BUNDESRECHTSANWALTSKAMMER

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Revision of procedural rules in EU antitrust law

Members of the Competition Law Committee

Rechtsanwältin Dr. Ellen Braun, LL.M.
Rechtsanwalt Dr. Matthias Karl, LL.M.
Rechtsanwalt Prof. Dr. Moritz Wilhelm Lorenz (Rapporteur)
Rechtsanwältin Dr. Dominique Wagener, LL.M. (Rapporteur)
Rechtsanwältin Dr. Daisy Walzel, LL.M. (Rapporteur)
Rechtsanwalt Dr. Markus Wirtz, LL.M. (Chair) (Rapporteur)
Solicitor Dr. Gordon Christian, LL.M.

Rechtsanwalt Dr. Christian Lemke, Vice President, The German Federal Bar
Ass. jur. Frederic Boog, LL.M., The German Federal Bar

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The German Federal Bar of the Federal Republic of Germany (Bundesrechtsanwaltskammer, “BRAK”) is the umbrella organisation of the self-regulatory bodies of the German Rechtsanwälte. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Position Paper

BRAK would like to thank you for the opportunity to comment and states the following:

Part A

Improving the effectiveness, including the speed, of certain aspects of the Commission's procedures in digitised and complex investigations

1. **Adapting the Commission’s investigative tools to the digital world**

Background

In its evaluation, the European Commission identified concerns about the effectiveness of the Commission’s investigative tools, particularly because of digitalisation. The Commission’s powers to conduct inspections and request information no longer enable it to investigate in an as effective (including speedy) manner in a world where the number of physical records is reducing and digital data is exploding. In the context of complex and data intensive investigations, it is also important for the Commission to an effective power to take statements in order to handle investigations in a focused and targeted way.

The following options are currently considered as potentially addressing the challenges investigations face due to digitisation:

Option 1: Introduce an independent and self-standing power for the Commission to adopt decisions ordering the preservation of digital and physical information.

and/or

Option 2: Adapt the existing Commission inspection power so that it is independent from the power to enter physical premises and means of transport, and adapt the power to conduct inspections so that it covers all business records, regardless of the storage location of the data.

and/or

Option 3: Enable the Commission to summon persons and ask them questions.

Opinion

From the perspective of the legal profession, it is important that official powers are clearly defined so that those affected by the relevant measures can recognise whether their rights are being upheld or whether the authority may be exceeding its powers. When adapting the Commission's existing powers of review under option 2 by expanding the existing offences, care must be taken to ensure that the wording does not become too "soft" and that it is not clear how far the authority's powers extend. This risk is likely to be lower if an independent power is introduced under option 1. The Commission's powers in the digital sphere would then also be clearly distinct from other powers. This would be welcome from the BRAK's point of view.

When implementing option 3, it would be necessary to ensure that the conditions for such questioning and the rights of the person concerned in the questioning are regulated in full and on the basis of previous case law.

Without prejudice to the preservation of comprehensive rights of defence, the following applies with regard to document obligations and rights of access to files in light of the judgment of the ECJ in the Intel case (C-413/14 P, 6 September 2017) the following applies: If the Commission conducts discussions or interviews with market participants to obtain information, it must document the essential content of these in an appropriate form and include them in the case file. Classification as "informal" does not exempt the Commission from this documentation and filing obligation. Violation of this obligation may impair the rights of defence if the undocumented or unfiled information could potentially be exculpatory or relevant to the assessment.

This obligation arises from the rights of defence and the principle of sound administration and is enshrined in EU law by Article 19(1) of Regulation (EC) No 1/2003 and, since the amendment by Regulation (EU) 2015/1348 – expressly by Article 3 of Regulation (EC) No 773/2004 ("Statements by persons").

According to Article 3 of Regulation (EC) No 773/2004, the Commission may interview persons (natural or legal) to obtain information, provided that they agree (paragraph 1). Such interviews must be recorded "by appropriate means" (including audio/video recording); a transcript must be drawn up, recording the date, place, participants and the essential content of the statements, and any documents provided must be attached (paras. 3–4). The interviewee shall receive the transcript for

information/confirmation and may suggest corrections; any refusal to confirm shall be noted (para. 5). The transcript shall be included in the case file (para. 6).

This codification reinforces the obligation derived from Article 19(1) of Regulation (EC) No 1/2003 and the rights of defence to document interviews in a comprehensible manner and to record them in the file, and corresponds to the requirements emphasised in the Intel judgment, according to which "informal" contacts must not circumvent the obligation to keep records.

In order to ensure transparency, impartiality regarding the conduct of proceedings and the rights of defence these documentation requirements must be provided for in the Commission's mandatory interviews. The legal representatives of the companies concerned must always be granted access to the transcript, not only when it is mentioned in the statement of objections.

2. Improving decision-making procedures to allow for effective (and faster) enforcement

Background

The European Commission has doubts as to whether its powers to adopt interim measures are sufficient. The current procedure for ordering interim measures prevents the Commission from ordering interim measures within a reasonable time. The Commission also points out that the substantive review required for ordering interim measures prevents more effective use of this instrument.

The procedure for commitments under Article 9 is considered to be a fundamentally suitable instrument for rapid intervention, but here as well the duration of the procedure is considered to be too long.

The following options are currently being considered to address these issues:

Option 1: amend the Commission’s power under Article 8 of Regulation 1/2003 to allow for faster interventions when necessary.

Sub-option 1: Change the legal test for imposing interim measures to allow for the effective use of interim measures.

and/or

Sub-option 2: Change the procedural requirements for imposing interim measures to allow for faster proceedings.

and/or

Option 2: adapt the Commission’s power to make commitments binding under Article 9 of Regulation 1/2003 by imposing a deadline for the submission of binding commitment offers on the investigated parties to ensure faster outcomes.

Opinion

From the BRAK's point of view, it is problematic both to reduce the requirements for legal review (Option 1, Sub-option 1) and to reduce the procedural requirements (Option 1, Sub-option 2). Without an abbreviated but nevertheless reliable legal review, the interference with the rights of the party concerned associated with interim measures cannot be justified. The fact that the Commission limits itself to issuing interim measures on the basis of existing theories of harm is attributable more to case

law than to the wording of Article 8 of Regulation 1/2003. If the EU courts also accept well-founded novel theories of harm in this area, this is likely to encourage the European Commission to apply them. It should also be noted that the DMA provides the Commission with further options for the often particularly fast-moving digital sector that go beyond Regulation 1/2003.

Similarly, the rights of the data subject require compliance with the procedural steps necessary to safeguard the right to be heard. In this respect, the question arises as to whether the legal requirements can be changed at all or whether the solution can rather be found in more efficient procedures within the Commission. In this context, there is discussion as to whether the hearing can be accelerated by dispensing with hearing letters. However, the BRAK has concerns as to whether a purely oral hearing satisfies the principle of the right to be heard. Information on the content of the hearing would certainly have to be provided in advance.

The BRAK is critical of the extension of the obligations of a company subject to an investigation by the European Commission, as apparently envisaged in option 2. The initiation of proceedings must not result in the company concerned having to admit, by submitting binding commitments, that its market conduct violates the provisions of EU antitrust law if it wishes to achieve a swift conclusion to the proceedings. Here, too, the key will lie more in more efficient proceedings before the Commission.

3. Improvement of the procedures for access to files, which are currently resource-intensive and time-consuming

Background

The European Commission is also working on improving the procedure for inspecting Commission files during a competition investigation. The current procedure for protecting confidentiality and granting access to files is inefficient, and the associated discussions on confidentiality issues tie up considerable resources.

In order to reduce the time spent by the Commission and the parties on preparing a non-confidential version of the file and granting access, a limited number of external advisers to the addressees of the statement of objections could be granted access to all accessible documents in the file on condition of confidentiality after the statement of objections has been issued. These advisers would be able to request access to non-confidential versions of documents in the file on behalf of their clients if it can be demonstrated that such access is essential for the purposes of the rights of defence. These external advisers could prepare a (partially) confidential reply to the statement of objections.

The European Commission is currently considering the following options:

Option 1: A system under which (a) addressee(s) of the statement of objections are granted access to non-confidential versions of all the documents mentioned in the statement of objections; and (b) a limited number of external advisors of the addressees of the statement of objections are provided with access to all accessible documents in the file under conditions of confidentiality.

or

Option 2: A system under which access is granted by providing all accessible documents in the file to a limited number of external advisors of the addressee(s) of the statement of objections under conditions of confidentiality.

Opinion

Option 2 should be rejected. From the BRAK's point of view, it is important that the addressee of a statement of objections also has access to the documents referred to therein and is not dependent on its advisors to report on these documents or to request non-confidential versions from the Commission. It is also conceivable that an addressee of a statement of objections may not have advisors. In this case, they could make an initial assessment of the objections on the basis of the documents referred to in the statement of objections and then decide whether to instruct advisors to inspect all further documents.

Option 1, on the other hand, appears to be suitable for addressing the problem identified by the Commission.

4. Improving the procedure for the participation of complainants and third parties in competition investigations

Background

The European Commission considers the current formal complaint procedure to be resource-intensive for both complainants and the Commission, particularly with regard to the procedure for rejecting complaints in cases that are not treated as a priority. In addition, the different rights of third parties in competition investigations by the Commission are identified as a potential cause of inefficiency and complexity.

The European Commission is proposing the following options for improving this situation:

Option 1: Abolish formal complainants' right to a rejection decision.

and/or

Option 2: Harmonise the rights of non-investigated parties in competition proceedings so that complainants and interested third persons would have the same rights (for example, the right to be informed of the nature and subject matter of the proceedings, the right to a non-confidential version of the statement of objections and to request participation in an oral hearing).

Opinion

The BRAK is fundamentally critical of any weakening of the legal position of the complainant (Option 1). The right to obtain a rejection decision should remain in place. In this context, it should be borne in mind that, for example, due to an existing information gap, not every type of infringement of competition law is suitable for private enforcement. In this respect, the complainant may be dependent on an investigation by the antitrust authorities with the corresponding investigative powers. For this reason, the complainant must also be able to verify whether the Commission was right to reject its complaint. In addition, Article 296(2) TFEU requires the European Commission to state the reasons for its decisions.

Incidentally, the BRAK sees no obstacle to harmonising the procedural rights of parties who are not the subject of an investigation (option 2).

Part B

Options for the fragmented enforcement of competition law in the case of stricter national legislation on unilateral actions

Background

With regard to Article 3(2) sentence 2 of Regulation 1/2003, the Commission's evaluation has essentially shown that Member States are applying increasingly strict national rules on unilateral actions, which raises concerns about possible fragmentation of the internal market.

The Commission is considering two options to resolve this issue:

Option 1: Adapt the existing coordination and information exchange mechanisms between competition authorities under Regulation 1/2003 so that these cover the application of stricter national laws on unilateral conduct in order to ensure the coherent, effective and complementary enforcement of available competition law instruments.

or

Option 2: Discontinue the current system as described here under section B.

The Commission considers these two options to be preliminary and is also examining the following options: adapting notices, providing additional guidance, incorporating current ECJ case law, and possibly simplifying and clarifying the rules.

Opinion

Overall, the BRAK recommends choosing option 1, i.e. extending the coordination and information mechanisms within the network of competition authorities.

The scope of application of Article 3(2) sentence 2 of Regulation 1/2003 and the remaining scope for action by Member States are limited. This is because the concept of "unilateral actions" is already restricted by the fact that the European Commission and, following it, the European courts are known to interpret the mirror image of this concept, namely bilateral conduct (i.e. "agreements, decisions and concerted practices" within the meaning of Article 101(1) TFEU), broadly (ECJ, *Adalat* (C-2/01 P), *VW* (C-74/04 P) and others). Even a dealer's tacit consent to a request from a supplier within the framework of a distribution relationship can, as is well known, fall under the concept of an agreement.

The partial fragmentation of the legal framework depending on the applicable national law*,* which has *also* been observed by the Commission, corresponds to the observations made by the BRAK. This situation can lead to a certain degree of legal uncertainty, particularly for companies with cross-border activities. However, in the opinion of the BRAK, better coordination and more precise guidelines could make a significant contribution here.

The decisions in *Towercast* (C-449/21, 2023), *Meta/Bundeskartellamt* (C-252/21, 2023), *bpost* (C-117/20, 2022) and *Nordzucker* (C-151/20, 2022) show that the existing system is already capable of constructively resolving key areas of tension and providing guidance for practice.

- In the *bpost* and *Nordzucker* judgments, the ECJ emphasises that parallel proceedings in different jurisdictions are only permissible insofar as they serve different legitimate objectives. In doing so, the Court strengthens legal certainty by providing clear guidelines for the delimitation of competences, thus ensuring consistent application within the internal market.

- The *Meta/Bundeskartellamt* judgment (C-252/21, 2023) in particular also illustrates that national provisions on avoiding abuse of a dominant position can be a useful supplement to EU law. At the

same time, the parallel nature of the provisions also serves the internal market, as dominant digital companies should not be able to gain an anti-competitive advantage by exploiting national differences (e.g. in data protection).

The BRAK therefore considers it appropriate to leave the Member States their current leeway, while at the same time expanding the coordination instruments to ensure legal clarity and avoid duplication of structures. In other words, increased coordination is useful in order to consolidate the guidelines already established by case law.

In the BRAK's view, however, abolishing the current system (option 2) would carry the risk of restricting the necessary flexibility of Member States, both at the level of national legislation and at the level of national antitrust authorities, and should therefore be considered with caution.

Furthermore, in the BRAK's view, option (2) carries the risk that, in the interests of formal harmonisation alone, significant gaps in protection would effectively arise. This applies in particular to Member States such as Germany, which have a differentiated and practice-oriented set of rules for controlling unilateral conduct. Sections 19 and 20 GWB have long had a noticeable deterrent effect on companies that are not dominant within the meaning of Article 102 TFEU, but whose conduct may nevertheless pose significant competitive risks for smaller market participants or innovative competitors. The provision in Section 20 GWB, which addresses relative market power and dependencies, contributes significantly to ensuring functioning competitive structures and would not be adequately reflected in the event of replacement-free harmonisation at Union level.

If this protective mechanism were to be removed, there would be a real risk that certain abusive practices – for example, in the relationship between powerful manufacturers and small customers – would not be effectively covered by either EU law or national regulations. Purely EU-law-based abuse control under Article 102 TFEU would be too broadly tailored for this in many constellations. In the view of the BRAK, these disadvantages cannot be offset by the conceivable advantages of greater harmonisation.

In order to ensure that Art. 3 (2) sentence 2 Regulation 1/2003 (or an equivalent provision post-reform) is not applied and interpreted by the Member States too broadly it would be helpful to have additional guidelines from the Commission in line with the European Courts' case law (eg Bayer Adalat, C-2/01 P and C-3/01 P, EU:C:2004:2, para. 101 et seq.; Super Bock, C-211/22, EU:C:2023:529, para. 44 et seq.) what behaviour is to be regarded as purely unilateral (and thus provides room for the application of stricter national law) as opposed to being part of an agreement (an effect on trade between the Member States being assumed for the purpose of the discussion at hand).

This aspect is particularly relevant in the context of the application of any EU group exemption regulation ("BER"), e.g. the vertical group exemption regulation 2022/720 (VBER), under which restrictions in certain types of agreements are exempted from the Art. 101 (1) TFEU prohibition if certain market share thresholds are not exceeded (and the agreement does not contain any hardcore restrictions), taking into account that certain Member States (eg Germany, France and Italy) have (stricter) national rules prohibiting abusive unilateral conduct of undertakings that fall short of market dominance (hence being outside the scope of Art. 102 TFEU) and do not exceed the market share threshold of the respective BER but are considered as having "relative market strength", eg for example suppliers of products from which their buyers (eg retailers and members of their distribution systems) are dependent (in Germany see Sec 19, 20 of the Act against Restraint of Competition). In this scenario (outside of Art. 102 TFEU), if there is indeed an agreement resulting from the ongoing supplier-buyer relation, the national rules must not be applicable to the supplier's behaviour as this would undermine the exemption under the applicable BER and be contrary to Art. 3 (2) sentence 1

Regulation 1/2003. Such relevant behaviour could be maximum resale prices, resale price recommendations, volume related sales restrictions, product assortment restrictions, quantitative purchase restrictions but also selection criteria in selective distribution systems. Nevertheless, absent clear guidance from the Commission, BRAK sees a considerable risk that, in practice, competition authorities and national courts may be inclined to apply the stricter national rules without conducting a detailed assessment and excluding the possibility that the respective conduct is part of an agreement (in line with the EU Courts' case law) and group exempted which would prevent the application of stricter national rules (pursuant to Art. 3 (2) sentence 1 Regulation 1/2003).

With regard to fragmentation in the application of law, the interaction between Article 21 of the Merger Regulation and Article 3 of Regulation 1/2003 should also be reviewed. For example, Article 3(3) of Regulation 1/2003 does not ensure that the restrictive effects of so-called cooperative joint ventures or minority shareholdings, which can currently be addressed by the Commission on the basis of Article 2(4) of the Merger Regulation or Article 101 TFEU can also be addressed by national competition authorities. This is because not all national competition laws have a counterpart to Article 2(4) of the Merger Regulation, but, depending on the Member State, cover in the context of merger control not only joint ventures but also minority shareholdings , which further increases potential gaps in protection (because in this case neither Article 2(4) of the Merger Regulation nor – on the basis of Article 3(3) of Regulation 1/2003 – Article 101 TFEU are available).

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