

## **ISFE Position Paper on proposed New Competition Tool**

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### **About ISFE**

1. ISFE represents the video games industry in Europe and is based in Brussels, Belgium. Our membership comprises national trade associations in 18 countries across Europe which represent in turn thousands of video games developers and publishers at national level. ISFE also has as direct members the leading European and international video games companies, many of which have studios with a strong European footprint, that produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, mobile phones and tablets.
2. ISFE's purpose is to serve Europe's video games ecosystem by ensuring that the value of games is widely understood and to promote growth, skills, and innovation policies that are vital to strengthen the sector's contribution to Europe's digital future. The video games sector represents one of Europe's most compelling economic success stories, relying on a strong IP framework, and is a rapidly growing segment of the creative industries. In 2019, Europe's video games industry was worth over €21bn, and the industry has registered a growth rate of 55% over the past 5 years in key European markets<sup>1</sup>.
3. Video games have a proven ability to successfully drive new business models. Digital transformation with the growth of online and app-based gaming accounts today for 76% of the industry's European revenues. Via the emergence of on-demand and streaming services and the launch of new high-performance consoles, together with the strong growth of mobile gaming, the industry offers players across Europe and in all age groups the possibility to enjoy and engage with video games. Today, 51% of Europe's population plays video games, which is approximately 250 million people, and 45% of the players are women.

### **The proposed New Competition Tool**

4. We believe that the current competition toolbox has provided a reliable and consistent framework that enforcers have been able to apply effectively across all sectors. Any

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<sup>1</sup> ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE  
<https://www.isfe.eu/isfe-key-facts/>.

move away from the principles of this framework should, in our view, only be considered with extreme caution.

5. The proposed new competition tool (NCT) will bring about what has been described as “a paradigm shift” in EU competition policy enforcement. However, we remain to be convinced that a compelling case has been made that such a tool is necessary or that the existing tools cannot address the perceived enforcement gap. The Commission’s proposals clearly have the potential to hugely expand regulatory control over markets in general, and over certain businesses in particular, for reasons that are completely unconnected to breaches of competition law. We believe that there is a very real risk that the proposed NCT could create legal uncertainty, limit development and innovation, and have a chilling effect on the competitiveness of many companies (including European ones) in what are ever evolving and innovative markets.
6. An additional concern for our member companies would be the potential impact of a new power to force companies to stop consumer-friendly and efficient behaviours, or to divest strategic assets, in the absence of any tangible and palpable market foreclosure, giving rise to the potential for material consumer harm. The video games industry is a consumer/player first sector and we would urge the Commission to give careful consideration to the possible detrimental impact on consumers of an NCT.
7. We also believe that an NCT should not be used to circumvent the evidentiary standards and procedural safeguards applicable in relation to Articles 101 and 102 TFEU or the jurisprudence of the CJEU. Furthermore, we think that the relationship between an NCT and the ex ante regulatory instrument for large gatekeeper platforms that is part of the DSA package will need to be very carefully managed to avoid fragmentation and to guarantee legal certainty. In addition, clarity on the legal test for intervention by the Commission will be essential to safeguard the rule of law and to ensure that companies enjoy the requisite legal certainty that is currently provided by Articles 101 and 102 TFEU. The rules relating to any NCT must also ensure that there is a clearly defined evidential bar for the imposition of remedies, and should adopt an effects-based approach, ensuring that any remedies imposed are absolutely necessary, proportionate, properly designed and capable of addressing any perceived issues.
8. The Commission has stated that the legal basis for an NCT is Article 103 TFEU in combination with Article 114 TFEU. However, we wonder if this is really sufficient to support the Commission’s proposals and fear that it might raise questions about the initiative’s constitutionality. Article 103 TFEU enables the adoption of legislation to “give effect to the principles set out in Articles 101 and 102” and to address restrictions of competition. The NCT, on the other hand, appears to be aimed at creating new competition, “without any prior finding of an infringement” of Articles 101 or 102 TFEU. Furthermore, there does not appear to be any need for the approximation of divergent national laws via the NCT pursuant to Article 114 TFEU.
9. The Commission appears to be relying on the fact that some jurisdictions (in particular the UK) already have a pro-competition tool which can be used without needing to find any infringement of competition law (e.g. the UK market investigation regime). However, what may be appropriate in the UK may not necessarily work for the Commission across the EU. Structural differences are relevant. The UK market investigation regime is a two-stage process – with two separate panels carrying out

independent reviews. There is a lot of rigour and scrutiny in the process. The panel members have diverse backgrounds which helps to avoid problems of “group think”. If the Commission does eventually adopt such a tool, we would argue that the same procedural and structural safeguards as exist in the UK (such as strong judicial review) should be implemented in the EU. After all, companies that have committed no infringement and that may be operating perfectly legally, could stand to have remedies imposed on them that can go so far as to require forced divestitures.

10. Furthermore, UK market investigations can have a serious impact on affected companies, and significant personnel and data resources typically have to be dedicated to engaging with investigating authorities (with the whole process usually taking over two years). Many consider that such investigations rarely result in pro-competitive outcomes that are proportionate to the time and expense involved and that companies are often left with little recourse to assert their rights of defence.
11. If an extension of the Commission’s tools and powers is eventually implemented, then:
  - (a) any potential intervention will need to be carefully considered, and held to be objectively justified and proportionate - new investigatory and enforcement powers can have a detrimental impact on competition in markets, and particularly in digital markets which are often fast moving and where any reduction in competition or chilling effect on innovation can be very hard to undo;
  - (b) the powers will need to be exercised with effective oversight;
  - (c) companies in markets subject to these new powers should not be overburdened when responding to such actions and will need to be given proper rights of defence and appeal.

**ISFE Secretariat, September 2020**