AmCham EU

CONSULTATION RESPONSE

Empowering the national competition authorities to be more effective enforcers

Executive summary

This consultation response outlines the American Chamber of Commerce to the European Union's (AmCham EU) recommendations on the general principles that should guide any further actions to empower national competition authorities (NCAs) to be more effective enforcers, as well as more detailed comments on the institutional design and independence of NCAs, safeguarding due process and the need for an improved mechanism to address conflicts among multiple leniency programmes.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the opportunity to provide input to the European Commission's public consultation on the empowerment of national competition authorities ("NCAs") to be more effective enforcers. The role of NCAs, working closely with the European Commission, is crucial to EU competition enforcement and the functioning of the single market. We believe that there are ways in which this role could be carried out more efficiently and with more clarity, to better equip NCAs with the tools to apply competition rules.

Our members agree with the principle that Member State authorities should be free of political influence, but in general we submit that Member States should have discretion to design their own enforcement regimes.

However, enforcement by multiple authorities in the same or related cases creates a risk of overlapping and potentially inconsistent action that reduces legal certainty and creates unnecessary costs for businesses, calling for a more harmonised approach across Member States.

Any review and harmonisation of Member State authorities' powers should also consider the protection of undertakings' rights of defence, which is essentially the other side of the same coin. Powers go hand in hand with rights of defence.

Below we provide more detailed comments to support our view on each of these issues.

1. Institutional design and independence of National Competition Authorities

AmCham EU believes that the current delineation of competence between the EU and the Member States on the existence and function of NCAs has generally worked well. The NCAs have the power and the duty to apply EU competition law but, being national organs, their institutional design is a matter for the Member States and national law (procedural and institutional autonomy). Of course, the national institutional design must fully respect the EU principles of equivalence and effectiveness,[1] but the Member States remain the ultimate decision-makers on the type of competition law enforcement agency they wish to have. This means that the Member States should continue to be solely responsible for the choice of enforcement system they prefer, e.g. whether this should be a judicial or an administrative system.

Accordingly, we believe that the EU should interfere with the choices of the Member States as to the institutional design of their respective NCAs only to the minimum extent necessary. In particular, AmCham EU is strongly opposed to any reform that would undermine the principle of separation between the investigative and the decision-making functions for those national enforcement systems that recognise this separation.

On the other hand, AmCham EU members strongly support the proposition that NCAs must be fully independent in their operations from the government and any other public or private bodies when carrying out their task of enforcing EU competition law. We support the inclusion of an enhanced principle of independence in any EU legislative measure that this consultation may result in, particularly in view of recent unfortunate developments in Poland and Greece. Introducing and

[1] Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, ECLI:EU:C:2010:739. See also Art. 35 Reg. 1/2003.

explicitly confirming at EU level the principle of the NCAs' independence would put an end to a rather curious state of affairs whereby EU secondary law explicitly safeguards the independence of national sectoral regulators (e.g. in telecoms and energy) but not of NCAs. This is an anomaly that should disappear.

2. NCA enforcement powers – safeguarding due process

EU-wide action, if any, must strike the right balance between the powers of NCAs and the rights of investigated parties. NCAs' enforcement powers should be subject to due process safeguards, particularly parties' rights of defence and effective judicial review. NCAs' procedures must, in particular, meet the standards set by the European Convention on Human Rights (the ECHR) and the EU Charter of Fundamental Rights (the Charter).

We therefore submit that, apart from any steps to expand or increase NCAs' enforcement powers, emphasis should also be put to the need to ensure that due process rights in Member States are effectively protected, including the following:

- The power to inspect business premises and non-business premises should respect the fundamental right to the inviolability of the home under Art. 7 of the Charter and Art. 8 of the ECHR.
- The power to issue requests for information should be subject to an obligation to comply with the principle of proportionality and to state sufficiently the purpose of the information request.
- The power to effectively gather digital evidence should be limited to data that falls within the legitimate scope of a search and avoid seizure of large quantities of computer data outside the legitimate scope of dawn raids.
- The power to collect information and evidence should be subject to legal professional privilege, with due regard given to the increasingly global nature of businesses that are subject to antitrust investigations by NCAs. NCAs should recognise the prohibition of self-incrimination, particularly by refraining from punishing the undertaking for refusal to provide self-incriminating information.
- Good administration, including the fair, impartial and timely handling of one's affairs, and presumption of innocence are fundamental rights (Arts. 41 and 48 (1) of the Charter) and not a matter of administrative discretion. Investigation and decision-making powers should be exercised in a way that eliminates a perceived or real prosecutorial bias, even at the earliest stages of investigations. Effective checks and balances are needed to ensure that cases are efficiently prioritized, focused and if warranted, terminated at an early stage. NCAs should seek, gather, and record information that is not only incriminating but also exculpatory.
- An essential pre-requisite for the exercise of the rights of defence is access-to-file. In line with Arts. 41 (2) (b) and 48 (2) of the Charter, the undertaking must be afforded the possibility to fully review and comment on the file without being subject to unreasonable time-limits, hurdles, or costs.
- The power to fully set enforcement priorities should be combined with a degree of transparency of NCAs' enforcement policies and investigation procedures. NCAs should provide indicative time lines for the conclusion of investigations, in line with the right of every person to have their affairs handled "within a reasonable time" under Art. 41 (1) of the Charter.
- The powers to impose dissuasive fines and periodic penalty payments and to collect information and evidence should be subject to the guarantees enshrined in Article 6 (1) of the ECHR and Art. 47 of the Charter, including full and effective judicial review by independent

courts that have sufficient resources to perform their tasks. The judicial review process should provide for the possibility of providing new evidence and cross-examining witnesses.

- In line with the principle of *ne bis in idem* (Art. 50 of the Charter) and to prevent an unnecessary burden for companies, parallel investigations in different Member States should be avoided and NCAs should coordinate their efforts as soon as there emerges a risk of parallel investigations.

3. The need for an improved mechanism to address multiple leniency programmes and conflicts among them

Part C.4 of the Commission's consultation includes a number of detailed questions on leniency programmes, including the alignment of Member State leniency programmes under the ECN Model Leniency Programme (MLP) and mechanisms for dealing with multiple leniency applications. We welcome the progress made by the ECN in adopting the MLP, including in particular the summary application system. As noted in the consultation, however, the summary application system has not been fully implemented by the Member States. Even where it has been implemented, the MLP does not include efficient mechanisms for coordinating multiple investigations.

We submit that further harmonisation is appropriate to avoid duplication of effort and potentially divergent outcomes. Increasing the efficiency of national enforcement actions will enhance the effectiveness of leniency programmes throughout the EU by increasing companies' incentives to participate actively in such programmes.

Similarly, we suggest that the Commission build on the success of the summary application process by creating a one-stop shop for leniency applications, whereby a leniency applicant could file a single application with the ECN for dissemination to the Commission and all relevant national authorities. Such a filing could be the first step triggering the formation of a working group in which the most relevant authority is designated as the lead authority for purposes of the parallel investigation(s). Such a procedure would eliminate the current risk of inconsistent results, conserve authority resources by avoiding duplication of effort and bolster the credibility of NCA enforcement to the benefit of EU competition law enforcement.

4. Proportionate fines in a fair and transparent process

Fines, as well as proceedings leading to their imposition, should be fair and transparent. Fines must be proportionate to the infringement (Art. 49(3) of the Charter) and should not be set arbitrarily. In the light of divergences in fine calculation methodologies, it is essential that NCAs at least account for fines imposed by other authorities for the same conduct in order to avoid double counting. In particular, there must be sufficient transparency on how foreign indirect sales and foreign penalties impact the fine calculation by the relevant NCA.[2]

Due process rights and procedural fairness should also apply to the fine-setting process, particularly given that issues relating to fine calculation are often the grounds for annulment of decisions or represent the most contentious issues on appeal. AmCham EU would welcome an opportunity to be

[2] *See, e.g.*, UK OFT's guidance as to the appropriate amount of a penalty, September 2012, paragraph 2.10 ("*The OFT may consider turnover generated in another Member State if the relevant geographic market is wider than the UK and the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.*")

heard on the amount of the fine and to comment on specific factors (*e.g.*, turnover and gravity multipliers, leniency aspects, recidivism uplifts, ability to pay) being relied on to calculate the fine.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €2 trillion in 2014 and directly supports more than 4.3 million jobs in Europe.