POSITION PAPER

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BUSINESSEUROPE response to the Commission consultation on the functioning of Regulation 1/2003 on the implementation of competition rules

INTRODUCTION

On 24 July 2008, the European Commission launched a consultation on the functioning of Council Regulation 1/2003, setting out the rules for the Commission's enforcement of EC antitrust rules.

According to the provision contained in Article 44 of Regulation 1/2003, the Commission will use the results of the consultation to prepare the report on the functioning of the regulation, which must be presented to the European Parliament and the Council by 1 May 2009.

BUSINESSEUROPE underlines the importance of a periodic assessment and revision of antitrust procedural rules.

GENERAL REMARKS

BUSINESSEUROPE supports efficient and effective public enforcement of antitrust rules by the European Commission and by national competition authorities. Antitrust law is crucial and its enforcement is fundamental for creating and sustaining a competitive economy.

Overall, the reforms introduced by Regulation 1/2003 have been generally welcomed by European companies. However, we believe that some improvements could still be made.

- **Abolition of the notification system and legal certainty**

The legal exception mechanism is one of the main novelties introduced by Regulation 1/2003. This mechanism is to be preferred to the previous notification system. However, optimising legal certainty is a primary concern for companies, and self-assessment can present difficulties.

BUSINESSEUROPE suggests that some subsidiary procedure could be put in place by the Commission to assist companies in this respect.

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The problem of self-assessment and legal certainty is referred to in Recital 38 of the regulation, which enables undertakings to approach the Commission for informal guidance. Following the adoption of Regulation 1/2003, the Commission issued a Notice on informal guidance, related to cases giving rise to genuine uncertainty "because they present novel or unresolved questions for the application of Articles 81 and 82". In the Notice, the Commission specifies that it would only provide informal guidance to individual undertakings insofar as this is compatible with its enforcement priorities. The Notice sets out a list of cumulative conditions to be satisfied to meet such requirement.

Unfortunately, the cumulative conditions included in the Notice are a source of concern, as they seem to make it extremely difficult in practice for undertakings ever to satisfy the Commission of the need for guidance. The fact that the Commission has not issued a single guidance letter since the Regulation came into force seems to justify our concern.

Where there is a range of possible views, it would be very helpful for business to have guidance from the Commission. Even if such guidance were not legally binding, this would also serve the Commission's objective to ensure the uniform application of Community rules.

Accordingly, BUSINESSEUROPE suggests that the Commission reconsiders its position on giving informal guidance. In particular, it would be helpful to European companies if the Commission were willing to provide written guidance with regard to cases and areas where previous decisions or case-law do not provide sufficient clarity or do not cover exactly the same matter.

- **Need for improvement in the protection of fundamental procedural rights**

Another general remark is connected to the relationship between sanctions and procedural guarantees.

In recent years, there has been a general increase in the level of the fines imposed by the European Commission for antitrust infringements. In this regard, BUSINESSEUROPE notes that an increase in the gravity of the sanctions should inevitably be accompanied by an improvement in the protection of the fundamental procedural rights of the parties involved in the proceeding.

The extraordinary level reached by fines poses serious questions about the existence of adequate checks and balances in the enforcement of competition law. Similar concerns have also been expressed by the OECD, which in addition highlights the importance of such checks and balances when considering the inherent weaknesses of the Commission's enforcement process, characterised by a combination of the functions of investigator and decision-maker (OECD Country Studies, European Commission – Peer review of Competition Law and policy, 2005).

BUSINESSEUROPE acknowledges the Commission's efforts to improve its enforcement process, however it urges the Commission to consider further reforms to

improve the system and reduce the risk of deficiencies in the protection of fundamental procedural rights of the parties involved in antitrust proceedings.

As an alternative to seeking to increase deterrence by imposing higher fines, the Commission might consider a revision of Regulation 1/2003 to improve upon the following aspects:

- The Commission regularly attributes a liability of parent companies for the conduct of their subsidiaries. This has profound legal consequences that need to be addressed by the regulation.

- The imposition of sanctions to companies for all acts of their employees irrespective of compliance efforts is also an aspect that should be taken into consideration by the regulation. Undertakings subject to fines should at least be granted the possibility to prove their compliance efforts and have fines reduced accordingly. The introduction of provisions regarding the consideration of compliance efforts would also encourage businesses to adopt and implement an effective compliance programme, which in itself will help to effectively prevent illegal actions from arising in the first place.

SPECIFIC REMARKS

- **Burden of proof**

Article 2 of the Regulation assigns to the party claiming the benefit of Article 81 (3) the burden of proving that the conditions of that paragraph are fulfilled. However, a competition authority has the power to apply the prohibition in Article 81 (1) only where the conditions of article 81 (3) are not fulfilled.

As already stated in the past, BUSINESSEUROPE believes that if a competition authority wishes to impose a fine and/or prohibit a certain conduct, it should be for the competition authority to demonstrate that the agreement or practice in question has negative effects on the market and that the conditions of Article 81 (3) are not fulfilled.

- **Relationship between Article 82 and national competition laws**

The second part of Article 3 (2) of the Regulation does not preclude Member States from adopting and applying stricter national laws to unilateral conduct engaged in by undertakings. BUSINESSEUROPE notes that this is an anomaly that should be removed when the Regulation is reviewed. It is fundamental that competition law issues are treated the same way within the Internal Market and that a level playing field for businesses is ensured.

In addition, uniform and consistent application of competition law across the different Member States would make the evaluation of behaviour allowed under the unilateral conduct rules much easier for companies. According to the existing system, companies have to examine at the same time different national competition rules and European

law, which can prove very difficult, especially because some national legislation provide more rigorous rules than Article 82.

We consider that consistent application of competition rules, together with the expected guidance on Article 82 by the Commission, would lead to a higher degree of legal certainty.

- **Cooperation with national authorities – interactions with leniency**

Article 11 does not set clear, generally applicable rules for allocating cases between national authorities and the Commission. This uncertainty on the competent authority has negative side-effects on the leniency programme.

Under the current system, companies willing to cooperate have to apply simultaneously for leniency in every Member State that could be affected by the cartel. This process tends to be unjustifiably difficult in practice, as the leniency programmes in the Member States have different formal requirements and also diverge in their legal consequences.

BUSINESSEUROPE suggests that a one-stop shop for leniency applications would be an important step to improve the legal certainty for companies willing to cooperate with the competition authorities.

- **Sector inquiries**

According to Article 17 of Regulation 1/2003, the Commission may decide to start a sector inquiry when specific circumstances suggest that competition may be restricted or distorted within the market. An inquiry is a complex, lengthy and costly process for both the Commission and the enterprises involved.

The burden that these procedures represent for enterprises should be relieved. BUSINESSEUROPE believes that the objectives of a sector inquiry can be equally achieved through improvements that would make the process more efficient and less costly for all parties involved.

European companies have the following concerns about the way the Commission conducts such inquiries:

- The scope of the enquiry: this should be defined more clearly and specifically, to avoid the risk of the process expanding beyond what is necessary along the way;

- The amount of data requested: companies involved in the inquiry often have to employ a large amount of their resources (human and financial) for long periods of time to respond to the Commission's questionnaires;

- The way data are requested: companies keep data according to their specific needs. The Commission wishes to obtain this data in a uniform format and in a short timeframe. Reformatting this data to fit the questionnaire requires a lot of time and resources. The Commission should take this into account and consider

accepting the data in the original format. It would furthermore be advisable that the Commission, when dealing with large enterprises, addresses the legal department (if available) who can best coordinate the response, rather than formulating questions to different employees within the same organisation;

- The use of inspections: following their use in the context of the recent inquiry in the pharmaceuticals sector, the extent to which inspections are used as part of an inquiry or as initiation of an investigation has become unclear. On-site inspections should only be carried out on the basis of evidence found during the sector inquiry. Without the justifiable suspicion of antitrust infringements, they run contrary to the basic principles of human rights and justice, as they permit to search private property without any objective reason, amounting to fishing expeditions.

- **Legal professional privilege**

The issue of legal professional privilege for in-house counsel is currently under scrutiny by the European Court of justice in the Akzo case.

The attitude taken by the Commission with regard to legal professional privilege for in-house counsel is a source of concern to business. The long-standing position of BUSINESSEUROPE in this regard is that when in-house legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

This issue is extremely relevant when considering the fundamental role of in-house counsel in carrying out the self-assessment foreseen by the system of Regulation 1/2003. BUSINESSEUROPE believes that the Commission should review its approach to this sensitive issue and arrive at a workable solution for all parties concerned, allowing companies to use in-house counsel to carry out "privileged" self-assessment.

Certain anomalies arise in the context of application of Regulation 1/2003, as some national competition authorities (e.g. OFT in the UK) recognise legal professional privilege for in-house counsel when investigating infringements of Articles 81 or 82. This however will not be the case when an authority is assisting the Commission in carrying out its own investigations.

Another issue that deserves clarification is the extent to which use can be made of the documents seized by national competition authorities from in-house counsel in those Member States where legal professional privilege is not currently recognised.

BUSINESSEUROPE believes that establishing a practical set of rules on the application of legal professional privilege for in-house counsel across the EU, subject to consultation with stakeholders, is in the interest of both the Commission and companies.