



EUROPEAN COMMISSION

*Brussels, 20.2.2018
C(2018) 880 final*

*Ms Laura BOLDRINI
President of the Camera dei Deputati
Piazza Montecitorio
IT-00100 ROME*

Dear President,

The Commission would like to thank the Camera dei Deputati for its Opinion on the Commission's 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}.

One of the Commission's strategic objectives is to achieve a new boost for jobs, growth and investment. In order to achieve this objective, it is essential to ensure the effective and coherent application of European Union competition law by national competition authorities and national courts. Since the entry into force of the Council Regulation (EC) No 1/2003¹, national competition authorities have applied European Union competition rules alongside the Commission. Now, European Union competition rules are being enforced on a scale which the Commission could never have achieved on its own, with national competition authorities accounting for 85% of all decisions applying European Union competition rules.

However, national competition authorities still face issues that prevent them from effectively performing their role. The proposal would ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers they need to carry out their job. Eliminating these obstacles would help eliminating distortions to competition in the internal market for the benefit of consumers and businesses, including small and medium-sized enterprises, which currently suffer harm from such obstacles. The proposal would also enable national competition authorities to effectively provide each other with mutual assistance, ensuring a more level playing field in the internal market.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

The Commission welcomes the support by the Camera dei Deputati for the proposed Directive and has taken due note of all its detailed views and concerns.

The Opinion of the Camera dei Deputati has been made available to the Commission's representatives in the forthcoming negotiations with the co-legislators and will inform these discussions. Regarding some of the points raised by the Camera dei Deputati, the Commission would like to make the following clarifications.

Regarding the views of the Camera dei Deputati on Articles 4 and 5 of the proposal, the Commission would like to point out that both articles only set minimum guarantees and leave it to Member States to decide how to best implement them. This approach minimises the interference in national specificities and allows Member States to set higher standards. For example, Member States may include rules providing for appointment procedures as part of the framework to guarantee independence or allowing for the financing of national competition authorities not only from the state budget but also from external sources, such as companies, as foreseen in Italy.

Regarding the Camera dei Deputati's comment that the strengthening of the powers of national competition authorities calls for reflection on the scope of the guarantees foreseen in Article 3, the Commission takes due note of all detailed views on what would be an appropriate scope of such guarantees. The Commission opted for proposing a broad provision that the exercise of powers should be subject to appropriate safeguards in accordance with general principles of Union law and Article 3 of the Charter of Fundamental Rights and explaining in recital 12 in greater detail what is required. This reflects the approach taken in the General Data Protection Regulation (EU) 2016/679. It will be for the Member States to design the specific safeguards in accordance with general principles of Union law and the Charter of Fundamental Rights once the Directive is adopted. The safeguards that are already embedded in some of the provisions of the proposal, such as prior judicial authorisation for inspections of non-business premises, are in line with general principles of Union law and the Charter of Fundamental Rights. The Commission would like to point out that such general principles and the Charter do not require prior judicial authorisation for inspection of business premises but the proposal does not prevent Member States from requiring such prior authorisation.

Regarding the Camera dei Deputati's view that Article 9 of the proposal, like Article 7 of Regulation 1/2003, should specify that structural remedies can only be imposed either where there is no equally effective remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy, the Commission would like to clarify that the principle of proportionality, referred to in Article 9, already requires that, when choosing between two equally effective remedies, national competition authorities should choose the remedy which is the least burdensome for the undertaking.

The Commission takes note of the Camera dei Deputati's suggestion that the elaboration of best practices on fines and periodic penalties could be useful. This is indeed foreseen in the Implementation Plan accompanying the proposal. Concerning the request to reconsider the provisions in Articles 12 to 14 regarding the calculation of the fine for associations of undertakings and recovery of fines from them, the Commission underlines that associations regularly participate in competition infringements but typically have very little turnover compared to their members. National competition authorities need to be able to fine the members of the association involved in the infringement to deter them from engaging in illegal practices. However, the proposed provisions do foresee a number of safeguards. For example, where necessary, to ensure full payment of the fine by the association of undertakings, national competition authorities can ask in the first place for payment of the outstanding amount of the fine only by undertakings whose representatives were members of the decision-making bodies of the association. Also, payment cannot be required from those members that did not implement the infringement and either were not aware of it or have actively distanced themselves from it before the investigation started.

With respect to the Camera dei Deputati's call to ensure that the notion of undertaking referred to in Article 12(3) does not translate into the application of the presumption of liability, the jurisprudence of the Court of Justice of the European Union indeed requires the exercise of decisive influence. It is only in cases of 100% or nearly 100% ownership of a subsidiary by the parent company that the jurisprudence of the Court allows for a rebuttable presumption of decisive influence. This reflects the fact that such a subsidiary is very unlikely to determine its own market conduct independently.

With respect to Camera dei Deputati's remark regarding the maximum amount of the fine, the Commission would like to clarify that the maximum fine foreseen in Article 23(2) of Regulation No 1/2003, which is 10% of the total turnover, in fact means worldwide turnover in order to ensure that the fines reflect the true economic power of companies that breach competition rules.

With respect to Camera dei Deputati's views regarding the chapter on Leniency, the Commission would like to assure the Camera that its intention is not to impinge on the autonomy of leniency programmes of Member States. As indicated above, the Camera dei Deputati's views will inform the negotiations with co-legislators.

The Commission hopes that these clarifications address the issues raised by the Camera dei Deputati and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Margrethe Vestager
Member of the Commission*