



Council of the
European Union

Brussels, 12 July 2017
(OR. en)

11215/17

Interinstitutional File:
2017/0063 (COD)

RC 11
JUSTCIV 178
IA 126
CODEC 1242

COVER NOTE

From:	General Secretariat of the Council
date of receipt:	11 July 2017
To:	Delegations
Subject:	Opinion of the European Economic and Social Committee - Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [COM(2017) 142 final – 2017/0063 (COD)]

Delegations will find attached the above mentioned opinion.

Please note that other language versions should be available at:

<https://dm.eesc.europa.eu/EESCDocumentSearch/Pages/opinionsresults.aspx?k=INT%2F821>



European Economic and Social Committee

INT/821

Enforcement of competition rules

OPINION

European Economic and Social Committee

Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

[COM(2017) 142 final – 2017/0063 (COD)]

Rapporteur: **Juan MENDOZA CASTRO**

Referral	European Parliament, 26/04/2017 Council, 27/03/2017
Legal basis	Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted at plenary	05/07/2017
Plenary session No	527
Outcome of vote (for/against/abstentions)	130/0/2

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the Commission's proposal, which it considers essential to the effective implementation of Regulation (EC) No 1/2003.
- 1.2 Although differences persist, as a result of voluntary harmonisation significant convergence has taken place between the systems in the various Member States, using EU rules as a template.
- 1.3 The ECN's system for case allocation should avoid any potential duplication of efforts on the part of the various Member States.
- 1.4 The EESC proposes that, in future, consideration should be given to the content of civil and administrative law being governed by means of a regulation.
- 1.5 Competition policy must guarantee equal opportunities. The EESC emphasises the importance of the national competition authorities (NCAs) having at their disposal the legal measures and instruments needed to tackle secret cartels, and draws attention to the serious harm caused by abuses of dominant position.
- 1.6 Respect for the **fundamental rights** of parties under investigation must be compatible with the full application of Articles 101 and 102 TFEU.
- 1.7 The EESC is concerned at the serious shortcomings with regard to the **independence and resources** of the NCAs that can currently be seen in many Member States. It is essential that NCAs are genuinely independent of the authorities; management staff must therefore be independent experts with a proven track record. Moreover, staff turnover should be kept low and members of staff should receive adequate vocational training.
- 1.8 In many cases, the damage caused by anti-competitive conduct is difficult – or even impossible – to repair, and the EESC therefore recommends that the powers allocated to the NCAs should also be used in preventive actions.
- 1.9 The Committee has previously argued that the size of **penalties** "should act as a deterrent and [...] should be made more severe in the event of a repeat infringement", and agrees that the ability of the competent authorities to impose penalties is a key component of competition policy.
- 1.10 The experience of the Commission, which usually applies **leniency** measures, can be regarded as positive. It is important that they are applied uniformly by the NCAs if genuine European competition law is to exist. However, these measures should not prevent injured parties (including consumers) from obtaining, by means of collective actions, compensation for the damage sustained.
- 1.11 The transnational nature of NCA actions means that **mutual assistance** between them is crucial.
- 1.12 When transposing the directive, the **suspension of the limitation period** must comply with the Member States' general rules on limitation periods.

1.13 NCAs should be granted the **power to institute legal proceedings in their own right**, since the lack of such a power hampers their effectiveness in some Member States.

1.14 The EESC highlights the importance of NCAs being able to use all types of **evidence** irrespective of the medium on which it is stored.

1.15 Information campaigns are needed, as most of the general public know very little about competition rules.

2. **The Commission proposal**

2.1 The EU Member States are essential partners of the European Commission when it comes to enforcing EU competition rules. Since 2004, the NCAs of the EU Member States have been empowered by Council Regulation (EC) No 1/2003 to apply EU competition rules alongside the Commission. For more than a decade both the Commission and the NCAs have enforced EU competition rules in close cooperation as part of the European Competition Network (ECN). The ECN was created in 2004 expressly for this purpose.

2.2 Enforcement of the EU competition rules by both the Commission and the NCAs is an essential building block for the creation of an open, competitive and innovative internal market and is crucial for creating jobs and growth in important sectors of the economy, in particular the energy, telecoms, digital and transport sectors.

2.3 The EU competition rules are one of the defining features of the internal market: if competition is distorted, the internal market cannot deliver on its full potential and create the right conditions for sustained economic growth. A key aspect of making the internal market deeper and fairer is ensuring that the internal market rules are effectively enforced so that they deliver close to the citizen.

2.4 Enforcement of EU competition rules is now taking place on a scale that the Commission could never have achieved on its own. The Commission typically investigates anticompetitive practices or agreements that have effects on competition in three or more Member States or where it is useful to set a Europe-wide precedent. The NCAs are usually well placed to act where competition is substantially affected in their territory. NCAs have the expertise with regard to how markets work in their own Member State. That knowledge is of great value when enforcing the competition rules.

2.5 There is untapped potential for more effective enforcement of the EU competition rules by the NCAs. Regulation (EC) No 1/2003 did not address the means and instruments by which NCAs apply the EU competition rules, and many NCAs do not have all the means and instruments they need to effectively enforce Articles 101 and 102 TFEU.

2.6 The gaps and limitations in NCAs' tools and guarantees mean that undertakings engaging in anti-competitive practices may face very different outcomes in proceedings, depending on the Member States in which they are active: rules under Articles 101 or 102 TFEU may be enforced ineffectively or not at all, for example because evidence of anti-competitive practices cannot be obtained or because undertakings can escape liability for fines. Uneven enforcement of the EU competition rules distorts

competition in the internal market and undermines the system of decentralised enforcement that was put in place by Regulation (EC) No 1/2003.

2.7 In consequence, the Commission considers that a legislative proposal pursuing a two-fold policy is needed:

–based on Article 103 TFEU, with the aim of empowering NCAs to more effectively enforce the EU's principles of competition, by granting them the necessary guarantees of independence, resources and powers;

–based on Article 114 TFEU, seeking to bolster the internal market by removing national obstacles that prevent the NCAs from enforcing the rules effectively, in order to prevent distortions of competition and achieve more uniform application of the rules to the benefit of consumers and businesses.

2.8 Moreover, enabling NCAs to effectively provide each other with mutual assistance will ensure a more level playing field and safeguard close cooperation within the ECN.

3. General comments

3.1 The EESC welcomes the Commission's proposal, which it considers essential to the effective implementation of Regulation (EC) No 1/2003. In order for a European competition system to be set up, the barriers and gaps regarding the full implementation of Articles 101 and 102 TFEU that currently exist in certain Member States need to be removed.

3.2 The decentralised application of competition rules as a result of Regulation (EC) No 1/2003 has not, as was feared, resulted in the fragmentation of the powers to enforce competition policy. Although differences persist, as a result of voluntary harmonisation significant convergence has taken place between the systems in the various Member States, using EU rules as a template¹.

3.3 The EESC points out that the existence of parallel powers - both EU and Member State - will in certain cases require a drive to adapt national institutions and laws. In any event, the case allocation system in the framework of the ECN should avoid potential duplication of efforts in the various Member States.

3.4 The Commission considers a directive to be the appropriate instrument as it takes account of "Member States' legal traditions and institutional specificities". However, the aim for the NCAs to apply the rules uniformly and coherently, notably as regards the catalogue of sanctions (Chapter V) and immunity from and reduction of fines (Chapter VI), entails overcoming the huge diversity that exists at present. The EESC therefore proposes that, in future, consideration should be given to the content of civil and administrative law being governed by means of a regulation, with the Member States retaining full autonomy with regard to criminal legislation.

3.5 Competition policy must guarantee equal opportunities. The EESC emphasises the importance of the NCAs being properly equipped with the legal means and instruments needed to tackle secret cartels

¹ [An Academic view on the Role and Powers of National Competition Authorities](#), European Parliament, 2016.

(as defined in Article 2(9) of the proposal) and also emphasises the serious harm that abuse of dominant position – usually by large companies or associations of large companies – causes to other businesses (SMEs in particular), consumers and users.

3.6 The EU Member States need to consider conducting information campaigns, as most of the general public know very little about competition rules.

4. **Specific comments**

4.1 **Fundamental rights**

4.1.1 The Commission's proposal refers to the general principles of EU law and the Charter of Fundamental Rights of the European Union², in order to guarantee respect for the following rights: defence of undertakings; freedom to conduct a business; property ownership; good administration; and an effective remedy (Articles 16, 17, 41 and 47 of the Charter).

4.1.2 The EESC points out that in order for the wide powers that the NCAs need to carry out their duties to be recognised, safeguards and guarantees of the rights of parties under investigation need to be put in place and this must be compatible with the full application of Articles 101 and 102 TFEU. The NCAs and, where necessary, national courts must ensure that these guarantees are upheld. According to the case law of the EU Court of Justice (CJEU), the presumption of innocence constitutes a general principle of EU law (Article 48(1) of the Charter), which Member States must respect when applying competition law³. The European Court of Human Rights has for its part confirmed the application of Article 6 of the European Convention on Human Rights (right to a fair trial)⁴ and has ruled on the Commission's legitimacy⁵ and the "non bis in idem"⁶ principle in competition proceedings.

4.2 **Independence and resources**

4.2.1 The independence guarantee involves exercising powers "impartially and in the interests of the effective and uniform enforcement" of the rules (Article 4(1)).

4.2.2 Member States should ensure that the staff and members of the NCAs' decision-making bodies perform their duties (Article 4(2)):

- independently from political and other external influence;
- without seeking or taking instruction from any government or other public or private entity;
- avoiding any action that is incompatible with the exercise of their duties;
- in addition:

² Judgement in *Karlsson and others*, C-292/97 ECLI: EU: C:2000:202, paragraph 37.

³ Judgements in the *Eturas* cases, (C-74/14, ECLI:EU:C:2016:42), paragraph 38, *E.ON Energie v Commission*, (C 89/11 P, ECLI:EU:C:2012:738), paragraph 72 and *VEBIC* (C 439/08, ECLI:EU:C:2010:739), paragraph 63.

⁴ *Menarini Diagnostics S.R.L. v Italy*.

⁵ C-12/03P *Commission v Tetra Laval* (2005).

⁶ See footnote 4.

- they may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct under national law;
- the grounds for dismissal should be laid down in advance in national law;
- they should not be dismissed for reasons related to the fulfilment of their duties and the exercise of their powers.

4.2.3 The EESC expresses its concern about the serious shortcomings in this regard that, according to the Commission, are currently being identified in many Member States. Adequate human, financial and technical resources (Article 5), are fundamental if NCAs are to fulfil their responsibilities. Independence requires substantial autonomy of the state structure⁷ including:

- judicial control;
- providing information to parliament;
- periodic activity reports;
- monitoring of budgetary allocations.

4.2.4 The EESC considers it essential that the NCAs are genuinely independent from the authorities. To that end, management staff must be independent experts with a proven track record. Moreover, staff turnover should be kept low and members of staff should receive adequate vocational training.

4.3 Powers

4.3.1 NCAs must be equipped with the following powers (Articles 6 to 11):

- Inspection of business premises without prior notice, with or without a court order, as required by Member State legislation:** this includes, at the very least, the right to enter any "premises, land and means of transport of undertakings"; to examine the books and other records; to make or obtain copies "in any form"; to "seal any business premises and books or records" and to request explanations. If a business refuses to allow an administrative or judicial inspection, the "authorities can obtain the necessary assistance of the police or of an equivalent enforcement agency", which "may also be obtained as a precautionary measure".
- Inspection of other premises without prior notice and with judicial authorisation:** this shall take place if there is a "reasonable suspicion" of elements existing that could be relevant to a serious infringement of Articles 101 or 102 TFEU.
- Requests for information.**
- Order to bring a detected infringement to an end.**
- Imposition of interim measures:** these apply "in cases where there is urgency due to the risk of serious and irreparable harm to competition and on the basis of a prima facie finding of an infringement". The measure must be granted for a specified term, which may be renewed.
- Establishing the binding nature of commitments offered by the undertakings.**

⁷

"Independence and accountability of competition authorities," UNCTAD 2008.

4.3.2 In many cases, the damage caused by anti-competitive conduct is difficult – or even impossible – to repair, and the EESC therefore recommends that the powers allocated to the NCAs should also be used in preventive actions.

4.4 **Infringement fines and periodic penalty payments**

4.4.1 **Infringement fines** that are "effective, proportionate and fair" may be applied when certain conduct occurs "intentionally or negligently": refusal to undergo an inspection; breaching a seal; incorrect or misleading answers; false information; or violation of interim measures. **Periodic penalty payments** cover cases of omission, such as the refusal to submit to an inspection, among others (Articles 12 and 15).

4.4.2 Following the usual criteria in criminal law, the fines that Member States must impose will take into account "both ... the gravity and ... the duration of the infringement" and the maximum amount of the fines "should not be set at a level below 10% of its total worldwide turnover in the business year preceding the decision" (Articles 13(1) and 14). Alternative criteria as regards liability for payment are laid down in the case of associations of undertakings (Article 13(2)).

4.4.3 It should be noted that the extension of liability for the payment of fines severally to all members of associations or groups of undertakings (Article 13(2)) fills a gap in the current legislation⁸.

4.4.4 Only businesses to which administrative penalties may apply fall within the scope of the proposal. Conduct that may constitute a criminal offence is a matter for the Member States. The Court of Justice of the EU has previously ruled on the compatibility of administrative and criminal penalties⁹.

4.4.5 The Committee, which has argued that the size of penalties "should act as a deterrent and [...] should be made more severe in the event of a repeat infringement"¹⁰, agrees that the ability of the competent authorities to impose penalties is a key component of competition policy. It is also concerned that competition law is currently under-enforced due to the considerable disparities in the legislation and structures of NCAs.

4.5 **Immunity/reduction of fines (leniency)**

4.5.1 Member States are provided with the power to establish the causes and procedures for immunity from or reduction of fines; however, this takes place within a framework that is set out in detail and includes:

- requirements for immunity (Article 16) and reduction (Article 17);
- conditions for applying these measures (Article 18);
- form of leniency applications (Article 19);
- a marker for a formal application for immunity (Article 20);

⁸ Judgement in case C-97/08 P, AkzoNobel NV v Commission, ECLI:EU:C:2009:536, paragraphs 45 and 77.

⁹ Judgement of 26.2.2013 - Case C-617/10 Åkerberg Fransson.

¹⁰ Opinion on the 2014 Competition Report - [OJ C 71, 24.2.2016, p. 33](#).

- summary applications when presented simultaneously to the Commission and to an NCA (Article 21);
- safeguards for those who request immunity (Article 22).

4.5.2 The rationale of the proposal is that, as the aim is to detect secret cartels, the significant disparities that exist between national laws and their effective enforcement create legal uncertainty, weaken the incentives to follow the rules and lead to inefficient EU competition policy. Furthermore, the Member States do not apply the ECN Model Programme¹¹, the fundamental aspects of which will be incorporated into the new rules.

4.5.3 In the EESC's view, it is important that leniency measures be applied uniformly by the NCAs if genuine European competition law is to exist, and the experience of the Commission, which usually applies measures of this kind¹², can be regarded as positive. However, these measures should not prevent injured parties (including consumers) from obtaining, by means of collective actions, compensation for the damage sustained.

4.6 **Mutual assistance**

4.6.1 In light of the new powers provided in this proposal, cooperation between NCAs should include mutual assistance and support in inspection procedures (Article 23), meaning that Member States must ensure that they provide notification of preliminary objections (Article 24) and comply with requests to enforce decisions (Article 25). Powers in the field of disputes have been set out (Article 26).

4.6.2 The EESC considers it necessary to impose these obligations given the transnational nature of competition policy.

4.7 **Suspension of limitation periods for the imposition of penalties**

4.7.1 The Commission's proposal sets out two specific criteria for the suspension of these periods: "for the duration of proceedings before national competition authorities of other Member States or the Commission in respect of an infringement concerning the same agreement, decision of an association or concerted practice" (Article 27(1)) and if judicial proceedings are taking place (Article 27(2)).

4.7.2 The EESC notes that the possible conflict with the requirements, which also provide for scenarios in which these periods may be disrupted in the event of judicial proceedings, should be addressed during the transposition of the directive.

¹¹ Commission Notice on immunity from fines and reduction of fines in cartel cases, [OJ C 298, 8.12.2006, p. 17](#).

¹² See *Cartel leniency in EU: overview*, Thomson Reuters. Examples of reductions and waivers applied by the Commission: Riberebro 50% ([OJ C 298, 8.12.2006, p. 17](#)); Hitachi 30%, and others; Philips, written off; Hitachi 50%; Schenker and others 55-40%; DHL, immunity (C-428/14, DHL/AGCM); Eberspächer 45% and Webasto, immunity.

4.8 **Power of NCAs to institute legal proceedings in their own right**

4.8.1 The proposal argues that NCAs should have the necessary legal standing to directly bring actions before a judicial authority, and should be entitled to take part in their own right as an appellant or respondent in judicial proceedings, with the same rights as the other parties (Article 28).

4.8.2 The EESC considers that, at present, not being able to do this makes it difficult for NCAs to take action in some Member States¹³; this power should therefore be put in place in order to comply with the requirements imposed upon NCAs under EU competition policy.

4.9 **Admissibility of evidence before NCAs**¹⁴

4.9.1 The EESC points out the importance of NCAs being able to use "documents, oral statements, recordings and all other objects containing information, irrespective of the medium on which the information is stored" (Article 30) as evidence.

Brussels, 5 July 2017

Georges DASSIS

The president of the European Economic and Social Committee

¹³ In its reply to the Commission's questionnaire, the German NCA ("Bundeskartellami") cited this as one of the causes of a "severely dysfunctional" system.

¹⁴ Limitations on the use of information (Art. 29). The Commission has stated that this Article may be reworded.