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**Corporate Influence in Competition Policymaking – Note by the European Union**

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## European Union

### 1. Introduction

1. *‘Lobbying, as a way to influence and inform governments, has been part of democracy for at least two centuries, and remains a legitimate tool for influencing public policies. However, it carries risks of undue influence’.* Following up on this statement from the OECD publication on lobbying in the 21<sup>st</sup> century, this contribution focuses on the implications of corporate influence in European competition policymaking and its enforcement.

2. Competition policymaking is an area where corporate influence can have significant impacts. The goal of competition policy is to promote fair markets and protect consumers, but corporate influence, if exerted in an undue fashion, can distort policy outcomes and undermine public trust. To address this issue, we need to understand the benefits and risks of corporate participation in competition policymaking and decision-making and explore ways to mitigate undue influence while maintaining the benefits of corporate contribution.

3. This contribution aims to provide an analysis of the implications of corporate influence in European competition policymaking and its enforcement. We examine the benefits of corporate participation and illustrate them with concrete examples, we also explain which are the primary mechanisms through which corporations can exert undue influence. Lastly, we also discuss best practices to mitigate undue corporate influence and discuss concrete measures the Commission has put in place in that respect.

### 2. The benefits of corporate participation in competition policymaking

4. The fundamental provisions of EU competition are defined in EU Treaty articles. However, competition policy comprises not only the rules laid down in the Treaties, but also secondary legislation (e.g., procedural rules on implementing competition law, block exemption regulations) as well as a vast body of soft law instruments adopted or published by the Commission to assist stakeholders in interpreting competition rules (e.g. guidelines, Commission Notices, Commission Communications, best practices, etc.).

5. In designing both the secondary legislation containing competition rules and the soft law instruments, the Commission strives for an evidence-based approach. In practice, this means that competition policy should be informed by the best available evidence and designed to achieve the desired impact. Stakeholder participation (including corporate participation) in policymaking is a very important tool to ensure that policy is evidence-based. While the Commission has other sources of evidence, corporations are also an important source (and sometimes the main source) of evidence that can inform the Commission’s work. This includes sector-specific data, practical experience in applying competition law, etc.

6. For example, when the Commission evaluates and reviews antitrust block exemption regulations, it often seeks to confirm whether the conditions for granting a safe harbour remain up to date. This generally requires understanding whether there are false positives or false negatives<sup>1</sup>. The Commission can rely on its own enforcement experience

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1 False positives in antitrust block exemption regulations occur where the rules exempt an agreement for which

or economic studies to understand whether specific restrictions that are block-exempted indeed fulfil the conditions of Article 101(3) of the Treaty on the Functioning of the European Union ('TFEU') or whether restrictions that are not block-exempted may be efficiency-enhancing and therefore able to fulfil the conditions of Article 101(3) TFEU. However, corporations are also well-placed to provide evidence of efficiencies deriving from certain restrictions, that can assist in this assessment.

7. Corporate participation in policymaking can also help to ensure that competition policy is well designed and able to achieve the desired impact. Corporations are often the main addressees of competition policy, since EU competition rules (in particular, antitrust and merger rules) generally concern their behavior. Understanding the impact of competition policy on corporations is therefore important to ensure good policy and avoid creating undue burden or disproportionate red tape. For example, best practices and guidelines can benefit greatly from input from corporations, e.g. to ensure that guidance addresses the issues where corporations perceive a need for such guidance or to reflect the best practices also from the perspective of corporations.

8. Corporate participation is of course also beneficial in the context of the Commission's enforcement activity. Both antitrust and merger enforcement rely to a certain extent on information provided not only by the investigated parties but also third parties. Such information is especially important when assessing possible effects of a merger or potentially infringing agreements/practices, as often, other corporations will be in a position to provide relevant data and evidence.

### 3. Undue corporate influence in competition policy making and enforcement

9. Striking a balance between the risks of undue corporate influence and the benefits of private sector engagement is crucial in competition policy. On one hand, competition enforcement consists in investigating corporate conduct and their effects on markets and industries. As a result, interactions with the private sector are a necessary and essential feature of competition policy. They provide factual evidence, valuable insights and expertise, ensuring that decisions and policies rely on a solid factual basis, are practical and informed by industry realities. On the other hand, at the extreme end of the spectrum, there exists a risk of regulatory capture, where policies are shaped to favour certain businesses over other stakeholders, undermining fair competition. The challenge therefore lies in maintaining transparency and safeguards to ensure that these interactions enhance, rather than compromise, the integrity of competition policy.

10. Before assessing the mechanisms through which undue influence may be exerted by corporations on competition policy and enforcement, a brief reflection on when corporate influence may become problematic is in order. As reflected above in Section 2, some level of corporate participation in competition policymaking and enforcement is essential. However, where excessive or improper use of power or leverage by corporations to sway political decisions, policies, or actions takes place in a way that is disproportionate, goes against the available evidence, or is to the detriment of other legitimate interests, one may speak of 'undue' corporate influence. This undue corporate influence in competition policy making or competition enforcement therefore needs to be assessed with respect to the aims competition policy is meant to achieve.

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it cannot be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty. False negatives occur where the rules do not exempt an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Article 101(3) of the Treaty.

11. In the European Union, the function of the competition rules referred to in Article 3(1)(b) TFEU is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.<sup>2</sup> Within an EU context, undue corporate influence in competition policy making or competition enforcement would therefore imply that (certain) corporate interests play a disproportionately large role – to the disadvantage of the interests of other stakeholders. Where such corporate influence is achieved by means that are not available to other stakeholders (as further described below), this influence may be problematic. It could ultimately mean that competition policy no longer serves the well-being of European citizens and in particular the interests of consumers.<sup>3</sup>

12. Several factors can make it easier for (larger) corporations to represent their interests in competition policy making and in competition enforcement (without necessarily amounting to undue corporate influence) – in particular in comparison with other stakeholders (such as small and medium-sized enterprises ('SMEs'), startups, worker or consumer representatives):

- **Complexity of the business environment:** A complex business environment can make it difficult for policy makers and competition authorities to fully understand all aspects of the industry. This can lead to over-reliance on industry-provided information and expertise, which can be biased.
- **Information asymmetry:** Industries often possess more detailed information about their operations than policy makers and competition enforcers. This information imbalance can hinder the ability of policy makers and competition authorities to make independent assessments, making them reliant on the industry's information and perspective.
- **Resource imbalance:** Policy makers and competition authorities may have limited resources compared to the industries they regulate. This can make it difficult for policy makers and competition authorities to effectively monitor and enforce compliance, leading them to rely on industry self-regulation or input, which may not always be impartial. Further, larger corporations tend to have more resources available than smaller ones (or than other economic actors) – this puts them at an advantage in advocating for their positions.
- **Lack of public engagement:** When there is minimal public involvement in the policy making process, it can lead to a situation where industry voices dominate the conversation, pushing policy outcomes in their favour. Generally, small and homogenous groups, like industry associations, will find it easier to organize themselves than large and heterogenous groups like consumers.

13. Whether these factors in practice facilitate undue corporate influence in competition policy making and competition enforcement depends to a large extent on the institutional framework in which corporations interact with policy makers and enforcers. Where this framework has shortcomings (and inadequate measures are in place to safeguard the integrity of policy making and enforcement), the following elements can enable undue corporate influence:

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<sup>2</sup> See to that effect Court judgment of 17 February 2011, C 52/09, TeliaSonera, paragraphs 21 and 22.

<sup>3</sup> See for example Art 101(3) TFEU and Art 2(1)(b) Regulation (EC) 139/2004.

1. **Insufficient transparency:** Corporations might obtain privileged access to policy makers and enforcers in the following ways:
  - In competition policy, there is a public interest in a transparent and accessible administration. It is essential to evidence-based policy-making that public officials be reachable and engage in an open dialogue with a wide range of stakeholders. Furthermore, in order to inform the public and establish a transparent competition policy, public officials should engage with stakeholders, including businesses and their (legal and economic) advisers – for example at conferences. Direct engagement in the public debate fosters a healthy exchange of perspectives, encourages mutual understanding, and helps align policy decisions with practical business realities. However, this aspect of policy-making also entails risks, notably if such communications occur at events that are not accessible to the general public. Public policy discussions occurring behind closed doors can allow corporations and their representatives to make arguments that cannot be scrutinized or rebutted by other stakeholders or by experts, and thereby to shape competition policy in their favour.
  - In competition enforcement, lack of transparency might also be an issue if the right to be heard is restricted, enforcement decisions are not published or in the absence of judicial review of enforcement decisions.
2. **Economic submissions:** For both competition policy-making and enforcement, the economic complexity of the issues at hand require competition authorities to actively seek detailed and comprehensive economic evidence to inform their decision-making. Input from businesses and their advisers plays a crucial role in competition policy-making, as it helps ensure that policy decisions are evidence-based and reflect economic and business realities. It is therefore crucial that competition authorities are equipped with the necessary expertise and resources to critically assess those submissions. In competition enforcement, competition authorities have the investigative powers and economic expertise to assess whether economic submissions brought forward by companies meet the required evidentiary standards. In competition policy debates, competition authorities may have less investigative powers at their disposal to analyze economic submissions brought forward by companies, and other stakeholders and policy makers may have less resources to critically assess them. This can create an incentive to shape policy discussions with economic studies. It is therefore important that the necessary resources and expertise are present to ensure that the valuable contributions from economic submissions by the private sector are properly taken into account and inform the debate in a balanced and fair manner.
3. **No declaration of conflicts of interests:** Experts might prepare reports or speak at events on the behalf of corporations without declaring conflicts of interest. Even where conflicts are declared, this may not always be transparent to a sufficient degree. This could lead policy makers and competition enforcers to consider something as independent advice that in reality may not be.
4. **Revolving doors:** Job mobility between the private and public sectors can be highly beneficial to the public sector, as it helps attract top talent who remain free to move back to private sector, and ensures that the public sector remains open to ongoing interaction with the real-world challenges and dynamics it seeks to regulate and support. Moreover, public sector employees or officials can switch to the private sector. The ability to do so is in the public interest, in order to afford top talent the flexibility in their career perspective and thus

avoiding reducing the incentive to join the public sector in the first place. However, absent adequate safeguards, such revolving doors can create conflicts of interest. For instance, when policy makers may take up positions in the industries they regulate there is a risk that the anticipation of future job opportunities may influence their decision making. Vice versa, business leaders may turn into policy makers and continue to represent the interests of their former employers or clients. While policy making undoubtedly profits from the expertise of former industry professionals, in cases where former professional and current regulatory responsibility overlap too strongly, issues of undue influence may arise. The issue of revolving doors may also apply to competition enforcement. Having said that, decision power that may shape the outcome of enforcement action is generally limited to boards or senior management. Competition enforcement also requires specialist knowledge and competition authorities benefit from the expertise brought from previous employers. This problem is exacerbated if authorities lack the resources to train staff in house and to retain excellent staff (see Lit e and f below). Relatedly, where job positions are term limited (e.g. to prevent entrenchment of power or to benefit from specialised expertise), the possibility to return to the private sector might be the only valid career alternative for competition experts and might be needed to attract talented candidates in the first place. A balance therefore needs to be struck between incentivizing the best profiles to put their talent to use in the public sector, while ensuring safeguards are put in place to curtail the risks of conflicts of interest.

5. **Expert training:** Antitrust experts sometimes provide specialist legal or economic training to competition enforcers or judges. Such training can bring significant value added to public officials, by providing access to expertise, means or analysis not otherwise accessible to them, or at higher costs. However, the framework under which such trainings take place must entail sufficient safeguards, as experts can also work businesses with an interest in influencing policy. This risk can be exacerbated if authorities lack the resources to train staff (see Lit f below).
6. **Weak mandates and lack of resources:** Competition authorities may not be endowed with the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce competition rules effectively.<sup>4</sup> In particular, competition authorities compete with law firms, consultancies and corporations for qualified staff and might find it hard to hire and retain staff without adequate resources.

14. Given the essential role of adequate representation in competition law proceedings and input from the private sector in the policy-making process, the Commission offsets any undue influence by implementing a range of safeguards and good practices. A number of those safeguards are listed in Section IV.

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<sup>4</sup> Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ directive), recital 5.

#### 4. Best practices to mitigate risks of undue corporate influence

15. As mentioned above, it is crucial for public authorities to receive input from the private sector. This collaboration helps anchor policies in real-world contexts, ensuring they are practical and effective. There is also a marked difference between corporations exercising their right of defence in our competition procedures and corporate influence on policy making, and it is crucial that companies can exercise their right of defence to ensure fairness and transparency in legal and regulatory processes. It is however essential to minimize any risk of undue corporate influence in competition policymaking to ensure that such policies remain effective, impartial, and truly serve the public interest.

16. Specific safeguards can nonetheless also be put in place to ensure that competition policies, as well as how they are enforced, are protected from undue corporate influence.

17. The Commission has already put in place such specific measures designed to mitigate the risk of undue corporate influence in competition policy making and enforcement. In particular, the Commission has put in place a set of safeguards to ensure the institutional framework within which corporations interact with decision makers and policy makers ensures that regulatory actions remain impartial, transparent, and accountable. These efforts focus on four areas: (i) preventing conflicts of interest among high-ranking officials, (ii) ensuring that actions taken by the Commission follow due process, (iii) subjecting the Commission's policies and decisions to public scrutiny and oversight, (iv) adequate resources.

18. First, a number of measures have been put in place to **enhance transparency and accountability of Commission officials**. Those measures uphold the European Treaties' provisions that the independence of Members of the European Commission must be beyond doubt and that Commissioners must behave with integrity and discretion.<sup>5</sup> They are therefore aimed at **preventing conflicts of interests** resulting from privileged access to policy makers and enforcers or "revolving doors". Those measures include:

- The introduction of a **Code of Conduct for the Members of the European Commission** (the 'Code of Conduct') as early as 1999 which sets out how European Commissioners need to apply their independence and integrity obligations. The latest iteration of the Code of Conduct, which was introduced in 2018, includes several safeguards against conflicts of interest:
  1. Individual European Commission Members are obliged to declare any positions held in the last ten years, their financial interests which could give rise to a conflict of interest and their membership of bodies intended to influence the exercise of public functions. The European Parliament examines the declarations in the context of the hearings of Commissioners-designate before their appointment. The declarations are updated at least on an annual basis, scrutinised under the authority of the President of the Commission and then published
  2. The Commission publishes information on the meetings held between Commissioners and interest representatives as well as the costs of Commissioners' individual business travel on the individual webpage of each Commissioner.

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<sup>5</sup> Consolidated version of the Treaty on European Union, TITLE III - PROVISIONS ON THE INSTITUTIONS, Article 17, OJ C 202, 7.6.2016, p. 25–26.

3. Commission members are bound to strict rules when it comes to post term of office activities. The Code of Conduct provides for a two-year scrutiny period (three years for the former Commission President). Commissioners are obliged to notify the professional activities in which they intend to engage during this period. If the intended activity is linked to the Commissioner's former portfolio, the Commission can only give its approval after having consulted an independent ethical committee.
  4. In the event of a breach of their obligations, the Court of Justice may deprive former Commissioners of their rights to a pension or other benefits.
  5. A report on the application of the Code of Conduct is published annually.
- The introduction of rules ensuring the independence of EU staff, contained in the **Staff Regulations and the Code of Good Administrative Behaviour** annexed to the Commission's Rules of Procedure. Those rules include that any personal interest or any interest in any business or organisation that could compromise the respect of these obligations must be declared immediately, and that outside activities covered by these rules, paid or unpaid, must first be approved. Staff members must also inform the institution for which they work if their spouse is employed and where and if a personal interest that might impair their independence or any other conflict of interest occurs, in the course of performance of their duties. Cooling-off periods of 2 years are also implemented, and members of EU staff cannot receive gifts of more than EUR 50 without prior permission.
  - The Commission introduced a **Transparency Register**, which is a database that lists organisations that try to influence the law-making and policy implementation process of the EU institutions. As part of the Commission's commitment to transparency, Commissioners, their cabinet members and all Commission staff holding management functions publish information and minutes on meetings held with interest representatives. Meetings relating to law or policy formulation or implementation in the EU can only take place if the interest representatives are registered in the EU Transparency Register. The Register therefore makes visible what interests are being pursued, by whom and with what budget, thus offering clear visibility into who is trying to influence decision-making processes. By meticulously tracking corporate interactions with regulators and lawmakers, it ensures corporations are held accountable and helps identify potential conflicts of interest.
  - The **European Ombudsman** plays a crucial role in combating conflicts of interest within the EU administration by investigating maladministration complaints, including those related to conflicts of interest. The Ombudsman can also launch own-initiative inquiries into systemic or serious issues, such as those related to conflicts of interest, and make recommendations to improve administrative practices.
19. Second, the Commission has put in place measures to **ensure due process and regulatory independence in decision-making processes**. Similarly to rules on conflict of interests, those help prevent that actions taken by the Commission are influenced by individual interests by ensuring that the proper checks and balances are in place.

- The Commission has issued best practices on the conduct of merger control<sup>6</sup> and antitrust<sup>7</sup> proceedings under its jurisdiction. The principal aim of these best practices is to provide guidance for interested parties on the day-to-day conduct of the Commission's proceedings. They are intended to foster and build upon a spirit of co-operation and better understanding between DG Competition and the legal and business community. In this regard, the best practices seek to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the review process.
- The European Commission operates under the **principle of collegiality**, meaning the College of Commissioners, composed of all 27 members, takes decisions collectively. This ensures equal responsibility and accountability for all Commissioners on all decisions.
- In merger and antitrust procedures, the **Hearing Officers** act as independent arbiters between the Commission services responsible for the individual investigations and the companies concerned, to ensure that rights of defence are respected. The Hearing Officer is also tasked to decide whether third parties to the investigation should be allowed to take part as interested third parties and to be heard. Articles 296 and 263 TFEU lay the foundation for the **obligation to provide reasons** for decision. All decisions taken by the Commission are therefore required to be sufficiently motivated, thereby preventing arbitrary decision-making.
- The Commission's competition decisions are subject to **judicial review** by the General Court and, ultimately, the Court of Justice of the European Union. This ensures independent oversight of Commission's decisions.

20. Third, a significant aspect of preventing undue corporate influence in decision-making and policy-making processes are measures ensuring public oversight. Such measures ensure a certain level of scrutiny from third parties and civil society, thereby helping prevent that decision- and policy-making is unduly influenced by individual interests. They also help counteract the effect of corporations having privileged access to policy makers and enforcers, by encouraging broader participation and contributions from other stakeholders. This is why Article 10 of the Treaty on the European Union states that: *'Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.'* The Commission has put in place a number of those measures, including:

- The **publication of information** in the context of investigations and policy-making, allowing stakeholders, including civil society, competitors, and other interested parties, to stay informed and offer their input. Regulation (EU) No 1025/2012 specifically mandates the publication of information related to European standards, ensuring proper consultation and market relevance before policy actions are taken. As an example, information on mergers notified to the Commission are systematically published in the Official Journal in order for third parties to be able to provide comments or concerns. When the Commission is envisaging to impose remedies or commitments, it also publishes a market test notice, to ensure that any interested party can comment. Commission merger, state aid and antitrust decisions

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<sup>6</sup> DG Competition best practices on the conduct of EC merger proceedings, 20.01.04.

<sup>7</sup> Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6-32.

and their motivation are also systematically published on the Commission's website, thereby providing third parties with the opportunities to be made aware of the rationale for those decisions.

- Competition policymaking currently takes place under the Commission's Better Regulation rules. Better Regulation rules ensure that policy is evidence-based and that the policymaking process is open and transparent for all stakeholders. For example, the **'Have Your Say' portal** on the European Commission's website allows citizens, businesses, and other stakeholders to share their views on proposed EU laws and policies. It aims to improve the quality of EU policymaking by encouraging participation and ensuring that legislation meets quality standards. In addition, the Commission actively seeks to ensure broad stakeholder consultations, targeting different audiences to achieve representative views.
- Article 15(3) TFEU provides for a **right of access to documents** of the Union's institutions, bodies, offices, and agencies. The same right is recognised in Article 42 of the Charter of Fundamental Rights of the EU. The European Commission's rules on access to documents are governed by Regulation (EC) No 1049/2001, which implements the right of access to documents enshrined in the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the EU.

21. Fourth, competition authorities need sufficient resources and clear submission guidelines to effectively assess the evidence presented to them, ensuring fair and thorough evaluations.

- The ECN+ directive aims to empower national competition authorities to enforce competition law more effectively, in particular by ensuring that enforcers have 'a sufficient number of qualified staff and sufficient financial, technical and technological resources' to ensure, at the minimum, 'the effective and uniform application of Articles 101 and 102 TFEU' within the European Union (Article 5 ECN+ directive).<sup>8</sup>
- The Commission has also made a concerted effort to build up sufficient human resources with the expertise and capabilities needed to match the high-calibre profiles typically found in large corporations. For example, the Chief Economist Team (CET) was established in 2003 to enhance the economic analysis supporting EU competition policy. The CET provides independent economic guidance on complex cases and policy development, ensuring that decisions are grounded in rigorous economic reasoning.
- The Commission has issued guidance on the submission of economic evidence that ensures that the probative value of economic submissions can be thoroughly assessed.<sup>9</sup> This entails inter alia also the submission of the underlying raw data and the software code used to make empirical assessments.

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<sup>8</sup> ECN+ directive.

<sup>9</sup> Commission Staff Working Paper, Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases, SEC(2011)1216.

## 5. Conclusion

22. Corporate participation in competition policymaking and enforcement is essential. Undue corporate influence can however influence policymaking or enforcement decisions to the detriment of legitimate public interests. Therefore, it is essential that adequate measures are taken to limit such undue influence.