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COVER NOTE

From: Presidency
To: Working Party on Competition

Subject: -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 (ECN+)

-Examination of the Presidency compromise proposal: Articles 1 to 11

Delegations will find in the Annex a Presidency compromise text concerning Articles 1 to 11, following the Working Party meetings on 12 May, 12 June, 3 July, 14 and 25 September and 9 October 2017, as well as delegations' comments.

Delegations are informed that changes compared to the Commission proposal (doc 7621/17) are marked in **bold/underlined** and ~~striketrough~~.

It is understood that all delegations have a general scrutiny reservation.

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
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Economic and Social Committee¹
Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union to ensure that competition in the internal market is not distorted. Effective enforcement of Articles 101 and 102 TFEU is necessary to ensure more open competitive markets in Europe, where companies compete more on their merits and without company erected barriers to market entry, enabling them to generate wealth and create jobs. It protects consumers from business practices that keep the prices of goods and services artificially high and enhances their choice of innovative goods and services.

¹ OJ C , , p. .

- (2) The public enforcement of Articles 101 and 102 TFEU is carried out by the national competition authorities (NCAs) of the Member States in parallel to the Commission pursuant to Council Regulation (EC) No 1/2003⁽²⁾. The NCAs and the Commission form together a network of public authorities applying the EU competition rules in close cooperation (the European Competition Network).
- (3) Article 3(1) of Regulation (EC) No 1/2003 obliges NCAs and national courts to apply Articles 101 and 102 TFEU to agreements or conduct capable of affecting trade between Member States. In practice, most NCAs apply national competition law ~~provisions~~ in parallel to Articles 101 and 102 TFEU. Therefore, this Directive, the objective of which is to ensure that NCAs have the necessary guarantees of independence and enforcement and fining powers to be able to apply Articles 101 and 102 TFEU effectively, will inevitably have an impact on national competition law ~~provisions~~ applied in parallel by NCAs.
- (4) Moreover, providing NCAs with the power to obtain all information related to the undertaking subject to the investigation in digital form irrespective of the medium on which it is stored, should also affect the scope of the NCAs' powers when, at the early stages of proceedings, they take the relevant investigative measure also on the basis of the national competition law ~~provisions~~ applied in parallel to Articles 101 and 102 TFEU. Providing NCAs with inspection powers of a different scope depending on whether they will ultimately apply only national competition law ~~provisions~~ or also Articles 101 and 102 TFEU in parallel would hamper the effectiveness of competition law enforcement in the internal market. Accordingly, the scope of the Directive should cover both the application of Articles 101 and 102 TFEU on a stand-alone basis and the application of national competition law applied in parallel to the same case. This is with the exception of the protection of leniency statements and settlement submissions which also extends to national competition law applied on a stand-alone basis.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1).

(5) National law prevents many NCAs from having the necessary guarantees of independence and enforcement and fining powers to be able to enforce these rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and national competition law ~~provisions~~ in parallel to Articles 101 and 102 TFEU as appropriate. For example, under national law many NCAs do not have effective tools to find evidence of infringements of Articles 101 and 102 TFEU, to fine companies which break the law or do not have the resources they need to effectively apply Articles 101 and 102 TFEU. This can prevent them from taking action at all or results in them limiting their enforcement action. The lack of operational tools and guarantees of many NCAs to effectively apply Articles 101 and 102 TFEU means that undertakings engaging in anti-competitive practices can face very different outcomes of proceedings depending on the Member States in which they are active: they may be subject to no enforcement at all under Articles 101 or 102 TFEU or to ineffective enforcement. For example, in some Member States, undertakings can escape liability for fines simply by restructuring. Uneven enforcement of Articles 101 and 102 TFEU and national competition law ~~provisions~~ applied in parallel to Articles 101 and 102 TFEU results in missed opportunities to remove barriers to market entry and to create more open competitive markets throughout the European Union where undertakings compete on their merits. Undertakings and consumers particularly suffer in those Member States where NCAs are less-equipped to be effective enforcers. Undertakings cannot compete on their merits where there are safe havens for anti-competitive practices, for example, because evidence of anti-competitive practices cannot be collected or because undertakings can escape liability for fines. They therefore have a disincentive to enter such markets and to exercise their rights of establishment and to provide goods and services there. Consumers based in Member States where there is less enforcement miss out on the benefits of effective competition enforcement. Uneven enforcement of Articles 101 and 102 TFEU and national competition law ~~provisions~~ applied in parallel to Articles 101 and 102 TFEU throughout Europe thus distorts competition in the internal market and undermines its proper functioning.

- (6) Gaps and limitations in NCAs' tools and guarantees undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU which is designed to work as a cohesive whole based on close cooperation within the European Competition Network. This system depends on authorities being able to rely on each other to carry out fact-finding measures on each other's behalf. However it does not work well when there are still NCAs that do not have adequate fact-finding tools. In other key respects, NCAs are not able to provide each other with mutual assistance. For example, in the majority of Member States, undertakings operating cross-border are able to evade paying fines simply by not having a legal presence in some of the territories of Member States in which they are active. This reduces incentives to comply with Articles 101 and 102 TFEU. The resulting ineffective enforcement distorts competition for law-abiding undertakings and undermines consumer confidence in the internal market, particularly in the digital environment.
- (7) In order to ensure a truly common competition enforcement area in Europe that provides a more even level playing field for undertakings operating in the internal market and reduces unequal conditions for consumers there is a need to put in place ~~minimum~~ guarantees of independence and **adequate** resources and core enforcement and fining powers when applying Articles 101 and 102 TFEU and national competition law ~~provisions~~ in parallel to Articles 101 and 102 TFEU so that NCAs **national administrative competition authorities** can be fully effective.
- (8) It is appropriate to base this Directive on the dual legal basis of Articles 103 and 114 TFEU. This is because this Directive covers not only the application of Articles 101 and 102 TFEU and the application of national competition law ~~provisions~~ in parallel to these Articles, but also the gaps and limitations in NCAs' tools and guarantees to apply Articles 101 and 102 TFEU, which negatively affect both competition and the proper functioning of the internal market.

- (9) Putting in place ~~minimum~~ guarantees to ensure that NCAs apply Articles 101 and 102 TFEU effectively is without prejudice to the ability of Member States to maintain or introduce more extensive guarantees of independence and resources for NCAs **national administrative competition authorities** and more detailed rules on the enforcement and fining powers of ~~these authorities~~ NCAs. In particular, Member States may endow NCAs with additional powers beyond the core set provided for in this Directive to further enhance their effectiveness, **such as powers to impose fines on natural persons or the power to carry out inspections on a voluntary basis.**
- (10) Conversely, detailed rules are necessary in the area of conditions for granting leniency for secret cartels. Companies will only come clean about secret cartels in which they have participated if they have sufficient legal certainty about whether they will benefit from immunity from fines. The marked differences between the leniency programmes applicable in the Member States lead to legal uncertainty for potential leniency applicants, which may weaken their incentives to apply for leniency. If Member States could implement or apply either less or more restrictive rules for leniency in the area covered by this Directive, this would not only go counter to the objective of maintaining incentives for applicants in order to render competition enforcement in the Union as effective as possible, but would also risk jeopardising the level playing field for undertakings operating in the internal market. This does not prevent Member States from applying leniency programmes that do not only cover secret cartels, but also other infringements of Articles 101 and 102 TFEU and equivalent ~~national~~ provisions **of national competition law, or from accepting leniency applications from natural persons in their own name.**
- (11) This Directive does not apply to national laws in so far as they provide for the imposition of criminal sanctions on natural persons, with the exception of the rules governing the interplay of leniency programmes with the imposition of sanctions on natural persons.

- (12) The exercise of the powers, **including the investigative powers**, conferred on NCAs should be subject to appropriate safeguards which at least meet the standards of general principles of EU 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**. These safeguards include the right to good administration and the respect of undertakings' rights of defence, an essential component of which is the right to be heard. In particular, NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU prior to taking a decision which adversely affects their interests and those parties should have an opportunity to effectively make their views known on these objections before such a decision is taken. Parties to whom preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU have been notified should have the right to access the relevant case file of NCAs to be able to effectively exercise their rights of defence. This is subject to the legitimate interest of undertakings in the protection of their business secrets and does not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission. Moreover, the addressees of ~~final~~ decisions of NCAs applying **finding an infringement of Article 101 or Article 102 TFEU, imposing remedies or fines, or making commitments binding** should have the right to an effective remedy before a tribunal, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union. Such ~~final~~ decisions of NCAs should be reasoned so as to allow addressees of such decisions to ascertain the reasons for the decision and to exercise their right to an effective remedy. The design of these safeguards should strike a balance between respecting the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced.
- (13) Empowering NCAs **national administrative competition authorities** to apply Articles 101 and 102 TFEU impartially and in the common interest of the effective enforcement of European competition rules is an essential component of the effective and uniform application of these rules.

- (14) The **operational** independence of NCAs **national administrative competition authorities** should be strengthened in order to ensure the effective and uniform application of Articles 101 and 102 TFEU. To this end, express provision should be made in national law to ensure that when applying Articles 101 and 102 TFEU NCAs **national administrative competition authorities** are protected against external intervention or political pressure liable to jeopardise their independent assessment of matters coming before them. For that purpose, rules should be laid down in advance regarding the grounds for the dismissal ~~offrom~~ **from the members of national administrative competition authority of those who take decisions in** the decision-making body of the NCAs **national administrative competition authorities** in order to remove any reasonable doubt as to ~~the~~ **their** impartiality ~~of that body and its~~ **their** imperviousness to external factors.
- (15) To ensure the **operational** independence of NCAs **national administrative competition authorities**, their staff and ~~members of the decision-making body~~ **those who take decisions** should act with integrity and refrain from any action which is incompatible with the performance of their duties. The need to prevent the independent assessment of staff or ~~members of the decision-making body~~ **those who take decisions in national administrative competition authorities** being jeopardised entails that during their employment ~~and/or~~ term of office and for a reasonable period thereafter, they should refrain from any incompatible occupation, whether gainful or not. ~~Furthermore, this also entails~~ **This means** that during their employment ~~and their term of~~ **in** office, they should not **be able to deal with proceedings in which they have been involved or which concern undertakings by which they have been employed or with which they have been professionally engaged before joining the national administrative competition authority to the extent that this might impair their impartiality. The assessment of whether their impartiality might be impaired in each case should take into account the nature and the level of their previous involvement or engagement. To the extent that this is necessary to ensure the impartiality of the investigation and the decision-making process, the individual concerned should be asked to recuse herself/himself from the specific case. For a reasonable period after leaving the national administrative competition authority, whenever former staff or those who took decisions in the national administrative competition authority engage in an occupation which is related to the proceedings with which they were dealing during their employment or term of office, they should not be involved in the same proceedings in their new occupation.**

Furthermore, during their employment and their term of office, the staff and those who take decisions should not have an interest in any businesses or organisations which have dealings with a **NCA national administrative competition authority** to the extent that this has the potential to compromise their independence. ~~The~~ **To avoid this, the** staff and ~~the~~ **members of the decision-making body** **those who take decisions** should declare any interest or asset which might create a conflict of interests in the performance of their duties. They should be required to inform the decision-making body, the other members thereof or, in the case of **NCA national administrative competition authorities** in which the decision-making power rests with only one person, their appointing authority, if, in the performance of their duties, they are called upon to decide on a matter in which they have an interest which might impair their impartiality. **The assessment of whether an interest might impair their impartiality should take into account factors such as the nature and the magnitude of the interest, the effect that the national administrative competition authority's decision may potentially have on that interest and the role of the individual concerned in the case. To the extent that this is necessary to ensure the impartiality of the investigation and the decision-making process, the individual concerned should be asked to recuse herself/himself from the case.**

- (16) The **operational** independence of NCAs **national administrative competition authorities** does not preclude either judicial review or parliamentary supervision in accordance with the laws of the Member States. Accountability requirements also contribute to ensuring the credibility and the legitimacy of the actions of NCAs **national administrative competition authorities**. Proportionate accountability requirements include the publication by NCAs **national administrative competition authorities** of periodic reports on their activities to a governmental or parliamentary body. NCAs **National administrative competition authorities** may also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.
- (17) ~~NCAs~~ **National administrative competition authorities** should be able to prioritise their proceedings for the enforcement of Articles 101 and 102 TFEU to make effective use of their resources, and to allow them to focus on preventing and bringing to an end anti-competitive behaviour that distorts competition in the internal market. To this end, they should be able to reject complaints, **except those lodged by public authorities as long as it does not affect resources of the competition authorities**, on the grounds that they are not a priority. This should be without prejudice to the power of NCAs **national administrative competition authorities** to reject complaints on other grounds, such as lack of competence or to decide there are no grounds for action on their part. The power of NCAs **national administrative competition authorities** to prioritise their enforcement proceedings is without prejudice to the right of a government of a Member State to issue general policy or priority guidelines to national **administrative** competition authorities that are not related to specific proceedings for the enforcement of Articles 101 and 102 TFEU.
- (18) NCAs **National administrative competition authorities** should have the necessary resources, in terms of **qualified** staff, ~~expertise~~ **able to conduct proficient legal and economic assessments**, financial means ~~and~~, technical **expertise and** equipment **including adequate information technology tools**, to ensure they can effectively perform their tasks when applying Articles 101 and 102 TFEU. In case their duties and powers under national law are extended, the resources that are necessary to perform those tasks should still be sufficient.

- (19) NCAs require a minimum set of common investigative and decision-making powers to be able to effectively enforce Articles 101 and 102 TFEU.
- (20) NCAs **National administrative competition** authorities should be empowered to have effective powers of investigation to detect any agreement, decision or concerted practice prohibited by Article 101 TFEU or any abuse of dominant position prohibited by Article 102 TFEU at any stage of the proceedings before them. **This should ensure that they are all in a position to effectively assist each other when requested to carry out an inspection or any other fact-finding measure on their own territory on behalf on and account of a competition authority of another Member State pursuant to Article 22 of Regulation (EC) No 1/2003.**
- (21) The investigative powers of national administrative competition authorities need to be adequate to meet the enforcement challenges of the digital environment and should enable national competition authorities to obtain all information in digital form, including data obtained forensically, related to the undertaking or association of undertakings which is subject to the investigative measure, irrespective of the medium on which it is stored, such as on laptops, mobile phones and other mobile devices.
- (22) National administrative competition authorities should be empowered to inspect the premises of both undertakings and associations of undertakings which are the subject of proceedings for the application of Articles 101 and 102 TFEU, as well as other market players which may be in possession of information which is of relevance to such proceedings. National administrative competition authorities should be able to carry out ~~such~~ **hall necessary** inspections when **they can show** there are ~~at least~~ reasonable grounds for suspecting an infringement of Article 101 or Article 102 TFEU. **Member States are not precluded from requiring prior authorisation by a judicial authority for such inspections.**

- (23) To be effective, the power of national administrative competition authorities to carry out inspections should enable them to access information that is accessible to the undertaking or association of undertakings or person subject to the inspection and which is related to the undertaking under investigation. **Similarly, it necessarily implies the power to search for documents or files which are not precisely identified in advance. Otherwise it would be impossible to obtain the information necessary for the investigation if undertakings refuse to cooperate or adopt an obstructive attitude.**
- (24) To minimise the unnecessary prolongation of inspections, national administrative competition authorities should have the power to continue making searches ~~of~~ **and to select** copies or extracts of books and records related to the business of the undertaking or association of undertakings being inspected at the authority's premises or at other designated premises.
- (25) Experience shows that business records may be kept in the homes of directors or other people working for an undertaking, ~~especially with~~ **in particular because of** the increased use of more flexible working arrangements. In order to ensure that inspections are effective, national administrative competition authorities should have the power to enter any premises, including private homes, ~~where~~ **if they can show that** there is a reasonable suspicion that business records ~~are being kept~~ which may be relevant to prove ~~an~~ **serious violation** ~~infringement~~ of Article 101 or Article 102 TFEU **are being kept in those premises**. The exercise of ~~this~~ **that** power should be subject to the **national administrative competition authority having obtained** prior authorisation ~~of~~ **from** a **national** judicial authority, **which may include a public prosecutor in certain national legal systems**. This does not prevent Member States **in cases of extreme urgency** from entrusting the tasks of a national judicial authority to a national administrative competition authority acting as a judicial authority, ~~in cases of extreme urgency~~. **The conduct of such inspections may be entrusted by a national administrative competition authority to the police or an equivalent enforcement authority, provided that the inspection is carried out in the presence of the national administrative competition authority. This is without prejudice to the right of the national administrative competition authority to conduct the inspection itself and to obtain the necessary assistance of the police or an equivalent enforcement authority, including as a precautionary measure, to overcome possible opposition on the part of the undertaking concerned.**

- (26) NCAs should have effective powers to require **undertakings to provide** information ~~to be~~ supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 101 TFEU or any abuse prohibited by Article 102 TFEU. **To that end, NCAs should be able to require the disclosure of information that may enable them to investigate putative infringements.** This should include the right to require information irrespective of where it is stored, provided it is accessible to **and at the disposal of the undertaking which is the** addressee of the request for information. Experience **also** shows that information provided ~~on a voluntary basis~~ by third parties, such as competitors, customers and consumers in the market, **on their own initiative** can also be a valuable source of information for informed and robust enforcement and NCAs should encourage this.
- (27) NCAs should have effective means to restore competition ~~on~~ **in** the market by imposing ~~proportionate~~ structural and behavioural remedies **which are proportionate to the infringement committed and which are necessary to bring the infringement to an end.** **The principle of proportionality requires that, when choosing between two equally effective remedies, NCAs should choose the remedy that is least burdensome for the undertaking. Structural remedies, such as obligations to dispose of a shareholding in a competitor or to divest a business unit, affect the assets of an undertaking and can be presumed to be more burdensome for the undertaking. However, this should not preclude NCAs from finding in a specific case that the circumstances of a particular infringement justify the imposition of a structural remedy because it would be more effective in terms of bringing the infringement to an end than a behavioural remedy.** **The effectiveness of a remedy depends not only on the capacity of the remedy to address a competition problem but also on its enforceability. For a remedy to be effective, it must be possible to implement it within a short period of time and to monitor compliance with it.**

(27a) Interim measures can be an important tool to ensure that while an investigation is on-going harm is not caused to competition which cannot be remedied by any decision taken at the end of the proceedings. NCAs should therefore have the power to adopt interim measures by decision. As a minimum, this power should apply in cases where an NCA has made a prima facie finding of infringement of Article 101 or Article 102 TFEU and where there is a risk of serious and irreparable harm to competition. Member States are free to provide NCAs with more extensive powers to adopt interim measures, in particular, with a view to enabling them to deal with developments in fast-moving markets. A decision ordering interim measures should only be valid for a specified period, either until the conclusion of the proceedings by a NCA, or for a fixed time period which may be renewed in so far as it necessary and appropriate.

(28) Where in the course of proceedings which may lead to an agreement or a practice being prohibited, undertakings or associations of undertakings offer NCAs commitments which meet their concerns, these authorities should be able to adopt decisions which make these commitments binding on, and enforceable against, the undertakings concerned. Such commitment decisions should find that there are no longer grounds for action by the NCAs without concluding as to whether or not there has been an infringement of Article 101 TFEU or Article 102 TFEU. **It should be at the discretion of NCAs whether or not to accept commitments.** Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding of an infringement and decide upon a case. **Member States are free to ensure that national competition authorities have effective means to reopen proceedings, such as where there have been material changes in any of the facts on which the decision was based, the undertakings act contrary to their commitments or the decision was based on incomplete, incorrect or misleading information provided by the parties. Similarly, effective means to monitor or verify compliance with commitments have proven to be effective tools for competition authorities.**

[...]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

Subject matter and scope

1. This Directive sets out certain rules to ensure that national competition authorities have the necessary guarantees of independence and resources and **the necessary** enforcement and fining powers to be able to ~~effectively~~ apply Articles 101 and 102 TFEU **effectively** so that competition in the internal market is not distorted and consumers and undertakings are not put at a disadvantage by national laws and measures which prevent national competition authorities from being effective enforcers. **This Directive also provides for certain rules on mutual assistance to safeguard the smooth functioning of the internal market and to safeguard the system of close cooperation within the European Competition Network.**

- ~~2. The scope of the **This** Directive covers the application of Articles 101 and 102 TFEU and national competition law provisions applied in parallel to Articles 101 and 102 TFEU to the same case. **As regards** with the exception of Article 29(2), **this Directive** which also extends to **the application of** national competition law applied exclusively **on a stand-alone basis.**~~

- ~~2. This Directive sets out certain rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the European Competition Network.~~

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

- (1) 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation **No** (EC) 1/2003 as responsible for the application of Articles 101 and 102 TFEU. Member States may designate one or more administrative authorities (national administrative competition authority), as well as judicial authorities (national judicial competition authority) to carry out these functions;
- (2) 'competition authority' means a national competition authority, ~~or~~ the Commission or both, as the context may require;
- (3) 'European Competition Network' means the ~~Network~~ **network** of public authorities formed by the national competition authorities and the Commission to provide a forum for discussion and cooperation in the application and enforcement of Articles 101 and 102 TFEU;
- (4) 'national competition law' ~~provisions~~ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union ~~antitrust~~ **competition** law pursuant to Article 3(1) of Regulation (EC) No 1/2003 ~~with the exception of~~, **as well as** the use of information taken from leniency statements and settlement submissions as referred to in Article 29(2) **when provisions of national competition law are applied exclusively. This term does not include and excluding** provisions of national law which impose criminal penalties on natural persons;
- (5) 'national court' means a national court or tribunal within the meaning of Article 267 TFEU;
- (6) 'review court' means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on ~~these~~ **those** decisions, irrespective of whether ~~the~~ **that** court itself has the power to find an infringement of competition law;

- (7) 'proceedings' means the proceedings before a national competition authority for the application of Article 101 or Article 102 TFEU, until that authority has closed these proceedings by taking a decision referred to in Articles 9, **11** or ~~Article 11~~**12** or has concluded that there are no grounds for further action on its part, or in the case of the Commission, means proceedings before it for the application of Article 101 or Article 102 TFEU until it has closed these proceedings by taking a decision pursuant to Articles 7, 9 or 10 of Regulation (EC) No 1/2003 or has concluded that there are no grounds for further action on its part;
- (8) 'undertaking' as contained in Articles 101 and 102 TFEU, means any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ~~in accordance with the case law of the Court of Justice of the European Union;~~
- (9) '~~secret~~ cartel' means an agreement ~~and/or~~ concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market ~~and/or~~ influencing the relevant parameters of competition through practices such as, **but not limited to**, the fixing **or coordination** of purchase or selling prices or other trading conditions, **including in relation to intellectual property rights**, the allocation of production or sales quotas, the sharing of markets **and customers**, including bid-rigging, restrictions of imports or exports ~~and/or~~ anti-competitive actions against other competitors, ~~which is not, partially or fully, known except to the participants;~~
- (10) 'immunity from fines' means ~~that no fine~~ **the exemption from fines that would otherwise be** imposed on an undertaking for its participation in a secret cartel, **in order to** as a reward **it** for its cooperation with a competition authority in the framework of a leniency programme;
- (11) 'reduction of fines' means **a reduction in the amount of the fine what** ~~that a reduced fine is imposed as compared to the fines which~~ would otherwise be imposed on an undertaking for its participation in a secret cartel, **in order to** as a reward **it** for its cooperation with a competition authority in the framework of a leniency programme;
- (12) 'leniency' means both immunity from fines and reduction of fines;

- (13) 'leniency programme' means a programme concerning the application of Article 101 TFEU or **a corresponding provision of** 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;
- (14) 'leniency statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a ~~secret~~-cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information **which is evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;**
- ~~(15) 'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;~~
- (16) 'settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of Article 101 TFEU or **Article 102 TFEU or** national competition law and its responsibility for that infringement, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;
- (17) 'applicant' means an undertaking that applies for immunity or reduction from fines under a leniency programme;
- (18) 'applicant authority' means a national competition authority which makes a request for mutual assistance as referred to in Articles 23, 24 or 25;

(19) 'requested authority' means a national competition authority which receives a request for mutual assistance and in the case of a request for assistance referred to in Articles 24 and 25 ~~may~~ **means, as appropriate,** the competent public office, authority or department which has principal responsibility for the enforcement of such decisions under national laws, regulations and administrative practice;

(20) 'final decision' means a decision that cannot be, or that can no longer be, appealed by ordinary means.

All references to the application, ~~or and~~ infringements, of Articles 101 and 102 TFEU shall be understood as including the parallel application of ~~the~~ national competition law ~~provisions~~ to the same case.

CHAPTER II FUNDAMENTAL RIGHTS

Article 3 **Safeguards**

The exercise of the powers referred to in this Directive by national competition authorities shall be subject to appropriate safeguards, including respect of undertakings' rights of defence and the right to an effective remedy before a tribunal, in accordance with general principles of Union law and the Charter of Fundamental Rights of the European Union.

CHAPTER III
INDEPENDENCE AND RESOURCES

Article 4

Independence

1. To guarantee the **operational** independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that **their national administrative competition authorities** ~~they~~ perform their duties and exercise their powers impartially and in the interests of the effective and uniform enforcement of ~~these~~ **those** provisions, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network.

2. In particular, Member States shall **at a minimum** ensure that:
 - a) The staff and the ~~members of the decision-making body of~~ **persons who take decisions** **in** national administrative competition authorities ~~can~~ **are able to** perform their duties and **to** exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;
 - b) The staff and the ~~members of the decision-making body of~~ **persons who take decisions** **in** national administrative competition authorities neither seek nor take any instructions from any government or other public or **from any** private entity when carrying out their duties and exercising their powers for the application of Articles 101 and 102 TFEU;
 - c) The staff and the ~~members of the decision-making body of~~ **persons who take decisions** **in** national administrative competition authorities refrain from any action which is incompatible with the performance of their duties and **or with the** exercise of their powers for the application of Articles 101 and 102 TFEU;

- d) ~~The members of the decision-making body of~~ **The persons who take decisions in national administrative competition authorities shall not be dismissed from such authorities for reasons related to the proper performance of their duties or the proper exercise of their powers in the application of Articles 101 and 102 TFEU as referred to in Article 5(2). They** may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or **if they** have been **found** guilty of serious misconduct under national law. The grounds **upon which such persons may be dismissed** ~~for dismissal should~~ **shall** be laid down in advance in national law; ~~They shall not be dismissed for reasons related to the proper performance of their duties and exercise of their powers in the application of Articles 101 and 102 TFEU as defined in Article 5(2);~~
- e) National administrative competition authorities **shall** have the power to set their priorities for carrying out **the** tasks for the application of Articles 101 and 102 TFEU as ~~defined~~ **referred** in Article 5(2). To the extent that national administrative competition authorities are obliged to consider **formal** complaints ~~which are formally filed, this shall include the power of those authorities~~ **shall have the power** to reject such complaints on the grounds that they do not consider **such a complaint** ~~them~~ to be an **enforcement** priority. This is without prejudice to the power of national competition authorities to reject complaints on other grounds defined by national law.

Article 5

Resources

1. Member States shall ensure that national competition authorities have **at a minimum** the human, financial and technical resources that are necessary for the effective performance of their duties, and **for the effective** exercise of their powers, when applying Articles 101 and 102 TFEU as ~~defined~~ **set out** in paragraph 2.
2. ~~The application~~ **In order to apply** of Articles 101 and 102 TFEU, ~~by~~ national competition authorities shall **be able, at a minimum, to** ~~include:~~ conducting investigations with a view to applying Articles 101 and 102 TFEU; ~~taking~~ **adopt** decisions ~~applying~~ **to apply those** ~~these~~ provisions on the basis of Article 5 of Regulation 1/2003; and ~~cooperating~~ **cooperating** closely in the European Competition Network with a view to ensuring the effective and uniform application of Articles 101 and 102 TFEU.

CHAPTER IV

POWERS

Article 6

Power to inspect business premises

1. Member States shall ensure that national administrative competition authorities ~~can~~ **are able to** conduct all necessary unannounced inspections of undertakings and associations of undertakings for the application of Articles 101 and 102 TFEU. Member States shall ensure that the officials and other accompanying persons authorised by national competition authorities to conduct ~~an~~ **such** inspections are at ~~a~~ minimum-empowered:
 - a) to enter any premises, land, and means of transport of undertakings and associations of undertakings;
 - b) to examine the books and other records related to the business irrespective of the medium on which they are stored, ~~including~~ **and shall have** the right to access **any** information which is accessible to the entity subject to the inspection;
 - c) to take or obtain, in any form, copies or extracts from such books or records and, where they consider it ~~necessary~~ **appropriate**, to continue making **such** searches ~~of~~ **and to select these those** copies or extracts at their premises or **at** other designated premises;
 - d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
 - e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answer.

2. Member States shall ensure that undertakings and associations of undertakings are required to submit to inspections conducted by national administrative competition authorities. Where an undertaking or association of undertakings opposes an inspection **that has been** ordered by a national administrative competition authority **and/or that has been** authorised by a national judicial authority, national competition authorities can obtain the necessary assistance of the police or of an equivalent enforcement ~~agency~~ **authority** so as to enable them to conduct the inspection. Such assistance may also be obtained as a precautionary measure.

Article 7

Power to inspect other premises

1. Member States shall ensure that if a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, **and** which may be relevant to prove ~~an serious violation~~ **infringement** of Article 101 or Article 102 TFEU, are being kept in any premises other than those referred to in Article 6, land or means ~~or~~ **of** transport, including the homes of directors, managers, and other members of staff of undertakings ~~and~~ **or of** associations of undertakings, national administrative competition authorities may conduct unannounced inspections in such premises, land and means of transport.
2. Such inspections ~~cannot~~ **shall not** be carried out without the prior authorisation of a national judicial authority.
3. Member States shall ensure that the officials and other accompanying persons authorised by the national ~~courts~~ **competition authority** to conduct an inspection in accordance with paragraph 1 of this Article have at least **a minimum** the powers set out in Article 6(1)(a)(b) and (c) and Article 6(2).

Article 8

Requests for information

Member States shall ensure that national administrative competition authorities may ~~by decision~~ require undertakings and associations of undertakings to provide all necessary information for the application of Articles 101 and 102 TFEU within a specified time limit. This obligation shall cover information which is accessible to ~~the~~ such undertakings ~~and~~ or associations of undertakings.

Article 8a

Interviews

Member States shall ensure that national administrative competition authorities are empowered to summon for an interview any representative of an undertaking or of an association of undertakings and any natural person who may possess information relevant for the application of Articles 101 and 102 TFEU.

Article 9

Finding and termination of infringement

Member States shall ensure that where national competition authorities find ~~that there is an~~ infringement of Article 101 or 102 TFEU, they may by decision require the undertakings and associations of undertakings concerned to bring ~~such~~ that infringement to an end. For that purpose, they may impose any behavioural or structural remedies which are proportionate to the infringement committed and which are necessary to bring the infringement effectively to an end. **If they have a legitimate interest in doing so, they may also find that an infringement has been committed in the past.**

Article 10

Interim measures

Member States shall ensure that national administrative competition authorities, acting on their own initiative, may by decision order the imposition of interim measures on undertakings **and associations of undertakings** at least 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 of Article 101 or Article 102 TFEU. Such a decision shall apply for a **specified** ~~specific~~ period, ~~of time~~ and may be renewed in so far that is necessary and appropriate.

Article 11

Commitments

Member States shall ensure that, in proceedings initiated with a view to **adopting** a decision requiring that an infringement of Article 101 or Article 102 TFEU be brought to an end, national competition authorities may by decision make ~~binding~~ commitments offered by undertakings **or associations of undertakings binding to, where those commitments** meet the concerns expressed by **those** ~~these~~ authorities. Such a decision may be adopted for a specified period, and shall conclude that there are no longer grounds for action by the national competition authority concerned.

[...]
