Empowering competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

2017/0063(COD) - 14/11/2018 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 569 votes to 70, with 36 abstentions, a legislative resolution on the 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.

The European Parliament's position adopted at first reading under the ordinary legislative procedure amended the Commission proposal as follows:

Fundamental rights: proceedings concerning infringements of Article 101 (agreements between undertakings, decisions of associations of undertakings and concerted practices) or 102 (abuse of a dominant position) of the Treaty on the Functioning of the European Union, including the exercise of the powers provided for in the Directive by national competition authorities (NCAs), shall comply with the general principles of Union law and the **Charter of Fundamental Rights of the European Union**.

This Directive covers the application of Articles 101 and 102 TFEU and the parallel application of national competition law to the same case. As regards Article 31(3) and (4) of this Directive, this Directive also covers the application of national competition law on a stand-alone basis.

The exercise of the powers, conferred by this Directive on NCAs, including the investigative powers, shall be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union, in accordance with the case law of the Court of Justice of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties.

In particular, NCAs shall inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU in the form of a statement of objections or a similar measure prior to taking a decision finding an infringement.

Independence and resources: the amended text specifies that staff members and decision makers within NCAs shall:

- be able to carry out their duties and exercise their powers **independently** of any external political or other influence;
- be subject to procedures to ensure that, for a reasonable period of time after leaving office, they refrain from dealing with implementation procedures that may give rise to **conflicts of interest**.

Member States shall ensure that the members of the decision-making body of national administrative competition authorities are selected, recruited or appointed according to **clear and transparent procedures** laid down in advance in national law.

In addition, NCAs shall: (i) have a sufficient number of qualified staff; (ii) be able to conduct investigations; (iii) be able to spend the allocated budget independently for the performance of their duties; and (iv) submit periodic reports on their activities and resources to a governmental or parliamentary body.

Powers: national administrative competition authorities shall be able to:

- be able to carry out all necessary **unannounced inspections** of undertakings and associations of undertakings with a view to the application of the competition rules and have the right of access to all information to which the entity subject to the inspection has access;
- require undertakings and associations of undertakings, as well as any other natural or legal person, to provide all necessary information within a specified and reasonable time limit. Requests for information shall be proportionate without requiring the addressee of the request to admit the existence of an infringement of the competition rules;
- invite to an **interview** any representative of an undertaking or association of undertakings, any representative of other legal persons and any natural person where such representative or person may have relevant information;
- **reopen enforcement proceedings** where there have been material changes to any of the facts on which a decision was based, where undertakings or associations of undertakings act contrary to their commitments, or where a decision was based on incomplete, incorrect or misleading information provided by the parties.

If two remedies are equally effective, NCAs shall favour the solution that is **least burdensome for the undertaking**. NCAs shall inform the Commission when they decide to discontinue proceedings.

Fines and periodic penalty payments: the maximum amount of the fine that national competition authorities may impose on each undertaking or association of undertakings participating in an infringement is **not less than 10 %** of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision.

Member States shall ensure that national administrative competition authorities may by decision impose **effective, proportionate and dissuasive periodic penalty payments** on undertakings and associations of undertakings. Such periodic penalty payments shall be determined in proportion to the average daily total worldwide turnover of such undertakings or associations of undertakings in the preceding business year per day and calculated from the date appointed by that decision in order to compel those undertakings or associations of undertakings at least to submit to an inspection or to comply with a decision.

Leniency: Member States shall ensure that national competition authorities have in place leniency programmes that enable them to **grant immunity from fines** to undertakings for disclosing their participation in **secret cartels**. The amended text underlined the need to enhance legal certainty for companies in the internal market and to make leniency programmes more attractive throughout the Union, by allowing all NCAs to grant immunity from fines and reduction of fines and to accept summary applications on the same conditions.

In order to be eligible for leniency, the applicant shall: (i) end its involvement in the alleged secret cartel, except in cases where an NCA considers that its continued involvement is reasonably necessary to preserve the integrity of the investigation; (ii) cooperate genuinely, fully, on a continuous basis and expeditiously with the NCA.

Parliament introduced amendments to: (i) require NCAs to inform applicants for immunity from fines whether or not conditional immunity is granted; (ii) specify the relevant information and evidence to be provided by the applicant to the NCA without delay with regard to the alleged secret agreement; and (iii)

specify the information to be provided by companies to the NCA so that a marker granting them a place in the order in which leniency applications are received can be granted.

Mutual assistance: Member States shall ensure that national administrative competition authorities are empowered in their own territory to exercise the powers referred to in this Directive, in accordance with their national law on behalf of and **for the account of other national competition authorities** in order to establish whether there has been a failure by undertakings or associations of undertakings to comply with the investigative measures and decisions of the applicant national competition authority. The applicant national competition authority and the requested national competition authority shall have the power to exchange and to use information in evidence for this purpose.