



The Commission's Public Consultation on a New Competition Tool - Views of Confederation of Finnish Industries EK

1 About us

Confederation of Finnish Industries (EK) is the leading business organisation in Finland. EK represents the entire private sector and companies of all sizes. EK has 24 member associations and approximately 16,000 member companies of which 96 % are SMEs. EK represents the interests of its members in business and employment matters.

EK is of the opinion that a strong and open European Single Market is vital for the prosperity of the EU and all the Member States. Competition policy plays an important role in ensuring the success of European companies and economy. We would like to point out the following issues regarding the proposed new competition tool.

2 General

EK supports the protection and promotion of effective competition in all markets. For the sake of European economy, effective competition and level playing field within the internal market must be safeguarded. Realistic market access must be ensured and new entrants must be able to operate in the market without the risk of being hampered by market players distorting competition. EK therefore understands and supports the Commission's aim to address all harmful competition problems. However, EK emphasizes that the problems related to alleged structural competition problems should not be addressed hastily or in a fragmented manner. When considering instruments to address specific competition concerns, it is important to first evaluate and define thoroughly the nature and effects of the alleged problems in relevant markets. Following this assessment, the Commission's various regulatory proposals and their effects should be considered as an ensemble. Increase in ad hoc regulation can be a threat to the coherent, fair and effective application of competition rules and thus, to the level playing field.

3 The Combined Effect of The Various Proposals Must Be Taken Into Account

EK is concerned that the Commission is currently considering several proposals linked either directly or indirectly with competition law. Thus, it is challenging to evaluate in advance the combined effect of all proposals to market operators. In addition to the proposed new competition tool, the Commission is currently evaluating the need for a new ex ante -regulatory framework regarding large online platforms as well as reviewing the market definition notice. In the field of industrial policy the recently published White Paper on Foreign Subsidies contains elements referring to competition law. In addition to the ongoing consultations, the ECN + Directive (2019/1) promoting effective enforcement of competition law is currently being implemented in the Member States. EK emphasizes that when considering regulatory reforms, it is crucial to examine the overall impact of the various proposals on the market and companies operating therein.



4 The Current Competition Regime Works

The current competition regime has been established over decades. The ground rules of the current competition regime have proved their worth and are applicable as such in different markets. Thus, a potential reform of established competition rules or increase in regulation, must be approached with caution. In EK's view, the structural competition concerns raised by the Commission can be largely addressed by the current rules and, if needed, by updated or new sector-specific guidelines or notices given by competent authorities. EK underlines that the growth potential of European companies should not be unduly restricted by reforms which unnecessarily tighten current regulations. However, we find it equally important to protect especially SMEs against unfair competition.

5 Better Legal Protection Needed

In all options of the Commission's proposal for a new competition tool, the discretion and competence of competition authorities increase significantly. To balance this, appropriate and effective legal measures are needed to protect those operators who would be subject to the use of the competition tool. In this respect, the Commission's proposal is incomplete and needs to be clarified. We underline that the content and limits of the competition authorities' discretion and powers should be defined in advance in a transparent and clear manner. The term "structural competition problem" and the criteria for identifying these kinds of problems need also to be defined. In addition, all corrective measures should be proportionate and their use should be based on a thorough economic analysis. EK is especially critical of the use of structural remedies in situations which would not require a finding of an actual infringement. Structural remedies have far-reaching consequences from the companies' point of view and an appropriate appeal process must be ensured. In practice an appeal process would delay the use of the competition tool and thus, it would not be a quick-fix to the structural competition problems. EK therefore invites the Commission to consider more thoroughly the appropriateness of structural remedies as a corrective measure.

6 Market Functioning Test Needs to be Clarified

EK welcomes the idea that the use of the competition tool would be based on a proper market functioning test. However, the proposal is unclear about the contents of the test and whether the results of the ongoing market definition consultation will be taken into account in further consideration regarding the proposed competition tool. At a general level, EK states that the test must be realistic, transparent, predictable and take into account the characteristics of the market in question. A thorough economic analysis is an essential part of the test as well as a detailed market investigation. It is important that companies are able to evaluate in advance the scope of application of the competition tool. In this respect, it should be borne in mind that all markets are different and it would be challenging to create a tool which would be applicable horizontally without problems.



7 Finally

EK understands that there may be a need for a new competition tool in situations where effective competition is limited, but the situation cannot, for some reason, be addressed by existing competition rules. However, it should be examined further whether there really are potential gaps in existing competition rules. The Commission's current proposal regarding the new competition tool is not sufficiently thorough in this respect. The proposal needs to be defined more clearly as all risks to legal security, coherent and equal application must be avoided. EK therefore encourages the Commission to further explore the need for a new competition tool and to pay particular attention to at least the following issues in its further preparations:

- a. The combined effects between various competition law related proposals need to be further examined;
- b. It is important to maintain in force the existing, well established competition rules and principles. If amendments to existing rules are necessary, they should be made by updating current (or drafting new) authority guidelines and notices, not by legal reforms. All potential amendments should be reviewed regularly and altered/abolished with ease, if found necessary;
- c. If a new competition tool is created, the tool must be simple, predictable, proportionate and applied in an equal manner. The coherent application of the tool in the internal market must be assured. The scope of application should be considered thoroughly, based on an economic analysis and market investigation;
- d. The discretion and powers of the competent authority must be clearly and unambiguously described in advance;
- e. The remedies must be equitable and predictable. The proposed structural remedies have far-reaching and unpredictable consequences to companies and markets and are therefore not acceptable;
- f. The relationship between the competition tool and, in particular, ex ante regulation needs to be clarified. It must also be thoroughly considered whether there is a real need for both instruments and how to avoid overlaps between these instruments, other competition law related proposals and existing competition regime. Excessive regulation must be avoided, therefore special attention should be paid to the combined effects and consequences of all proposed competition law related reforms.