BUSINESSEUROPE

POSITION PAPER

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Effective enforcement by National Competition Authorities

Introduction

A well-functioning competition enforcement setting is at the basis of a fair and growth-enhancing European Single Market that benefits consumers and business. Not only the European Commission, but also National Competition Authorities (NCAs) play a crucial role in this setting.

BUSINESSEUROPE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and is convinced that competition provides more efficiency, innovation and choice. **Antitrust law is crucial and its enforcement is fundamental for creating and sustaining a competitive economy**.

BUSINESSEUROPE therefore strongly supports the Commission initiative to better assess the concrete effectiveness of NCAs. Businesses are the main interlocutors of competition enforcement bodies and are supportive of a **fair, efficient, effective and balanced system based on consistent application of EU competition rules across the EU and on the respect of fundamental due process principles**.

We support the objective of improving legal certainty as well as alignment across the single market amongst NCAs to ensure **consistency in terms of implementation and enforcement of competition rules**. In terms of procedure, it is crucial to have independent investigation processes and the possibility to rely on legal review mechanisms at each step of the procedure, in order to ensure the rights of defence.

Antitrust proceedings in the EU should be conducted by the different authorities applying the same principles and the same minimum level of **respect for due process**. This is particularly important for businesses in order to ensure a transparent and accessible regulatory framework for the enforcement of competition law across the EU.

In light of the points developed in this paper, BUSINESSEUROPE believes that a sensible way forward in this debate could be ensuring that NCAs acknowledge and declare to abide by the principles of the 2011 **Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU**. The Notice provides practical guidance on the conduct of antitrust proceedings before the Commission in accordance with existing EU rules and CJEU case law. Where relevant, these principles should also be applied beyond antitrust proceedings (e.g. sector inquiries, leniency applications and settlements), to activities currently not addressed by the best practices.

By signing up and committing to abide by the principles set up by the Notice as a minimum procedural standard, NCAs would help increase understanding and consistency of their investigations and ensure fundamental procedural rights of parties under investigation, thereby enhancing the efficiency of their operations and ensuring more transparency and predictability in the process, irrespectively of the Member State where such activity is carried out.

In addition, this would contribute to harmonising EU competition law enforcement procedures applicable across Member States with those of the Commission.

1. General remarks

Possible action is this field in relation to **resources** will have very important practical consequences for companies. A preliminary consideration is that providing additional enforcing tools and enlarged budgets to national authorities may not automatically lead to better competition law enforcement. Quantity should not be mixed with quality.

Furthermore, as NCAs perform general guarantee functions intended to produce benefits for the entire community, they should be financed through public resources, and not for example through levies imposed on firms as in some Member States (i.e. since 2013 the Italian Antitrust Authority is financed by a levy to companies with total annual revenues exceeding EUR 50 million). This is not only inappropriate in light of the nature of their functions, but could also alter the NCAs incentives.

Independence is, on the other hand, a fundamental pre-requisite for any competition authority to function properly. However, also this should be matched with adequate procedures and checks and balances to protect the rights of companies. With great power, comes great responsibility.

Due process and enforcement powers are interconnected: a general increase in the powers attributed to NCAs should meet with an increase in procedural rights. More predictability and clarity in relation to the enforcement tools available to agencies throughout the EU would not only be fair to companies, but would also increase deterrence.

Businesses – that act both as complainants and defendants in competition cases – **do not find that competition authorities overall lack appropriate tools and powers.**

On the other hand, BUSINESSEUROPE believes there is need to ensure a level playing field as regards **due process** and procedural guarantees for companies before awarding additional powers to NCAs, as well as a more even qualitative enforcement of competition law across the Member States.

Most notably, the latter is highly relevant for the good functioning of **leniency programmes**, which undeniably constitute a fundamental enforcement tool for any competition authority. Unfortunately however the current system is highly fragmented.

Another important aspect is the perception that sometimes a competition agency having spent time and resources into an investigation is not willing to close it, even if the findings should lead to conclude that a case has no merits.

Lastly, another aspect raised by the consultation is related to the application of competition law to business associations. Business associations are strongly committed to compliance with antitrust rules, and we believe that also in this context more consistent enforcement across Europe – and coherent with EU competition law principles – is needed.

We develop further on these issues in the following pages.

2. Specific remarks

2.1 Independence

BUSINESSEUROPE supports actions aimed at granting independence for NCAs that may be currently lacking it, or suffering from external political pressure or interference in their operation.

We wish to stress however that independence does not mean lack of accountability – to the contrary, a higher degree of independence must be accompanied by greater accountability and judicial control.

A major concern that is closely linked to independence is that competition authorities are in most cases both "prosecutor and judge". An interesting example is the Swedish Competition Authority, that cannot take enforcement decisions but has to build its case before of a court, and only a judge can then issue a decision. This system is currently under review. We believe this might be a good model to take inspiration from.

The need for adequate safeguards and full jurisdictional review is also essential to prevent negative consequences linked to the binding effect of NCAs final decisions for the purposes of damages actions (Article 9 Dir. 2014/104) and the potentially criminal nature of antitrust sanctions[1].

Under such a setting, an NCA could more legitimately aspire to a level of independence close to what public prosecutors normally have, as this would be matched with a strong judicial overview of its conduct.

In this context, the right balance is needed between efficient enforcement and the possibility for a NCA to have both investigative and decision-making powers on one hand, and the need for effective judicial review also covering the facts and evidence of the case on the other.

In addition to that, it is crucial that Member States adopt measures to ensure that any decision by an NCA is taken independently from political influence and constraints on budget and resources. In addition, NCAs should adopt internal regulations prohibiting

[1] Judgment of the ECtHR of 27 September 2011, Menarini Diagnostics S.R.L c. Italy.

any political interference, establishing a fair and clear selection process for members of the decision making bodies based on merit and integrity, along with controls, sanctions and dismissal procedures in case of violation.

Finally, the application of EU competition rules should be entrusted to an independent institution that does not carry out regulatory functions. The combination of competition and regulatory functions may seriously jeopardize the independence of the NCAs.

2.2 Due process

European competition authorities must not only respect the minimum rights of defence and adhere to the fundamental procedural guarantees – they should actually aspire at setting the highest standards for due process.

This is particularly the case in relation to the following, basic aspects of a competition investigation:

- Jurisdictional clarity (investigations carried out by more than one NCA and potential abuse of jurisdiction)

- Inspections and evidence gathering and evaluation (i.e. legal privilege, documents unrelated to the scope of the investigation or breach of company employees' rights, witness cross-examination, no unjustified refusal of relevant evidence proposed by the parties, adequate economic analysis)

- Limitation periods, reasonable timing for decisions and adequate deadlines (especially taking into consideration the impact of investigations on the results and normal functioning of companies, and the potential reputational damage), adequate deadlines taking into consideration the complexity of the case: In Spain, for example, parties are given 15 working days (including Saturdays) to respond to the Statement of Objections, which is clearly insufficient.

- Minimum procedural standards granting the parties the possibility to effectively exercise their right of defense (including statement of objections, transparency and access to file). This should be the case since the early informal stage of the investigation, so to allow the parties to cooperate with the NCA and clarify the facts before a statement of objections is issued.

- Exchange of information on the factual elements and legal perspectives of the parties with other NCAs and the Commission to ensure good cooperation.

- Sanctions proportionate to the economic effects, duration and seriousness of the infringement

- Judicial review (if not a fully-fledged court-based system concluded by a judgment rather than an administrative decision by the authority having conducted the investigation)

While the European Commission's antitrust enforcement practices are not perfect – especially in relation to the lack of separation of investigative and decisional powers – if followed by NCAs they would at least constitute a basic step forward in some cases. Regardless of the actual practice, at least in theory they can provide examples of minimum rights for companies in competition investigations.

By way of example, we would like to remark that only recently (from September 2015) the Polish Competition Authority started issuing statements of objections and has set up an internal evaluation committee. These new tools – which are designed to strengthen procedural fairness and parties' defence rights – were entirely absent by the national competition enforcement setting until a few months ago. We highly appreciate this positive national development. Both the statement of objections and the evaluation committee should be seen as important steps towards better enforcement of competition law in Poland alongside standards of procedural fairness.

However, we cannot help highlighting that before this novelty undertakings in Poland were in the highly regrettable situation of having no guarantee they would be adequately informed before the procedure was coming to an end. It is also worth noticing is that these changes do not result from changes in the law. On the contrary, they will be introduced on a voluntarily basis as a good administrative practice.

2.3 Leniency

As mentioned, coordination is crucial for the good functioning of **leniency programmes**.

The possibility for companies involved in an antitrust violation to come forward and provide information in order to stop the violation and support enforcement actions is a formidable tool in the hands of competition authorities.

However, currently both the Commission and the various NCAs have their own loose leniency programmes. This system is highly fragmented and even the ECN's Model Leniency Programme is not binding on national competition authorities, as was recently confirmed by the European Court of Justice. The Court also specified that applications for leniency for the same cartel at EU and national level are autonomous.

This makes the current system not only rather complex but also less appealing that it could be for potential leniency applicants, making it therefore less likely to uncover ongoing antitrust breaches through these programmes. Currently, leniency applicants may need to file a leniency application with the Commission and with every NCA potentially competent for the infringement in question.

BUSINESSEUROPE believes that further coordination and consistency of national and EU leniency programmes would strengthen competition law enforcement in the EU, and would help modernise the current system in Europe while also responding to the basic principles of the single market.

We would be in favour of a one-stop-shop (or at least a binding marker system) in case of multiple applications – otherwise the risk to lose the privileged place of the first

applicant is very high when the case is transferred to another agency, as the Court of Justice ruled recently. As a consequence, this would involve a basic standard for leniency applications in the ECN. The ECN Model Leniency Programme could be a good reference.

2.4 Uniform and coherent application of competition rules

An effective application of EU competition law must relate to a common understanding of the rules. Divergent practices by NCAs may negatively affect business decisions and create legal uncertainty.

Multilateral cooperation among NCAs may reduce the risk of diverging outcomes. There are areas for improvement that require more effective supervision and cooperation. There are for example significant doubts on the *uniform* application of the effect on trade criterion. Several NCAs seem to have an insufficiently developed practice in analysing the *effects* of a particular practice on competition and the relevant application of Article 101.3 TFUE.

Systematic transparency on the NCA network coordination on material enforcement of EU competition rules is needed, in particular in view of the application of the mechanism provided under article 11 (4) of Regulation 1/2003.

Another aspect touched upon by the Commission consultation where more consistency is needed, across Europe and with respect to EU competition law principles, is in relation to the **application of competition rules to business associations**. Business associations are strongly committed to compliance with antitrust rules. However, some rules remain unclear: this is the case for example of exchange of sectoral statistical data, which is procompetitive, but may be considered a competition infringement. Also some NCAs – e.g. in Spain – can impose fines up to 10% of the turnover of its members. The latter is however entirely unrelated with a business association's budget – which normally is a no-profit organisation whose budget is based upon its members fees. In practice, this means that a business association might receive a higher fine than a cartel-participant company, entirely disproportionate and potentially leading to the association's bankruptcy.

Looking at the correlation between EU law and the national systems, the suggestion to introduce the European concept of undertaking into the national competition system would lead to immense changes for liability rules in some Member States. **We do not believe that a parent company in a holding should be held liable** as part of a "single economic unit" because one of its subsidiaries is involved in a competition violation. In some national systems, like for example Germany, only the acting legal person (the subsidiary) can be held liable (system of corporate separability / liability of separate legal entities). Taking on the European concept of undertaking would lead to a systematic split between competition law and other fields of law. Also, this would not seek to punish the true infringer but rather to apprehend a solvent debtor – but this aspect should however be better dealt with by foreseeing adequate rules for successor liability in cartel cases.

BUSINESSEUROPE also **recommends that competition authorities recognise and value companies' compliance activities**, and granted the possibility to those subject to investigations to prove their efforts. This would help create more certainty on what needs to be done and on the value of these efforts in the event of violations and would encourage additional compliance actions. Some antitrust authorities - like the UK's OFT and to a certain extent Italy's AGCM - may take into account the existence of a compliance programme as a mitigating factor when calculating the fine. It is also key that competition authorities across Europe do not generally view the existence of a compliance programme as an aggravating factor resulting in an increase of the fine.

2.5 Jurisdiction: extra-territorial application competition law

Another important aspect of current national practices relates to extra-territorial application of EU and national competition laws. A recent example of this can be found from the Belgian Competition Authority (case GCL vs Federation Equestre International - FEI), who decided to apply extra-territorially Belgian and EU competition laws via interim measures in relation to an agreement produces prima facie anticompetitive effects, where the competence of the NCA could be conflicting with that of competition authorities in any country of the world (including all EU Member States). In the specific case the defendant was based in a 3rd country, Switzerland, and one event only would take place in Belgium. The interim measures by the NCA force national equestrian federations to suspend in all countries outside Belgium one of their rules (unsanctioned events rule according to which athletes that participate in a non-recognised event, must undergo a cooling off period before participating again in an FEI recognised event).

Article 11(4) of Regulation 1/2003 does not require NCAs, as regards interim measures, to notify the Commission in advance of a summary of the case, the envisaged decision or any other document indicating the proposed course of action. In other words, there is no procedure to ensure that interim measures decisions by NCAs are known to the European Commission, which has the important role of driving consistency and coordination of competition law enforcement within the EU.

In light of the above considerations and examples, **BUSINESSEUROPE believes there is a need to ensure a more level playing field as regards procedural guarantees for companies before awarding additional powers to NCA**. Any initiative in this field should be very cautiously assessed and the EU should find the right balance between enforcement powers and due process rights.

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