

# Position Paper

## UEAPME<sup>1</sup> reply to the Public Consultation on empowering national competition authorities to be more effective enforcers.

### General Remarks

UEAPME welcomes the initiative of the Commission to launch a public consultation to evaluate how to empower national competition authorities (NCAs). This position paper aims at summarizing the SMEs position towards the enforcement of EU competition rules by the national competition authorities.

Regulation 1/2003 has introduced a system of enforcement based on the direct effect of all the competition rules of the EU thus enabling since 2004 the national competition authorities to run the competition rules of the EU. This regulation, however, does not specify what instruments and means the NCAs can use for this purpose. Although the NCAs cooperate closely, within the European competition network, with the European Commission to ensure the uniform application of the rules, differences persist and some NCAs are still not able to exploit their full potential.

Therefore, UEAPME overall agrees with the findings of the Commission's Communication "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM (2014) 453, 9.7.2014), in particular to the need to give enforcement powers to NCAs.

Furthermore, in addition to the elements mentioned by the Commission (resources and sufficient independence, sufficient implementing instruments, authorisation to impose fines, correct leniency programme), UEAPME would like to point out another aspect that can contribute to the effective application of the EU competition rules by NCAs, namely a well-developed policy of "advocacy". Advocacy could include any activity aimed at raising awareness and education of the society on competition law, in order to achieve positive effects for the economy. All actors of the society should be involved, i.e. consumers, businesses, policy makers, public institutions, private organizations.

### Resources and Independence of the NCAs

Article 35 of regulation 1/2003 offers flexibility to the Member States for the organisation of the NCAs, provided however that the provisions of the regulation and the principles of effectiveness and equivalence of the EU law are respected. This means that national legislation defines the means and the degree of independence of the NCAs. Therefore, there are considerable differences between the NCAs' human and financial resources, as well as independence from public bodies, across the EU.

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<sup>1</sup> UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

In general, strengthening the human and financial resources within the NCAs proves crucial for sound antitrust enforcement. Ensuring the independence of the Competition Authority is also very important, to avoid conflicts of interests. Nevertheless it should be kept in mind that NCAs are part of the administrative/ judicial system of the respective member state and that they have to observe the rule of law and the principles of political responsibility.

Furthermore, due also to national laws regarding the prioritization of NCAs' action, it might happen that some cases remain uninspected if the volume of the activity is limited. This leaves SMEs in most member states without the support of NCAs. Therefore it would be useful to have a tool, where SMEs or their representatives have the possibility to bring competition cases before an independent authority, which has an obligation to decide the case.

## **Enforcement Toolbox of the NCAs**

It is highly important NCAs have a full range of instruments (both at the level of inquiry and of the decision-making process) for applying the EU competition rules. In this regard, it is the responsibility of national policy-makers to develop appropriate procedures, provided that they comply with the general principles of the EU legislation, in particular the principles of effectiveness and equivalence.

Many Member States have already, more or less voluntarily, aligned their rules of procedure to the rules for the Commission, as defined in Regulation 1/2003. The European competition network also approved 7 recommendations on significant powers of execution in 2013, on which the NCAs may rely to put pressure on politicians to adopt effective implementing instruments. There are nonetheless differences between the EU Member States, and some lack essential skills.

UEAPME wishes to underline the importance of the collaboration within the European Competition Network. However, we generally agree with the finding of the Communication of the European Commission, namely that it is not always possible to achieve convergence with such 'gentle' instruments. Differences in terms of the rules of procedure in the EU may lead to costs for companies that are active across borders and to legal uncertainty. Therefore we are in favor of level playing field principles within the EU, at the condition that these principles of fair play ensure a high level of protection of the rules of fundamental rights such as the right to defense, the "due process" and the principle of the right to be heard (*audi alteram partem*). In this context, it is preferable to set European standards on certain points which have to be applicable for all the NCAs after transition by the national legislator as for example the obligation to issue a statement of objections and statement of objections to provisional measures.

A greater degree of coordination is needed when two or more NCAs apply Art.101 or Art.102 of the Treaty on the Functioning of the European Union (TFEU) to the same behavior. To enhance coordination, the introduction of a one-stop-shop system concerning the assessment of the material breach of competition could be useful. There should also be consultation in cases when the NCAs applies articles 101 and 102 TFEU extra-territorially. Furthermore, regarding the violation of Art.101 and 102, the most important mitigating and aggravating circumstances should be minimum-harmonized at EU level.

## **Power of the NCAs to impose fines on undertakings**

Similarly, the EU legislation does not regulate the sanctions to be applied by the NCAs for breach of EU competition rules. It therefore falls to the national legislators to provide for effective, proportionate and sufficiently dissuasive sanctions. Although many NCAs apply the same method for fixing the amount of the fines, there are still differences: the nature of the fines (penal sanction, administrative penalty), the basis of calculation, the method used to take into account the gravity and duration of the infringement, the mitigating and aggravating circumstances, etc.

Therefore model guidelines for the calculation of the fines by the ECN should be elaborated along the lines of the successful model leniency program project. With regard to the basis for calculating the fines, UEAPME requests to consider the very extreme effects, compared to other sectors, that the calculation of a fine can have if done only on the basis of the turnover in areas with significant turnover but relatively low profit margins.

## **Leniency Programmes**

The public consultation also includes a series of questions relating to leniency programmes and the combination of leniency programs for businesses and penalties for individuals. As observed in the Communication for the Ten years of Regulation 1/2003, a well-designed leniency programme is essential for effective implementation of the rules against the most serious offences, including secret agreements.

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