Submission to the EU Antitrust Procedural Rules Evaluation

6 October 2022

Introduction

We, a group of civil society organisations, welcome the possibility granted by the European Commission (EC) to express our views on the EU antitrust procedural rules. This submission focuses on those changes to Regulations 1/2003 and 773/2004 (together the "Procedural Regulations") that, in our view, would lead to an improvement in terms of their effectiveness, efficiency, relevance, coherence and EU value added (the five evaluation criteria helpfully and correctly identified by the EC in its introduction to the questionnaires).

The modifications proposed emphasise the idea of competition as being of social value to the economies of the EU Member States and to their societies as a whole. This idea is reflected in the approaches and definitions adopted in the formative years of EU competition law and policy, when the commitment to achieve these broader goals was palpable, and before the shift towards a more economic approach made its inroads into the enforcement of EU competition law.

We are convinced that, among other things, the above-mentioned shift has pulled competition law and policy away from the arena of healthy public discourse. Instead, it has relegated its interpretation and the shaping of its agenda and enforcement to an isolated technocratic "elite", contrary to its original roots and, even more fundamentally, to its original function of dispersing economic power and serving as a guarantee for a democratic system.

Against this background, this submission is an attempt to note possible new courses of enforcement, and changes in policy, which could bring competition law and policy back to their original role and to their constitutional home within the EU's legal order. We believe that one way to do so is to open and broaden the debates on competition law and policy to civil society organisations (CSOs), and to create new and broader venues and fora for their voice to be heard during enforcement of competition rules. In addition, we are convinced that having a more participatory enforcement system is key to enhancing the legitimacy, accountability and relevance of competition proceedings, to the benefit of all parties involved.

This approach would also be consistent with the EC's desire to "make markets work for people", which is a goal that can only be achieved if people are part of the debate, and are not merely considered as passive actors who have no value to add in the shaping of the enforcement of the framework.

Equally, improving procedural rules in ways that better guarantee and enhance CSOs' participation would be instrumental to improve the EC's decision making, bringing perspectives, information and evidence the EC would not be exposed to otherwise. This added value has been repeatedly been highlighted by Vice-President Vestager, who during her speech at the BEUC conference said that BEUC is often the EC 'reality check', because it brings in 'a perspective that is

often not captured by any other stakeholders'[1]. The Vice-President stressed again this concept in another recent speech about the Digital Markets Act enforcement, where she affirmed that for the 'enforcement to be a success, we will also rely on third-parties to detect non-compliance with the DMA or assess compliance proposals by gatekeepers'[2]. Thus, a modification of the procedural rules in the direction of making these interventions possible and easier is needed for consistency and efficiency purposes alike.

Such changes would bring another added value. Indeed, arguably, participation rights (of civil society) can effectively improve the quality of administrative decision-making.[3]

Implementing our suggestions could provide this broader reality check and better administrative decision making. It would also help ensure that competition policy continues to be seen – in the eyes of its citizens, particularly the next generation – as a core toolkit relevant to their present and future.

The status quo

In the current framework, there are limited occasions for CSOs and other relevant stakeholders to participate in the Commission's or national competition authorities' proceedings. The relevant procedural rules require a 'legitimate interest' or 'sufficient interest' as the legal basis to intervene. Most notably, the issue arises in several places in the Procedural Regulations:

- Article 7(2) of Regulation 1/2003: it establishes that those entitled to lodge a complaint are natural and legal persons which show a "legitimate interest" (and Member States);
- Article 5(1) of Regulation 773/2004: it repeats that natural and legal persons which show a "legitimate interest" may lodge a complaint for the purpose of Article 7 of Regulation 1/2003.
- Article 27(3) of Regulation 1/2003: it establishes that it the EC considers it necessary, it may hear natural or legal persons which show a "sufficient interest"; and
- Article 13(1) of Regulation 773/2004: it opens the door to natural or legal persons (other than those referred to in Articles 5 and 11 of that Regulation) to be heard if they show a "sufficient interest".

However, and rightly so, in the introduction to its evaluation, the EC recognises that 'A number of significant changes have occurred in market dynamics over the past twenty years and many are potentially liable to impact the way competition rules are enforced.' It adds that the 'digitisation of the global economy (...) has highlighted a potentially increasing tension between the need for prompt and effective intervention and the complexity of antitrust proceedings'. We argue that the digitisation of the economy has also massively reshaped the dynamics in a variety of markets and changed the role consumers - i.e. first and foremost, individuals - are allowed to play. As a consequence, we believe that those individuals should be given more space to bring into the enforcement proceeding their perspectives, as well as the relevant evidence they might be able

[1]Keynote speech by EVP Vestager at the BEUC conference on consumer protection in the digital age, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5810

[2] Keynote speech by EVP Vestager at the IBEC conference, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5915

[3] Mendes, 2009.

to gather to help the EC in the efficient and consistent application of competition rules. Thus, we welcome the EC's intent to review its procedural rules, in order to make them fit for those changes.

In addition, we have noted that in many instances the EC has expressed its desire to engage with stakeholders. The review of the Procedural Regulations must not be a missed opportunity to clarify which stakeholders the EC wants to engage with, and must ease the procedure for this engagement to make it possible in practice. Again, this would add to the coherence of the Commission's updating of the package of competition instruments.

Our suggestions

We suggest that the EC reviews its Procedural Rules as follows:

- To introduce in Regulation 1/2003 and in Regulation 773/2004 a broader interpretation of the 'legitimate interest' concept, which is currently key for participation in competition proceedings. We recommend that this interpretation includes the broad variety of interests at stake in each market under scrutiny. This broad interpretation should be in line with the recognition of the wider role of competition rules mentioned above. We note, once again, that broader participation enhances the legitimacy and accountability of competition proceedings.

- To clarify the concept of 'sufficient interest' in 27(3) of Regulation 1/2003 and Article 13(1) of Regulation 773/2004. We note that Recital 11 of Regulation 773/2004 recurs to a presumption when it comes to the existence of consumers' sufficient interest[4], and that this presumption is upheld in the Decision of the President of the EC on the function and terms of reference of the Hearing Officer[5]. We believe that similar presumptions could substantially ease the path for CSOs' participation in competition procedures and we call the EC to make use of this instrument, and therefore to adequately shape and communicate those presumptions. The use of presumptions would create more legal certainty for all stakeholders and provide legitimate boundaries to the EC's discretionary assessment. We would be glad to assist in the task of shaping presumptions concerning CSOs' sufficient interest.

- To review the EC's priority-setting as part of the broader process of allowing stakeholders' participation in the enforcement of competition rules. The EC counts on wide discretion when it comes to its priority-setting. While we recognise that priority-setting is a basic public administrative tool to rationalise financial and human resources and to deal with constraints, the form that priority-setting takes can have a substantial impact on the ability of consumers, CSOs and all affected stakeholders to participate in the enforcement of competition rules. For example, priority-setting can limit the

[4] See EC Regulation 773/2004, OJ [2004] L 123/18, Recital 11: '[....] Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. [...]'.

[5] See Decision of the President of the European Commission of 13 October 2011, OJ [2011] l 275/29, Recital 12.

complaints that the EC's acts on, and can disproportionately exclude the consumers and CSOs' complaints - which represent the main way those actors can engage with the enforcement of competition rules. At the EU level, this risk is further reinforced by the fact that back in 2009, the EC decided to focus its attention on exclusionary abuses only[6]. This choice, which unfortunately has never been reviewed since then, clearly contrasts with the current reality of many markets, where undertakings with a dominant position consistently adopt exploitative practices towards both consumers and competitors.

Signatories

ARTICLE 19

Balanced Economy Project

Privacy International

SOMO

[6] Reference is made to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.