



Legal Affairs Strategy for the Next Political Cycle

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INTRODUCTION

Europe already has one of the most advanced legal systems in the world, often being the inspiration for others. It is essential that EU legal policies continue this trend and work towards:

- improving the competitiveness both inside and outside EU borders;
- ensuring smaller companies are not overloaded with requirements and procedures which will deter them from scaling up or staying in business;
- a fair balance between legislation which is intended to protect stakeholders (and the economic and social context surrounding companies) and enabling legislation that helps companies thrive in the Single Market;
- a legal framework that is up to date with new technological developments and different business models; not necessarily by legislating more, but rather in a smarter and more adaptive way to avoid that once rules are implemented, they immediately become obsolete;
- ‘evaluate first principle’ ensuring that existing legislation is reviewed before changing the rules or introducing new ones. This is important for business because it ensures stability and coherence of EU action;
- promoting the use of self-regulation as it presents a good solution to keep the pace with evolution while supporting trust in the market.

This paper lays out with some level of detail BusinessEurope Legal Strategy for the upcoming political cycle which will help fulfil the objectives set by [A Business Ambition for 2030](#) adopted at the end of 2018. Specific strategic papers on EU Competition law & State aid and on Intellectual property have been published and can be found on BusinessEurope’s website.

1. COMPETITION LAW AND STATE AID¹

FACTS & FIGURES

- ▶ Since 2012, about 300 planned mergers are notified annually of which the vast majority (about 90%) were unconditionally cleared.
- ▶ In total, as of January 2019, 27 planned transactions (in 30 years) have been prohibited; 152 notifications were withdrawn during Phase 1, and an additional 44 notifications during Phase 2 (1990-March 2019).
- ▶ Since 2015, more than 96% of new State aid measures fell under the General Block Exemption Regulation (GBER) - an absolute increase of about 28 percentage points compared to 2013.
- ▶ In 2017, around 94% of total State aid spending was allocated to horizontal objectives of common interest, such as environmental protection, research, development and innovation and regional development.
- ▶ More than 90% of cartels cause a price increase. Over 90% of the value of fines imposed by the Commission are maintained on appeal.
- ▶ National competition authorities in the EU take some 85% of all the decisions that apply EU antitrust rules.

(Source: European Commission)

BusinessEurope supports a smart competition policy. We clearly recognise the fundamental role that well-functioning competition rules play in the internal market, both in terms of limiting distortions and ensuring more efficiency and innovation by allowing competitors to enter new markets and protecting consumer choice. Furthermore, EU competition policy is one of the few areas where the EU has extra-territorial teeth.

EU competition policy should ensure that effective competition between companies exists thereby contributing to job creation, growth and investment. It should also address the global challenges which businesses are facing in order to boost their and the EU's overall competitiveness.

BusinessEurope priorities:

- Ensure a strong EU competition policy that is protecting competing companies and consumers, whilst ensuring that EU companies can compete also at a global level;
- Ensure effective and independent competition law enforcement preserving legal certainty, a level playing field in the internal market and non-discrimination;
- Ensure that the administrative and procedural framework of EU competition proceedings, particularly in EU merger control, is sufficiently speedy, transparent and proportionate;

¹ For further details please consult: <https://www.busseurope.eu/publications/improving-eu-competition-and-state-aid-policy-busseurope-position-paper>

- Ensure effective checks and balances in the system and reform judicial review of Commission decisions;
- Ensure an effective leniency policy for those bringing forward possible antitrust infringements;
- Ensure that markets are defined in a realistic and dynamic way;
- Ensure that competition in the internal market is not distorted by competing companies, in and outside the EU, that are not operating under the same rules;
- Ensure that EU State aid policy supports good aid and investment in large research and innovation projects that contribute to growth, jobs and EU global competitiveness while fundamentally safeguarding a market driven European economy;
- Ensure effective State aid control to safeguard fair competition;
- Ensure a proportionate and speedy treatment of State aid cases which do not raise competition concerns;
- Ensure more legal certainty for company cooperation and/or joint research and development projects;
- Ensure that EU companies can equally and effectively compete in digital markets.

2. INTELLECTUAL PROPERTY²

FACTS & FIGURES

- ▶ IP-intensive industries account for about 90% of EU trade with the rest of the world generating a trade surplus for the EU of EUR 96 billion. (Source: EPO/EUIPO)
- ▶ IP-intensive industries generate around 42% of EU GDP translating into 28% of all jobs in the EU (60 million). (Source: EPO/EUIPO)
- ▶ Around 2.5 million jobs worldwide are at risk every year as a result of counterfeiting and piracy. (Source: EUIPO)
- ▶ 96% of Europeans agree that protecting IP is important. (Source: EUIPO)
- ▶ Demand for patent protection continues to grow over 174 000 applications (+4.6%) filed at the EPO in 2018. (Source: EPO)
- ▶ 47% of European patent applications originates from EPO states (+3.8% compared to 2017), 25% from US, 13% from Japan and 5% from China. (Source: EPO)
- ▶ 71% of European patent applications are filed by large enterprises, 20% by SMEs and individual inventors (compared to 24% in 2017) and 9% by universities and public research organisations (compared to 7% in 2017). (Source: EPO)

*Patent applications from European countries

Intellectual property (IP) is key to drive innovation, growth, competitiveness and job creation in Europe. European innovation is vital to ensure that the European Union (EU) can maintain its global leading role in developing sustainable solutions to cope with mutual challenges prompted, for example, by consumer safety, urbanisation, digitalisation, climate change, lack of food and clean water, a growing aging population and health issues.

IP protects the fundamental intangible knowledge-based assets which are essential for European companies' investments and efforts to provide tangible solutions to society. IP generates business opportunities and should be considered one of the fundamental pillars of the EU industrial competitiveness.

BusinessEurope strongly believes that the European Commission (hereinafter, "the Commission") should include IP among general EU industrial policy goals, as well as underline IP positive impact while discussing various policy areas, e.g. internal market, innovation, digital economy, health, energy, competition and trade matters. IP should be part of any industrial policy discussion.

Raising awareness of the societal benefits that IP offers should be a priority. Information campaigns and education initiatives aimed to highlight the positive impact of IP on various aspects of EU economy, e.g. competitiveness in current and future technologies, growth, jobs, solutions to implement UN sustainable development goals, climate change, should be promoted and organised all over Europe. The use of IP and knowledge-based assets (e.g.

² For further details please consult: <https://www.busesseurope.eu/publications/intellectual-property-priorities-next-institutional-cycle>

trade secrets) should also be better promoted as a major business opportunity through international, EU and national projects.

Global competition in facilitating domestic growth and employment through means of an innovation-friendly IP system is increasing rapidly. EU businesses are facing intense competition from third country competitors and need a level playing field, i.e. the same IP standards worldwide to apply. Inventors, both domestic and foreign, are increasingly confronted with a challenging IP environment in some third countries. To ensure that this competition is fair on a global level, BusinessEurope expects the EU to maintain a strong, high-quality and coherent IP strategy when it comes to discussing any bilateral trade agreements, as well as possible revisions of WTO rules. Strong and harmonised IP standards accompanied by equally strong competition rules should be guaranteed in any attempts to reform bilateral and multi-lateral trade agreements, in particular at WTO level. The EU should seek to regain its position as the “standard setter” on the global scene.

The acceleration of technological progress and digital revolution both create new challenges in the IP environment and open new opportunities. New technologies such as 3D printing, artificial intelligence, 5G, the Internet of Things (“IoT”) and data managing should be part of any policy discussion in the future. BusinessEurope urges the next Commission and European Parliament to ensure continuous efforts to achieve a good balance between strong IP protection, on the one hand, and legal certainty to encourage new technologies, on the other hand.

To ensure a strong, efficient and reliable IP protection framework, BusinessEurope also urges the Commission to uphold and strengthen its commitment to combat counterfeiting, unlawful transfer of technology and other unlawful practices, which ultimately would deprive IP holders of their legitimate rights or interfere with the IP right holder’s ability to exercise them.

BusinessEurope priorities:

- Launch education campaigns at European and national levels to raise awareness of the societal benefits of IP;
- Ensure the fundamental principles of legal certainty, proportionality, transparency, predictability and effectiveness;
- Align global IP standards through various EU bilateral agreements;
- Promote the fundamental principles laid down in the TRIPS and subsequent WIPO treaties and agreements;
- Ensure continuous efforts to achieve a good balance between strong IP protection, on the one hand, and legal certainty to encourage new emerging technologies, on the other hand;
- Continue and strengthen the commitment to combat counterfeiting, unlawful transfer of technology and other unlawful practices;

- Ensure the rapid entry into operation of the Unitary Patent system, preferably including the UK³;
- Establish a stronger accountable IP governance and a better coordination and strategic approach among the various institutions and bodies in charge of IP policy in Europe, at both technical and political levels.

³ This paragraph is not supported by the Spanish Confederation of Employers and Industries (CEOE), the Confederation of Industry of the Czech Republic (SPCR) and the Confederação Empresarial de Portugal (CIP).

3. COMPANY LAW AND CORPORATE GOVERNANCE

BusinessEurope aims to improve the environment in which European companies operate, the tools which they use to communicate (and interact) with their stakeholders and the conditions which favour their mobility within the EU.

For BusinessEurope, it has been a long-time priority to facilitate the creation of companies in Europe without forgetting the ability to scale up which should equally be a focus for the EU.

3.1 COMPANY LAW

FACTS & FIGURES

- ▶ Out of 21 million SMEs in Europe, 5.2 million are single-member/one-shareholder companies.
- ▶ The costs of setting-up a subsidiary can vary by up to 20 000 EUR if processed 'abroad' or at 'home'.
- ▶ Out of 28 Member States, only 16 allow the set-up of a company to be carried out online.

(Source: European Commission)

BusinessEurope has welcomed the EU Company Law Package which has recently been agreed between the co-legislators. This package aimed to facilitate companies' use of digital technologies and to make it easier to perform essential cross-border operations such as mergers, divisions and conversions.

Access to digital tools to perform key company operations is essential for companies. It is something where the EU can deliver in order to help every entrepreneur to act faster in a highly competitive and increasingly connected business environment. The possibilities of creating a company digitally, registering branches digitally, and doing this only one time (the "once only" principle) have clear added value, which businesses within the EU should be able to benefit from without delay.

The agreement on the directive on mergers, divisions and conversions is also a potential major step on EU freedom of establishment for companies. Without prejudice to the necessary guarantees benefiting company stakeholders (shareholders, workers and creditors) it is important that these new EU procedures do not become a *de facto* barrier to move within the internal market. If numerous national requirements continue to diverge after the transposition phase, companies will not be motivated to use the instrument.

Once formally adopted, the work must continue to ensure a smooth implementation into national legal systems of these two directives. This means avoiding a gold-plating exercise whereby Member States add up requirements to the existing provisions in these proposals which will hinder the use of mobility and digitalisation tools by companies.

Despite a potential positive contribution of the company law package, smaller companies and individual entrepreneurs will continue to face the lack of an EU company law form

which is tailor-made to their specific size and needs. The *Societas Europaea* (European Company Statute) has not picked up as expected due to its complexity and high cost. That is why BusinessEurope believes the EU should continue to explore the possibilities around a European company law form designed for SMEs taking inspiration in the work done around the Single Member Company (SUP) and European Private Company (SPE) proposals as well as in the now adopted European Company Law package.

3.2 INSOLVENCY AND SECOND CHANCE

FACTS & FIGURES

- ▶ 200 000 companies go bankrupt every year in the EU.
- ▶ 50% of businesses do not survive the first 5 years.
- ▶ Recovery is higher in restructuring procedures (83% of claims) compared to liquidation procedures (57% of claims).

(Source: European Commission)

BusinessEurope strongly supports the recently adopted directive on pre-insolvency proceedings and second chance. The quick and smooth implementation of this directive is crucial to establish a mindset of second chance for struggling (honest) entrepreneurs in the EU.

3.3 CORPORATE GOVERNANCE

FACTS & FIGURES

- ▶ There is a decrease of 5% in the number of listed companies on European stock market. Being listed in the stock market in the EU is becoming less attractive.
- ▶ There have been 303% fewer initial public offerings (IPO) in European stock markets since 2015.

(Source: EuropeanIssuers)

BusinessEurope seeks to promote good corporate governance through the exchange of best practices and increased transparency through a better application of national codes of corporate governance.

In the past 5 years, the EU has been gearing EU corporate governance actions towards shareholder/investor engagement; and in the 5 years before that (which followed the international sub-prime crisis) transparency, capital adequacy and authority supervision, especially in the financial area, were the main objectives. Now the debate mainly revolves around accountability and sustainability, two important principles that the majority of boards and management are increasingly taking into account in their decisions. There is pressure from the markets and society on companies to deliver on this front.

In this scenario, BusinessEurope intends to be an active partner in the discussion whilst upholding key principles in this area:

- Flexibility, currently given by self-regulation, is very important. The integrity of the *comply or explain* approach in the EU must be preserved in particular after the Shareholder Rights Directive II has transformed into law a big proportion of national corporate governance codes. The *comply or explain* approach is widely supported by companies, boards, investors, shareholders and market authorities. It allows companies to tailor corporate governance mechanisms to their specific circumstances, ownership structure, size, sector and culture. It also allows to go beyond (and ahead of) legislation in the pursuit of objectives that are in the interest of the company, its stakeholders and the society at large (e.g. sustainability, board diversity policies, etc).
- Whatever approach the EU takes on sustainability in corporate governance, it should not punish those companies active in this area (frontrunners - mainly listed companies - in terms of due diligence initiatives). It could encourage others to keep up without triggering measures which increase the reporting burden and audit costs for companies.
- Legislation should not be taken lightly nor adopt a one size-fits-all solution.

Corporate governance faces other important challenges. Digitalisation which incorporates new emerging technologies including blockchain present new possibilities around, for example, conducting general shareholder meetings, managing shares and votes but also raise important questions for example on security, scrutiny and legal effects in case of ‘technical glitches’ (leading to judicial challenging).

Europe is witnessing (at least in a few Member States) the rise of an activist investor movement⁴. In the first nine months of 2018, there were 40 activist shareholder campaigns against European companies with a market capitalization of more than \$500 million. Although having its shareholders engaged is important for companies (a clear objective of the shareholders right directive revision), when done in a non-reasonable way activism can be driven by short sightedness and disregard for the well-established business model. Outspoken shareholder activists do not shy to use strong instruments to make their case even if it means becoming antagonistic with management or use media to pressure companies.

BusinessEurope priorities:

- Ensure a smooth transposition of the company law package and insolvency directive whilst avoiding the creation of additional requirements (via gold plating) that jeopardise the goals set out for these initiatives;
- Continue to explore the possibilities around a European company law form designed for SMEs taking inspiration on previous initiatives (SPE, SUP);
- The integrity of the *comply or explain* approach in the EU must be preserved;

⁴ Lazard’s Review of Shareholder Activism, 2018
<https://www.lazard.com/media/450805/lazards-2018-review-of-shareholder-activism.pdf>;
<https://www.marketwatch.com/story/activist-investors-on-the-march-in-europe-2018-12-13>.

- Incentivising further use of digital tools in boards and general assemblies to better adapt to an increasing change of shareholder and board landscape (e.g. due to internationalisation);
- Mapping and understanding recent shareholder/investor/proxy advisor activism in the EU and if necessary, follow-up with measures necessary to minimise potential abuses;
- Studying the possibilities and understanding the impact of using new technologies such as blockchain in the field of corporate governance.

4. COMPANY REPORTING AND ACCOUNTING

FACTS & FIGURES

- ▶ About 27 000 domestically listed companies on 88 major stock exchanges in the world use IFRS Standards.
- ▶ EU rules on non-financial reporting apply to approximately 6000 large companies across the EU.

(Source: IFRS Foundation; European Commission)

BusinessEurope supports the use of International Financial Reporting Standards (IFRS) for listed companies in the EU. Adoption of IFRS has achieved its primary objective of comparability and transparency and the EU Accounting Directive has achieved a satisfactory level of harmonisation of public reporting across the EU.

Regarding non-financial reporting, BusinessEurope supports the work of the EU corporate reporting Lab to identify and encourage best practices. It is an efficient way to consider the diversity of companies (structure, geography, goods and services, customer and suppliers). A detailed post implementation review should be performed to analyse the results of the non-financial information directive (2014/95). The EU should not take any measures which increase the overall reporting burden and audit costs for companies.

BusinessEurope supports the process towards better governance of the IASB and favours a closer involvement of EFRAG within the Foundation. We also encourage widening the membership of EFRAG and the development of national funding mechanisms that are not already contributing to EFRAG to ensure the long-term funding of EFRAG.

BusinessEurope priorities:

- Ensure a proportionate (non)financial reporting framework in the EU;
- Ensure a set of international financial reporting standards (IFRS), which meet the needs of European stakeholders;
- Base audit regulation on international accepted principles (*International Audit Standards*);
- Support the work and structure of EFRAG on financial reporting;
- Improve the governance of the International Accounting Standards Board (IASB).

5. CONSUMER LAW

FACTS & FIGURES

- ▶ Consumer expenditure represents 56% of EU's GDP. *(Source: europa.eu)*
- ▶ The potential of the EU single market for consumers is estimated to generate benefits of 58 billion euros per annum. *(Source: European Parliament)*
- ▶ Only 11% of Europeans shop online in another Member State whilst 40% do it in their own Member State. *(Source: European Commission)*
- ▶ Overall consumer trust in the Eurozone is at a 16-year high. *(Sources: 2017 Consumer Conditions Scoreboard; 2017 report on Consumer and Marketing Law Fitness Check)*
- ▶ Consumers know their rights better, which helps them make more informed purchasing decisions. *(Ibid.)*
- ▶ There are fewer consumer complaints, they are better handled, and compliance with consumer legislation has increased. *(Ibid.)*
- ▶ 21 EU/EEA countries already have some form of collective redress. *(Source: European Commission)*
- ▶ Lawyers are the main beneficiaries of class actions in the US, with an average lawyer earning 1 million US dollars per claim whilst consumers receive only around 32 US dollars per claim. In 2016 alone, the US litigation spending amounted to 2x the EU budget for that whole year (approx. \$429 billion). *(Source: Institute of Legal Reform)*
- ▶ Collective redress procedures inevitably take longer to litigate, in some cases lasting for 10 years. For example, in Poland (with larger number of cases), only ten out of possibly 210 cases have yet reached a substantive decision since 2010. *(Source: Institute of Legal Reform)*

Effective consumer protection is a key enabler of online trust and a key pillar for the completion of Europe's Digital Single Market.

BusinessEurope is fully committed to work together with EU institutions and other stakeholders to find ways to achieve a more coherent interpretation, implementation and enforcement of EU Consumer Law as well as more awareness among businesses about existing business-to-consumer rules. BusinessEurope supports the use of guidance/interpretation guidelines as tools to reach a more uniform interpretation of EU law. BusinessEurope is supportive of ongoing initiatives regarding awareness and is working together with other European business organisations towards an initiative to contribute to better communication between businesses and consumers.

Regarding enforcement, the increasing competition coming from third countries in the ecommerce sector will require extra efforts to preserve a level playing field amongst businesses where every trader, also based outside of the EU, is aware of and is applying the existing rules.

The EU should continue to promote out-of-court dispute resolution systems and also encourage businesses' use of the EU ODR-platform. The now under discussion representative actions proposal risks creating wrong incentives that will lead to an abusive litigation culture in Europe (present in the US) which will benefit neither the victims of damages nor businesses.

Many new rules have been adopted in the last legislature (e.g. sale of goods and digital content proposals, geo-blocking regulation, modernisation of Consumer Rights Directive, etc). It is crucial that their implementation does not lead to a crescent legal fragmentation that will jeopardise businesses' ability to make use of the enormous potential of the Single Market. Just as the 2017 Consumer Law Fitness Check showed, the Commission needs to focus, rather than proposing new layers of legislation, on better and more uniform enforcement across the EU. If new legislation is to be considered in the future, it is fundamental that full harmonisation is the preferred approach and that overlap with existing legislation is avoided.

BusinessEurope priorities:

- Ensure a smooth implementation of recently adopted consumer protection rules - contract law and New Deal for Consumers – in a way that prevents further fragmentation within the single market;
- Out-of-court dispute resolution systems should continue to be promoted in the EU as well as initiatives that improve awareness of consumers and companies of consumer legislation;
- If the representative actions proposal is adopted, the EU must strive towards preventing wrong incentives to be created that will lead to an abusive litigation culture in Europe (present in the US) not benefiting neither the victims of damages nor businesses;
- Continuous focus on public enforcement with the effective roll out of the Consumer Protection Cooperation Regulation.

BUSINESSEUROPE



BusinessEurope is the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent and campaigning on the issues that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.



Austria



Belgium



Bulgaria



Croatia



Cyprus



Czech Republic



Denmark



Denmark



Estonia



Finland



France



Germany



Germany



Greece



Hungary



Iceland



Iceland



Ireland



Italy



Latvia



Lithuania



Luxembourg



Malta



Montenegro



Norway



Poland



Portugal



Rep. of San Marino



Romania



Serbia



Slovak Republic



Slovenia



Spain



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