POSITION PAPER

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Improving EU Competition and State Aid Policy

CHAPTER I - PRIORITIES

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 few areas where the EU has 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 in order to boost their and the EU's overall competitiveness. As such, it is one of the key components of a successful EU industrial policy.

In this context, the Commission should explore how EU competitiveness can be enhanced and how, at the same time, the EU can adapt EU competition policy to developments on global markets. It should also be clear that the internal market is and will be a key driver of EU competitiveness. Its effective functioning should be ensured as it is a major advantage of the EU. The EU should ensure a level playing field for all business models allowing them to be competitive and to respond to customer demand, also in a rapidly changing digital environment. The EU should put in place: a more strategic industrial policy aimed at creating enabling conditions at EU level; a common approach to strategic EU value chains that also takes account of policies implemented by third countries; a smart implementation of EU competition rules to allow the emergence of new innovative firms that can grow into sizeable European companies, able to compete with global enterprises operating by different rules; and ensure that national and local rules are proportionate and fit for purpose. EU policies should converge towards common objectives.

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Facts & Figures

- Since 2012, about 300 planned mergers are notified annually of which the vast majority (about 90%) were unconditionally cleared.
- In total, as of January 2019, 27 planned transactions (in 30 years) have been prohibited; 152 notifications were withdrawn during Phase 1, and an additional 44 notifications during Phase 2 (1990-March 2019).
- Since 2015, more than 96% of new State aid measures fell under the General Block Exemption Regulation (GBER) - an absolute increase of about 28 percentage points compared to 2013.
- In 2017, around 94% of total State aid spending was allocated to horizontal objectives of common interest, such as environmental protection, research, development and innovation and regional development.
- More than 90% of cartels cause a price increase. Over 90% of the value of fines imposed by the Commission are maintained on appeal.
- National competition authorities in the EU take some 85% of all the decisions that apply EU antitrust rules.

(Source: European Commission)

BUSINESSEUROPE has identified the following overall priorities:

- Ensure a strong EU competition policy that is protecting competing companies and consumers, whilst ensuring that EU companies can compete also at global level;
- Ensure effective and independent competition law enforcement preserving legal certainty, a level playing field in the internal market and non-discrimination;
- Ensure that the administrative and procedural framework of EU competition proceedings, particularly in EU merger control, is sufficiently speedy, transparent, and proportionate;
- Ensure effective checks and balances in the system and reform judicial review of Commission decisions;
- Ensure an effective leniency policy for those bringing forward possible antitrust infringements;
- Ensure that markets are defined in a realistic and dynamic way;
- Ensure that competition in the internal market is not distorted by competing companies, in and outside the EU, that are not operating under the same rules;

- Ensure that EU State aid policy supports good aid and investment in large research as well as innovation projects that contribute to growth, jobs and EU global competitiveness while fundamentally safeguarding a market driven European economy;
- Ensure effective State aid control to safeguard fair competition;
- Ensure a proportionate and speedy treatment of State aid cases which do not raise competition concerns;
- Ensure more legal certainty for company cooperation and/or joint research and development projects;
- Ensure that EU companies can equally and effectively compete in digital market.

CHAPTER II – EU MERGER CONTROL POLICY

II. 1 THE ROLE OF EU MERGER CONTROL: SUBSTANTIVE TEST, MARKET DEFINITIONS, EFFICIENCIES

Supporting innovation and putting in place the best possible environment conducive to innovation and the creation, development and success of companies in Europe is one of the key objectives of the EU. Competition policy plays a crucial role in this regard, both in positive terms, but also potentially in negative ones depending on the strategic choices and business decisions that will be made, not least regarding mergers and acquisitions.

EU Competition enforcement should not prevent individual EU companies, alone or together, from achieving greater scale and technological leadership enabling them to compete at global level. At the same time, it should safeguard the effective functioning of the internal market.

Despite the fact that EU merger policy as such does not prevent the creation of large companies, its impact in influencing companies' strategic decisions should not be underestimated. Even though the vast majority of concentrations subject to EU merger control are cleared, many transactions have been abandoned and notifications withdrawn possibly in view of a likely prohibition or significant remedy requirements. The Commission has shown to largely favour structural remedies (instead of behavioural ones) which often leads to selling the parts of the businesses concerned to non-European firms.

The EU Merger Regulation, relevant notices and guidelines, and the existing body of case law and practice, give the Commission enough discretion to identify all the competitive constraints that merging firms face and any changes to the substantive test and other provisions in the Merger Regulation would create new uncertainties, nullifying some of the well-established case law, and increase existing discretion. This would be inappropriate in view of the legally sub-optimal procedures under the EU Merger Regulation with limited external and internal controls (see, II.3). Instead, the Commission should explore how EU competition policy can adapt to developments on global markets and where necessary change relevant notices and guidelines.

Overall, regarding the definition of markets, the Commission defines geographic markets correctly, setting the right framework to assess competitive constraints from outside the EU. However, the Commission should identify on the basis of objective and transparent criteria whether there are situations where it should put more weight on the global market environment when assessing certain concentrations bearing in mind overall market developments as well as competition within the internal market.

Moreover, the Commission should also take account of the various forms of public subsidies (e.g. export subsidies, loans, funding of state-owned companies, etc.) that companies from outside the EU enjoy. These subsidies are relevant when assessing both markets' dimensions (as they may allow companies from outside the EU to sell globally, while EU companies often cannot, thereby giving the impression of the market being smaller) and market players' power on the same markets (as companies benefiting from public subsidies might consequently have much stronger market power).

It should also be explored whether the Commission is sufficiently flexible when appraising efficiencies from mergers. For example, the Commission should consider not adopting an overly static view of markets when appraising the existence of sufficient competitive pressure from remaining firms and from potential market entry, as this is a condition for accepting efficiencies. In situations where markets are rapidly evolving, dominance is often temporary. In such cases, the Commission should adopt a dynamic analysis and long-term view of the markets when appraising the existence of competitive pressure. The Commission should also not require disproportionate evidence when asking the parties to provide information that efficiencies directly benefit consumers, and are merger-specific, substantial, timely and verifiable.

In cases where the merging parties compete outside the EU and where third country competitors do not (yet) have business activities or revenues in the EU, enough consideration should be given to the global market environment. For example, when the non-European business of the merging companies is vital to support their European activities, in times when EU demand is low and technical development is mainly driven by demand from outside, the EU should not focus predominantly on the market conditions in the internal market, notwithstanding the importance of a proper consideration of the conditions in the internal market. This is even more valid if there is an indication, following a proper economic analysis, that non-European competitors might become active in the EU after a longer period within the foreseeable future. In such circumstances, the Commission should also consider adopting a more dynamic analysis and long-term view of the markets. EU competition policy should be fit for purpose. By not properly taking the global market environment and dynamics into account and by focusing too much on immediate effects in the EU, or on narrow geographical markets, the Commission may put EU companies at a disadvantage, preventing them from achieving greater scale and technological leadership which enables them to compete at global level.

The EU should also improve its ability to collect information about (global) markets. Both notifying parties, and third parties, should be granted more flexibility when responding to an information request. Unclear, overly detailed, voluminous, irrelevant requests, short deadlines, formalities of requests, may affect the quality of the information provided, especially regarding markets outside the EU. Moreover, they put an unnecessary

burden, not only on the merging parties, but also on third parties such as competitors or customers asked to respond (see, II.2).

Information about global markets should also feed into policymaking in general. Reaching a full and detailed understanding of how third countries support their national industry would allow benchmarking. This kind of information should be gathered in a systematic way.

II.2 MERGER CONTROL PROCEEDINGS

EU merger control, even regarding simpler transactions, generally places significant procedural burdens on companies and is too formalistic and costly for the merging parties, as well as for third parties, competitors or customers of the merging parties. Pre-notification periods for simple deals are excessively long; requests for internal documents in Phase II are disproportionate; the Commission only acknowledges Legal Professional Privilege on an ad hoc basis; parties should be allowed more time to be heard.

In view of the very large number of cases which are cleared by the Commission, EU merger control should be streamlined, e.g. by lifting the pre-notification requirement in simple cases, introducing time limits for pre-notification procedures in other cases, gradually abolishing the Form CO and replacing it with a more flexible approach led by the actual needs of the individual case but without compromising legal certainty.

Current thresholds are relatively simple and predictable and should be maintained. An expansion of EU merger control would cause disproportionate burdens. The number of cases to be reviewed by the Commission and requests for guidance on filing requirements would increase, increasing the workload of the Commission as well. Simple turnover thresholds should be retained as any other thresholds (e.g. based on transaction value) are unclear leading to uncertainty. Objectively determinable thresholds are essential for parties to a concentration to establish whether or not the transaction triggers merger filing requirements and minimise case-by-case consultations and disputes.

The EU should further simplify procedures under the EU merger regulation and exclude certain transactions from the filing requirement, such as joint ventures which will not operate in the EU and which do not have strong links with European value chains, by adding a clear local nexus requirement beyond simple parent company turnover in the EU to ensure that only those transactions that are capable of distorting competition within the EU are reviewed.

As mentioned, the administrative burdens for parties filing a concentration as well as third parties are significant, in particular, regarding the production of information and internal documents. Requests for internal documents must comply with the principle of proportionality. Excessive data requests should be avoided, ensuring that requests are unambiguous, specific, and limited to the information required for the analysis. 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. Notifying parties, and, importantly, also third

parties, should be granted more flexibility when responding to an information request. Unclear or irrelevant requests, and short deadlines, may affect the quality of the information provided, especially regarding markets outside the EU.

Issues relating to timing, intended scope and focus of the review, as well as availability of data and information, should always be discussed with the notifying parties at the beginning of the pre-notification. Parties should also have earlier access to the file to discuss potential competition concerns and possible efficiencies or remedies at an early stage. Lastly, with regard to standstill obligations, it should not be a problem when companies exchange information that is necessary to assess the transaction and take actions to preserve the value of the acquired business between signing and closing ("gun-jumping").

II. 3 CHECKS AND BALANCES

In practice, the Commission acts both as investigator and decision-maker in merger proceedings. It is therefore crucial that there is a proper due process and that there are effective checks and balances in the system. Internal checks should involve a complete and impartial re-examination of both the procedural and the substantive aspects of a case and access to these bodies should not be limited as this prevents them from being an effective impartial arbiter throughout the proceedings. Existing checks and balances (e.g. Chief Economist, peer review panel, hearing officer) should be strengthened and institutionalised. This should not lead to longer procedures (especially if our proposals on streamlining control proceedings as set out above are implemented in tandem) but to more reliable outcomes of merger investigations, increase consistency between different EU policies, a better understanding of business realities and industry know-how whilst protecting confidential business information.

For example, a "*devil's advocate panel*" could carry out a comprehensive and objective check of all major steps in a merger control procedure. The preparation of the 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 his control of the substantive assessment.

Furthermore, the current system of judicial review of merger decisions is unsatisfactory and ineffective. More should be done to reform judicial review of Commission decisions 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 merger alive and prevent the erosion of key benefits after a negative decision. The effectiveness of EU competition law enforcement is undermined 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. For example, the creation of a non-political, technical, specialised chamber at the General Court, which could appoint economic experts, should be considered. In addition, the use of the accelerated procedure should be contemplated more often, especially if the Court detects a procedural flaw.

CHAPTER III – ANTITRUST POLICY

III.1 HORIZONTAL COOPERATION

EU rules on horizonal cooperation should encourage companies to collaborate to carry out joint technology development or achieve objectives of other EU policies (e.g. environmental and sustainability objectives). Especially in the age of Industry 4.0, such joint research projects or collaborations through industry platforms play an important role. Platforms offer new opportunities and business models for companies on both the provider and customer side. A self-assessment on the question of whether a particular form of cooperation between competitors is admissible is always associated with a high degree of legal uncertainty. The Commission should therefore give clear guidance to companies intending to collaborate. There is already significant uncertainty for cooperation arrangements outside Industry 4.0 but for new digital projects (e.g. with a view to cooperation arrangements for the generation and shared use of data) there is yet none or only little case law. Existing policy should improve and provide more legal certainty for companies that want to develop new digital projects. This might be done for example through guidance letters, "no infringement" decisions, or clearer criteria in the Horizontal Block Exemption Regulations and the Guidelines on Horizontal Cooperation.

EU competition policy should also encourage temporary collaboration between companies (consortia) to make more effective bids for contracts. Such consortia of companies would be eligible for tender, enabling it to bid for the larger contracts that have become more and more the normal situation. Consortia have many advantages in big contracts because they can increase their economic and financial standing and minimise the risk whilst combining and complementing their technical and professional expertise. Current strict competition law enforcement can discourage such collaboration between competitors because of the legal uncertainty and risk of breaching the rules. This could lead to fewer bids or even to single bids in a tender procedure. Therefore, the EU should provide more clarity on how companies can enter into a consortium and engage in joint bidding in order to compete more effectively without falling foul of competition rules.

III. 2 ANTITRUST PROCEEDINGS

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 as this could discourage EU companies from engaging in certain transactions. The EU should actively foster a common competition enforcement policy ensuring consistent application of EU competition rules and avoiding duplication of procedures. National competition authorities should be able to act independently and have sufficient resources to do so, in accordance with the recent ECN+ Directive. They should have key investigative powers and the ability to impose effective sanctions. The Commission should enable full decentralisation of EEA competition law across the EEA and full participation of relevant national competition authorities in an “EEA-wide” European Competition Network to foster uniform and coherent enforcement across the EU and EEA.

The rights of defence should be respected to counterbalance the quasi-criminal nature of antitrust sanctions. Moreover, an effective right of recourse should be available. The Legal Professional Privilege, as provided under national rules, should be preserved. In such regard, the jurisprudence of the Court of Justice admits the application of different privilege rules to procedures carried out by national competition authorities accepting that communications with qualified in-house counsels may be subject to protection in national procedures.

The EU needs an effective leniency framework which provides incentives to companies which are able to provide relevant information about competition law infringements. A one-stop-shop leniency application/marker system should be created to ensure that a leniency application with any national authority has an effect for the entire EU. This would make the system more secure whilst reducing administrative burdens.

When determining the level of fines, the Commission and national competition authorities should consider successfully implemented compliance programs as mitigating circumstance. Compliance programmes play an essential role in the prevention of cartels. 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. Fines for business associations should not be excessive and not force members to pay the fine when they have not violated competition rules themselves.

III. 3 DIGITAL ECONOMY

Technological innovations, e.g. in the context of the digital economy, should foster market integration, enhancing consumer welfare, and allowing EU companies to effectively compete in digital markets, in the same market under the same regulation. Currently, different national authorities take diverging approaches to deal with issues such as the freedom of online retailers, online access, interoperability. There should be better cooperation between Member States and relevant authorities to avoid a divergent approach. The EU should provide more clarity on how companies can innovate and compete in the digital economy to ensure more legal certainty and convergence of competition law enforcement as the economy digitalises further and concentration increases.

Overall, the EU should use an evidence-based approach to ensure an adequate application of competition law adapted to the digital economy to address any potential challenges in: role of data, market definition, non-monetary transactions, network effects, gatekeeping roles, creation of conglomerates, merger thresholds and innovation.

Every business sector and, particularly SMEs, faces the challenge of applying connected, digital technologies, be it in production, in distribution or in development. It should therefore be the goal of EU policy to encourage all companies of all sizes and all sectors to exploit the opportunities of digitisation, as also set out in the Commission report “Competition policy for the digital age”.

Regarding access to data, data sharing is a varying issue of importance depending on the sector involved. While it is clear that a one-size-fits-all policy would be detrimental due to the specific nature of each sector, data sharing will be crucial for deep learning in

support of AI and innovative opportunities. In this sense, standardisation in support of interoperability must be ensured and data usage agreements promoted.

Voluntary data sharing between businesses and sectors would support an open and vibrant data economy. This should be the norm, while respecting firms' contractual freedom. When this cannot be promoted between business and sectors, current competition policy should address evidence-based instances of market failure or anti-competitive behaviour.

If competition policy cannot address these concerns, a European assessment, involving all stakeholders in the relevant sectors, should take place to determine whether barriers exist or if the playing field is unbalanced. Any potential action to alleviate these concerns should be justified, legal, proportionate and non-discriminatory. It should achieve level competition and the protection of IP rights.

We must ensure free, undistorted and vigorous competition in our markets and the development of platforms, also of big platforms, should not be over hastily regarded as a threat, since growth is also a reflection of entrepreneurial success. Several highly promising platforms, especially in the business-to-business sphere, are currently developing very well in Europe. Any new regulation, e.g. regarding abuse control, which has not been fully thought through runs the risk of stifling these platforms or placing a break on their growth. However, it would be an advantage from the standpoint of companies if existing abuse control procedures could be accelerated. This would not only provide more rapid legal certainty but also create a better picture of the dynamics prevailing in platform markets.

Internet and digitalisation have been major disruptors of ecommerce. Online traders nowadays compete on a global level as ecommerce is, by definition, borderless. Consumers can access an immense offer of products and services, on a 24/7 basis from any online shopping outlet based in any part of the world. This should be considered when designing and implementing relevant regulations, also in view of the fact that multi-channel retail will remain the trend for retail in the coming years.

CHAPTER IV – STATE AID POLICY

IV. 1 EU STATE AID CONTROL

State subsidies, market protection, and unfair trade practices that infringe market-based principles give an unfair competitive advantage to competing firms. To counter this, we need effective State aid control to secure fair competition in the internal market while at the same time avoiding competitive disadvantages of EU companies. Clear State aid rules are fundamental to ensure a level playing field and ensure that State aid expenditure is kept at reasonable levels, targeting market failures.

The expansion of the General Block Exemption Regulation and the State aid modernisation has increased discretion for the Member States, allowing them in some situations to take proper account of the specific situation in their countries. However, increased discretion has also increased the risk of a more subjective and less uniform application of the State aid rules. The Commission recently revealed important compliance gaps, especially regarding block-exempted measures that are directly

implemented at national level. Hence, Member States need to improve their adherence to the rules and the Commission should continue to support their efforts. It is therefore very important that the application of the new framework is being evaluated.

Other parts of the existing framework are also relevant and should be properly evaluated such as matters related to the recovery of illegal aid, national enforcement, private enforcement, and the lack of clear procedural rules to be followed by the Commission in relation to disputes about new or existing aid. The Commission should review enforcement of State aid rules at national level and focus especially on how private enforcement, involving national courts, could be encouraged.

Overall, we need more coherent application of the EU State aid rules at national level. As mentioned, the Member States need to improve their adherence to the rules and the Commission should support their efforts by providing clear guidance and active monitoring. Moreover, special efforts should be made to raise awareness of State aid rules, especially at local level. This is important, not only to avoid distortions but also to avoid problems related to the recovery of illegal aid.

IV. 2 GLOBAL LEVEL PLAYING FIELD

EU State aid rules have usually arranged for a level playing field within the EU, without also ensuring a level playing field for EU companies competing worldwide, apart from a few exceptions, such as the existence of a so called "*matching clause*" in some situations (e.g. the Research, Development and Innovation framework) to compensate for the distortive third-country subsidy. However, this clause has never been applied because there is a lack of data regarding aid granted to competitors by third countries.

We need to strengthen rules to address market-distorting subsidies, including indirect industrial subsidies in the form of selective tax cuts, cross-subsidisation, cheap sovereign loans to state-owned enterprises and/or inflated procurement prices paid by local public authorities. Such focus on the global dimension should not be detrimental to smaller companies and cases with a national/regional dimension and it should be considered to highlight the global dimension for some commodities, goods or services where prices are normally set on the global market, or for some well-considered areas.

Work needs to be done to improve the scope and implementation of relevant WTO rules and the Commission should address this issue in the context of free trade agreements. The Commission should continue its active work on making trade agreements with substantive provisions on State aid. These are important steps towards better subsidies control which takes the global dimension into account.

Likewise, an overly strict interpretation of the incentive effective criterion or an overly rigid application of the proportionality test in the relevant EU State aid rules, would put EU companies at a competitive disadvantage vis-à-vis their competitors located outside the EU which do not suffer from comparable constraints.

III. 3 MARKET FAILURES, IMPORTANT PROJECTS OF COMMON EUROPEAN INTEREST, AND FOLLOW-ON INVESTMENTS

More should be done to encourage public investment in large research and innovation projects of common European interests that contribute to growth, jobs and EU global competitiveness, while fundamentally safeguarding a market and company driven European economy. This is not about "picking winners" but about filling the funding gap and correcting a market failure because the high risks involved with such projects daunt private investors.

In 2014, the Commission developed the framework for funding Important Projects of Common European Interest (IPCEI). The project on microelectronics, approved in December 2018, was the first case of application of the instrument with the involvement of France, Italy, the United Kingdom and Germany and the participation of about 40 companies. The process to develop the operational programme took a very long time (about three years) partly because the Commission insisted on having four separate national notifications with almost identical content and timelines. This required heavy coordination efforts in order to ensure an effective notification process. For the pre-notification phase, regular meetings at different levels had to be organised and an effective managing body had to be set up to ensure a proper follow up. Another challenge was to bring national funding regulations in line with the IPCEI regulation (e.g. common understanding of definitions). Equally complex was the management of enterprises' confidential data within the "integrated" project.

Administrative burdens should be reduced and decision-making speeded-up. For example, requiring a comprehensive description of a counterfactual scenario which corresponds to the situation where no aid is awarded (point 29 of the Communication) is unduly burdensome.

Procedures required to activate the instrument should also be simplified. Although the Commission expects to maintain control over all individual funding from Member States participating in the Common European Project (as this funding is admitted to a greater extent than the ordinary State aid limits), one single notification procedure should be required so all subsequent public funding should be considered as automatically eligible once the Common Project has been approved as a whole. It is also crucial to shorten the timing of the approval procedures, making them faster, especially in fields where innovation cycles are very short.

Although the Commission will take a more favourable approach if the project involves co-financing by a Union fund (see section 3.2.2 letter f of the IPCEI Communication), it is necessary that the combination of the various types of available financing is fostered through greater alignment of rules and procedures to support the IPCEI not only through national resources, but also through funding by European Institutions (Commission, EIB, etc.), both directly managed (such as, for example, those of Horizon Europe) and indirectly (such as those of the structural funds).

Lastly, although this could also be addressed in the Research, Development and Innovation Framework, the requirements for IPCEIs should also allow downstream industrial projects to effectively benefit from the IPCEI characterisation. Downstream application (e.g. last stage development of very innovative industrial products) projects are very useful to bridge the "valley of death" but generally do not allow the same IPR

sharing nor trigger the same spill over effects as more upstream/generic research. These projects can nonetheless be very beneficial to EU innovation and to other EU policies.

It is important that regional aid is not used to attract and relocate jobs from one Member State to another. If this is unlikely, the Guidelines should encourage investment by already existing businesses (so called follow-on investments) that contribute to growth, jobs and EU global competitiveness, and not solely focus on attracting new investors. The General Block Exemption Regulation, allows enterprises in “c” areas, initial investments in new economic activities (so called “greenfield investments”) but “follow-on investments”, such as diversification of existing establishments into new products or new process innovations, is subject to the notification obligation and therefore has to be assessed on a case-by-case basis under the Regional State Aid Guidelines.

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