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ICC Comments on the Proposal for an EC Regulation on Consumer Protection Co-operation

Commission on Marketing and Advertising,
Commission on Competition,
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Introduction

According to the European Commission, the development of international shopping brings with it the risk of increased cross-border infringements. Therefore, unless backed by effective enforcement, cross-border trade and e-commerce could result in rogue traders undermining the internal market and harming consumers with impunity. Also, consumer confidence in such shopping depends to a large extent on effective cross-border enforcement. However, each EU Member State has put in place an enforcement system designed for domestic application, and not for meeting the challenges of the internal market and the threat posed by rogue traders. National authorities lack the power to investigate illegal practices outside their jurisdiction, and some are restricted in acting against activities originating from within their country, but which are directed solely at foreign consumers. Furthermore, national authorities are under no obligation to assist their counterparts in other Member States.

ICC agrees with the main thrust of the analysis underpinning the European Commission's proposal. ICC therefore supports the setting up of a network of national authorities equipped with adequate instruments for common investigation, surveillance and enforcement. Indeed, effective and efficient cooperation and coordination are necessary for the elimination of trans-border fraudulent practices and the ensuing distortions of competition. Such a streamlined and systematic approach is also essential to advertising self-regulation in Europe, by providing an effective "legal backstop" against the small, but very harmful, minority of traders who base their entire operation on deception and deceit. Hence, an improved enforcement structure will contribute to the good functioning of the internal market, and is therefore in the interest of consumers as well as of companies and society as a whole. However, the Regulation should be so framed as to allow Member States to maintain and use established national structures that provide effective consumer protection, including those that rely on the support of private institutions or self-regulatory schemes. It seems possible that the proposed new Article 8.2a is intended to provide a greater flexibility on this very point. It should, however, be further clarified e.g. in the recitals.

Although fully recognising the need for improved machinery and supporting the conceptual approach taken by the European Commission, ICC has nonetheless been seriously concerned about the framing and the practical implementation of the proposal. In particular, the proportionality and justification of some of the powers bestowed on the authorities open themselves to serious questioning. ICC is likewise worried about the wide scope of the Regulation's provisions on information exchange, and the insufficient protection of business secrets. These two points are further developed below.

Competences and Powers of the National Authorities (Article 4)

The need for improved legal certainty; Commission's proposal

In the view of ICC, the regulation, as proposed by the Commission, grants disproportionate and discretionary powers to the authorities, going further not only than those of the most stringent consumer protection regimes in the EU, but also substantially beyond what applies in enforcement of

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competition law, including the Commission's own newly revised and upgraded powers in that field. As outlined below, the existing general principles related to competition law, including the minimum rights of the parties involved, must be kept in mind when considering this initiative.

ICC is bewildered by the fact that the Commission provides hardly any reasoning or analysis as to why these specific powers are required and should be framed in precisely the proposed way. This is not acceptable. ICC believes any interventionist power should be carefully motivated, so as to identify the kind of situations it is intended for and to have proper checks and balances introduced. Only then will it be possible to make sure the proposal is justifiable and provides satisfactory legal certainty. Also, there should be an impact assessment, particularly with regard to how this new regime plays out in the context of existing national enforcement procedures, which it would function in conjunction with.

In this context, ICC would like to point out that by nature there is a basic difference between marketing and anti-trust cases.

In a hard-core cartel, the participants typically have an obvious and strong interest of concealing what they are doing and of suppressing and withholding evidence. This explains why i.e. unannounced on-site inspections may be used in such cases. Nonetheless, in each individual case the circumstances and facts must give sufficient grounds for assuming the identified parties are involved in a serious offence, before such a "dawn raid" can be undertaken. Only premises relevant to the alleged infringement can be searched. One may debate what the exact legal criteria should be, and they differ between countries, but competition authorities generally are not allowed to go on "fishing expeditions".

In marketing, however, the offence is normally widely advertised. It may of course still be framed in an egregiously deceitful manner, but will all the same usually reveal itself beyond any doubt. Furthermore, the reversed burden of proof regarding any product claim etc. capable of substantiation means the onus is on the trader, not the authorities, to provide satisfactory evidence. Issues of truthfulness are by far the most common in marketing cases, and, in particular, the practices of rogue traders invariably are based in some way on false claims and promises. Therefore, investigating advertising and other commercial practices does not meet with the same difficulties as in the anti-trust domain.

ICC recognises, however, that the investigation may run into other problems, such as tracking down and identifying the (real) perpetrators, finding out how the practice has been conducted and from where, mapping out if and how various operators are interrelated etc. Hence, ICC does not preclude means of coercion or other strong investigative measures may be justified in certain, qualified cases. The European Commission, therefore, should have presented the legal criteria that would trigger the use of those powers. The principle of proportionality is mentioned in (4) of the recitals with reference to Article 5 of the Treaty. ICC, however, feels this to be insufficient, and that a proportionality test should be explicitly applied to the use of the powers in question. Also, ICC finds the absence of any mentioning of legal privilege quite remarkable, and maintains this principle should indeed be part of the Regulation.

In particular, the powers being granted under points (a), (b) and (h) of Article 4.3 regarding access to documents and information and on-site inspections represent considerable changes to current regimes and would have substantial impact in practice. ICC notes with surprise that (h) relates to the extraordinary measure of freezing and/or sequestering assets, without there being any reasoning justifying this power with regard to visualized circumstances or type of infringements.

Article 4.2 states that the powers of investigation and enforcement shall be exercised in conformity with national law. The question, however, arises to what extent such national rules can legally modify or constrain those powers and/or their use. By way of constitutional hierarchy, the legal instrument (a regulation) takes precedence over any national legislation. Furthermore, Article 4.3 clearly says the powers under (a) - (h) are the minimum ("at least"). This underscores and confirms the need for explicit checks and balances in the Regulation itself.

Regarding access to documents, ICC considers it to be inappropriate and unjustifiable to enable the authorities to request, copy or seize any document whatsoever. The authorities should of course only have access to documents that are directly relevant to the investigation at hand, taking proportionality and the circumstances of the case into account. This also applies to the right of the authorities to request information from any person.

As for on-site inspections, at least the criteria, procedures and standards of practice generally applicable to dawn raids under competition law should be used here as well, including the minimum rights of the parties involved. In particular, the authorities should be obliged to obtain judicial orders before carrying out an inspection.

It seems fundamental that none of the powers of Article 4.3 should be exercised unless there are grounds for a reasonable suspicion of an infringement.

Remarkably, there is no reference in the proposal to the European Convention of Human Rights or the Charter of Fundamental Rights of the EU. The Convention protects i.a. privacy, home, family and correspondence. According to Article 8.2 those rights may be modified, but only by law and in pursuit of certain demo-critically necessary objectives. It is clear that under the Convention and EC law, coercive actions by authorities must be neither arbitrary nor disproportionate . This principle is to be applied in each individual case. Furthermore, it transpires from the relevant jurisprudence that under certain circumstances the protection of the private home may extend to business premises. Still, there is a clear difference between business premises and the private sphere, as Article 8:2 allows more far-reaching interventions in the former case than in the latter .

Again, this shows the powers of the proposal must be subjected to the fundamental requirements of proportionality, privacy and legal certainty. Obviously, special care has to be taken with regard to measures directed against private persons; as the Commission's proposal stands, authorities may be free to use the powers as they see fit, apparently including the interrogation of individuals without even the suspicion of a serious infringement. Due consideration should also be had to issues of freedom of speech and the media; possibilities to request, or even seize material that may contain editorial information, sensitive or not, seem highly dubious from a democratic and constitutional point of view . Here, ICC wants to reiterate the need for closer identification of the situations that would justify use of the various powers.

Article 4 as currently amended by procedures of the Council and the Parliament (EP)

It is satisfying to note that both the amended text adopted by the Coreper, and the version of the EP clearly say that the powers of Article 4 can only be exercised where there is a reasonable suspicion of an infringement. The Committee has also improved the Article 4(3) (a)-(b) by inserting criteria of relevance, and in (c) of necessity; (h) has been removed by both Coreper and the EP.

In spite of those amendments, ICC still feels the powers are too general and far-reaching, and therefore need to be more closely motivated and defined, as outlined above.

Obviously, there needs to be other prerequisites for on-site inspections than the self-evident that they should be "necessary" - an imprecise criterion lending itself to wide interpretations. Also, the proposal does still not provide the qualification criteria required for investigation measures against private individuals. For instance, dawn raids on private homes should not take place unless there is a reasonable suspicion of a serious infringement. The lack of a clear proportionality test with regard to the powers in question is not acceptable. In a new point of the recitals (16.a), the EP proposes a text which claims the Regulation to respect and observe the Charter, and hence the Regulation should be interpreted and applied with respect to the rights and principles thereof. An improvement, as such, but in the view of ICC it is nonetheless insufficient. ICC believes the powers of Article 4 should be framed so as to comply per se with those rights and principles. In both the amended texts the notion of application in accordance with national law is retained, but still without any clarification as to the exact legal and practical meaning of this. Any mentioning of legal privilege is conspicuously absent.

Use and Exchange of Information (Articles 6 and 12)

The need to guarantee confidentiality; Commission's proposal

The transfer of material containing company secrets always poses a risk of the information being disclosed to someone who should not have it. The more transfers and recipients involved, the greater the risk becomes. ICC would like to emphasise the importance of qualified information being adequately and sufficiently protected. It should be clarified in the Regulation that the exchange procedure is to be operated on the basis of a need-to-know principle, meaning the transferred information should be accessible for the purpose of the investigation only. Furthermore, the Regulation should state that the fact that information may be exchanged does not amount to an automatic right of access to file. It is fundamental that a reliable and verifiable procedure is established, including the proper assessment of the need to transfer the information requested, and of the implications of its possible disclosure.

Companies concerned should have the right to find out what information about them the authorities have stored and disseminated, and to challenge the relevance and accuracy of it. Also, they should be notified beforehand of any transfer of confidential information, and have the right to challenge the exchange in a court of law, unless this would appreciably hamper the investigation according to established criteria. On the subject of Article 6, ICC would also like to make reference, *mutatis mutandis*, to its recent document "Information Exchanges in International Cartel Investigations".

The Regulation should provide that the information exchanged may only be used for the purpose for which it was obtained and requested. Article 12.1 is therefore too loosely framed, as the notion of "laws that protect consumers' interests" makes the scope very wide. Furthermore, Article 12.2 gives the impression of being meant to override any national restrictions on what may be invoked as evidence. This does not seem to sit well with Article 4, where it says the powers of the authorities shall be exercised "in conformity with national law". This again underlines the need for clarification of how the Regulation relates to national procedural laws. Also, in the view of ICC information transferred from one Member State to another, should be accepted as evidence only if it was legally obtained, and only invoked with regard to sanctions similar to those applied in the first country.

Article 12.3 provides that information communicated in mutual assistance shall be confidential, subject to certain exceptions. The principle is fine, but its exact and practical meaning has to be clarified, i.e. to what concept(s) of confidentiality is being actually referred, and when, where and how it kicks in. As for information being transferred between jurisdictions with differing procedural laws and different levels of secrecy protection, ICC is of the opinion that a viable and effective solution is to establish a common set of confidentiality rules. Under no circumstances should the level of protection be lower than that of the country from where the information originates. The exception in Article 12.3 a could be construed to mean the authorities will have full discretion as to what may be disclosed, whereas the

only reasonable meaning is that confidentiality may be waived for what is already in the public domain. The wording should be amended accordingly. The exception in 3.b seems to provide for full disclosure of everything given in evidence. Obviously this goes much to far, as also such material may need to be restricted to various degrees, depending on the circumstances. Therefore 3.b should be amended as well.

Articles 6 and 12 as currently amended by procedures of the Council and the Parliament

The text of Article 6, as adopted by Coreper does not provide the necessary safe-guards outlined above, nor does the EP version.

In both the relevant texts, Article 12 has been improved compared to the Commission's proposal, but still requires further amendments. In particular, ICC would like to make the observation that the powers of Article 4 are to be exercised in conformity with national law, and that the exchange of information normally ensues from the use of those powers. Thus, it is unclear what is actually meant by confidentiality here, and what standards would apply. ICC therefore maintains a common and comprehensive regime of confidentiality should be established.