



# EU competition policy in the light of digitisation and globalisation

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# Executive summary

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AK welcomes the fact that the EU Commission is taking a comprehensive look at re-orientating competition regulations.

The interests of workers and consumers must be given greater priority in all future legal acts. This means that special interest groups should preferably be included in the decision-making process of the actual procedures.

An ex ante regulation both at the national and European level is needed in order to counter the continued growth in power of electronic access gatekeeper platforms. In addition, prohibitions and limitations on certain unfair trade practices ("black list") will be needed.

The promised new competition tool must be harmonised with the body of rules of the ex ante regulation and should be applied both to companies that have a dominant position in the market as well as to those that do not, above all in the IT sector. This is necessary so that emerging monopolies and market failures can be identified at an early stage and counteracted in good time.

The "Commission Notice on the definition of relevant market for the purposes of Community competition law" must be revised as a matter of urgency and major amendments must be made due to the changes in business environment such as digitisation and globalisation. This includes in particular data on competition and greater emphasis placed on potential competition as a dynamic element in market definition.

The efforts of the Commission to subject foreign subsidies to greater observation and control in the future are basically welcomed. However, examining foreign subsidies exclusively from the viewpoint of market distortion is not enough to create a level playing field for the companies that are active in the EU market.

A holistic assessment is therefore required, taking into account the industrial and economic policy objectives of the EU. In addition to traditional subsidies, other forms of foreign country subsidy must be considered, in particular the domestic, sanction-free disregard of international minimum labour standards and environmental agreements. National regulatory authorities are needed for all three partial areas, and therefore also for corporate acquisitions by third countries. In the context of public procurement procedures, foreign subsidies require clear exclusion rules when the de minimis threshold of € 200,000 is exceeded. Moreover, the special interest groups as recognised by law must play a greater part in public procurement procedures.

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# The AK's position

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## 1. An explanation of the EU's goals regarding competition

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In the first half of 2020 the European Commission initiated four consultations focusing on the future direction of **EU competition policy**.

The Austrian Federal Chamber of Labour (AK) was involved in all four consultations and also submitted its opinion to the relevant national ministries as an aid to elaborating Austria's position.

The basic tone of all consultations was to give European answers to the challenges posed by growing digitisation and globalisation. It has to be said, that many current legal acts of the European Commission can be described as needing reform. They fall far short of satisfying the minimum requirements in terms of employment, social, consumer protection, taxation, and competition policies. The Notice on market definition, for example, dates back to 1997. The face of competition has changed dramatically since then. Digital companies have overtaken the old economy in terms of their economic importance and continue this trend even in the ongoing corona pandemic. It almost appears that they are immune to the economic lockdown.

The new challenges posed by digitisation and globalisation must, therefore, give rise to doubts as to whether and how far the current tools are sufficient to ensure fair competition in an open economic system. However, this also means strengthening the rights of workers and consumers and creating confidence in functioning markets by doing so.

The European Commission is therefore scrutinising current competition regulations in several ongoing consultation procedures and intends consequently to close any still existing gaps.

AK welcomes these initiatives of the European Commission. Both new business models based on digitisation and data power with its tendency to create monopolies, as well as geopolitical developments, call

for proactive measures at the level of the European Union. Therefore, greater participation of workers' rights organisations in the area of EU merger control should be considered.

The current consultations must be seen in close proximity to each other and, as a package of measures, should contribute to the future overall orientation of Europe regarding competition.

The consultation procedures on the "New Competition Tool" and the "Digital Services Act" are aimed at identifying and counteracting problems related to competition at an early stage. The new competition tool is intended to help introduce measures at an early stage when structural competition issues arise - also below the market dominance threshold; an ex ante regulation of the major internet platforms is proposed for discussion in the "Digital Services Act". However, these tools must be harmonised with each other.

The consultation procedure on the "Commission Notice on the definition of relevant market" is now to evaluate whether this body of legislation still offers a valid approach to the definition of markets in the technical and geographical sense, or whether it must be amended accordingly in view of the economic trends which have occurred since it was issued in 1997.

The latter consultation on the White Paper on foreign subsidies - which should rather be seen in connection with competition law - presents approaches which aim to prevent distortions caused by foreign subsidies and ensure fair competition in a global environment through various measures.

AK supports the efforts of the European Commission to create fair competition both within and outside the European Union, but wishes to point out that the basic direction of competition protection for consumers must remain the main focus, because an open, competitive economy safeguards jobs and guarantees quality at appropriate prices and diversity through innovation for consumers.

AK's positions on the consultations are explained in detail below.

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## 2. Consultation of the European Commission on the Digital Services Act

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In this consultation procedure, the European Commission is posing numerous questions on a range of subjects, e.g. internet security, liability provisions, conditions of employment with platform operators, freedom of speech, and a level playing field in the digital sphere. A key component of this consultation is the introduction of an ex ante rule for internet platforms with gatekeeper function. These issues can be found in Module III of the EU consultation procedure. In this position paper we take a close look at them. However, we wish to emphasise that guaranteeing decisive protective provisions for employees of online platforms must also be considered by the European Commission. The position of AK on the whole consultation questionnaire can be found at [https://www.akeuropa.eu/sites/default/files/2020-08/EN\\_Digital%20Services%20Act.pdf](https://www.akeuropa.eu/sites/default/files/2020-08/EN_Digital%20Services%20Act.pdf)

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### 2.1. General information

Market dominant internet platforms have features of classic infrastructures. While the electricity, telecommunications or rail networks are regulated, large online platforms set their own rules and act as private rule-setters and "gatekeepers". Furthermore, all market dominant internet platforms share one characteristic, namely that they own a large data pool that is significant in terms of competition and so have a data infrastructure as well as a digital infrastructure. The competition authorities have already concluded or initiated some important proceedings. These proceedings, however, last too long to allow to establish a level playing field. The addressed cases of misuse all share the fact that the relevant dominant platform operator (such as Amazon, Google, or Facebook) misused its dominant position. The control of misuse by antitrust laws regularly operates ex post and ultimately is only a reactive response.

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### 2.2. Assessment of AK

#### Specific considerations of an ex ante regulation

In the opinion of AK it is of great importance that an ex ante regulatory framework is introduced in the future for the large online platforms. The problems that result from the dominance of digital gatekeeper platforms are manifold and can only be resolved by the creation of specific regulatory authorities, both at the national

and at the European level. In order for these future regulatory authorities to be able to discharge their duties, they must be granted sufficiently effective powers of inquiry. In particular, they must be able to obtain important information from online platforms, which is necessary with regard to their regulatory duties. In addition, AK welcomes the points addressed in the consultation on whether there will be bans or restrictions imposed on certain unfair trade practices ("black list") and whether suitable remedial measures will be available to take action against these large online platforms whenever necessary.

Furthermore, extending Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which came into force in July 2020, to include consumers should be considered (e.g. revealing reasons for blocking).

Sector-specific ex ante rules for market dominant internet platforms which supplement the existing antitrust laws are, therefore, urgently needed. This should ensure that the rules of the game are determined proactively for two- or more sided markets in order to address the challenges posed by the speed of digitisation.

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## 3. Consultation of the European Commission on the "New Competition Tool"

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In this consultation the European Commission has submitted a new instrument for the early identification of competition issues for discussion.

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### 3.1. General information

AK welcomes these new efforts, i.e. using the new competition tool, to help remedy competitive issues rapidly.

The European Commission has highlighted the fact that the following characteristics of a market are the main force behind structural competitive issues: extreme advantages of size and association, strong network effects, zero-based pricing and data dependency as well as market dynamics, which promote a sudden and radical weakening of competition (tipping), as well as "the winner takes most" scenarios. The European Commission rightly states that these characteristics are typical for digital markets, but can also occur in other markets.

Both the European Commission and the national competition authorities have, in numerous decisions - primarily on digital markets - identified tendencies to

create monopolies which, once they have emerged, are difficult to tackle. Due to the complexity of the issues involved, years of investigation are needed to determine unfair practices and penalise them accordingly. Due to the length of an investigation, market positions are frequently consolidated, so that even high fines in the event of violations only have limited success.

The new competition tool under discussion is intended to work as a proactive measure to address tendencies to unfair competition - above all in the digital sector – at a very early stage and to support current competition laws.

The aim of the European Commission with this consultation is to develop a procedure that can identify and remedy structural competition issues that cannot be remedied at all (or not effectively) within the framework of EU competition rules. Remedial measures aimed at behaviour and possibly structural imbalances are to be imposed in order to improve how the relevant market functions. However, since a violation of competition rules is not the basis for this procedure, no fines should be imposed.

The European Commission wishes to clarify whether this tool should be applied only to market dominant companies (application across all economic sectors or limited to digital companies only) or whether it should be extended to include companies without a dominant market position (also with application across all economic sectors or limited to digital companies).

### 3.2. Assessment of AK

AK supports a “forward-looking” and flexible competition tool which will enable the EU Competition Commission to identify structural competition issues at an early stage and to remedy them. At this point AK wishes to draw attention to the position paper “Demands relating to competition policy from the viewpoint of workers and consumers” which includes a call for competition surveillance to take effect significantly earlier and below the market dominance level in the fast-growing digital markets.

Of the four options for a new competition tool revealed by the consultation, AK is in favour of the option which proposes measures to be taken both against companies with market dominance and companies without market dominance. In our opinion, the inclusion of companies that are not dominant in the market is important, so that the EU Competition Commission can take early action against trends towards establishing monopolies from taking shape and in the event of market failures.

Regulation at the EU level, which would also enable intervention below the market dominance level while maintaining appropriate legal protection, should also be introduced in the sector of the rapidly-developing digital markets.

However, one criticism we have is that structural remedies, for example the obligation to sell a company or part of a company, should only be possible in the event of massive violations and while maintaining appropriate legal protection, and that the new competition tool is not suitable for this task. We reject the possibility of applying penalties in the event of a refusal to provide information by the employees of a company due to their position of dependence. Furthermore, consumer protection organisations should be given the opportunity to comment their views on the effects of structural competition issues before a final decision is taken and not merely the companies, suppliers and customers of these companies as listed in the consultation.

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## 4. Consultation of the European Commission “Notice on the definition of relevant market”

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With this consultation, the European Commission wishes to assess whether the Notice, which dates from 1997, continues to offer a valid approach to the definition of markets in the technical and geographical sense or whether it must be updated.

### 4.1. General information

The definition of the relevant market is a significant parameter both for the investigation in the event of competition violations (in particular in the case of market misuse) and for proceedings regarding merger control. Therefore, transparent and comprehensible rules for legal subjects are needed for European and national competition laws so that they understand in which technically and geographically relevant market they are economically active. If a company has a dominant position in the market, it is subject to special competition rules and must align its business practices accordingly (e.g. a ban on discrimination and a prohibition on undercutting dumping prices).

However, AK wishes to emphasise the importance of an updated Notice due to changes in the business environment such as digitisation and globalisation. This can be seen in the fact that the examples given in the Notice refer exclusively to the old economy, such as the paper and automotive industries. It does not mention a regulatory framework for competition law regarding digital companies.

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## 4.2. Assessment of AK

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### Competition forces

The SSNIP test, which is used to identify whether demand can be substituted, shows that it cannot be applied to zero price markets. These business models are usually found in the digital economy. In addition to the SSNIP test, other models for the market definition must be listed in a new Notice.

The criteria to determine whether supply can be substituted must be modified, in the opinion of AK. At the moment an investigation is underway to determine whether companies can change their production within a short time and without any appreciable additional costs or risks.

Today markets change much faster and global competition with third countries also plays a greater role than when the Notice under discussion was issued. For this reason, a static inventory of the state of competition does not appear to be appropriate to these times. This dynamic development should be included above all in the application of the definition of a market in merger control and a medium-term forecast applied.

The inclusion of potential competition is only mentioned in passing in the Notice. In view of the fast-changing market situation due primarily to technological change, greater focus should be placed on potential competition when a new version is drawn up. A dynamic approach should be taken.

### Make greater use of the know-how of workers' rights and consumer protection organisations

Regarding the provision of proof, the European Commission states that it collects information primarily from important customers and companies or professional and industrial associations. At this point AK wishes to emphasise that labour representatives and consumer protection organisations also have important information (e.g. the status of competition, ongoing price rises, studies, complaints, etc.). Therefore, the Commission should have more contact with the above organisations as part of cartel proceedings. This should also be enshrined in a revised Notice.

### Determining market share

At this point AK wishes to point out that determining market share is an important criterion to determine market dominance. However, market share cannot be the sole criterion. AK wishes to refer to digital

companies with a powerful market presence, for example, which are continuously expanding their business areas, and whose resulting market share can be very low initially. But the market position is determined largely by the financial power and data power of the company. This should also be included in a new version.

The current Notice does not contain any updated references on how to deal with business models based on two- and more sided markets and how the relevant market shares should be related. The current Notice should be updated for this reason as well.

### The main trends and developments since publication of the Notice

Although in some areas of the economy the fundamentals of market definition have scarcely changed, major adjustments are necessary in the digital sector.

In the opinion of AK this applies in particular to the following:

- Development of zero price markets
- Significance of two- and more sided markets and recognition of the current effects
- Market definition in relation to data
- Significance of data that is not reflected in market shares
- Significance of an expansion in business areas by powerful digital companies for competition.

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## 5. Consultation on the White Paper on foreign subsidies in the Single Market

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The aim of the consultation is to subject subsidies from third countries to greater monitoring and control in the future.

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### 5.1. General information

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The goal is to create a level playing field for companies active in the EU market. The Commission is proposing three tools to close the gaps in regulations related to foreign investments. The first partial tool will allow to investigate foreign subsidies ex post, the second partial tool focuses on corporate acquisitions, and the third partial tool deals with possible distortions of the market due to foreign subsidies for bidders in a public procurement procedure.

If defined correctly, all three tools can make a significant contribution to establishing a level playing field.

## 5.2. Assessment of AK

### Market distortions can only be one aspect of investigations

Foreign subsidies to preferred companies are looked at exclusively from the viewpoint of whether possible market distortions exist. However, market distortions can only be one aspect of the investigation. In its new industrial strategy published recently, the European Union is pursuing strategic objectives to strengthen the industrial autonomy of the EU. Therefore, with a view to establishing a comprehensive investigation, it should be considered whether and to what extent foreign country subsidies counteract the strategic interests of the Union. Regarding the issue of company acquisitions financed by foreign subsidies in particular, the need for thorough investigation with reference to the aims of EU industrial and economic policy is especially pertinent. The possible risk, for example, to social and regional cohesion, regional development, employment and security of supply, health, environmental protection, technological independence should be recognised as factors when investigating acquisition procedures

### Foreign subsidies should be further defined

The White Paper is essentially limited to classic subsidies such as financial grants, liabilities, or tax advantages offered by third countries. With this the European Commission means subsidy practices it is all too familiar with from the EU's aid surveillance system. Limitation to financial grants will facilitate investigation. However, in practice it has often proved to be inappropriate since foreign subsidies are often found to be as non-transparent as possible.

Foreign subsidies and the resulting market distortions must be further defined and other forms of subsidy must be included. Subsidies exist, for example, when foreign companies can defy internationally-recognised key labour standards and environmental standards within the domestic market without incurring penalties in order to offer goods and services more cheaply on the EU market. The disregard of international minimum labour standards and environmental agreements should, at all events, be listed under subsidies which produce distortions in the market.

### National regulatory authorities for corporate acquisitions and effective investigative tools

The Commission has proposed the creation of regulatory authorities at the European Commission and in Member States for partial tools 1 (general behaviour) and 3 (public procurement procedures). However, for partial tool 2 (corporate acquisitions) it is proposing that it should have sole authority to investigate, which we do not accept. It would also be sensible not to carry out procedures to investigate foreign direct investments and procedures to investigate foreign subsidies in parallel (as proposed on page 51 of the White Paper) but to obtain an overview by combining both procedures.

Grants often have a very complex structure, not least through the participation of private companies, which makes it difficult to identify the grants. Therefore, in the pre-investigation phase, the regulatory authorities need effective investigative tools to be able to establish rapidly whether further investigation is needed. In this regard the Commission makes a sensible proposal, namely that if the relevant companies and the third country do not cooperate sufficiently, the regulatory authority will make a decision based on the information available and ultimately will issue the corresponding remedial measures.

### Public procurement procedures: obligatory exclusion if foreign subsidies exceed the de minimis threshold of € 200,000

Foreign subsidies, in particular those granted to companies active in markets with overcapacity or with high market concentration, inevitably put competitors in the EU, which are subject to the TFEU rules on **state subsidies** at a disadvantage. In view of this situation we expressly welcome the efforts of the Commission to tackle foreign subsidies separately in the field of public procurement procedures.

It is essential that the list of reasons for obligatory exclusion from public procurement procedures is expanded to include distorting subsidies from third countries. AK wishes to state its explicit support for the obligatory exclusion from future public procurement procedures throughout the EU for a period of three years. This type of exclusion would have a general preventative effect.

If a foreign subsidy of more than € 200,000 (de minimis threshold) is granted, this should result in the obligatory exclusion from the public procurement procedure. However, the Member States should be able to deviate from this obligatory exclusion in

exceptional circumstances if there are urgent reasons for the benefit of the general interest which make awarding of the contract essential, e.g. if urgently needed vaccines or emergency equipment can only be bought from a company, which meets the reasons for obligatory exclusion.

### **Inclusion of legally-recognised special interest groups**

Furthermore, we propose that special interest groups be allowed greater participation in public procurement procedures. In addition to competitors, legally-recognised special interest groups should be given the right to alert the official contracting body or, alternatively, the national authority, that notification has not been submitted. The burden of proof should lie with the relevant company.

In conclusion it can be said that our assessment of this consultation is basically positive. However, the next steps will be decisive. The contributions of consumer protection organisations and labour representatives to the consultations should by all means be included in future legal acts.



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## About us

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The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.