

ETNO response to the EC consultation concerning empowering the national competition authorities to be more effective enforcers



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ETNO welcomes the endeavors of the European Commission to improve the enforcing of EU antitrust rules. The EC is gathering views on how to ensure that National Competition Authorities (“NCAs”) (i) can enforce independently when enforcing EU competition rules, (ii) have an adequate competition toolbox to detect and tackle infringements, (iii) to impose effective fines on companies which break the antitrust rules, and (iv) have leniency programs that work EU-wide.

In this regard, ETNO would like to highlight the following issues:

1. Independency of NCAs

The autonomy and independency of NCAs should be preserved. Generally speaking, in most Member States there is no need to strengthen the institutional position and resources of NCAs. NCA decisions should remain subject to the court’s supervision.

However, in some countries, the speed of competition enforcement processes should be increased to make these decisions more assessable for interventions that might be necessary in digital markets. Speeding-up processes could imply the need for more resources to achieve that goal.

2. Towards harmonised competition enforcement rules within the EU

Even though EU competition rules are governed mainly by national law (in accordance with the general principles of EU law), it does not necessarily mean that the NCAs should apply different procedural rules.

The huge differences in the scope of investigative powers of NCAs (e.g. gathering digital evidence) are just one example of the different applicability of the procedural rules. Under

the current NCAs cooperating network, NCAs discuss the approach to be taken for more or less similar cases in different countries. However, the outcome does not necessarily seem to lead to a consistent way of dealing with national cases. Little information is made available to companies as to the choices made by NCAs in their cooperating model and as regards material and procedural aspects of the enforcement of national cases, while at the same time, NCAs may exchange information on individual cases.

ETNO suggests that the EU Commission should increase their supervision of the NCAs, for example, by monitoring NCA cases and their coordination on these cases or by the regular reporting of NCAs to the EU Commission on national cases. This may help increase the alignment of the NCAs in the application of EU competition rules.

As undertakings' rights are not harmonized within the EU (i.e. they do not have a right to be heard in the coordination network of NCAs in many Member States), undertakings should generally be provided with a mechanism to refer to the European Commission in case of similar cases in different Member States. In this way, they could request that the European Commission discuss the alignment of such cases in the NCA cooperation network or comment on the work of the NCAs that are applying different procedural approaches leading to different outcomes. Indeed, these outcomes adversely affect stakeholders and impede a coherent competition law approach in the case of cross-border cases.

In order to ensure more effective enforcement, the calculation method of fines should also be harmonized within the EU, whereby the limit of the final sanction sum should be preserved by the principle of proportionality according to EU law. Harmonisation should not however lead to inflation of fines which should therefore be subject to a clear objective criterion, such as potential damage to the economy for instance.

3. Consistency between NCAs and National Regulatory Authorities (NRAs)

The amalgamation of competences of NCAs and NRAs does not necessarily strengthen the enforcement of antitrust rules. It is rather the consistency of NCA and NRA decisions and/or findings that leads to a true enforcement and to legal certainty, especially regarding the decisions on abuses of dominant position or market segmentation.

As the NRAs are also applying competition law in the course of making their decisions, a consistent interpretation and enforcement of antitrust rules must be guaranteed. Otherwise possible contradictions in the interpretation of antitrust law may happen.

4. Effective and timely enforcement of NCA decisions

NCA of some Member States do not have fixed periods or do not respect the deadlines within which responses and decisions must be made. As NCAs assess potential anti-trust or anti-competitive behaviors that have taken place in the past, any delay in a timely reaction by the NCAs, including the assessment of the facts and evidence, could harm the market and competition. The timely decision-making of the NCAs should therefore be guaranteed in order to achieve legal certainty. In some instances, fixed deadlines exist but there are numerous possibilities of exemptions. In such cases, exemptions will render the fixed deadline ineffective. Therefore, if a time limit exists, it should come with only limited possibility for derogation.

5. Transparency of decisions

There is still much left to desire concerning the transparency of the (national) anti-trust decisions. As explained above, transparency in the cooperation and alignment of the NCAs in more or less similar cases in different Member States remains insufficient.