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EFFECTIVE ENFORCEMENT OF EU COMPETITION RULES BY NATIONAL COMPETITION AUTHORITIES (ECN+)

Commission Proposal for a Directive

Introduction

Competition is crucial for business; it provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice. BusinessEurope therefore endorsed the Commission assessing the effectiveness of national competition authorities enforcing EU antitrust rules. Consistent application of EU antitrust rules is essential for the integrity of the single market; it provides protection 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. Similarly, we support creating a genuine common competition enforcement policy. Clearly, it is in the interest of all that national competition authorities should have enforceable guarantees that they can act independently and have sufficient resources to do so. They should have key investigative powers and the ability to impose effective fines albeit not without appropriate procedural guarantees to counterbalance the quasi-criminal nature of antitrust sanctions and the fact that competition authorities are often both “prosecutor and judge” (having both investigative and decision-making powers). Also, it should not be forgotten that decisions of competition authorities have binding effect for the purpose of damages actions in that same country.

Due process

The proposal for a Directive rightly acknowledges the importance of companies’ fundamental rights and requires authorities to respect appropriate safeguards for the exercise of their powers in accordance with the EU Charter of Fundamental Rights and with general principles of Union law, at least as far as rights of defence and effective right of recourse are concerned. But where the proposal for a Directive is very detailed on increasing enforcement powers, it is vague on these appropriate safeguards, which are not defined any further. This discrepancy and unbalance must be remedied, 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.

The validity of national 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. As a first step, some minimum guarantees should



be set out and national competition authorities could be required to sign up to the principles of the 2011 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU even though such best practices could be enhanced with regards to due process. This would be a sensible first step to ensure the respect of the minimum rights of defence and fundamental procedural guarantees. In fact, BusinessEurope believes that this should be addressed before awarding additional enforcement powers to national competition authorities. Having said this, competition authorities should not only respect minimum rights of defence but aspire at setting the highest standards for due process. This should not be jeopardised by the proposal for a Directive which will apply to and therefore should respect existing organisation structures which, for example, combine an administrative and a judicial system.

Legal Professional Privilege

Among those national procedural rights not to be undermined by the adoption of the proposed Directive, it is of particular importance that the Legal Professional Privilege (LPP), as provided under national rules, is preserved. In such regard, the jurisprudence of the CJEU (judgment of the CJEU of 14 September 2010, case C-550/07P, Akzo Nobel, paragraph 102) admits the application of different LPP rules to procedures carried out by national competition authorities than to those run by the European Commission, accepting that communications with qualified in-house counsels may be subject to LPP protection in national procedures. Thus, BusinessEurope believes that enhanced investigative powers of the national competition authorities cannot allow them to access and use legal advice communications exchanged with qualified in-house counsel, which would be otherwise protected by LPP under national procedural laws.

Fundamental rights

Other fundamental procedural rights to be valued include the protection of confidential documents, appropriate time-limits to answer requests for information, the right to a hearing and access to file, the right to receive a statement of objections, as well as the right to judicial control.

In relation to requests for information, the Directive should specifically value the privilege against self-incrimination, which also applies to companies. Companies are not obliged to incriminate themselves by admitting a violation of EU competition law. Even the European Court of Justice and the General Court have acknowledged this right (inter alia laid down in Article 6 of the ECHR; cf. CJEU, 18.10.1989, C-374/87, Orkem; EGC, 20.02.2001, T-112/98, Mannesmannröhren), however, not to its entire extent. The European legislator is not barred from recognising a higher standard of fundamental rights than the European Courts. The establishment of the truth should not be achieved at all cost but should be consistent with the rule of law.

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.). It must be sufficient that the search can be made at the premises of the undertaking and only with the consent of the undertaking and its presence should a continued search take place at any other premises than the one of the undertaking.



Leniency

With respect to 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, as is acknowledged by the Commission, both the Commission and national competition authorities apply different systems which negatively affects the effectiveness of the programmes.

BusinessEurope welcomes the attempts of the Commission to try to solve this but more is needed. The integration in the Directive of provisions previously included only in a Notice, such as the ECN Model Leniency Programme, is welcome. 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, Article 20 should be reinforced as it currently falls short of introducing a one-stop-shop or binding marker system. This is regrettable as 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.

Fines

BusinessEurope is worried about the proposals regarding business associations and maximum amount of fines. It is proposed in Article 14 that the maximum amount of the fine imposed on an association where an infringement relates to the activities of its members should be at least 10% of the total worldwide turnover of each member active on the market affected by the infringement. This is excessive and could easily lead to the insolvency of the association concerned forcing its members to pay for the fine following Article 13 even those who have not violated competition rules themselves despite paragraph 2 of Article 13. The terminology used in Articles 13 and 14 is too vague and will lead to different interpretations from national authorities which do not follow the foreseen harmonisation principle.

Regarding the calculation of the maximum amount of a fine in general, BusinessEurope believes that this 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.

Also, the proposed Directive extends the notion of "undertaking" to systematically include the parent company so that the parent company in a holding would be held



liable because one of its subsidiaries is involved in a competition violation. The suggested wording seems to imply that the parent company may automatically be fined which is not in accordance with the case law of the Court of Justice. Again, the proposed wording is unfair as it would force a company to pay for the infringement of its subsidiary even though it acted with complete autonomy. To prevent companies from restructuring themselves in order to avoid paying for a sanction, 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.

Moreover regarding fines, Article 27 of the proposed Directive imposes 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.

Regarding periodic penalty payments, the proposal sets out three ways to make a company comply. First with a penalty payment; second with a fine for not complying in accordance to Article 12 (2); and third when calculating the final fine when non-compliance should be taken into account. It should be avoided that these tools are used cumulatively and that companies are fined multiple times for the same infringement as this would be contrary to the "ne bis in idem" principle.

Lastly, BusinessEurope regrets that the proposal for a Directive does not recognise and value companies' compliance activities as a mitigating factor when calculating the fine.

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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