BUSINESSEUROPE

POSITION PAPER

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PROPOSAL FOR A NEW COMPETITION TOOL

Introduction

BUSINESSEUROPE supports a smart competition policy. We clearly recognise the fundamental role that well-functioning competition rules play in the internal market, both in terms of limiting distortions and ensuring more efficiency and innovation by allowing competitors to enter new markets and protecting consumer choice. Furthermore, EU competition policy is one of the areas where the EU has considerable (extra-territorial) teeth. EU competition policy should ensure that effective competition between companies exists thereby contributing to job creation, growth and investment. It should also address the global challenges which businesses are facing to boost their and the EU's overall competitiveness. As such it is one of the key components of a successful EU industrial policy.

Any changes to the existing rules should be proportionate to avoid legal uncertainty and harmful spill-over and side effects that could discourage investment. BUSINESSEUROPE is worried that the introduction of a New Competition Tool (NCT), even with a limited scope, would drastically alter the existing enforcement framework extending already powerful enforcement tools which the Commission has at its disposal. The NCT is not just procedural; it will put in place a very broad new substantive tool prohibiting certain "abusive" behaviour by non-dominant companies, in non-notifiable merger situations, and in parallel behaviour situations that are not considered a cartel. As such it is bypassing the enforcement of Articles 101 and 102 TFEU and risks creating overlap and inconsistencies with existing regulatory provisions and regulated markets (e.g. energy, transport, telecommunications, and postal services).

Delinking remedies from infringements

Existing competition rules give the Commission extensive powers to investigate competition problems and impose broad remedies to sanction and deter infringements. It is now proposed to extend these powers by enabling the Commission to impose behavioural and structural remedies even when there is no finding of an infringement and when there is no dominance (in options 3 and 4).

BUSINESSEUROPE questions the need for such a major shift and departure from fundamental principles of EU competition law. In our view, there are no structural competition problems or gaps that could justify the granting of such powers. The proposals would undermine the rule of law as it applies to EU competition law enforcement, especially as some of these powers, such as those regarding structural remedies, have far-reaching consequences affecting the rights of owners, employees, investors, business partners, etc. which can retroactively be altered, for example by terminating a particular business model or the divestment of (parts of) a company. In addition, the Member States are in the early stages of implementing the ECN+ Directive which will also significantly reinforce enforcement powers.

In order to permit a more timely enforcement of the competition rules and address problems with respect to the (length of) proceedings, the Commission could make greater use of interim measures, provided that they are imposed after a proper

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investigation showing the existence of a prima facie illegal behavior, and by targeted measures to speed up the process and create more efficient reviews (e.g. to set deadlines for procedures). In addition, ex ante guidance by competition authorities (preferably in close coordination with the Commission to ensure consistency) is a good way to steer companies or markets at an early stage. Such authorities can thus indicate to companies at an early stage where bottlenecks for fair competition may arise. To this end, it would be good for competition authorities (i) to develop the capacity and willingness to provide guidance on market developments at an early stage and (ii) to investigate the possibility for supervisors to issue case-by-case guidance letters (via a much more informal and faster route than via an infringement procedure) comparable to how this sometimes happens in the form of 'informal opinion' or even 'comfort letters' In any case, procedural deficiencies do not warrant the introduction of new far-reaching substantive provisions with new enforcement powers.

BUSINESSEUROPE is highly concerned that the introduction of such powers would create significant legal uncertainty and lead to increased administrative burdens and costs to deal with investigations and procedures. It would also lead to less innovation given that highly innovative companies which manage to attract many customers could later be facing problems because of their success. This is even more true because we fear that it will be difficult to limit the application of the NCT to very specific situations given the very dynamic nature of certain markets, so there will likely be spill-over effects to smaller players, emerging innovators and to traditional industries which could have a chilling effect on the competitiveness of European companies in general.

Legal basis

The Commission proposes to base the NCT on Article 103 TFEU in conjunction with Article 114 TFEU. In our view, Article 103 TFEU is not an appropriate legal basis. The scope of the authorisation to the Council to adopt all appropriate Regulations and Directives is determined by the content of Articles 101 and 102 TFEU. The Regulations and Directives cannot amend or supplement the implementation of these provisions, so we question whether it will be possible to base the options, which delink the imposition of remedies from either an infringement of competition law or from a dominant position, on Article 103 TFEU. BUSINESSEUROPE also has doubts whether Article 114 TFEU can be an appropriate basis considering that the aim of the NCT is not to remove distortions of competition but to remove potential problems that are not infringing competition rules. Additionally, obligations for companies to comply with information requests cannot be based on this Article.

Market Investigations

As mentioned, BUSINESSEUROPE is concerned about the burdens and costs of investigations and far reaching information requests. What rights of defence will companies have and what kind of evidence will be requested? How can disproportionate requests for information be avoided? Parallels should be drawn between existing powers under the ECN+ Directive, whose implementation should be carefully evaluated, and those regarding sector inquiries, which are highly effective to uncover competition problems. In this context it is important that no new powers are created, and that the importance of companies' fundamental rights is acknowledged, such as those related to the right to be heard, effective judicial review, and access to information.

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