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THE DIRECTOR GENERAL

To Coreper

12 March 2018

Dear Ambassador,

European Competition Network

I write to you regarding current discussions on the proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+).

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 and we therefore 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 said this, we would like to bring the following key considerations to your attention.

Regarding fines, BusinessEurope is worried about the proposals regarding fines for business associations. 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.

We believe that the calculation of a fine 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. 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

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 416 279

BUSINESSEUROPE a.i.s.b.l.

WWW.BUSINESSEUROPE.EU

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
EU Transparency register 3978240953-79

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.

While in some Member States competition proceedings have a purely administrative character, other Member States foresee a criminal or an administrative offence procedure. As long as the efficiency of the procedure is guaranteed, it should be left to the discretion of the Member States how they structure their competition proceedings. The imposition of a strictly "administrative proceeding" would interfere with existing legal systems and traditions.

We would also like to emphasise the need for a one-stop-shop leniency application/marker system. Such a system would be a true move for a homogeneous enforcement within the ECN and would remove injustices of the current system. It would also make the leniency system more accessible and thus more attractive. If EU competition law is applied in a decentralized manner by national enforcers instead of the Commission alone, a leniency application with any of these enforcers should have an effect for the entire EEA and all national enforcers and the Commission. While at first this might appear to require more administration, this could be handled on the basis of the current information exchange on leniency applications within the ECN.

It is of particular importance that the Legal Professional Privilege (LPP), as provided under national rules, is preserved. The jurisprudence of the CJEU also accepts that communications with qualified in-house counsels may be subject to LPP protection in national procedures. Thus, enhanced investigative powers of national competition authorities should not enable them to access and use legal advice communications which would be protected by LPP under national procedural laws.

Other indispensable fundamental procedural rights to be respected 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.

We hope that you share these points and attach a copy of our earlier position paper on the issue. We remain at your disposal should you wish to discuss this further.

Yours sincerely,

Markus J. Beyrer