable competition tool is required that is appropriate to the modern economy and adequately integrates the acquis communautaire of services of general interest about their special role protected by the European Treaties.

Any future legislative projects and competition tools at European level should be much more respectful of the acquis communautaire on services of general interest. European policy

[2] https://www.ceep.eu/wp-content/uploads/2015/07/sgi-for-everyone-draft.pdf

developments thus show the discrepancy between the protection of existing rights and the actual observance of the European Commission's competition law initiatives.

CEEP is therefore concerned that an excessive focus on efficiency may go against the spirit of the European Treaties. More particularly, the Treaty on the Functioning of the European Union includes several provisions that establish that non-economic considerations relating inter alia to environmental and consumer protection, education or social cohesion. In this sense, it is of great relevance that the acquis communautaire and the presented rules are respected, so that the specific role of SG(E)Is will be noted and protected in the new tool to combat emerging risks to fair competition.

The role of a new competition tool

We do not believe that worthwhile to us to create a New Competition Tool (NCT) that appears to be redundant with the tools and powers already available to the Commission (1) and ongoing reforms(2).

1) We understand that the new competition tool would be used to conduct investigations in sectors where competition problems are likely to arise. However, the Commission already has the power to conduct sector inquiries when it considers that a market is not functioning as well as it should and that violations of the competition rules may be the cause, and it has tools that enable it to intervene quickly in the event of doubts about the anti-competitive nature of certain practices, in order to prevent potentially anti-competitive practices from creating irreparable damage to the economy.

   These elements should be taken into account in estimating the costs and benefits of implementing this new tool, as recommended by the Commission's Better Regulation Guidelines.

2)

2.1The European Competition Law

We believe that competition law as applied in Europe is flexible enough to remain effective and should be the preferred tool to regulate the practices of companies, whether they operate in the digital field or not. The Commission already possesses a whole arsenal of instruments, whose effectiveness has been widely proven, which enables it to respond to emerging competition concerns.

It is undeniable that certain existing tools need to be revised to take better account of the characteristics of the digital economy. In particular, both with regard to the analysis of practices restricting competition and merger control, improvements need to be made in the way the Commission defines relevant markets and takes into account the dynamics

of market evolution. **Revised, the existing tools should be sufficient to apprehend the practices of digital companies and guarantee the contestability of the markets.**

2.2The Digital Services Act

At the same time, the European Commission is proposing to complement the competition law with specific ex ante rules to target "gatekeepers". We support the objectives pursued by the Commission via the Digital Services Act (i.e. the establishment of a fairer competitive environment, a source of innovation that benefits society). As envisioned by the European Commission, the Digital Services Act could introduce specific rules to prohibit certain practices (self preferencing, data bundling, privacy policy tying, etc.) and detail the types of obligations that should be imposed on regulated operators (for example, through provisions on data portability and interoperability), along the lines of what exists under Articles 101 and 102 of the TFEU. These lists of prohibited practices and obligations will need to be updated frequently to avoid being circumvented and becoming obsolete.

Consequently, before the introduction of a New Competition Tool, the Commission should first :

- Update the current competition tools
- wait for and assess the results from the proposed ex ante regulation for large online gatekeeper platforms.

The role of algorithms

Online platforms have become popular largely because it seems that they offer innovative services at none or low monetary costs. However, the dependence on these gatekeeper platforms comes at a price. In particular, the use of algorithms and AI systems should therefore be subject to clear standards. Regarding algorithm-based categorisation of persons or population groups, discriminatory distortions have regularly been proven.

The distortions apply to a wide range of applications such as face recognition, crime prevention, language analysis, university admissions and advertising. This is because the algorithms behind these applications are not subject to any general interest. It is therefore not possible to view or even intervene in the structure and design of the algorithms, or the data sets, models and assumptions on which they are based. Since these algorithms are primarily aimed at profit or the reduction of costs, as well as economic efficiency, public welfare effects and interests usually play a subordinate role in their conception and development. Competition analysis must therefore focus on assessing the effects of a firm's conduct on non-price parameters. Only then can a decision adequately consider the specific conditions of the affected markets.

The issue of digital sovereignty and technological dependence

As the use and exploitation of data accounts for an ever greater part of the value added, the question arises as to who controls data. We need an orderly and transparent process to enable people and companies to deal with their data in a sovereign manner.

Both NCT and DSA should consider that few foreign digital companies are currently dominating the digital economy, which is linked but also beyond competition consideration.

This phenomenon can for example be observed with regards to could computing services where tech giant established outside the EU already dominate the market. Citizens, companies and public entities are becoming more and more dependant from these few players. We would like to particularly underline this high risk of technological and economic dependence on these service providers.

At the same time, it should be noted that these providers are subject to third country legislation. Some of them have raised concerns in the last few years, notably the CLOUD Act or the Foreign Intelligence Surveillance Act (FISA). This creates vulnerabilities to the security and protection of European data, as prominently highlighted in the recent "Schrems II" decision by the CJEU.

CEEP calls on the Commission to be particularly attentive given the issues of data confidentiality, digital sovereignty and technological and economic dependence that the development of the Cloud computing market brings with it.

This topic raises also issues regarding digital skills. Indeed, individual as well as public and private enterprises, particularly SMEs, must be enabled to acquire digital skills without barriers and be able to understand data processing processes. Only in this way can an individual informational self-determination be achieved. Recent initiatives of the European Commission show that although consumers are in principle enjoying ever greater protection, they need to manage and monitor it independently. For most consumers, this is a responsibility that they do not can and want to manage.

European legislation should make sure that it is possible for EU citizens, businesses and public institutions to choose a provider which respects European values. Today the existence of gatekeepers and highly concentrated market does not allow for such a choice.