European Commission aims to make National Competition Authorities more effective

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On 22 March 2017, the European Commission issued a proposal for a Directive 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 proposed Directive, if adopted, would entail the most significant reform of the antitrust rules in the European Union in over ten years.

Following the "modernisation" of EU antitrust through Regulation 1/2003, National Competition Authorities (NCAs) have become the primary enforcers of the European rules on anticompetitive practices: since 2004, the Commission has adopted only 15% of the enforcement decisions in the field of EU antitrust; the remaining 85% were adopted by the NCAs.

However, as the Commission pointed out in its 2014 Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, enforcement varies significantly from one EU Member State to another. Shortcomings in the institutional make-up and the legislative framework of the individual NCAs explain some of these differences. *I*n addition, the increased NCA activity also means that NCAs must work together in cross-border investigations and help each other ensure the effectiveness of their decisions; but often Member States lacked a legal framework to do so. Following a public consultation launched at the end of 2015, the Commission now proposes to overcome these obstacles and increase the effectiveness of national enforcement in six (broad) areas:

1. *Independence and resourcing (*Articles 4 and 5 of the proposed Directive). Some NCAs have struggled with political interference into their operations; a notable example is the Polish Office for Competition and Consumer Protection whose president is not nominated for a fixed term and can therefore be dismissed at any moment. To avoid such issues, the proposed Directive requires EU Member States to ensure that the independence of their NCAs is enshrined in national laws. Also included in this chapter of the Directive is the requirement that NCAs be allowed to prioritise cases (which, for example, the Spanish National Authority for Markets and Competition currently cannot do). Finally, the Member States also need to ensure the practical effectiveness of the NCAs, by providing the necessary funding and resources for their operation.
2. *NCA powers* (Articles 6 to 11). These provisions mainly concern the investigative powers of the NCAs, such as the power to conduct on-site inspections. It is worth noting that during inspections, the NCAs will be able to obtain copies of all information, even if stored digitally or only accessible from the premises of the undertaking raided (but not located there). NCAs are also required to have the ability to impose interim measures and resolve cases through

commitments.

3. *Fines which NCAs can impose* (Articles 12 to 15). The proposed Directive requires that NCAs are able to impose fines both for substantive and procedural breaches of antitrust rules. The proposal also requires that the EU notion of "undertaking" is applied when imposing fines to avoid situations such as in Germany, where several companies (most notoriously in the "sausage" cartel) managed to escape fines imposed by the Federal Cartel Office by restructuring the legal entities operating the business which infringed the antitrust rules. In terms of the level of the fines, t is remarkable that the proposed Directive requires that the maximum amount of fines NCAs can impose "should not be set at a level below 10% of [the undertaking's] total *worldwide* turnover in the business year preceding the decision" (Article 14). This means that, in case of parallel investigations by multiple NCAs, the maximum amount of the fine can exceed (significantly) the maximum amount which the Commission can impose (which is also 10% of the worldwide turnover of the undertaking, but the Commission will normally apply this maximum only once). Nothing is foreseen to ensure that NCAs take into account fines imposed by other NCAs for the same infringement.
4. *Use of leniency programmes* (Articles 16 to 22). A particularly pressing issue in recent years has been the interplay between parallel applications for leniency to multiple NCAs (and, in addition, to the European Commission). The proposed Directive creates a system to improve predictability of leniency rankings. However, the proposal goes further than that and seems to harmonise national leniency systems, including limiting them to "secret cartels". It is unclear whether this is meant to prevent NCAs from granting fine reductions for cooperation in case of disclosure of other antitrust infringements (as was, for example, the case in the UK until now). Furthermore, the requirement that leniency applicants can only disclose the fact and content of their application to "other competition authorities" is problematic since "competition authorities" has been defined as the European Commission and the NCAs: on this reading, disclosure to authorities outside of the EEA seems to be prohibited without the authorisation of the NCAs (although the EC leniency notice is just as problematic in this respect).
5. *Mutual assistance between NCAs* (Articles 23 to 26). This part of the proposed Directive is specifically aimed at creating a legal framework for the notification and execution of decisions of NCAs in other Member States.
6. *Limitation periods for the imposition of penalties* (Article 27). This article provides for a mandatory suspension of the limitation period for an NCA to impose a fine during the time another NCA is investigating the same infringement – quite a remarkable provision, allowing NCAs to "tag-along" investigations of other NCAs (although the proposal specifies that the suspension is "without prejudice to absolute limitation periods provided for under national law").

The proposal will now be discussed in the European Parliament and the Council (where amendments can be made). The draft currently stipulates that Member States would have two years to transpose it into national law after it is adopted and enters into force. How much the proposed Directive will affect enforcement in a given Member State depends on the current institutional set-up and legal framework in that Member State, although virtually every NCA will see some changes (and some would say that the proposed Directive is the sum of the wish lists of all the NCAs). In any event, as currently drafted, the proposed Directive would increase the risk of parallel investigations by multiple NCAs and increase the level of the fine that they cumulatively may impose (even beyond the maximum level set for the Commission). Query whether in those circumstances "modernisation" will not overshoot its objectives?