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# Empowering national competition authorities (NCAs)

Since 2003, national competition authorities (NCAs) have boosted the enforcement of EU competition and antitrust rules significantly. However, each year losses of €181-320 billion accrue because of undiscovered cartels, which increase prices by between 17 % and 30 % on average. In March 2017, the Commission proposed a new directive to ensure that all NCAs have effective investigation and decision-making tools, could impose deterrent fines, and have well-designed leniency programmes and enough resources to enforce EU competition rules independently.

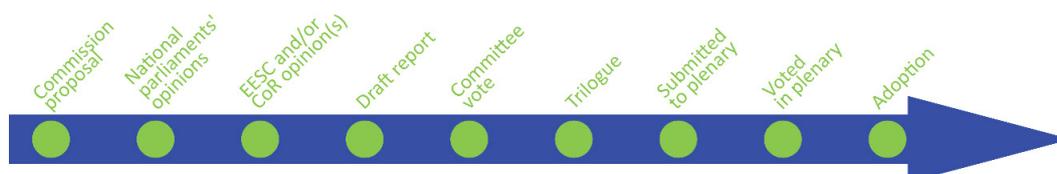
On 30 May 2018, Parliament and Council reached an agreement on the proposal in trilogue. It increases the independence, resources and powers of NCAs and envisages more harmonisation of the national leniency programmes and reduced burdens on undertakings. Parliament adopted the text on 14 November 2018, the final act was signed on 11 December 2018.

### 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, 22.3.2017, 2017/0063(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Economic and Monetary Affairs (ECON)
Rapporteur:	Andreas Schwab (EPP, Germany)
Shadow rapporteurs:	Tibor Szanyi (S&D, Hungary); Joachim Starbatty (ECR, Germany); Petr Ježek (ALDE, Czech Republic); Paloma López Bermejo (GUE/NGL, Spain); Michel Reimon (Greens/EFA, Austria); Barbara Kappel (ENF, Austria)
Procedure completed.	Directive (EU) 2019/1 <a href="#">OJ L 11, 14.1.2019, pp. 3-33.</a>

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## Introduction

The EU's Member States are essential partners when it comes to [enforcing](#) EU competition and antitrust rules, something that is key to creating an open, innovative and job-creating single market. Since 2004, the national competition authorities (NCAs), together with the European Commission have been empowered to apply EU antitrust rules by [Regulation \(EC\) 1/2003](#). This is done in close cooperation within the [European Competition Network](#) (ECN).

Since 2004, NCAs have adopted 865 competition decisions (compared with the Commission's 128) which equals 85 % of decisions.<sup>1</sup> According to the Commission, NCAs have boosted the enforcement of EU competition rules significantly. However, each year losses of [€181-320 billion](#) accrue because of undiscovered cartels that increase prices by an average of between 17 % and 30 %.

There are four underlying issues that affect the ability of NCAs to be more effective enforcers of the decentralised system put in place by Regulation 1/2003: (1) a lack of effective competition tools; (2) a lack of effective powers to impose deterrent fines; (3) divergences in leniency programmes<sup>2</sup> discouraging companies from coming clean across Europe; and (4) a lack of safeguards to ensure that NCAs can act independently when enforcing the EU competition rules and have the resources they need to carry out their work.<sup>3</sup>

According to the Commission, less effective enforcement means that the conditions for markets to function efficiently are not ensured. Businesses cannot compete fairly on their merits and face barriers to market entry. Consumers miss out on the benefits of competition enforcement, namely lower prices, better quality, or wider choice.

Before presenting its [proposal](#) for a new directive on the empowerment of national competition authorities in March 2017, the Commission announced in its [single market strategy](#) (October 2015) that effective compliance is essential to deliver the opportunities and benefits of the single market and that a more consistent and efficient enforcement policy would improve overall compliance with single market rules and EU law in general.

1 For example, in 2014 the French NCA fined manufacturers of home care and personal care products nearly €1 billion for having coordinated their commercial policy towards supermarkets. These actions allowed them to maintain artificially high prices for the end consumers. Another decision taken in 2014 concerned Greece. The Greek NCA fined poultry meat producers nearly €40 million for fixing prices of fresh and frozen poultry meat and for allocating customers. For more decisions and examples, see European Commission, [Impact assessment](#), SWD(2017) 114.

2 The proposal provides, in its Article 2, the following definitions:

'Leniency' means both immunity from fines and reduction of fines.

'Leniency programme' means a programme concerning the application of Article 101 TFEU or national competition law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel.'

3 European Commission, executive [summary](#) of the impact assessment, SWD(2017) 115, p. 2.

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The European Parliament in its [resolution](#) of 26 May 2016 on the Commission's single market strategy, encouraged the Commission to deepen its work on enforcement. The Parliament pointed out that 'many measures have already been adopted but are not yet properly enforced, thus undermining the level playing field in the single market'. It called on the Commission to ensure that administrative coordination, cooperation and enforcement were prioritised at all levels by taking well-targeted enforcement action based on transparent and objective criteria.

## Context

The Commission proposal is intended to complement Regulation (EC) No 1/2003. It will give substance to the requirement in Article 35, so that Member States should designate NCAs in such a way that the provisions of the regulation are effectively complied with. Ensuring that the NCAs have effective decision-making and fining powers should mean that the requirements of Article 5 of Regulation (EC) No 1/2003 (which confers on the NCAs the right to adopt decisions and fines when applying Articles 101 and 102 of the [Treaty on the Functioning of the European Union](#) (TFEU)) are fully respected.<sup>4</sup>

The proposal is also based on Articles 103 and 114 of the. Ensuring that the NCAs have the means and instruments to be more effective enforcers of Articles 101 and 102 TFEU falls within the ambit of Article 103(1) TFEU as it is conducive to ensuring the full effectiveness of competition rules. Furthermore, such measures can be adopted pursuant to Article 103(2)(e) TFEU 'to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article' and to Article 103(2)(a) 'to ensure compliance with the prohibitions laid down in Article 101(1) and Article 102 by making provision for fines and periodic penalty payments'.<sup>5</sup>

## Existing situation

According to the Commission, there is 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. Many NCAs do not have the necessary means and instruments to enforce Articles 101 and 102 TFEU effectively. In particular:<sup>6</sup>

(1) Some NCAs do not have enforceable safeguards<sup>7</sup> ensuring that they can apply EU competition rules without taking instructions from public or private entities. A number of authorities struggle with insufficient human, technical and financial resources.

4 [COM 2017\(142\)](#), p. 4.

5 [COM 2017\(142\)](#), p. 5.

6 [COM 2017\(142\)](#), pp. 2-4.

7 The absence of enforceable safeguards at EU level for NCAs could lead to direct or indirect influence from other public or private bodies 'For example, a risk of influence by other state bodies exists where state-owned companies or activities by state bodies are the subject of an investigation by the NCA or where its enforcement action would interfere with other public interests'. See European Commission, [Impact assessment](#), SWD(2017) 114, point 2.2.4.



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(2) Many NCAs do not have all the tools they need to detect and tackle competition law infringements effectively. Some NCAs do not have key investigative powers such as the ability to gather evidence stored on mobile phones, laptops, tablets, etc. – a key drawback in the digital age.

(3) Not all NCAs can impose effective fines. In some Member States, national law prevents NCAs from imposing fines for breaches of EU competition law, e.g. in some Member States companies can restructure to escape paying fines. The level of fines imposed varies greatly: the penalty for the same offence can be much higher in one Member State than another without that difference being justified by objective circumstances.

(4) Divergences in leniency programmes across the Member States discourage companies and individuals from coming clean and providing evidence of anti-competitive practices. The Commission points out in its impact assessment, that companies that choose to cooperate are required to provide self-incriminating leniency material. However, the level of protection granted for such material varies significantly. For example, in 20 Member States leniency statements are accessible to public prosecutors and/or the police, who could use it for purposes other than for the enforcement of EU competition rules. In 12 Member States, civil courts in proceedings other than actions for damages have access to such statements. This might expose companies cooperating with the competition authorities to liability to other proceedings.<sup>8</sup>

(5) Many NCAs do not have adequate fact-finding tools. Other gaps in NCAs' ability to provide mutual assistance also undermine the European system of competition enforcement which is designed to work as a cohesive whole. For example, administrative NCAs cannot request the enforcement of their fines across borders if the infringer has no legal presence in their territory. In the digital era, many companies sell over the internet, potentially to numerous countries, but may have a legal presence in only one Member State for instance. These companies currently have a safe haven from paying fines.

A legislative proposal is therefore needed to empower NCAs to be more effective enforcers of EU competition rules (for instance with necessary guarantees of independence and resources and enforcement and fining powers). According to the Commission, removing the national obstacles that prevent NCAs from enforcing the rules effectively would help remove distortions to competition in the internal market and stop consumers and businesses, including SMEs, from being put at a disadvantage and suffering detriment from such measures.

## Comparative elements

In the [impact assessment](#) accompanying the proposal, the Commission points out that the level of enforcement of EU competition rules is very uneven in the EU, not only because of the diverging market sizes in the Member States. For example, in the period between 2004 and 2015, the Irish (2), Maltese (3), Estonian (4), Latvian (5), Luxembourgish (5), Cypriot (6), Bulgarian (7), Czech (10), Finnish (14) and Polish (14) NCAs adopted fewer than 15 decisions each, whereas the French (119), German (113), Italian (112) and Spanish (101) NCAs each took over 100 decisions.<sup>9</sup>

<sup>8</sup> [Impact assessment](#), SWD(2017) 114, p. 24.

<sup>9</sup> [Impact assessment](#), SWD(2017) 114, p. 13.

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With respect to the relevant investigative powers, some NCAs (Bulgaria, Denmark and Italy) lack the fundamental power to inspect the homes of business people for evidence of infringements. For instance, the power to collect digital evidence from laptops and mobile phones is important as the storage and circulation of information is largely digital. In some cases, the evidence necessary to prove for instance that companies are engaged in a price-fixing cartel exists only in digital form. However, several authorities face key limitations: six NCAs cannot access data stored on clouds or servers located in other countries even though many companies routinely keep data there. Competition authorities need to be able to access the same data as the company being inspected. Furthermore, five NCAs cannot access mobile phones in inspections to check if company employees have any information about the alleged infringement, even though this is an obvious means by which cartelists can communicate.<sup>10</sup>

Regarding the relevant decision-making powers, for instance, 11 NCAs cannot impose structural remedies to restore competition on markets.<sup>11</sup>

## Parliament's starting position

The European Parliament [resolution](#) of 26 May 2016 on the single market strategy is primarily a response to the Commission communication. It supports the overall objectives of the Commission and recognises its potential to help achieve economic prosperity, increase competitiveness and secure sustainable growth and new jobs.

The Parliament, however, called on the Commission to deepen its work on enforcements and 'to ensure that administrative coordination, cooperation and enforcement are prioritised at all levels (EU, and between Member States and national, local and regional authorities) by taking well-targeted enforcement action based on transparent, objective criteria, ensuring that the most economically significant cases of unjustified or disproportionate barriers are addressed'.

## Council starting position

The Council largely welcomed the single market strategy. In February 2016, however, it [emphasised](#) 'that implementation, compliance and enforcement should be further improved, upgraded and intensified'. In that regard, the Council called on the Commission 'to prioritise smart but firm enforcement actions, based on transparent and objective criteria, targeting the most economically significant cases of unjustified or disproportionate barriers, and drawing on dedicated, ring-fenced resources'.

<sup>10</sup> [Impact assessment](#), SWD(2017) 114, p. 16.

<sup>11</sup> [Impact assessment](#), SWD(2017) 114, p. 17.



## Proposal

### Preparation of the proposal

In 2013/2014, the Commission conducted an assessment of the functioning of Regulation (EC) No 1/2003. Based on the results of this analysis, the 2014 Commission's [communication](#) on 10 years of Council Regulation 1/2003 found that there was scope for the NCAs to be more effective enforcers, mentioning the need to guarantee that NCAs (1) have adequate resources and are sufficiently independent, (2) have an effective toolbox, (3) can impose effective fines, and (4) have effective leniency programmes.<sup>12</sup>

On 19 April 2016, the European Parliament's Committee on Economic and Monetary Affairs (ECON) and the European Commission's Directorate-General for Competition co-organised a [public hearing](#) on how to empower NCAs to be more effective enforcers. The hearing was followed by two panel discussions on the four topics covered by the public consultation. The participants in these discussions, including some 150 stakeholders from academia, business, consultancy, law firms, press, private individuals and public authorities, widely agreed with and supported the objectives of the initiative.<sup>13</sup>

In its [impact assessment](#), the European Commission proposed four policy options:

1. a baseline scenario of taking no EU action;
2. exclusively soft action;<sup>14</sup>
3. EU legislative action to provide NCAs with minimum means and instruments to be effective enforcers, complemented by both soft action and detailed rules where appropriate; and
4. provision of detailed and uniform means and instruments for NCAs through EU legislative action.

The preferred option was the third. Option 2 was discarded by the Commission as it would not provide a sound legal basis to ensure that all NCAs have the necessary means and instruments to be effective enforcers. Option 4 was discarded as it would have brought limited additional benefits relative to the preferred option but at the same time entail greater interference in national legal systems and traditions.

According to the Commission, the benefits of the preferred option (e.g. reducing the estimated losses of €181-320 billion for business and consumers) would exceed the costs of implementation by far. It would entail [implementation costs](#) of the legislative initiative for public administrations, some costs for training and familiarisation with the changes introduced and potentially a limited increase in staff in some NCAs. Companies would face limited initial adaptation costs in terms of familiarisation with the new rules (which would vary depending on the Member State in which they operate).

<sup>12</sup> [COM 2017\(142\)](#), pp. 9-10.

<sup>13</sup> [COM 2017\(142\)](#), p. 11.

<sup>14</sup> Soft action could take the form of ECN recommendations or resolutions. These documents are setting out the position of all ECN members and can be used as advocacy tools to influence policymakers. See European Commission, [Impact assessment](#), SWD(2017) 114, point 5.2.



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An indicative amount of €1 million per year is envisaged to maintain, develop, host, operate and support the ECN system in compliance with the relevant confidentiality and data security standards. Other administrative costs incurred in connection with the functioning of the ECN, e.g. organisation of meetings, provision of training programmes, and the issuing of guidelines and common principles, are estimated at €500 000 per year.<sup>15</sup>

The Ex-Ante Impact Assessment Unit of DG EPRS produced an [appraisal](#) of the Commission's impact assessment. The appraisal, inter alia, concluded that despite 'solid expertise', there were some weaknesses: these included 'limited quantification of costs and benefits' and the 'rather limited' range and assessment of policy options.

## The changes the proposal would bring

The Commission [proposal](#) consists of 10 chapters comprising 34 articles. The proposal suggests, inter alia, that NCAs, can perform their duties and exercise their powers independently from political, public and other external influence (Articles 4 and 5). The proposal ensures that NCAs have the power to set their priorities in individual cases including the power to reject complaints for priority reasons. In this context, the proposal does not interfere with Member States' prerogative to define general policy objectives. In addition, Article 5 introduces the requirement for Member States to ensure that NCAs have the human, financial and technical resources necessary to perform their core tasks under Articles 101 and 102 TFEU.

Articles 6 to 11 provide for the core minimum effective powers to investigate (e.g. to inspect business and non-business premises, to issue requests for information) and to take decisions (e.g. to adopt prohibition decisions including the power to impose structural and behavioural remedies, or commitment decisions). The proposal will also provide for effective sanctions for non-compliance. These would be calculated in proportion to total turnover, but Member States would have flexibility in how this is implemented.

Articles 12 to 15 deal with fines and penalty payments. To ensure NCAs can set deterrent fines on the basis of a common set of core parameters: first, there should be a common legal maximum of no less than 10 % of worldwide turnover and second, when setting the fine, NCAs should have regard to the core factors of the gravity and duration of the infringement.

Articles 16 to 22 deal with leniency and aims to ensure that employees and directors of companies that file for immunity are protected from individual sanctions.

Articles 23 to 26 describe the cross-border mutual assistance aspect. If, for instance, one NCA requests another NCA to carry out investigative measures on its behalf, officials from the requesting NCA have the right to attend and actively assist in that inspection.

<sup>15</sup> [COM 2017\(142\)](#), p. 14.

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## Views

### Advisory committees

Consultation of the European Economic and Social Committee (EESC) is [mandatory](#) on this proposal.

The EESC appointed Juan Mendoza Castro (Workers – Group II, Spain) to draft the opinion on the Commission proposal. The [opinion](#) was adopted in the EESC plenary on 5 July 2017. The EESC welcomes the Commission's proposal, but proposes not least 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'.

### National parliaments

The [deadline](#) for the submission of 'reasoned opinions' on the grounds of subsidiarity was 19 June 2017. The national parliaments largely support the Commission proposal, so there was no reason to trigger the '[yellow card](#)' procedure.

### Stakeholders' views<sup>16</sup>

The Commission launched an online [public consultation](#) from 4 November 2015 until 12 February 2016 within the framework of its data collection and better regulation instruments. Stakeholders were invited to contribute their views on how to empower the national competition authorities (NCAs) to be more effective enforcers.

By the end of the consultation period, the Commission had received [181 replies](#) from various stakeholders, ranging from private individuals to law firms and consultancies, companies and industry associations, consumer organisations, academics, non-governmental organisations, think tanks and trade unions, and public authorities, including a number of ministries and NCAs, from within and outside the EU.

Overall, 76 % of respondents considered that NCAs could do more to enforce EU competition rules than they currently do. Moreover, 80 % supported action being taken to boost enforcement by NCAs. By stakeholder category this broke down as: 100 % of academic institutions, consumer organisations, trade unions and NCAs; 86 % of NGOs; 84 % of consultancies/law firms; 77 % of companies (including SMEs, micro-enterprises and, sole traders); 67 % of think-tanks and 61 % of industry associations. 64 % of the stakeholders who participated in the public consultation considered that this should preferably be a combination of EU and Member State action with the remaining preferences being 19 % in favour of EU action only and 8 % in favour of Member State action only.<sup>17</sup>

<sup>16</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

<sup>17</sup> [COM 2017\(142\)](#), p. 10.

## Legislative process

The Council in its Competitiveness configuration (Internal Market, Industry, Research and Space) dealt with the empowerment of NCAs at its 29-30 May 2017 [meeting](#). The Council took note of a presentation by the Commission. The technical examination of the proposal has already begun in the Council preparatory bodies.

In the European Parliament, the lead committee on empowering NCAs is the Economic and Monetary Affairs (ECON) Committee. The ECON Committee appointed Andreas Schwab (EPP, Germany) as rapporteur. He presented the [draft report](#) to the ECON committee on 9 October 2017. The rapporteur 'fully supports the overall objectives of the proposed directive'. He believes, however, that a reference to the Charter of Fundamental Rights of the European Union and the general principles of Union law is not sufficient. He therefore suggests setting out the key safeguards in relation to proceedings for the application of Articles 101 and 102 TFEU. In particular, he considers that in order to exercise the rights of defence it is essential for the parties under investigation to be informed of the preliminary objections against them under Articles 101 and 102 TFEU prior to a decision adversely affecting their rights. In this context, he also believes that it is important to guarantee that certain communications between lawyers and clients are excluded from enquiry.

ECON discussed the amendments to the draft report at its October and November 2017 meetings. The [report](#) was adopted in the ECON committee on 27 February 2018. The Committee on Internal Market and Consumer Protection (IMCO) has provided an opinion. On 13 March 2018, the plenary confirmed the committee's decision to enter into interinstitutional (trilogue) negotiations (Rule 69c).

Members had introduced amendments to, inter alia, (1) require NCAs to inform an (immunity) applicant<sup>18</sup> whether or not it has been granted conditional immunity; (2) specify the information and evidence that the applicant must promptly provide to the NCA with respect to the alleged secret agreement; (3) to specify the information to be provided by the undertaking to the NCA so that a 'marker'<sup>19</sup> for a formal application for immunity might be granted.

In this context, Members considered it essential that the parties under investigation receive a statement of objections before NCAs take a decision finding an infringement. Furthermore, NCAs should conduct proceedings within a reasonable timeframe.

18 The proposal includes the following definition in its Article 2: 'Applicant means an undertaking that applies for immunity or reduction from fines under a leniency programme. Applicant authority means a national competition authority which makes a request for mutual assistance ...'

19 Article 20 of the proposal explains the markers for a formal application for immunity. The proposed article reads as follows:

'(1) Member States shall ensure that an undertaking wishing to make an application for immunity can initially apply for a marker to national competition authorities. The marker grants the applicant a place in the queue for a period to be specified on a case-by-case basis by the national competition authority receiving the application for a marker. It allows the applicant to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity. (2) Member States shall ensure that national competition authorities have discretion whether or not to grant a marker. (3) Member States shall ensure that if the applicant perfects the marker within the specified period, the information and evidence provided will be deemed to have been submitted at the time the marker was granted.'



On 30 May 2018, Parliament and Council reached an agreement in trilogue. The [agreement](#) provides that companies under investigation will have to be informed of the preliminary objections raised against them in a statement of objections. This has not been the practice in all Member States so far. In future, companies in the EU will no longer be facing fines, without having had the possibility to properly defend themselves before – for the time being, there are still diverging rules in place across Member States. In addition, the Parliament insisted that the Commission, in light of developments in the digital economy, delivers a new analysis on the increased use of ‘interim measures’.

In detail, the agreement includes, among other things, the following points:

- > The members of the decision-making body of NCAs are selected, recruited or appointed according to clear and transparent procedures laid down in advance. They should have a sufficient number of qualified staff and sufficient financial, technical and technological resources.
- > If two remedies are equally effective, NCAs should favour the least burdensome for the undertaking, in line with the principle of proportionality;
- > In order to reduce administrative and other considerable burdens in terms of time, it should be possible for applicants to submit statements in relation to full or summary applications as well as requests for ‘markers’, either in an official language of the Member State of the NCA concerned, or, where bilaterally agreed between the NCA and the applicant, in another official language of the Union.
- > The legality and proportionality of the ‘interim measure’ may be reviewed in expedited appeal procedures.
- > Leniency: NCAs should have a leniency programme allowing them to grant immunity from fines to undertakings for secret cartels.

In the Council, the Permanent Representatives Committee (Coreper) confirmed the compromise text during its 20 June 2018 meeting.

The ECON committee endorsed the compromise text on 11 July, and the plenary adopted the agreed text on 14 November 2018.

The Council adopted it on 4 December, the final act was signed on 11 December 2018 and published in the [Official Journal](#) of the EU on 14 January 2019.

The directive entered into force on 3 February 2019. Member States must transpose its provisions into national law by 4 February 2021.



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### Other sources

[Empowering competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market](#), European Parliament, Legislative Observatory (OEIL).

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