European Parliament
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Committee on Petitions

6.5.2019

NOTICE TO MEMBERS

Subject: Petition No 0300/2017 by Ryszard Florek (Polish) on a disagreement with the Commission treatment of the petitioner's case related to EU competition policy

1. Summary of petition

The petitioner is a Chairman of the Board for a Polish company. He asks that the Commission be required to examine the substance of this Polish company case in a reliable and impartial manner.

In view of the petitioner, the Commission must enforce the ban on the abuse of dominant positions, thus preventing entrepreneurs from enjoying a monopoly over time. To this end, the Commission receives complaints from entrepreneurs. The petitioner is of the opinion that the Commission, using informal acts, i.e. guidelines or notices, refuses to investigate cases concerning the abuse of dominant positions, for example by concluding that the EU is not sufficiently interested in examining a given case. Therefore, in view of the petitioner, the Commission does not take up cases brought by smaller enterprises or that originate in less interesting markets. The petitioner presents the case of this Polish company that lasted more than four years and was closed by the Commission.

2. Admissibility

Declared admissible on 14 July 2017. Information requested from Commission under Rule 216(6).

3. **Commission reply**, received on 22 September 2017

The petition raises essentially two issues:
- It argues that the notion of 'EU interests' (allowing priority setting) gives the Commission too much discretion and that the current division of responsibilities for enforcing competition law between the national competition authorities and the Commission means that companies

are deprived of the right to have their case examined. It further claims that the complaints of companies from Member States that joined the EU after 2004 are rejected significantly more often;
- It argues that the Commission has not properly examined FAKRO's complaint against VELUX.

The Commission's observations

A. On priority setting and the division of responsibilities between the national competition authorities and the Commission

As is the case for all competition authorities, the Commission has limited resources. The Commission must therefore prioritise how it deploys its investigative resources as to which investigations to pursue and which to close. EU law gives the Commission a margin of discretion to set its priorities in this respect. However, this discretion is exercised according to objective criteria such as the impact of the alleged infringement on the common market, the probability of establishing an infringement, or the level of resources that would be required to pursue the investigation. Judicial scrutiny is also an important safeguard, with the exercise of this discretion and the application of the objective criteria being subject to regular review by the EU Courts.

As to the division of responsibilities for enforcing competition law between the national competition authorities ("NCAs") and the Commission, Articles 4 and 5 of Regulation 1/2003[1] give the Commission and the NCAs full parallel competences to apply Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). This regulation also gives the competition authorities, including the Commission, the responsibility for efficient division of work with respect to those cases where an investigation is deemed to be necessary.

Indicative, non-binding principles for allocation of cases are set out in the Commission Network Notice.[2] In most instances the authority that receives a complaint will remain in charge of the case. The Commission is in principle always well placed to deal with any infringement of Article 102 TFEU that could have an effect on trade. As explained in the Network Notice, the Commission is particularly well-placed to act where the infringement has effects in more than three Member States or where there is a link to other EU provisions which may be exclusively or more effectively applied by the Commission, if the Union interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement. However, this does not preclude the possibility of re-allocation of a case from the Commission, including cases where the infringement may have effects in more than three Member States. Furthermore, the Commission is, as a matter of principle, not obliged to act, even if a given case has effects in more than three Member States.

Equal treatment is a core principle of EU law, which the Commission is bound to respect. The Commission's enforcement is strictly impartial. It is based solely on the application of facts and law and the Commission applies the rules equally to all cases, irrespective of the identity

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25).
[2] Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03).

of the Member States or companies involved. As far as the Polityka Insight report is concerned, the Commission firmly rejects its findings including any suggestion of lack of impartiality. The data on which the report relies is inaccurate and incomplete. For instance, although the majority of the Commission's enforcement action takes place under Article 101 TFEU, the report considers only Article 102 TFEU cases. Even from this already unnecessarily small sample, a number of decisions are missing. The same is true for the rejection of complaints decisions considered by the Report: it looks only at published rejection decisions (even overlooking some of them) whilst the actual number of rejection decisions in the timeframe investigated by the Report is about four times as high. What is more, the very approach of the Report to look at the nationality of complainants or the nationality of infringers is flawed: what matters is whether the Commission is equally protecting consumers and business in all Member States of the EU. As a result its findings are fundamentally unsound. The Commission has discussed its assessment of the Report with its authors.

B. On the Commission's assessment of FAKRO's complaint

As regards the complaint lodged by FAKRO, the Commission has thoroughly assessed FAKRO's allegations that VELUX had breached Article 102 TFEU. The Commission has gathered and carefully analysed a significant amount of information from both parties, including economic data concerning a number of Member States.

In line with the procedure set out in the Commission Notice on Handling Complaints[1], following this assessment, the Commission took the preliminary view that the complaint should not be further examined based on the low probability of establishing the existence of the infringement and the scope of the investigation required. The Commission informed FAKRO of its intention to reject the complaint in a letter that set out the reasons that led the Commission to its provisional conclusion, and provided FAKRO with the opportunity to submit supplementary information or observations.

FAKRO submitted such supplementary observations, as well as several additional submissions, which the Commission has been carefully assessing. This has notably involved requesting additional information from both FAKRO and VELUX. Following this assessment, the Commission expects to be able to take a final position on the complaint shortly.

As regards the duration of the investigation, the timing of any decision depends on the circumstances of each individual case. In the *VELUX* case, the scope of the allegations, the numerous issues to be assessed and in particular the extensive documentation in the file, including several consecutive submissions (some of which very recent) containing new claims and adding further voluminous documents, are among the circumstances that explain the time needed to reach a decision.

Conclusion

The Commission is finalising its assessment of the supplementary observations and additional

[1] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05).

submissions in the complaint lodged by FAKRO and expects to be able to take a final position on the complaint shortly. Any decision by the Commission is subject to review by the EU Courts.

4. REV Commission reply, received on 28 March 2018

As indicated in the Commission's initial reply, the Commission has continued its assessment of the complaint lodged by FAKRO in order to take a final position.

The Commission met with FAKRO in October 2017 to discuss the complaint and the supplementary observations. Subsequently, in early January 2018, FAKRO submitted additional information. The Commission has carefully assessed the information submitted by FAKRO and has, in addition, requested information from VELUX, which it is currently assessing.

Once this assessment is completed, the Commission expects to be able to take a final position on the complaint. Any decision by the Commission is subject to review by the EU Courts.

5. REV II Commission reply, received on 30 July 2018

As indicated in previous observations, the Commission has thoroughly assessed FAKRO's allegations that VELUX had breached Article 102 TFEU. The Commission has carefully analysed a significant amount of information from both FAKRO and VELUX and provided several opportunities to the parties to submit supplementary information and to comment on the other party's submissions, as well as on the Commission's preliminary assessment. On the basis of an impartial assessment of the facts and the law, the Commission concluded that further investigation is unlikely to lead to finding an infringement of competition rules. The Commission has therefore rejected FAKRO's antitrust complaint (under Article 7(2) of the Regulation on Antitrust Proceedings (Regulation 773/2004)) on 14 June 2018. A non-confidential version of the decision has been published on the Commission's website (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40026).

6. REV IIICommission reply, received on 6 May 2019

The Commission has assessed the additional correspondence provided by the petitioner. This correspondence is focused on the petitioner's original claim that the notion of 'EU interests' that allows the Commission to prioritise its enforcement actions under the EU competition rules, gives the Commission freedom to apply discretion disproportionally; that the current division of responsibilities for enforcing competition law between the national competition authorities and the Commission means that companies are deprived of the right to have complaints examined; and that the complaints of companies from Member States that joined the EU after 2004 are rejected significantly more often, as alleged in the Polityka Insight report[1].

The Commission's initial views regarding this petition remain unchanged, in view of this additional correspondence, as the petitioner has not brought forward any new information

[1] Available here: https://www.politykainsight.pl/_resource/multimedium/20114428

which would change the Commission's initial conclusions. The Commission would however like to address certain statements in the petitioner's additional correspondence.

The petitioner states that the basic acts of EU law regarding the enforcement of competition rules do not contain provisions that would allow the Commission to prioritise its cases and that this power stems only from a Commission Notice, which is not a binding act of EU law. In this regard, the Commission would like to recall that the EU Courts have consistently held that, in order to perform its task to implement the Treaty rules on competition effectively, the Commission is entitled to give differing degrees of priority to the competition complaints brought before it (see, for example, Case C-119/97 P *Ufex*, EU:C:1999:116, paragraph 88).

In relation to the petitioner's complaint to the Commission in Case AT.40026, the petitioner also argues that he no longer has the possibility to effectively enforce his rights, due to the length of the Commission's procedure, since national competition authorities and national courts can no longer pursue the allegations in view of the applicable limitation periods. The Commission would first like to note that the General Court will have the opportunity to rule on this matter, as the petitioner made the same claim in the context of his appeal of the Commission's decision to reject the complaint (Case T-515/18). The Commission maintains its view, as expressed in its initial views on the petition, that the timing of any decision depends on the circumstances of each individual case. In the case at hand, the scope of the allegations, the numerous issues to be assessed and the extensive documentation in the file, including several consecutive submissions by the complainant containing new claims and adding further voluminous documents, are among the factors that explain the time needed to reach a decision. In any event, both national competition authorities and national courts have the power to apply EU competition law. Since the Commission did not formally initiate proceedings (under Article 2 of Commission Regulation (EC) No 773/2004[1]) in the case, competent national competition authorities were free to pursue the same claims. Similarly, the fact that a complaint is pending before the Commission does not preclude a company from enforcing its rights by bringing an action before a competent national court in a Member State[2]. Conversely, the decision of a national competition authority which would not contain any assessment relating to infringement of Articles 101 and 102 TFEU cannot have the effect of requiring the Commission to open an investigation[3] and it does not prejudge the Commission's right to prioritise its enforcement actions. Moreover, the requirement of effectiveness cannot have the effect of imposing an obligation on the Commission, when it finds that there is no Union interest in opening the investigation, to establish whether the national competition authority has the institutional, financial and technical means to fulfil the task entrusted to it by Council Regulation (EC) No 1/2003[4][5].

As regards the Polityka Insight report, the petitioner argues that the Commission refused two requests for public information sent by the authors of the report and that it should disclose the

[1] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), *OJ L 123, 27.4.2004, p. 18–24.*

[2] Case T- 480/15 *Agria Polska and Others v Commission*, judgment of the General Court of 16 May 2017, ECLI:EU:T:2017:339, para 82.

[3] Case T- 480/15 *Agria Polska and Others v Commission*, judgment of the General Court of 16 May 2017, ECLI:EU:T:2017:339, para 77 and the case-law cited therein.

[4] Case C-373/17 P - Agria Polska and Others v Commission, ECLI:EU:C:2018:586, paragraph 84.

[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), *OJ L 1, 4.1.2003, p. 1–25.*

actual data regarding cases pursued and cases rejected.

The Commission dealt with this matter in its reply to the petitioner's requests for access to documents. In reply to the first request, the Commission informed the applicant that the right of access as defined in Regulation 1049/2001[1] applies only to existing documents in the possession of the Institution. The Commission informed that it did not possess a document containing the information requested that it could give access to, while referring the applicant to publicly available statistical information. The second application concerned an ongoing case. The Commission informed the applicant that therefore, the document requested fell under the exceptions of Article 4 of Regulation (EC) No 1049/2001 concerning ongoing cases. Hence, the Commission could not give access to the requested document and provided detailed reasoning. The applicant has not followed up on his two requests for access to documents with a confirmatory application requesting the Commission to review its position.

On the actual data regarding the Commission's decisions, and how it differs from the data presented in the Polityka Insight report, the Commission notes that an infringement decision is not so much about 'punishing' the company concerned, but primarily intended to benefit consumers and all businesses with operations in the Single Market – large and small. In this context, Commission enforcement actions against incumbents in newer Member States (i.e. those that have joined since 2004) create opportunities for businesses in those Member States which bring more choice, higher quality and lower prices to consumers. The Polityka Insight report only focusses on Commission actions under Article 102 of the Treaty (abuse of a dominant position), whilst enforcement actions under Article 101 of the Treaty (ban on agreements that restrict competition) make up the majority of the Commission's enforcement actions.

The Commission would like to assure the Committee on Petitions and the petitioner that the Commission's enforcement and priority setting system is strictly based on impartiality. It is based solely on the facts in the matter at hand and the law. Complaints brought to the Commission's attention are treated equally irrespective of the identity or origin of the complainant, alleged infringer or Member State concerned. In fact, this is the main reason why the Commission has not compiled statistics on complainants' or alleged infringers' origins.

The focus of the Commission's antitrust enforcement also depends on trends in economic development and therefore is inherently cyclical. As a result, certain sectors and companies of a particular origin may be affected more frequently at certain times. In recent years there have been (and still are) a number of information technology cases leading to fines on United States companies which are prevalent in the sector. Similarly, a series of financial cartel cases resulted in fines on banks, particularly those of German or Swiss origin.

Finally, the focus of the Commission's antitrust enforcement has been influenced by its efforts to ensure the liberalisation of former state monopolies in newer Member States. That is why there appear to be a comparatively higher number of cases concerning, for example, energy and telecoms companies in newer Member States in recent years. This mirrors the Commission's enforcement actions that took place in the older Member States (i.e. that joined

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
OJ L 145, 31.5.2001, p. 43–48

before 2004), for instance in post, telecoms and energy markets. Consumers in newer Member States should also benefit from Commission intervention in liberalised markets as has happened in older Member States.

The Commission recalls that it needs to set enforcement priorities on the basis of its available resources. It cannot pursue every case that comes to its attention. It follows that a number of complaints received cannot be pursued further by the Commission. Whilst few complaints from companies in newer Member States have been taken forward, about twice as many complaints (lodged after 1 May 2004) from companies in older Member States under Article 102 TFEU have been rejected by decision, whether one looks at the period generally covered by the report (2005-2016) or at the period 2012-2016. There are several examples of complaints from newer Member States that the Commission pursued, such as Polish oil refiner PKN Orlen's complaint which resulted in a EUR 28 million fine on Lithuanian Railways for blocking Orlen's access to an alternative rail freight operator. Additional information on the Commission's enforcement actions since 2004 can also be found in its joint reply to written questions E-004543/17 and E-004546/17 (available here: http://www.europarl.europa.eu/doceo/document/E-8-2017-004543-ASW_EN.html).

Conclusion

In view of the above, the Commission's initial views regarding this petition remain unchanged, since the petitioner has not brought forward any new information which would change the Commission's initial conclusions.