BUSINESSEUROPE

EU COMPETITION POLICY

PRIORITIES FOR THE NEXT POLITICAL CYCLE

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OVERVIEW

Well-functioning competition rules play a fundamental role in the internal market, both in terms of limiting distortions and ensuring efficiency and innovation by allowing competitors to enter new markets and protecting consumer choice. Consistent and effective application of EU competition 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. 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. As such it contributes to efficient markets, investments, and innovation, necessary to develop market-based sustainable solutions and technologies to contribute to the green and digital transition. It should address the global challenges which businesses are facing to boost their and the EU's overall competitiveness. As such, it is one of the key components of a successful EU industrial policy and we support assessing whether EU competition policy is fit to respond to the challenges the EU is currently facing as part of the current debates on competitiveness and as stressed in the reports from Enrico Letta and Mario Draghi and also the Mission Letters of the Commission President.

For the forthcoming EU political cycle, BusinessEurope has 3 overarching priorities in the field of Competition:

- **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 is sufficiently speedy, transparent, and proportionate.**
- **Ensure that EU competition policy and enforcement works together with other jurisdictions, converges towards common objectives and defines markets in a realistic and dynamic way.**

SUMMARY

1 ENSURE EFFECTIVE AND INDEPENDENT COMPETITION LAW ENFORCEMENT PRESERVING LEGAL CERTAINTY, A LEVEL PLAYING FIELD IN THE INTERNAL MARKET AND NON-DISCRIMINATION THROUGH:

Uniform application

- Support the work of the European Competition Network (ECN) to strengthen the coherent application of EU antitrust rules by all enforcers;
- Increasing transparency about national decisions.

Enhanced legal certainty

- Competition authorities offering the necessary guidance that shield businesses from harm;
- Continuously amend and update relevant guidelines when authorities' practices and case law become a source of legal uncertainty;
- Provide informal ex ante guidance to steer companies or markets at an early stage.

2 ENSURE THAT THE ADMINISTRATIVE AND PROCEDURAL FRAMEWORK OF EU COMPETITION PROCEEDINGS IS SUFFICIENTLY SPEEDY, TRANSPARENT, AND PROPORTIONATE THROUGH:

Avoiding imposing unnecessary burdens and the creation of new tools

- Do not extend the already powerful enforcement tools which the Commission has at its disposal;
- Focus the procedural framework for competition law enforcement on what is necessary for effective enforcement without imposing unnecessary burdens for companies and other market participants.

Timely enforcement

- Setting deadlines to complete antitrust inquiries into anticompetitive conduct;

Streamlined merger control procedures

- Introduce time limits for pre-notification procedures and provide transparency about the average duration;
- Avoid excessive data requests, ensuring that requests are unambiguous, specific, and limited to the information required for the analysis;
- Grant notifying parties and third parties more flexibility when responding to an information request;

- Give more guidance about new theories of harm, e.g. based on innovation aspects or ecosystems, and let anticipated efficiency gains generated by the merger play a more prominent role in the competition assessment.

Maintain predictable thresholds for merger control

- Provide legal certainty and stop encouraging referral requests from Member States under Art. 22 EUMR;

Checks and balances

- Reform judicial review and speed-up proceedings, for example making DG Comp an independent agency;
- Strengthen and improve internal checks, such as peer review panels, in order to obtain a genuine complete and impartial re-examination of both the procedural and the substantive aspects of a case.

Respect rights of defence

- The Commission and national competition authorities should respect appropriate safeguards for the exercise of their powers. This should also be checked by the Hearing Officer and Chief Economist;
- Recognise the privilege against self-incrimination, which also applies to companies, and deny accessing and using legal advice communications exchanged with qualified in-house counsel.

Improved leniency procedures

- The ECN Model Leniency Programme should be binding on national competition authorities and there is a need for a one-stop-shop or binding marker system;
- 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.

3 ENSURE THAT EU COMPETITION POLICY AND ENFORCEMENT WORKS TOGETHER WITH OTHER JURISDICTIONS, CONVERGES TOWARDS COMMON OBJECTIVES AND DEFINES MARKETS IN A REALISTIC AND DYNAMIC WAY THROUGH:

An effective industrial policy

- 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 ;
- 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.

Market definition

- Improved implementation of market definition rules especially regarding the approach to the geographic market definition and potential entry.

Enhancing cooperation between the EU and non-EU jurisdictions in competition law enforcement.

- Developing/enhancing bilateral and multilateral agreements to facilitate information sharing, joint investigations, and coordinated enforcement actions; harmonizing competition laws and regulations (by aligning procedural and substantive aspects); and promoting internationally recognized best practices to improve consistency and predictability in enforcement across jurisdictions;
- Focus on capacity building and technical assistance for non-EU competition authorities, providing training programs, workshops, and joint initiatives to enhance enforcement capabilities.
- 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.

DETAIL

1 ENSURE EFFECTIVE AND INDEPENDENT COMPETITION LAW ENFORCEMENT PRESERVING LEGAL CERTAINTY, A LEVEL PLAYING FIELD IN THE INTERNAL MARKET AND NON-DISCRIMINATION.

- **Uniform application.** Divergent decision-making at national level harms the level playing field for companies operating in the single market. The work of the European Competition Network (ECN) should therefore be strongly supported to strengthen the coherent application of EU antitrust rules by all enforcers. TheEU needs a genuine common competition enforcement policy.

  Uniform application should be further encouraged 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.

  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 procedures should be avoided.

- **Legal certainty.** Undue fear that companies could be infringing competition rules increases the risk that those companies will refrain from cooperating. This can lead to under-investment, for example in cases where enhanced coordination is necessary (typically when projects are very big in scope, requiring different kind of competences and skills, possibly from different sectors) to develop market-based sustainable solutions and technologies. 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 because decisions of competition authorities have binding effect for the purpose of damages actions. It is important that competition authorities offer the necessary guidance that reflects these developments and shields businesses from harm.

  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, so we support that the Commission intends to provide guidance on exclusionary abuses of dominance (Article 102 TFEU) even though we are not in favour of presumption rules or a reduced use of a more economic approach. 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 to develop

the capacity and willingness to provide guidance on market developments at an early stage and 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'.

2 ENSURE THAT THE ADMINISTRATIVE AND PROCEDURAL FRAMEWORK OF EU COMPETITION PROCEEDINGS IS SUFFICIENTLY SPEEDY, TRANSPARENT, AND PROPORTIONATE.

- **Avoid imposing unnecessary burdens and the creation of new tools.**
  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 have significant enforcement powers in the field of digital markets. 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. There is thus no need to broaden the toolset of the Commission or to restart discussions on the need of a "New Competition Tool" at European level, as it can work well with existing tools. Such a new tool will increase administrative burdens and lead to increased uncertainty, which may have a chilling effect on investment.

  It is important that the procedural framework for competition law enforcement is proportionate and focuses on what is necessary for effective enforcement without imposing unnecessary burdens for companies and other market participants.

- **Timely enforcement.** The fact that there is no legal deadline for the Commission to complete antitrust inquiries into anticompetitive conduct creates legal and economic uncertainty. To permit a timelier enforcement of the competition rules the Commission should consider targeted measures to speed up the process and create more efficient reviews (e.g. to set deadlines for procedures).

- **Streamline merger control procedures.** EU merger control generally places significant procedural burdens on companies, even regarding simpler transactions, and is too formalistic and costly for the merging parties, as well as for third parties, competitors or customers. Pre-notification periods for simple deals are excessively long; requests for internal documents in Phase II are disproportionate. In view of the very large number of cases which are cleared by the Commission, EU merger control should be streamlined, e.g. by introducing time limits for pre-notification procedures and being transparent and publish the average duration.

  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. Notifying parties, and, importantly, also third parties, should be granted more flexibility when responding to an information request. Appropriate timing should be granted when such requests are issued and sending extensive requests during vacations periods should in principle be avoided.

On substance, the European Commission should give more guidance when it introduces and uses new theories of harm, e.g. based on innovation aspects or ecosystems. This would increase the legal certainty and predictability of decisions for companies. Also, anticipated efficiency gains generated by the merger benefitting consumers should play a more prominent role in the competition assessment by the European Commission.

- **Maintain predictable thresholds for merger control.** Objectively determinable thresholds are essential for parties to a concentration to establish whether the transaction triggers merger filing requirements and minimise case-by-case consultations and disputes. The practice of the European Commission to encourage referral requests from Member States under Art. 22 EUMR, even if a transaction falls below the national merger thresholds, has led to great legal uncertainty and needs to be abolished after the recent CJEU judgment. When the European Institutions look for new possibilities to examine certain cases that are currently below the thresholds, they should always make sure to guarantee legal certainty, focus on a "local nexus" with the Internal Market and avoid disproportionate burdens.

- **Checks and balances.** In practice, the Commission acts both as "prosecutor and judge" in competition proceedings, having both investigative and decision-making 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, especially regarding the timing of procedures. More should be done to reform judicial review and speed-up proceedings, for example making DG Comp an independent agency and notanother DG from the Commission.

  Internal checks, such as peer review panels 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.

- **Respect rights of defence.** The rights of defence should always be respected. The use of interim measures, inspections, structural remedies etc. have far-reaching consequences affecting the rights of owners, employees, investors, business partners, etc. The Commission and national competition authorities should respect appropriate safeguards for the exercise of their powers. This should also be checked by the Hearing Officer and Chief Economist. 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 and 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.

- **Improved leniency procedures.** The EU needs an effective leniency program which provides incentives to companies which can 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. The ECN Model Leniency Programme 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.

Another important issue here is the link between leniency and private enforcement. The consequences of the latter have had the effect of reducing the number of leniency applicants. As cartel cases are by nature the most damaging practices, having the more negative effects on competition, sufficient action should be taken to detect them, also reinforcing ex-officio capacities (i.e. cartel detection through economic analysis etc.), encouraging the use of an anonymous reporting system or using AI algorithms.

3 ENSURE THAT EU COMPETITION POLICY AND ENFORCEMENT WORKS TOGETHER WITH OTHER JURISDICTIONS, CONVERGES TOWARDS COMMON OBJECTIVES AND DEFINES MARKETS IN A REALISTIC AND DYNAMIC WAY.

- **Industrial policy.** Competition policy 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 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. A strategic industrial policy should be aimed at creating enabling conditions at EU level. It should be ensured that national and local rules are proportionate and fit for purpose and that EU policies converge towards common objectives.

- **Market definition.** The Commission's new market definition notice emphasises future market developments and clarifies the relation between market definition and the competitiveness assessment. We welcome the new notice, supporting that it has been expanded, giving companies more legal certainty and predictability. We also support that factors such as global competition and competition in digital markets have been described in more detail. We will follow the implementation of the new notice, hoping that it will lead to an improved implementation especially regarding the Commission's approach to the geographic market definition and potential entry of competitors.

- **Enhancing cooperation between the EU and non-EU jurisdictions in competition law enforcement.** The interconnected nature of global markets requires a coordinated approach to competition law enforcement. Divergent regulatory frameworks and enforcement practices can lead to inconsistencies, and enforcement gaps. Therefore, an additional policy priority focusing on the importance of fostering international cooperation between the EU and non-EU jurisdictions in competition matters could prove useful.

To enhance competition law enforcement on a global scale, the EU could consider collaboration with non-EU jurisdictions, particularly with close economic partners. This involves developing/enhancing bilateral and multilateral agreements to facilitate information sharing, joint investigations, and coordinated enforcement actions (particularly in merger and cartel cases); harmonizing competition laws and regulations (by aligning procedural and substantive aspects); and promoting internationally recognized best practices to improve consistency and predictability in enforcement across jurisdictions. As regards the disclosure of confidential information to third countries, such disclosure should only be possible, if the receiving country follows the same concepts and practices regarding confidentiality, professional and business secrets, legal privilege, rights of defence and sanctions. The disclosure of confidential information to third parties should be explicitly prohibited.

The EU could also focus on capacity building and technical assistance for non-EU competition authorities, providing training programs, workshops, and joint initiatives to enhance enforcement capabilities. Regular monitoring and evaluation of cooperation initiatives will ensure continuous improvement and alignment with global best practices.

Regarding the EEA/EFTA States, these countries 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.

The Commission should 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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