BUSINESSEUROPE

POSITION PAPER

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EU ANTITRUST ENFORCEMENT
EVALUATION OF REGULATIONS 1/2003 AND 773/2004
Commission Consultation

Introduction

Competition is crucial for business; it provides the best incentive for efficiency, encourages innovation, and guarantees consumers the best choice. BusinessEurope therefore commends the Commission for assessing the performance of the EU antitrust enforcement framework. Consistent and effective application of EU antitrust rules in accordance with relevant fundamental rights and procedural safeguards is essential for the integrity of the single market; it provides protection and legal certainty.

Unform application and legal certainty

BusinessEurope has always been worried about divergent decision-making at national level and therefore strongly supported the work of the European Competition Network (ECN) to strengthen the coherent application of EU antitrust rules by all enforcers. We need a genuine common competition enforcement policy and relevant provisions in Regulations 1/2003 and 773/2004 are (still) extremely important. BusinessEurope suggests to further encourage uniform application by means of increasing transparency. It is important that there is updated information about national decisions in a solid overall knowledge base where relevant legal documentation can be accessed in one place.

As mentioned by the Commission, since the adoption of the Regulations, society has undergone significant changes which have impacted commercial relations and will continue to have substantial impact in the coming years. Businesses are rapidly adapting to technological innovations and to changing markets and consumer trends whilst at the same time national competition authorities are also actively enforcing competition rules. A self-assessment on the question of whether a particular form of cooperation between competitors is admissible is increasingly complex in such a dynamic and multifaceted environment and the risk of harmful sanctions is real also in view of the fact that decisions of competition authorities have binding effect for the purpose of damages actions. This requires flexibility in the organisation of both horizontal and vertical relationships, and it is important that competition authorities offer the necessary guidance that reflects these developments and shields businesses from harm.

There is a real risk that companies will refrain from cooperating, for example in cases where enhanced coordination is necessary (typically when projects are very big in

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scope, requiring different kind of competences and skills, possibly from different sectors) to develop market-based sustainable solutions and technologies, if they have undue fear that they could be infringing competition rules.

To avoid such legal uncertainty – and potential underinvestment – the Commission should take a pragmatic approach to business' needs. To stay ahead with the dynamic reality, relevant guidelines should be continuously amended or supplemented when authorities' practices and case law becomes a source of legal uncertainty. Likewise, BusinessEurope would welcome more flexibility as regards the provision of informal guidance to businesses in line with recital 38 of Regulation 1/2003 and the treatment of novel legal issues. Whilst BusinessEurope endorses the system based on the principle of self-assessment that was created by Regulations 1/2003 and 773/2004 and does not support the reintroduction of the notification system, we do believe that the strict approach set out in the previous Notice on Informal Guidance under which the Commission can provide informal guidance was no longer justified so we welcome the recently adopted new Notice which gives the Commission more flexibility. In fact, BusinessEurope would encourage the Commission to be very open, encouraging companies with valid questions to ask for informal guidance and educate those businesses about the rules, as the Commission has successfully done in the context of the COVID-19 crisis, also with the use of soft enforcement tools, when appropriate.

The Commission should also set a clear standard for enforcement as regards certain practices at national level to avoid fragmentation. Divergent approaches in Member States and duplications of procedure should be avoided and it should be clear that the fact that a national authority permits, or even encourages, a certain kind of cooperation between companies, that does not necessarily mean that it is permissible under Article 101 TFEU. Having said that, the Commission and national authorities should not only consider the fact that the undertakings concerned have followed the EU or national guidance in good faith as a mitigating factor when considering a sanction, as set out in the relevant guidelines, but also consider not to impose a sanction. This will provide an extra level of comfort. EU and national decision practice needs to be aligned to achieve the required legal certainty, in view also of the nature of the antitrust sanctions.

Antitrust proceeding

The procedural framework for competition law enforcement should be proportionate and focus on what is necessary for effective enforcement without imposing unnecessary burdens for companies and other market participants. The existing enforcement framework gives the Commission extensive powers to investigate competition problems and impose broad remedies to sanction and deter infringements. Also, the Commission as well as national authorities were recently entrusted with new enforcement powers in the field of digital markets. In our view, this framework works generally well and there are no structural competition problems or gaps that could justify altering the existing rules or Commission powers and extend the already powerful enforcement tools which the Commission has at its disposal, such as the use of interim measures, inspections, structural remedies etc. Some of those powers and tools have far-reaching consequences affecting the rights of owners, employees, investors, business partners, etc. In addition, Member States are implementing the ECN+ Directive which has also significantly reinforced enforcement powers and it should not be forgotten that decisions of competition authorities have binding effect for the purpose of damages actions. It is important to uphold the rule of law as it applies to EU competition law enforcement and provide for appropriate procedural guarantees to

counterbalance the quasi-criminal nature of antitrust investigations and sanctions (see also below).

Timely enforcement

In order to permit a timelier enforcement of the competition rules the Commission could consider targeted measures to speed up the process and create more efficient reviews (e.g. to set deadlines for procedures). The problem is that there is no legal deadline for the Commission to complete antitrust inquiries into anticompetitive conduct and this creates legal and economic uncertainty. For instance, antitrust law could provide that the decision opening an investigation must set out the date by which the proceedings have to be concluded as is the case in some Member States, such as Italy (Article 6(3) of D.P.R. 217/1998). This date could be extended if duly reasoned. The Commission could consider adopting such a provision at EU level, in line with article 6 ECHR and Article 47 of the Charter, which requires the European Commission (and the NCAs) to conclude their investigation within a reasonable timeframe.

In addition, ex ante guidance by competition authorities (preferably in close coordination with the Commission and other national competition authorities to ensure consistency throughout the EU) 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'.

Due process and fundamental rights

As mentioned, it is important that the rights of defence are respected. The Commission and national competition authorities should respect appropriate safeguards for the exercise of their powers in accordance with the EU Charter of Fundamental Rights and with general principles of EU law, at least as far as rights of defence and effective right of recourse are concerned. The validity of procedural rights which are derived from the principles of the European Convention of Human Rights and the case law of the European Court of Human Rights should be confirmed. Such fundamental procedural rights include the protection of confidential documents, appropriate time-limits to answer requests for information, the right to receive a statement of objections, the right to a hearing and access to the file (which could be granted at an earlier stage in the proceedings, so before the statement of objections is notified), as well as the right to effective judicial control.

In relation to requests for information, the privilege against self-incrimination, which also applies to companies, should be explicitly recognised. The administrative burdens linked to requests for information are significant so requests should comply with the principle of proportionality, also with respect to the time allowed for companies to reply, which should be appropriate and take into account the complexity of the information required. Excessive data requests should be avoided, ensuring that requests are unambiguous, specific, and limited to the information required for the analysis and that companies have sufficient time to reply. Bringing procedural infringement cases should be reserved for exceptional cases (the Commission should not ask for massive

amounts of information and then fine companies for missing out on non-important points). Regarding the power to inspect business premises and take copies or extracts from the business' books or records, it should be avoided that forensic images are taken of information that is not necessary for the inspection, but which can include highly sensitive information from a business point of view (e.g. R&D, patent applications, etc.).

BusinessEurope also believes that competition authorities should be denied accessing and using legal advice communications exchanged with qualified in-house counsel, which should be protected by Legal Professional Privilege, especially considering that implementation of the ECN+ Directive significantly increases enforcement and investigation powers of those authorities. Given their intimate knowledge of businesses activities, in-house counsel plays a key role in the context of self-assessment and antitrust compliance, but to this end their legal advice should not be disclosable to competition authorities**.** To assure an effective competition law enforcement in the internal market, it is therefore important to ensure that the Legal Professional Privilege is recognised to all in-house counsel in the Member States.

Judicial control and checks and balances

In practice, the Commission acts both as "prosecutor and judge" in competition proceedings, having both investigative and decision-maker powers. It is therefore crucial that there are effective checks and balances in the system. The current system of judicial review of competition decisions is unsatisfactory and ineffective. More should be done to reform judicial review and speed-up proceedings. Effective judicial remedies underpin the whole structure of the EU and they must be put in proper working order. The length of proceedings discourages and frustrates litigations, and it is almost impossible to keep a certain transaction alive and prevent the erosion of key benefits after a negative decision. BusinessEurope believes that the effectiveness of EU competition law enforcements suffers by the delays in hearing appeals. This increases legal uncertainty which does not only have a direct effect on the companies concerned but also an indirect effect on the whole economic system of the EU. The creation of a non-political, technical, specialised chamber at the General Court, which could appoint economic experts, could be considered, in addition to an increased use of the accelerated procedure, especially if the Court detects a procedural flaw.

Internal checks, such as peer review panels, hearing officer, Chief Economist, could also be strengthened and improved to obtain a genuine complete and impartial re-examination of both the procedural and the substantive aspects of a case. Access to these internal review bodies/persons should not be limited as this prevents them from being an effective impartial arbiter throughout the proceedings. A "devil's advocate panel" could carry out a comprehensive and objective check of all major steps in a competition procedure. The preparation of a decision could also be separated from the investigation by setting up a separate decision team. The hearing officer could be given more independence and a stronger role regarding the control of the substantive assessment. This should not lead to longer procedures if control proceedings are streamlined, for example by the setting of targeted deadlines and time limits. Respective checks and balances should of course also be applicable for national authorities to ensure due process, legal certainty, and cohesion in the application of EU law.

Fines

Regarding sanctions and fines, it is important that emphasis is placed on the proportionality of sanctions, also by national authorities, to avoid unwarranted burdens for companies. In the same context, the proper assessment of evidence on the basis of a well-established decision practice is also necessary to avert wrong outcomes and misalignment between enforcers.

Companies' compliance measures should be recognised as a mitigating factor when calculating the fine. Compliance programmes play an essential role to improve the compatibility of companies' activities with competition rules. Hence, a possible mitigating effect on fines would be a very positive signal for the establishment of such programmes as it could enhance the endeavours of companies to set in place the best compliance programme available, which requires considerable costs and continued efforts. A consistent approach amongst national competition authorities towards compliance programmes would help companies in the effective implementation of EU-wide programs, since they have proven to be a best practice in different jurisdictions, especially where national competition authorities have issued specific guidelines or frameworks, such as in France and Italy. Therefore, the Commission could establish at EU level a legal basis for considering compliance measures as mitigating factors in the setting of fines for antitrust law infringements.

Regarding the calculation of the maximum amount of a fine in general, BusinessEurope believes that the calculation should always be based solely on the turnover of the infringer in question, so the company in the particular sector investigated, and not on the total turnover of the entity in other different sectors in which the company could carry out business operations, but which are not under investigation. This would also be consistent with the Commission's calculation of fines and decisional practice as well as existing case law which limits sales taken into account for the purpose of fine calculation to the sales in relation to the infringement. Additionally, when the infringement directly damaged providers/suppliers and not clients, the relevant amount to calculate the maximum fine should take the total purchase figure in the specific sector that is investigated into account and not the whole turnover of the fined company.

Regarding business associations, in consequence, only the turnover of the business association itself should be used as calculation base. Fines should not be excessive and force members to pay the fine when they have not violated competition rules themselves. The actual approach does not take the structural difference between the role played by associations and the one played by companies in an infringement into account. It is disproportionate compared to the financial situation of the associations and passing the payment of the fine to the associated businesses could represent a serious limitation of the activity of the association.

BusinessEurope also believes that a parent company should not automatically be fined for the infringement of its subsidiary if the latter acted with complete autonomy. In our view, it would be sufficient to foresee the liability of the legal or economic successor of the infringer, instead of introducing a disproportionate group liability, irrespective of individual guilt.

We also regret the suspension of the limitation period for fines for as long as the decision of a competition authority is the subject of proceedings pending before a review court. This could lead to a never-ending limitation period which would be in conflict with the reasonable period of proceedings according to Article 6 of the European Convention of Human Rights. And lastly, as mentioned, the Commission and national authorities should consider the fact that the undertakings concerned have followed EU or national guidance in good faith not only as a mitigating factor when considering a fine but also as a reason not to impose a sanction.

Leniency

BusinessEurope has always supported an effective leniency program which provides incentives to companies which are able to provide relevant information about serious and harmful restriction of competition. Unfortunately, both the Commission and national competition authorities apply different systems which negatively affects the effectiveness of the programmes.

Typically, the ECN Model Leniency Programme as a whole should be binding on national competition authorities. Leniency applications or requests for markers should be accepted not only in the official language of the national competition authority in question but also in English. In addition, there is a need for a one-stop-shop or binding marker system. Otherwise, there is a real risk that a company loses the privileged place of the first applicant when the case is transferred to another authority or prosecuted in parallel by various authorities. A real one-stop-shop would also lead to less bureaucracy for leniency applications and thus to a better acceptance of the leniency programmes.

EEA/EFTA States

The EEA/EFTA States have decentralized public enforcement of EEA competition law in practice in the EFTA-pillar by implementing the relevant parts of Regulation 1/2003 into Protocol 4 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (SCA). However, because of the Commission's refusal to accept decentralised enforcement as a matter of EEA law, neither the competition authorities of the EEA/EFTA States nor the EFTA Surveillance Authority are treated on an equal footing with the authorities of EU Member States in the European Competition Network. Accordingly, the unilaterally established decentralized enforcement of Articles 53 and 54 EEA in the EFTA-pillar is impeded by the lack of power of the competition authorities of the EFTA States to request their colleagues in the EU to carry out inspections on their behalf, as well as their lack of access to confidential information already held by authorities of most of the EU Member States, and vice versa.

BusinessEurope urges the Commission to enable full and symmetrical decentralization of EEA competition law throughout the EEA and full participation of the national competition authorities of the EEA/EFTA States and ESA in an "EEA-wide" European Competition Network. The lack of "cross-pillar" effect will impede the uniform enforcement of the competition rules in the EEA and thereby the level playing field in the internal market.

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