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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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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

Delegations will find attached document COM(2017) 142 final.

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2017/0063 (COD)

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)

{SWD(2017) 114}
{SWD(2017) 115}
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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

General Context

The EU Member States are essential partners of the European Commission for enforcing the EU competition rules. Since 2004, the national competition authorities of the EU Member States (NCAs) are empowered by Council Regulation (EC) No 1/2003[1] to apply the EU competition rules alongside the Commission. Indeed, the NCAs are obliged to apply the EU competition rules to agreements or practices that are capable of having an effect on trade between Member States. For more than a decade both the Commission and the NCAs have enforced the EU competition rules in close cooperation in the European Competition Network (ECN). The ECN was created in 2004 expressly for this purpose.

Enforcement of the EU competition rules by both the Commission and the NCAs is an essential building block for the creation of an open, competitive and innovative internal market and is crucial for creating jobs and growth in important sectors of the economy, in particular, the energy, telecoms, digital and transport sectors.

The EU competition rules are one of the defining features of the internal market: where competition is distorted, the internal market cannot deliver on its full potential and create the right conditions for sustained economic growth. A key aspect of making the internal market deeper and fairer is ensuring that the internal market rules are effectively enforced so that they deliver close to the citizen. Enforcement of the EU competition rules is now taking place on a scale which the Commission could never have achieved on its own. Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%. Action by a multiplicity of enforcers is a much stronger, more effective and better deterrent for companies that may be tempted to breach the EU competition rules. The Commission typically investigates anticompetitive practices or agreements that have effects on competition in three or more Member States or where it is useful to set a Europe-wide precedent. The NCAs are usually well placed to act where competition is substantially affected in their territory. NCAs have the expertise on how markets work in their own Member State. That knowledge is of great value when enforcing the competition rules. Action at national level promotes support by society at large for competition enforcement.

Reasons for and objectives of the proposal

There is untapped 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 and many do not have all the means and instruments they need to effectively enforce Articles 101 and 102 TFEU:

1. Some NCAs do not have enforceable guarantees that they can apply the EU competition rules independently without taking instructions from public or private entities. A number of authorities struggle with insufficient human and financial resources. This may have an impact on their ability to effectively enforce. For

[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 2003, L 1, p.1).

example, some NCAs are not able to carry out simultaneous inspections of all members of a suspected cartel, giving the others valuable time to destroy evidence and escape detection. Others lack the appropriate forensic IT tools to find evidence of infringements.

2. Many NCAs do not have all the tools they need to effectively detect and tackle competition law infringements. Some NCAs do not have key investigative powers such as to gather evidence stored on mobile phones, laptops, tablets etc. - a key drawback in the digital age. Their investigative powers are often without force because they are not backed up by effective sanctions if companies do not comply with them.

3. Not all NCAs can impose effective fines: In some Member States, national law prevents NCAs imposing effective fines for breaches of EU competition law, e.g. in some Member States companies can restructure to escape paying fines. In some Member States, there are little or no fines imposed for infringements of Articles 101 and 102 TFEU. 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. Leniency programmes are a key tool for detecting cartels. They encourage companies to provide valuable information about cartels in which they participated in exchange for full or partial immunity from fines. Companies considering applying for leniency need a sufficient degree of legal certainty to be incentivised to cooperate with authorities. That is particularly so when companies apply for leniency in different Member States because the cartel affects a number of jurisdictions. However, divergences in leniency programmes across Europe discourage companies from coming clean and providing evidence of these anti-competitive practices.

5. Gaps and limitations in NCAs' tools and guarantees also undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU based on close cooperation within the ECN. 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. 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 cross-border if the infringer has no legal presence in their territory. In the digital era, many companies sell over the internet to potentially numerous countries but may only have a legal presence in e.g. one Member State. Such companies currently have a safe haven from paying the fine.

These gaps and limitations in NCAs' tools and guarantees mean that companies 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, because evidence of anti-competitive practices cannot be collected or because undertakings can escape liability for fines. Uneven enforcement of the EU competition rules distorts competition in the internal market and it undermines the system of decentralised enforcement that was put in place by Regulation (EC) No 1/2003.

A legislative proposal is therefore needed to empower the NCAs to be more effective enforcers of the EU competition rules to ensure that NCAs have the necessary guarantees of independence and resources and enforcement and fining powers. Removing national obstacles which prevent NCAs from enforcing effectively will help remove distortions to competition in the internal market and stop consumers and businesses, including SMEs, being put at a disadvantage and suffering detriment from such measures. Moreover, enabling NCAs to effectively provide each other with mutual assistance will ensure a more level playing field and safeguard close cooperation within the ECN.

The proposal is part of the Commission Work Programme 2017[2] and is based on enforcement experience in the ECN since 2004.

Consistency with existing policy provisions in the policy area

The proposal will complement Regulation (EC) No 1/2003, as empowering the NCAs to be effective enforcers will mean that the full potential of the decentralised system of enforcement put in place by this instrument is realised. In particular, it will give substance to the requirement in Article 35 of Regulation (EC) No 1/2003 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 will 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 TFEU) are fully respected and elaborated on. Giving NCAs effective fact-finding powers will mean that full effect is given to the obligation in Article 22 of Regulation (EC) No 1/2003, which requires that NCAs are able to carry out such measures on behalf of their fellow ECN members. In its 2016 Communication on EU law: Better results through better application,[3] the Commission underlines the importance of having a robust, efficient and effective enforcement system to ensure that Member States fully apply, implement and enforce EU law. It highlights that enforcing EU law remains a challenge and calls for a stronger focus on enforcement to serve the general interest.

Consistency with other Union policies

The proposal is fully consistent and compatible with existing Union policies in other areas, in particular those which give the NCAs or the ECN a specific consultative, cooperation, monitoring, reporting or decision-making role.[4]

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2 COM(2016) 710 final.

3 Communication from the Commission - EU law: Better results through better application, C/2016/8600, (OJ C 18, 19.1.2017, p.10).

4 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002, L 108, p.33); Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009, L 211, p.55); Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ 2009, L 337, p.1); Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy integrity and transparency (OJ 2011, L 326, p.1); Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012, L 343, p.32); Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC)

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

Legal basis

The current proposal is based on both Articles 103 and 114 TFEU because it pursues a number of goals which are inextricably linked, namely to: (1) give effect to the principles set out in Articles 101 and 102 TFEU by empowering NCAs to be more effective enforcers; (2) ensure 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 NCAs from being effective enforcers; (3) ensure that the same guarantees and instruments are in place for national competition law when it is applied in parallel to Articles 101 and 102 TFEU to ensure legal certainty and a level playing; and (4) put in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ECN.

Ensuring that the NCAs have the means and instrument 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 the competition rules. Article 103(1) empowers the Council to adopt regulations or directives "to give effect to the principles set out in Articles 101 and 102". In particular, 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".

However, this legal basis does not in itself suffice, because both the aim and the content of the proposed Directive transcend this legal basis. The proposed Directive has an independent objective of seeking to bolster the functioning of the internal market by: (1) tackling national rules which prevent NCAs from being effective enforcers thereby creating more equal protection of companies and consumers in Europe; (2) ensuring that the same guarantees and instruments are in place for national competition law when it is applied in parallel to Articles 101 and 102 TFEU to ensure legal certainty and a level playing field; and (3) putting in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ECN.

In some Member States, national law prevents NCAs from imposing effective fines on companies for infringements of the EU competition rules. Infringing companies present in Member States where NCAs lack effective fining powers are thus sheltered from sanctions and have little incentive to act in compliance with EU competition rules. This reinforces market distortions through-out Europe and undermines the internal market. Moreover, the differences between the Member States in the core principles for leniency programmes mean that companies can be treated differently depending on which authority acts. Only action at EU level can ensure that there are common core principles for granting leniency, thus providing a more level playing field for businesses.

No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013, L 347, p.671); Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (OJ 2014, L 158, p.77).

Similarly, limitations or gaps in national laws may prevent NCAs from effectively gathering evidence. Measures taken to undermine the independence of the NCAs or to limit their resources necessarily emanate from the Member States themselves. For example, restrictions on independence can be motivated by the desire to exercise greater control over decision-making by the authority. A government's ability to apply influence or pressure on a NCA may result in political considerations prevailing over sound competition enforcement based on legal and economic arguments, to the detriment of companies operating in the internal market.

These gaps and limitations in NCAs' tools and guarantees mean that companies engaging in anti-competitive practices can be subject to no enforcement at all under Articles 101 or 102 TFEU or to ineffective enforcement, for example, because evidence of anti-competitive practices cannot be collected or because undertakings can escape liability for fines. Companies cannot compete on their merits where there are safe havens for anti-competitive practices. 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 against anti-competitive practices which keep prices for goods and services artificially high. Uneven enforcement of Articles 101 and 102 TFEU throughout Europe thus distorts competition in the internal market and undermines its proper functioning.

Another way that the approximation of national laws is addressed by the proposed Directive is because its scope covers the application of national competition rules. In practice most NCAs apply national competition law provisions in parallel to Articles 101 and 102 TFEU in the same case. The proposed Directive will inevitably have an impact on national competition law provisions applied in parallel by NCAs. Moreover, when a NCA takes investigative measures at an early stage of a case, it is often difficult to know whether there is an effect on trade triggering the application of EU competition law. Accordingly, the NCA has to assume that both may apply. This means that when NCAs use the power foreseen by the proposal to collect digital evidence, they would do so potentially for the application of both EU and national law. It is therefore difficult, if not impossible, to dissociate such parallel application of national law and Articles 101 and 102 TFEU. If the same guarantees and instruments were not in place for national law when it is applied in parallel to Articles 101 and 102 TFEU, this would cause legal uncertainty and risk undermining the level playing field. Furthermore, in order for the protection of leniency and settlement material to be meaningful, it must apply not just while proceedings before NCAs for the application of the Articles 101 and 102 TFEU are on-going, but also for the stand alone application of the equivalent national law provisions.

Gaps and limitations 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, the majority of NCAs cannot notify key enforcement measures or request the enforcement of their fines cross-border if the infringer has no legal presence in their territory. Such companies currently have a safe haven from paying the fine. The resulting ineffective enforcement distorts competition for law-abiding undertakings and undermines consumer confidence in the internal market, particularly in the digital environment. Addressing these divergences by providing for a system for the cross-border notification of preliminary objections to alleged infringements of Articles 101 and 102 TFEU and decisions applying these Articles, as well as the cross-border enforcement of fines imposed by administrative NCAs, is a key aspect to ensuring a level playing field in Europe and to preventing distortions of competition. Similarly, in order to safeguard the smooth functioning of the system of

parallel powers in the ECN, national rules on limitation periods should be suspended for the duration of proceedings before NCAs of another Member State or the Commission.

Approximating national laws with these specific aims, which are reflected in full in the text of the proposed Directive, goes beyond giving effect to Articles 101 and 102 TFEU and rather concerns the proper functioning of the internal market.

In conclusion, the proposal for a Directive, both in its aim and its content, pursues a two-fold policy, one relating to the effective application of EU competition policy and the other to the proper functioning of the internal market. These components are inextricably linked: ensuring that NCAs are empowered to be effective enforcers necessarily means legislating to remove obstacles in national laws that result in uneven enforcement, thereby distorting competition in the internal market. Consumers and businesses will not be put at a disadvantage by national laws and measures which prevent NCAs from being effective enforcers. The same guarantees and instruments for NCAs must be in place for the application of national competition law provisions when they are applied in parallel to Articles 101 and 102 TFEU, because of the need for legal certainty and a level playing field. Finally, providing for effective cross-border mechanisms on mutual assistance is necessary to ensure a more level playing field and safeguard the system of parallel powers within the ECN. These interdependent, though distinct aims, cannot be pursued separately through the adoption of two different instruments. For instance, it is not feasible to spilt the proposed Directive into a first instrument, based on Article 103 TFEU which provides NCAs with the means and instruments they need to apply Articles 101 and 102 TFEU, and a second, based on Article 114 TFEU, that requires Member States to provide for the same rules for the application of national competition law when it is applied in parallel to the EU competition rules. For these reasons, the proposal is also based on Article 114 TFEU.

Subsidiarity

Regulation (EC) No 1/2003 set up a decentralised system of competition enforcement, however the full potential of this system has still to be realised. The proposed Directive would ensure that competition enforcement effectively delivers at national level by giving NCAs the guarantees and instruments they need to be effective enforcers.

NCAs are applying rules with a cross-border dimension

The EU should take action to address the problems identified because the NCAs are applying EU rules which have a cross-border dimension. Enforcement action by the NCA of one Member State may impact on competition, businesses and consumers in other Member States, e.g. a national-wide cartel typically excludes competitors from other Member States. If NCAs do not have the necessary means and instruments to enforce (e.g. they lack resources), this may have direct negative consequences for consumers and business not only in the Member State of the NCA concerned but also in other Member States, as well as on the ability of NCAs to cooperate throughout Europe. Member State Y cannot address the lack of means and instruments of a NCA in Member State X, thus only EU action can tackle this problem.

Ensuring that cross-border cooperation works effectively

Only action at EU level can ensure that the system of cooperation set up by Regulation (EC) No 1/2003 works sufficiently. One of the main elements of Regulation (EC) No 1/2003 is that it provides for cooperation mechanisms that allow NCAs to investigate alleged infringements beyond the borders of their Member State. One NCA can ask another NCA to carry out

investigative measures on its behalf to gather evidence located in another jurisdiction. As noted above, this mechanism does not work well if not all NCAs have effective powers to carry out inspections or to request information. Again, it is difficult to tackle this issue at national level. For example, if the NCA in Member State A needs the NCA in Member State B to gather evidence from companies located in its territory, but the NCA in Member State B does not have effective powers to gather this evidence, there is little that Member State A can do about this.

Interlinkage between competition authorities' leniency programmes in Europe

Leniency programmes are interlinked because companies regularly file applications to a number of EU jurisdictions and need guarantees of cross-border legal certainty. The experience of the last decade has shown that such cross-border legal certainty cannot be sufficiently achieved by Member States individually. Divergences in leniency programmes still lead to different outcomes for leniency applicants in terms of whether they benefit from immunity from fines or even from fines reductions at all. Companies which are considering reporting cartel behaviour to a number of jurisdictions in return for more lenient treatment lack the certainty they need about whether and to what extent they will benefit from this. EU action is needed to ensure that a leniency system is available and applied in a similar way in all Member States.

National laws can prevent NCAs from being more effective enforcers

As explained above in the section on the legal basis, national law can prevent NCAs from being sufficiently independent and having effective tools to detect infringements and impose effective fines on companies for infringements of the EU competition rules. In order to address this issue, measures need to be taken at EU level.

Experience shows that in absence of EU legislation NCAs are unlikely to get all the necessary tools

Soft action has been used extensively to prompt voluntary action at national level, however, several NCAs still lack the guarantees and instruments to be effective enforcers. After more than a decade, the changes needed to make the decentralised enforcement system of Regulation (EC) No 1/2003 work better and empower the NCAs to be more effective enforcers, are unlikely to ensue. This means that many NCAs will continue to miss certain key tools to detect and sanction infringements or lack sufficient resources, to the detriment of the proper functioning of the decentralized system put in place by Regulation (EC) No 1/2003.

In sum, existing national competition frameworks will not by themselves allow the NCAs to enforce the EU competition rules more effectively across the EU. Moreover, the Commission cannot enforce any EU requirements regarding the investigation and sanctioning tools, resources and institutional structure of NCAs when enforcing the EU competition rules as long as such requirements do not exist. Accordingly, only an initiative at the EU level can empower the NCAs to be more effective enforcers by ensuring that they have more effective means and instruments to apply the EU competition rules.

Proportionality

For most aspects the proposal will set minimum standards to empower NCAs to effectively enforce EU competition rules. This ensures an appropriate balance between meeting the general and specific objectives of the proposal whilst not unduly interfering in national traditions. Member States will still be able to set higher standards and adapt their rules to national specificities. For example, Member States will remain free to design, organise and fund their national competition authorities as they see fit, provided their effectiveness is ensured. Moreover the proposed Directive also ensures that the choice of those Member States which have opted for a judicial model of competition enforcement is fully respected.

It is only in the area of conditions for granting leniency for secret cartels that more detailed rules are required to reap added value in terms of competition enforcement. 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 potential 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 approach taken in the proposal maximises the increase in effectiveness of the NCAs with a minimum of interference in national specificities by limiting the most detailed rules to where this is strictly necessary to boost effective enforcement.

Such a calibrated approach will not be a radical departure from, but a logical evolution of, general EU law requirement that Member States must provide for effective procedures and sanctions for the enforcement of EU rules. According to the Court of Justice of the Europe Union, national law must ensure that EU competition law is fully effective.[5] The Court has also held that detailed national procedural rules for the functioning of NCAs must not jeopardise the attainment of the objective of Regulation (EC) No 1/2003, which is to ensure that Articles 101 and 102 TFEU are applied effectively by those authorities.[6]

Choice of the instrument

The aim of the proposal for a Directive is to enhance the effectiveness of the NCAs, while not imposing one size fits all so as to allow taking into account Member States' legal traditions and institutional specificities. Accordingly, a directive is the best way of ensuring that NCAs have the guarantees they need to be more effective enforcers, without unduly interfering in national specificities and traditions. In contrast to a regulation, it will leave Member States the choice of the most appropriate means of implementing the measures in the Directive. Moreover, a directive is a flexible tool for ensuring that NCAs have the necessary guarantees of independence and resources and enforcement and fining powers, while leaving room for Member States to go further if they so wish.

5 Case C-557/12, *Kone AG v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, para. 32.

6 Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, EU:C.2010:739, paras 56 and 57.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

Ex-post evaluations/fitness checks of existing legislation

In 2013/2014, the Commission conducted an assessment of the functioning of the Council Regulation (EC) No 1/2003. Based on the results of this analysis, the 2014 Commission's Communication on Ten Years of Council Regulation 1/2003 found that there is scope for the NCAs to be more effective enforcers and identified a number of areas for action to boost effective enforcement by the NCAs, namely 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.[7]

The 2014 Communication built on the Report of Five Years of Regulation 1/2003, which found that empowering the NCAs to co-enforce the EU competition rules has positively contributed to stronger enforcement.[8] However, it concluded that there is room for improvement, in particular, to ensure that NCAs have effective enforcement powers and fining tools.

Stakeholder consultations

From 4 November 2015 until 12 February 2016, the Commission held a public consultation in the form of an EU Survey which was split into two parts, a first one with general questions seeking input from non-specialised stakeholders, and a second one for stakeholders with a deeper knowledge/experience of competition matters.

The consultation followed up the Commission's Communication on Ten Years of Regulation 1/2003 which identified a number of areas of action to boost the powers of NCAs to enforce the EU competition rules. Accordingly, the second part of the consultation addressed four key issues: (i) resources and independence of the NCAs; (ii) enforcement toolbox of the NCAs; (iii) powers of NCAs to fine undertakings; and (iv) leniency programmes.

There were 181 replies from various stakeholders, ranging from private individuals, law firms and consultancies, companies and industry associations, consumer organisations, academics, non-governmental organisations, think tanks and trade unions to public authorities, including a number of Ministries and NCAs, from within and outside the EU.

76% of respondents considered that NCAs could do more to enforce EU competition rules than they currently do. Moreover, 80% supported that action should be taken to boost enforcement by NCAs. By stakeholder category: 100% of the academic institutions, consumer organisations, trade unions and NCAs which participated in the public consultation supported that action should be taken; 86% of NGOs; 84% of consultancies/law firms; 77% of companies/SMEs/micro-enterprises/sole traders; 67% of think tanks and 61% of industry

[7] Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives COM(2014) 453 and the accompanying Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003 SWD(2014) 230 and Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues SWD(2014) 231, http://ec.europa.eu/competition/antitrust/legislation/regulations.html.

[8] Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 COM(2009) 206 final and the accompanying Staff Working Paper SEC(2009) 574 final, http://ec.europa.eu/competition/antitrust/legislation/regulations.html.

associations. 64% of the stakeholders who participated in the public consultation supported that such action 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.[9]

In addition to the public consultation, on 19 April 2016, the European Parliament's Committee on Economic and Monetary Affairs (ECON) and the Commission co-organised a public hearing with the aim to provide experts and stakeholders with an additional opportunity to share their views on the public consultation. The hearing was followed by two panel discussions on the four topics covered by the public consultation. The participants in these discussions, including around 150 stakeholders from academia, business (large and small), consultancy, industry associations, law firms, press, private individuals and public authorities, widely agreed with and supported the objectives of the initiative.

Finally, two meetings were held with relevant Ministries to get their preliminary feedback. On 12 June 2015, Ministries were informed about the main issues that had been identified by the Commission. A second meeting with the Ministries and NCAs was held on 14 April 2016 in which they were informed about the results of the public consultation.

The results of the public consultation, the public hearing and the meetings with Ministries were taken into account in the proposal.

Collection and use of expertise

Extensive data collection was carried out by the Commission in cooperation with all NCAs to have a detailed picture of the status quo.

Impact assessment

The impact assessment report prepared by the Commission covers all main aspects related to this proposal. Four policy options were examined. The preferred option, which is implemented in this proposal, is to take EU legislative action providing NCAs with minimum means and instruments to be effective enforcers, complemented by both soft action and detailed rules where appropriate.

Regarding the other three policy options that were examined in the impact assessment report: (i) The baseline scenario of taking no EU action is highly unlikely to achieve the policy objectives and would not be in line with stakeholders' expectations; (ii) The option of taking exclusively soft action would not provide a sound legal basis to ensure that all NCAs have the necessary means and instruments to be effective enforcers. Moreover, soft measures have been in place for a number of years, without achieving the aim of fully realising the potential of the decentralised system put in place by Regulation (EC) No 1/2003; (iii) Providing NCAs with detailed and uniform means and instruments though EU legislative action would bring limited additional benefits relative to the preferred option but at the same time entail greater interference in national legal systems and traditions.

[9] The remaining 8% answered: "do not know/not applicable".

The assessment of the benefits of the preferred option, both in qualitative and quantitative terms (for example the positive impact on Total Factor Productivity growth-a key ingredient of GDP),[10] shows that the benefits will largely exceed the costs of implementation.

The Commission's Regulatory Scrutiny Board gave its comments on the draft Impact Assessment in September 2016 and in its favourable opinion in December 2016, which were duly taken into account.[11] In view of these comments, the final Impact Assessment provides all available anecdotal evidence to illustrate the problem drivers, more details on the policy options that were considered, and a detailed analysis of the costs and benefits of the preferred option, which illustrates how the benefits of the current proposal would significantly outweigh the associated costs. Moreover, the final Impact Assessment elaborates on the limitations and uncertainties of the quantitative estimates, provides a clearer presentation of stakeholders' views during the public consultation, and better demonstrates the compatibility of the options considered with the subsidiarity and proportionality principles.

Who will be affected and how

Empowering the NCAs to be more effective enforcers will benefit all consumers and companies, both large and small including SMEs, by boosting effective competition enforcement and creating a more level playing field. There is thus no need to provide for a differentiated scope, e.g. to include exemptions or to apply a lighter regime as regards measures towards SMEs.

NCAs

NCAs will be the prime beneficiaries of the initiative, and together with businesses, the most directly affected. Once implemented, the proposal will provide all NCAs with effective means and instruments to find evidence of infringements, to fine companies which break the law, to act independently when enforcing the EU competition rules and to have the resources they need to perform their tasks, and to have at their disposal leniency programmes that are more effective. This will allow the NCAs to take effective enforcement action and enable them to cooperate better with other competition authorities in the EU leading to more competition on markets. More particularly, it will ensure that the system of cross-border information gathering and exchange put in place by Regulation (EC) No 1/2003 works effectively. This might create some additional costs for some public authorities, if for example new IT tools need to be provided, but these costs are expected to be negligible. Not all NCAs will be affected in the same way, since the changes required will be dependent on the precise starting point of each national legal framework.

Businesses

Businesses will also be significantly affected by the initiative. Firstly, like consumers, businesses suffer from the consequences of a sub-optimal level of competition enforcement, as they face the negative impact of higher prices from their suppliers and the lower levels of innovation and choice, as well as from attempts of competitors infringing competition rules to

[10] See Section 6.3 of the Impact Assessment Report available at: http://ec.europa.eu/transparency/regdoc/?fuseaction=ia.

[11] See Opinions of 28 September 2016 and 9 December 2016 available at: http://ec.europa.eu/transparency/regdoc/?fuseaction=ia. See also Annex I of the Impact Assessment Report.

foreclose them from the market. The proposal will boost competition enforcement by NCAs in Europe and create a more level playing field in which a competition culture prevails to the benefit of all companies, both large and small, as it will enable them to compete more fairly on their merits and grow throughout the single market. This will also incentivise businesses to innovate and offer a better range of higher quality products and services that meet consumers' expectations.

Secondly, the proposal will also to a certain extent benefit businesses subject to investigations for alleged infringements of EU competition rules. The introduction of core effective means and instruments for NCAs will reduce divergent outcomes for companies, making the application of the EU competition rules more predictable and increasing legal certainty across the EU. Businesses may also benefit from enhanced procedural rights particularly in those jurisdictions in which there is room for improvement, as well as more legal certainty when applying for leniency. Businesses could face initial adaptation costs in terms of familiarisation with new procedural rules. However, overall, the costs for businesses involved in cross-border activities in the single market to adapt to different legal frameworks will likely be reduced.

On the other hand, for those businesses infringing the law in some jurisdictions, it will become more difficult to conceal evidence or to escape fines, or to benefit from low fines.

Consumers

Consumers will benefit from the advantages that stronger competition brings to the market in terms of wider choice and better products. For consumers, the lack of means and instruments and capacity of NCAs to un-leash their full potential when enforcing the EU competition rules means that they miss out on the advantages of competition enforcement. The proposal will ensure for consumers an equivalent level of protection across Europe from business practices that keep the prices of goods and services artificially high, enhancing their choice of innovative goods and services at affordable prices.

Fundamental rights

The proposal ensures the protection of the fundamental rights of companies which are subject to competition proceedings, namely (but not exclusively), the right to conduct a business, the right to property, good administration and the right to an effective remedy before a tribunal (Articles 16, 17, 41 and 47 of the Charter of Fundamental Rights of the European Union). It will give NCAs effective powers to enforce the EU competition rules only to the extent that this is necessary and proportionate. It will oblige Member States to provide for appropriate safeguards for the exercise of these powers which at least meet the standards of the Charter of Fundamental Rights of the European Union and are in accordance with general principles of EU law, including due respect of the data protection rights of natural persons. In particular, these safeguards should respect the rights of defence of companies subject to proceedings for the enforcement of Articles 101 and 102 TFEU, an essential component of which is the right to be heard. This includes the right to formal notification of the NCA's objections under EU competition law and effective right of access to the file so that companies can prepare their defence. Moreover the addresses of final decisions of NCAs applying Articles 101 and 102 TFEU should have the right to an effective remedy before a tribunal to challenge these decisions.

The proposal also includes specific safeguards for the respect of fundamental rights. For example, inspections of non-business premises should be subject to the authorisation of a

judicial authority. Fundamental rights guarantees are also embedded in several provisions. For instance, fines, structural and behavioural remedies can only be imposed by NCAs provided they are "proportionate". NCAs will only be able to carry out inspections and issue requests for information, provided they meet a "necessity" test.

4. BUDGETARY IMPLICATIONS

Effective and efficient cooperation and exchange of information between Member States requires secure infrastructure. The ECN relies on interoperability for its functioning. In the current multiannual financial framework (MFF) these actions are mainly financed under the ISA^2 programme[12] subject to the programme's available resources, eligibility and prioritisation criteria. The modalities of the budgetary impact of the proposal beyond 2020 will be subject to the Commission's proposals on the next MFF and the final outcome of the negotiations on the MFF post 2020. An indicative amount of 1 million EUR per year is foreseen to maintain, develop, host, operate and support a central information system (European Competition Network 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, developing and providing training programmes, issuing guidelines and common principles are estimated at 500 000 EUR per year.

As regards staff, the legislative proposal is budget-neutral and does not require additional staff resources. Details are explained in the legislative financial statement annexed to this proposal.

5. OTHER ELEMENTS

Implementation plans and monitoring, evaluation and reporting arrangements

The Commission has prepared an Implementation Plan which identifies the main challenges that Member States are likely to face during the adoption and implementation of the Directive, and suggest a number of actions to address them.

The Implementation Plan includes (i) a single contact point with the Commission through a functional mailbox that Member States can use for all issues related to the proposed Directive, and (ii) a number of actions to be carried out by the Commission and by the Member States to address the three main implementation challenges: (a) implementation within the time-frame, (b) the provision of training and support for NCAs, and (c) ensuring adequate information for the businesses community.

The Commission will monitor the transposition and implementation of the Directive, both during the period running up to the date for transposition and after transposition.

An ex-post evaluation of the Directive will be carried out after 5 years from the date of its transposition.

[12] Decision (EU) 2015/2240 of the European Parliament and of the Council of 25 November 2015 establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA^2 programme) as a means for modernising the public sector (OJ 2015, L 318. p. 1).

Explanatory documents

The proposed Directive sets out specific measures to ensure that: (1) NCAs have effective guarantees of independence and resources and enforcement and fining powers; (2) that the same guarantees and instruments are in place when NCAs apply national law in parallel to Articles 101 and 102 TFEU; and (3) NCAs can provide each other with effective mutual assistance to safeguard the system of close cooperation within the ECN. There are several legal obligations stemming from the proposed Directive. Its effective transposition will therefore require that specific and targeted amendments are made to the relevant national rules. In order for the Commission to monitor the correct transposition, it is thus not sufficient for Member States to transmit the text of the implementing provisions, as an overall assessment of the resulting regime under national law may be necessary. For these reasons, Member States should also transmit to the Commission explanatory documents showing which existing or new provisions under national law are meant to implement the individual measures sets out in the proposed Directive.

Detailed explanation of the specific provisions of the proposal

The proposal consists of 10 chapters comprising 34 articles.

Chapter I – Subject matter, scope and definitions

This Chapter defines the scope and the main terms used in the proposal. The definitions used largely reflect those used in Regulation (EC) No 1/2003 and Directive 2014/104/EU on damages for infringements of the competition rules.[13]

Chapter II – Fundamental Rights

The proposal will ensure that Member States provide for appropriate safeguards for the exercise of the powers provided for in this proposal. These safeguards will have to at least meet the standards of the Charter of Fundamental Rights of the European Union and general principles of Union law.[14] During the public consultation process, there was a clear demand from lawyers, business and business organisations for ensuring that NCAs have effective enforcement powers to be counter-balanced by increased procedural guarantees.

Chapter III – Independence and resources

This chapter ensures that NCAs enjoy the necessary guarantees of independence. In particular, it introduces guarantees aiming to protect the staff and management of NCAs from external influence when enforcing the EU competition rules by: (i) ensuring that they can perform their duties and exercise their powers independently from political and other external

[13] OJ L 349, 5.12.2014, p.1.

[14] According to the case law of the Court of Justice of the European Union, "*the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on the Member States when they implement [EU] rules*", judgment in *Karlsson and Others*, Case C-292/97, ECLI: EU:C:2000:202, para 37. See also the judgment in *Eturas*, Case C-74/14, ECLI:EU:C:2016:42, para 38, in which the Court of Justice of the European Union recalled that the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in *E.ON Energie v Commission*, C 89/11 P, ECLI: EU:C:2012:738, para 72), which the Member States are required to observe when they implement EU competition law. See also to that effect, judgment in *VEBIC*, C439/08, ECLI: EU:C:2010:739, para 63.

influence; (ii) explicitly excluding instructions from any government or other public or private entity; (iii) ensuring that they refrain from any action which is incompatible with the performance of their duties and exercise of their powers; (iv) prohibiting the dismissal of their management for reasons related to decision-making in specific cases; (v) ensuring that they have the power to set their priorities in individual cases including the power to reject complaints for priority reasons. Regarding this last aspect, the proposal does not interfere with Member States' prerogative to define general policy objectives. Most stakeholders during the public consultation process supported action covering all these aspects. Notably, businesses reported that the lack of ability of NCAs to set their priorities in full prevents them from focusing on infringements that cause the most harm to competition.

In addition, this Chapter introduces an explicit requirement for Member States to ensure that NCAs have the human, financial and technical resources that are necessary to perform their core tasks under 101 and 102 TFEU. The relevant provision leaves room for Member States to deal with economic fluctuations without risking the effectiveness of NCAs.

Chapter IV – Powers

Investigation and decision-making powers and procedures are the main working tools of competition authorities. However, currently there is a patchwork of powers across Europe, with many NCAs not having all the powers they need. The scope of NCAs' investigative and decision-making powers varies considerably, which can significantly impact on their effectiveness.

To address this, the proposal provides for the core minimum effective powers to investigate (the power to inspect business and non-business premises, to issue requests for information) and to take decisions (the power to adopt prohibition decisions including the power to impose structural and behavioural remedies, commitment decisions, and interim measures). Taking action to ensure that NCAs have such effective tools was widely supported in the public consultation. For example, stakeholders, particularly businesses, highlighted that the lack of power for NCAs to impose structural remedies was particularly problematic for companies damaged by the anticompetitive behaviour of the infringer.

The proposal will also ensure that those tools have teeth by providing for effective sanctions for non-compliance. To be meaningful they will be calculated in proportion to the total turnover of the undertaking concerned, but Member States will have flexibility in how this is implemented (e.g. specific percentages are not set for the level of the fine).

Chapter V – Fines and periodic penalty payments

The ability of competition authorities to fine companies which breach competition law is a central enforcement tool. The purpose of fines is to punish companies which have infringed competition rules and to deter the same and other companies from engaging in or continuing illegal behaviour. In 2009, the Court of Justice of the European Union ruled that "*the effectiveness of the penalties imposed by NCAs and the Commission is a condition for the coherent application of the EU competition rules*".[15] However, there are a number of issues that affect the level of enforcement of Articles 101 and 102 TFEU and mean that companies

[15] Judgment in *Inspecteur van de Belastingdienst v X BV*, C-429/07, ECLI: EU:C:2009:359, paras 36-39.

can face very low or no fines at all depending on which authority acts, undermining deterrence and the level-playing field.

Firstly, the nature of the fines imposed by NCAs for the infringement of the EU competition rules varies across Member States. Fines can be imposed either in administrative proceedings (imposed by the NCA), in non-criminal judicial proceedings (imposed by courts) or in criminal or quasi-criminal proceedings (imposed mainly by courts or, in some cases, by the NCA but according to quasi-criminal (misdemeanour) procedures). In the majority of Members States fines are administrative. Civil fines[16] are imposed in three Member States. In five Member States fines are imposed in (quasi) criminal proceedings. In most Member States in which fines are primarily imposed in (quasi) criminal proceedings, EU competition law is under-enforced or, even if enforced, sanctions were seldom imposed in the period 2004-2013. Most stakeholders stated in the public consultation that criminal systems are less suited for the effective enforcement of the EU competition rules. To address these problems of "under-enforcement" and whilst maintaining flexibility for Member States, the proposal will ensure that in those Member States where the administrative NCA cannot today adopt fining decisions, powers will either have to be given to NCAs to adopt such decisions directly or Member States will have to ensure that such decisions can be taken by a court in non-criminal judicial proceedings. The need for change will thus be kept to a minimum.

Secondly, there are differences in the methodologies for calculating fines that can have a significant impact on the level of fines imposed by NCAs. These differences mainly concern: (1) the maximum fine that can be set (the legal maximum) and (2) the parameters for calculating the fine. Such differences partly explain how fines today can vary by up to 25 times depending on which authority acts. Very low fines may be imposed for the same infringement, meaning that the deterrent effect of fines differs widely across Europe which was an issue flagged during the public consultation. The fines imposed may not reflect the harm caused to competition by the anti-competitive behaviour. 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 the worldwide turnover and second, when setting the fine, NCAs should have regard to the core factors of gravity and duration of the infringement.

The third aspect concerns limitations regarding who can be held liable for paying the fine. The concept of "undertaking" in EU competition law is established by the case law of the European Court of Justice. It means that different legal entities belonging to one "undertaking" can be held jointly and severally liable for any fines imposed on such "undertaking".[17] This sends a clear signal to the entire corporate group that the absence of good corporate governance and compliance with competition law will not remain unpunished. It also allows the fine to reflect the overall strength of the corporate group and not only that of the subsidiary, making it more meaningful and deterrent. However, several NCAs cannot today hold parent companies liable for infringements committed by subsidiaries under their control. Also, several NCAs cannot hold legal successors of an infringer and economic successors of an infringer liable for fines or there is uncertainty about this, despite the long established case law of the European Court of Justice. This means that companies can escape fines simply by merging with other companies or through corporate restructuring. To address

16 The term “civil fines” is used to denote fines imposed in non-criminal judicial proceedings.

17 Judgment in *AkzoNobel NV v Commission*, C-97/08 P, ECLI:EU:C:2009:536. It has to be shown that the parent company exercises decisive influence over the subsidiary that committed the infringement.

this, the proposal provides that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings.

Chapter VI – Leniency

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. This Chapter aims to increase legal certainty for companies that wish to apply for leniency and thus to maintain their incentives to cooperate with the Commission and the NCAs by reducing the current differences between the leniency programmes applicable in the Member States. To achieve this, the proposal transposes the main principles of the ECN Model Leniency Programme into law, thus ensuring that all NCAs can grant immunity and reduction from fines and accept summary applications under the same conditions. In the public consultation, 61% of stakeholders found the lack of implementation of the ECN Model Leniency Programme by Member States to be problematic.

Furthermore, this Chapter ensures that applicants will have the benefit of five working days to file summary applications and clarifies that they should not be confronted with parallel resource intensive requests from NCAs while the Commission is investigating the case. It also clarifies that, once the Commission has decided not to act on a case, summary applicants should have the opportunity to submit full leniency applications to the relevant NCAs.

Finally, this Chapter ensures that employees and directors of companies that file for immunity are protected from individual sanctions, where they exist, provided that they cooperate with the authorities. This is important in order to maintain incentives for companies to apply for leniency because their leniency applications often depend on their employees cooperating fully, without fear of incurring sanctions.

Similarly, individuals who have knowledge of the existence or functioning of a cartel or other types of antitrust violations should be encouraged to provide that information, e.g. including through the establishment of reliable and confidential reporting channels. To that end, many NCAs have in place, or are considering the introduction of, effective means to protect individuals who report or disclose information about violations of EU competition law from retaliation, for example, disciplinary measures by their employers. For example, the Commission introduced an anonymous whistleblower tool for competition cases on 16 March 2017.[18] The Commission has underlined the importance of the protection of whistleblowers and is looking into the possibility of horizontal or further sectoral action at EU level.[19]

Chapter VII – Mutual Assistance

This Chapter ensures that when one NCAs requests another NCA to carry out investigative measures on its behalf to gather evidence located in another jurisdiction, officials from the requesting NCA have the right to attend and actively assist in that inspection. This will make the conduct of such inspections more efficient and effective.

Moreover, this Chapter ensures that there are arrangements in place to allow NCAs to request and provide mutual assistance for the notification of decisions and enforcement of fines when companies have no legal presence in the territory of the requesting NCA or they do not have

[18] http://ec.europa.eu/competition/cartels/whistleblower/index.html.
[19] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254.

sufficient assets for the fine to be enforced against in that territory. Such mutual assistance is designed to minimise intrusion into national law and would incorporate key safeguards: (i) notification and enforcement will be carried out in accordance with the laws of the requested Member State; (ii) decisions imposing fines can only be enforced once they are final and can no longer be appealed by ordinary means; (iii) limitation periods will be governed by the law of the applicant Member State; (iv) the requested authority is not obliged to enforce fining decisions if this is manifestly contrary to the public policy of that Member State; and (v) disputes concerning the lawfulness of a measure will fall within the competence of the applicant Member State, while disputes concerning the notification or enforcement measures taken in the requested Member State will fall within the competence of the requested Member State.

Mutual assistance is a core aspect of this proposal because it is indispensable to close cooperation within the ECN and, therefore, to the success of the decentralised system on which the effective application of EU competition law depends. Without effective mutual assistance there cannot be a level playing field for companies with activities in more than one Member State, and the proper functioning of the internal market is hampered as a consequence.

Chapter VIII – Limitation periods

This Chapter ensures that if proceedings are on-going before a NCA or the Commission, the limitation periods applicable for other NCAs that may bring proceedings regarding the same agreement, decision of an association of undertakings or concerted practice are suspended for the duration of these proceedings. This will ensure that the system of parallel powers within the ECN works effectively and other NCAs are not prevented from subsequently acting as a result of their proceedings being time-barred. Member States remain free to determine the duration of limitation periods in their system or to introduce absolute limits provided that they do not render the effective enforcement of EU competition law practically impossible or excessively difficult.

Chapter IX – General provisions

This Chapter ensures that administrative NCAs, which are best placed to explain their decisions, have of their own right the power to bring and/or defend their cases before courts.[20] This will prevent the duplication of costs and effort inherent in another body defending these cases.

This Chapter also provides a key safeguard that information collected pursuant to the proposed Directive can only be used for the purpose for which it is acquired and cannot be used for the imposition of sanctions on natural persons.

Finally, this Chapter ensures that evidence is admissible irrespective of the medium on which the relevant information is stored, to ensure that the relevant procedural rules are digital proof.

[20] The European Court of Justice has ruled that Article 35 of Regulation (EC) No 1/2003 must be interpreted as precluding national rules which do not allow a NCA to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken, *VEBIC*, Case C-439/08, ECLI:EU:C:2010:739, para 64.

2017/0063 (COD)

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 Committee[1]

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.

(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

[1] OJ C , , p. .

[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).

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.

(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 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 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 and more detailed rules on the enforcement and fining powers of these authorities. In particular, Member States may endow NCAs with additional powers beyond the core set provided for in this Directive to further enhance their effectiveness.

(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.

(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 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. 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 Article 101 or Article 102 TFEU 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 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 independence of NCAs 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 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 of the members of the decision-making body of the NCAs in order to remove any reasonable doubt as to the impartiality of that body and its imperviousness to external factors.

(15) To ensure the independence of NCAs, their staff and members of the decision-making body 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 being jeopardised entails that during their employment and term of office and for a reasonable period thereafter, they should refrain from any incompatible occupation, whether gainful or not. Furthermore, this also entails that during their employment and their term of office, they should not have an interest in any businesses or organisations which have dealings with a NCA to

the extent that this has the potential to compromise their independence. The staff and the members of the decision-making body 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 NCAs 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.

(16) The independence of NCAs 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. Proportionate accountability requirements include the publication by NCAs of periodic reports on their activities to a governmental or parliamentary body. NCAs may also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.

(17) NCAs 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 on the grounds that they are not a priority. This should be without prejudice to the power of NCAs 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 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 competition authorities that are not related to specific proceedings for the enforcement of Articles 101 and 102 TFEU.

(18) NCAs should have the necessary resources, in terms of staff, expertise, financial means and technical equipment, 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 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.

(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 inspections when there are at least reasonable grounds for suspecting an infringement of Article 101 or Article 102 TFEU.

(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.

(24) To minimise the unnecessary prolongation of inspections, national administrative competition authorities should have the power to continue making searches of 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 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 there is a reasonable suspicion that business records are being kept which may be relevant to prove a serious violation of Article 101 or Article 102 TFEU. The exercise of this power should be subject to the prior authorisation of a judicial authority. This does not prevent Member States 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.

(26) NCAs should have effective powers to require 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. This should include the right to require information irrespective of where it is stored, provided it is accessible to the addressee of the request for information. Experience shows that information provided on a voluntary basis by third parties, such as competitors, customers and consumers in the market, 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 the market by imposing proportionate structural and behavioural remedies.

(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. 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.

(29) To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Articles 101 or 102 either directly themselves in administrative proceedings or to seek the imposition of fines in non-criminal judicial proceedings. This is without prejudice to national laws of the Member States which provide for the imposition of sanctions by courts in criminal proceedings for the infringement of Articles 101 and 102 TFEU.

(30) To ensure that undertakings and associations of undertakings comply with the investigation and decision-making powers of the NCAs, national administrative competition authorities must be able to impose effective fines for non-compliance, and periodic penalty payments to compel compliance with these powers either directly themselves in administrative proceedings or to seek the imposition of fines in non-criminal judicial proceedings. This is without prejudice to national laws of the Member States which provide for the imposition of such fines by courts in criminal judicial proceedings. Moreover, this Directive affects neither national rules on the standard of proof nor obligations of NCAs to ascertain the facts of the relevant case, provided that such rules and obligations are compatible with general principles of Union law. The fines and periodic penalty payments should be determined in proportion to the total turnover of the undertakings and associations of undertakings concerned

(31) To ensure the effective and uniform application of Articles 101 and 102 TFEU, the notion of undertaking, as contained in Articles 101 and 102 TFEU, should be applied in accordance with the case law of the Court of Justice of the European Union as designating an economic unit, even if it consists of several legal or natural persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries where such a parent company and its subsidiary form a single economic unit. To prevent undertakings escaping liability for fines for infringements of Articles 101 and 102 TFEU through legal or organisational changes, NCAs should be able to find legal or economic successors of the undertaking liable, and to impose fines on them, for an infringement of Articles 101 and 102 TFEU in accordance with the case law of the Court of Justice of the European Union.

(32) To ensure that the fines imposed for infringements of Articles 101 and 102 TFEU reflect the economic significance of the infringement, NCAs should take into account the gravity of the infringement. NCAs should also be able to set fines that are proportionate to the duration of the infringement. These factors should be assessed in accordance with the case law of the Court of Justice of the European Union. In particular, as regards the assessment of the gravity of an infringement, the Court of Justice of the European Union has established that consideration must be given to the circumstances of the case, the context in which the infringement occurred and the deterrent effect of the fines. Factors that may form part of this assessment are the turnover for the goods and services in respect of which the infringement was committed and the size and economic power of the undertaking, as they reflect the influence the undertaking was able to exert on the market. Moreover, the existence of repeated infringements by the same perpetrator shows its propensity to commit such infringements and is therefore a very significant indication of the gravity of the conduct in question and accordingly of the need to increase the level of the penalty to

achieve effective deterrence. When determining the fine to be imposed, NCAs should consider the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates. Similarly, NCAs should be entitled to increase the fine to be imposed on an undertaking or association of undertakings that continues the same, or commits a similar, infringement after the Commission or a national competition authority has taken a decision finding that the same undertaking or association of undertakings has infringed Articles 101 or 102 TFEU.

(33) Experience has shown that associations of undertakings regularly play a role in competition infringements and NCAs should be able to effectively fine such associations. When assessing the gravity of the infringement in order to determine the amount of the fine in proceedings brought against associations of undertakings where the infringement relates to the activities of its members, regard should be had to the sum of the sales by the undertakings that are members of the association of goods and services to which the infringement directly or indirectly relates. In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which NCAs may require payment of the fine from the members of the association where the association is not solvent. In doing so, NCAs should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(34) The deterrent effect of fines differs widely across Europe and in some Member States the maximum amount of the fine that can be set is very low. To ensure NCAs can set deterrent fines, the maximum amount of the fine should be set at a level of not less than 10% of the total worldwide turnover of the undertaking concerned. This should not prevent Member States from maintaining or introducing a higher maximum amount of the fine.

(35) Leniency programmes are a key tool for the detection of secret cartels and thus contribute to the efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. However, there are currently marked differences between the leniency programmes applicable in the Member States. Those differences lead to legal uncertainty on the part of infringing undertakings concerning the conditions under which they can apply for leniency as well as their immunity status under the respective leniency programme(s). Such uncertainty may weaken incentives for potential leniency applicants to apply for leniency. This in turn can lead to less effective competition enforcement in the Union, as fewer secret cartels are uncovered.

(36) The differences between leniency programmes at Member State level also jeopardise the level playing field for undertakings operating in the internal market. It is therefore appropriate to increase legal certainty by reducing these differences.

(37) NCAs should grant undertakings immunity from, and reductions of, fines if certain conditions are met. Undertakings should be deemed to have provided a national competition authority with evidence in respect of a secret cartel which enables the finding of an infringement of Article 101 TFEU if that national competition authority did not have sufficient evidence to find an infringement of Article 101 TFEU in

connection with the same cartel at the time of the submission by the undertaking of such evidence.

(38) Applicants should have the possibility to apply for leniency in writing or, where appropriate, by other means that do not result in the production of documents, information, or other materials in the applicant's possession, custody, or control. To that effect, NCAs should have a system in place that enables them to accept leniency statements either orally or by other means, including in digital form.

(39) Applicants which have applied for leniency to the European Commission in relation to an alleged secret cartel should be able to file summary applications in relation to the same cartel to the NCAs that they deem appropriate. NCAs should accept summary applications that contain a minimum set of information in relation to the alleged cartel and not request additional information beyond this minimum set before they intend to act on the case. However, the onus is on applicants to inform the NCAs to which they have submitted summary applications if the scope of their leniency application with the Commission changes. NCAs should provide applicants with an acknowledgement stating the date and time of receipt, and inform the applicant whether they have already received a previous summary or leniency application in relation to the same cartel. Once the Commission has decided not to act on the case in whole or partially, applicants should have the opportunity to submit full leniency applications to the NCAs to which they have submitted summary applications.

(40) Legal uncertainty as to whether undertakings' employees are shielded from individual sanctions can prevent potential applicants from applying for leniency. Current and former employees and directors of undertakings that apply for immunity from fines to competition authorities should thus be protected from any sanctions imposed by public authorities for their involvement in the secret cartel covered by the application. Such protection should be dependent on these employees and directors actively cooperating with the NCAs concerned and the immunity application predating the start of the criminal proceedings.

(41) In a system of parallel powers to apply Articles 101 and 102 TFEU, close cooperation is required between NCAs. In particular when a NCA carries out an inspection on behalf of another NCA pursuant to Article 22(1) of Council Regulation (EC) No 1/2003, the presence and assistance of the officials from the requesting authority should be enabled to enhance the effectiveness of such inspections by providing additional resources, knowledge and technical expertise.

(42) Similarly, arrangements should be put in place to allow NCAs to request mutual assistance for the notification of preliminary objections and decisions and the enforcement of decisions imposing fines or period penalties when the undertaking concerned has no legal presence in their territory. This would ensure the effective enforcement of Articles 101 and 102 TFEU and contribute to the proper functioning of the internal market.

(43) To ensure the effective enforcement of Articles 101 and 102 TFEU by NCAs there is a need to provide for workable rules on suspension of limitation periods. In particular, in a system of parallel powers, national limitation periods should be suspended for the duration of proceedings before NCAs of another Member State or the Commission. This does not prevent Member States from maintaining or introducing absolute

limitation periods, provided that the duration of such absolute time periods does not render the effective enforcement of Articles 101 and 102 TFEU practically impossible or excessively difficult.

(44) To ensure that cases are dealt with efficiently and effectively within the European Competition Network, in those Member States where a national administrative competition authority is competent to investigate infringements of Articles 101 or 102 TFEU and a national judicial competition authority is competent for adopting a decision finding the infringement and/or imposing the fine, national administrative competition authorities should be able to bring directly the action before the national judicial competition authority. In addition, to the extent that national courts act as review courts in proceedings brought against enforcement decisions of NCAs applying Articles 101 or 102, national administrative competition authorities should be of their own right fully entitled to participate as a prosecutor, defendant or respondent in those proceedings, and enjoy the same rights of such a party to those proceedings.

(45) The risk of self-incriminating material being disclosed outside the context of the investigation for the purposes of which it was provided can weaken the incentives for potential leniency applicants to cooperate with competition authorities. As a consequence, regardless of the form in which leniency statements are submitted, information in leniency statements obtained through access to the file should be used only where necessary for the exercise of rights of defence in proceedings before the courts of the Member States in certain very limited cases which are directly related to the case in which access has been granted. This should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law.

(46) Evidence is an important element in the enforcement of Articles 101 and 102 TFEU. NCAs should able to consider relevant evidence irrespective of whether it is made in writing, orally or in a recorded form, including covert recordings made by legal or natural persons provided this is not the sole source of evidence. This is without prejudice to the right to be heard.

(47) To underpin close cooperation in the European Competition Network, the Commission should maintain, develop, host, operate and support a central information system (European Competition Network System) in compliance with the relevant confidentiality, data protection and data security standards. The European Competition Network relies on interoperability for its effective and efficient functioning. The general budget of the Union should bear the costs of maintenance, development, hosting, user support and operation of the central information system as well as other administrative costs incurred in connection with the functioning of the European Competition Network, in particular the costs related to the organisation of meetings. Until 2020 the costs for the European Competition Network System are foreseen to be covered by the programme on interoperability solutions and common frameworks for European public administrations (ISA^2 programme), subject to the programme's available resources, eligibility and prioritisation criteria.

(48) Since the objectives of this Directive, namely to ensure that NCAs have the necessary guarantees of independence and resources and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU and national competition law in parallel to Articles 101 and 102 TFEU and to ensure the effective functioning of the

internal market and the European Competition Network, cannot be sufficiently achieved by the Member States alone, and this objective can by reason of the requisite effectiveness and uniformity in the application of Articles 101 and 102 TFEU be better achieved by the Union alone, in particular in view of its territorial scope, the Union may adopt measures in accordance with the principle of subsidiarity as set out on Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve this objective.

(49) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents,[3] Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

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 enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU 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. The scope of the 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, with the exception of Article 29(2) which also extends to national competition law applied exclusively.

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.

[3] OJ C 369, 17.12.2011, p. 14.

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 (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 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 law pursuant to Article 3(1) of Regulation (EC) No 1/2003 with the exception of the use of information taken from leniency statements and settlement submissions as referred to in Article 29(2) 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 decisions, irrespective of whether the 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 Article 9 or Article 11 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 the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets 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 is imposed on an undertaking for its participation in a secret cartel as a reward for its cooperation with a competition authority in the framework of a leniency programme;

(11) 'reduction of fines' means 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 as a reward 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 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;

(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 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 mean the competent public office, authority or department which has principal responsibility for the enforcement of such decisions under national laws, regulations and administrative practice.

All references to the application, 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 independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that they perform their duties and exercise their powers impartially and in the interests of the effective and uniform enforcement of these 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 ensure that:

   a) The staff and the members of the decision-making body of national administrative competition authorities can perform their duties and 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 national administrative competition authorities neither seek nor take any instructions from any government or other public or 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 national administrative competition authorities refrain from any action which is incompatible with the performance of their duties and exercise of their powers for the application of Articles 101 and 102 TFEU;

d) The members of the decision-making body of national administrative competition authorities may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct under national law. The grounds for dismissal should 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 have the power to set their priorities for carrying out tasks for the application of Articles 101 and 102 TFEU as defined in Article 5(2). To the extent that national administrative competition authorities are obliged to consider complaints which are formally filed, this shall include the power of those authorities to reject such complaints on the grounds that they do not consider them to be a 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 the human, financial and technical resources that are necessary for the effective performance of their duties and exercise of their powers when applying Articles 101 and 102 TFEU as defined in paragraph 2.

2. The application of Articles 101 and 102 TFEU by national competition authorities shall include: conducting investigations with a view to applying Articles 101 and 102 TFEU; taking decisions applying these provisions on the basis of Article 5 of Regulation 1/2003; and 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 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 inspection are at 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 the right to access 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 to continue making searches of these copies or extracts at their premises or 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 ordered by a national administrative competition authority or authorised by a national judicial authority, national competition authorities can obtain the necessary assistance of the police or of an equivalent enforcement agency 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 which may

be relevant to prove a serious violation 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 transport, including the homes of directors, managers, and other members of staff of undertakings and associations of undertakings, national administrative competition authorities may conduct unannounced inspections in such premises, land and means of transport.

2. Such inspections cannot 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 to conduct an inspection in accordance with paragraph 1 of this Article have at least 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 undertaking and association of undertakings.

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 infringement to an end. For that purpose, they may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

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 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 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 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 to meet the concerns expressed by 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.

CHAPTER V

FINES AND PERIODIC PENALTY PAYMENTS

Article 12

Fines on undertakings and associations of undertakings

1. Without prejudice to national laws of the Member States which provide for the imposition of sanctions in criminal judicial proceedings, Member States shall ensure that national administrative competition authorities may either impose by decision in administrative proceedings, or request in non-criminal judicial proceedings the imposition of effective, proportionate and deterrent pecuniary fines on undertakings and associations of undertakings when, either intentionally or negligently, they infringe Articles 101 or 102 TFEU.

2. Without prejudice to national laws of the Member States which provide for the imposition of sanctions in criminal judicial proceedings, Member States shall ensure that national administrative competition authorities may either impose by decision in administrative proceedings, or, request in non-criminal judicial proceedings the imposition of effective, proportionate and deterrent pecuniary fines on undertakings or associations of undertakings which are determined in proportion to their total turnover, where intentionally or negligently:

   a) they fail to comply with an inspection referred to Article 6(2);

   b) seals fixed by officials or other accompanying persons authorised by the national competition authorities as referred to by Article 6(1)(d) have been broken;

   c) in response to a question referred to by Article 6(1)(e), they give an incorrect, misleading answer, fail or refuse to provide a complete answer, or fail to rectify within a time-limit set by the national competition authority an incorrect, misleading or incomplete answer given by a member of staff;

d) they supply incorrect, incomplete or misleading information in response to a request made by a decision referred to by Article 8 or do not supply information within the specified time-limit;

e) they fail to comply with a decision referred to in Articles 10 and 11.

3. Member States shall ensure that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings.

Article 13

Calculation of the fines

1. Member States shall ensure that when national competition authorities determine the amount of the fine for an infringement of Article 101 or Article 102 TFEU regard is had both to the gravity and to the duration of the infringement.

2. Member States shall ensure that, when a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where necessary to ensure the full payment of the fine, Member States shall ensure that national competition authorities are entitled to require the payment of the outstanding amount of the fine by any of the undertakings whose representatives were members of the decision-making bodies of the association. To the extent that it is still necessary, national competition authorities shall also be entitled to require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred. However, payment shall not be required from those members of the association that did not implement the infringement and either were not aware of it or have actively distanced themselves from it before the investigation started.

Article 14

Maximum amount of the fine

1. Member States shall ensure that the maximum amount of the fine a national competition authority may impose on each undertaking or association of undertakings participating in an infringement of Articles 101 or 102 TFEU should not be set at a level below 10% of its total worldwide turnover in the business year preceding the decision.

2. Where an infringement by an association of undertakings relates to the activities of its members, the maximum amount of the fine shall not be set at a level below 10 % of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association. However, the financial liability of

each undertaking in respect of the payment of the fine shall not exceed the maximum amount set in accordance with paragraph 1.

Article 15

Periodic penalty payments

Member States shall ensure that national administrative competition authorities may by decision impose effective, proportionate and deterrent periodic penalty payments on undertakings and associations of undertakings which are determined in proportion to their daily total turnover in order to compel them:

a) to submit to an inspection referred to in Article 6(2),

b) to supply complete and correct information as referred to in Article 8,

c) to comply with a decision referred to in Articles 9, 10 and 11.

CHAPTER VI

LENIENCY

Article 16

Immunity from fines

1. Member States shall ensure that national competition authorities have in place leniency programmes that enable them to grant immunity from fines to undertakings.

2. Member States shall ensure that immunity can be granted only if the undertaking

   a) fulfils the conditions laid down in Article 18;

   b) discloses its participation in a secret cartel; and

   c) is the first to submit evidence which:

      i. at the time the national competition authority receives the application, enables it to carry out a targeted inspection in connection with the secret cartel, provided that the national competition authority did not yet have in its possession evidence to carry out an inspection in connection with the secret cartel or had not already carried out such an inspection; or

      ii. in the national competition authority's view, enables the finding of an infringement of competition law, provided that the national competition authority did not yet have in its possession evidence to find such an

infringement and that no other undertaking previously qualified for immunity under paragraph 2(c)(i) in relation to the same cartel.

3. Member States shall ensure that all undertakings are eligible for immunity from fines, with the exception of undertakings that have taken steps to coerce other undertakings to participate in a secret cartel.

Article 17

Reduction of fines

1. Member States shall ensure that national competition authorities have in place leniency programmes that enable them to grant a reduction of fines to undertakings which do not qualify for immunity.

2. Member States shall ensure that a reduction of fines is granted only if the conditions laid down in Article 18 are fulfilled and the applicant discloses its participation in a secret cartel and provides the national competition authority with evidence of the alleged secret cartel which represents significant added value for the purpose of proving an infringement of Article 101 TFEU or a corresponding provision under national law, relative to the evidence already in the national competition authority's possession at the time of the application.

3. Member States shall ensure that national competition authorities are able to grant an additional reduction of fines if the applicant submits evidence which the national competition authority uses, without the need for further corroboration, to prove additional facts which lead to an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel. The reduction of fines for the applicant shall be proportionate to such increase in fines.

Article 18

General conditions for leniency

Member States shall ensure that, in order to qualify for leniency, the applicant must satisfy the following cumulative conditions:

a) it ended its involvement in the alleged secret cartel immediately following its application, except for what would, in the competent national competition authority's view, be reasonably necessary to preserve the integrity of its investigation;

b) it cooperates genuinely, fully, on a continuous basis and expeditiously with the national competition authority from the time of its application until the authority has closed its proceedings against all parties under investigation by adopting a decision or has otherwise terminated its proceedings. This includes:

i. providing the national competition authority promptly with all relevant information and evidence relating to the alleged secret cartel that comes into its possession or is available to it;

ii. remaining at the national competition authority's disposal to answer any request that may contribute to the establishment of the facts;

iii. making current (and, if possible, former) employees and directors available for interviews with the national competition authority;

iv. not destroying, falsifying or concealing relevant information or evidence; and

v. not disclosing the fact of, or any of the content of, its application before the national competition authority has issued objections in the proceedings before it, unless otherwise agreed; and

c) when contemplating making an application to the national competition authority it must not have:

i. destroyed, falsified or concealed evidence of the alleged secret cartel; or

ii. disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

Article 19

Form of leniency applications

Member States shall ensure that applicants can apply for leniency in writing and that national competition authorities have a system in place that enables them to accept leniency statements either orally or by other means that do not result in the production of documents, information, or other materials in the applicant's possession, custody, or control.

Article 20

Marker for a formal application for immunity

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.

Article 21

Summary applications

1. Member States shall ensure that applicants that have applied for leniency, either by applying for a market or by submitting a full application, to the Commission in relation to an alleged secret cartel can file summary applications in relation to the same cartel with the national competition authorities which the applicant considers well placed to deal with the case.

2. Member States shall ensure that national competition authorities accept summary applications provided that they take one of the forms stipulated in Article 19, have the same product, geographic and durational scope as the leniency application filed with the Commission and include a short description of the following, in so far as it is known to the applicant at the time of the submission:

   a) the name and address of the applicant;

   b) the other parties to the alleged secret cartel;

   c) the affect product(s);

   d) the affected territory(ies);

   e) the duration;

   f) the nature of the alleged cartel conduct;

   g) the Member State(s) where the evidence is likely to be located; and

   h) information on the applicant's other past or possible future leniency applications in relation to the alleged secret cartel.

3. Member States shall ensure that national competition authorities refrain from requesting from the applicant any information related to the alleged infringement covered by the summary application beyond the items set out in paragraph 2 before they require the submission of a full application pursuant to paragraph 6.

4. Member States shall ensure that national competition authorities which receive a summary application provide the applicant with an acknowledgement stating the date and time of receipt.

5. Member States shall ensure that national competition authorities which receive a summary application verify whether they already had received a previous summary or leniency application in relation to the same alleged secret cartel at the time of its receipt and inform the applicant accordingly.

6. Member States shall ensure that applicants have the opportunity to submit full leniency applications, perfecting the summary applications referred to in paragraph 1, to the national competition authorities concerned, once the Commission has informed those authorities that it does not intend to act on the case in whole or in part. Member States shall ensure that national competition authorities have the power to specify a reasonable period of time within which the applicant must submit the full application together with the corresponding evidence and information.

7. Member States shall ensure that if the applicant submits the full application in accordance with paragraph 6, within the period specified by the national competition authority, the information contained therein will be deemed to have been submitted at the date and time of the summary application. If the applicant had submitted the summary application no later than 5 working days after filing the leniency application to the Commission, the summary application will be deemed to have been submitted at the date and time of the leniency application submitted to the Commission.

Article 22

Interplay between leniency programmes and sanctions on natural persons

Member States shall ensure that current and former employees and directors of applicants for immunity from fines to competition authorities are protected from any criminal and administrative sanctions and from sanctions imposed in non-criminal judicial proceedings for their involvement in the secret cartel covered by the application, if these employees and directors actively cooperate with the competition authorities concerned and the immunity application predates the start of the criminal proceedings.

CHAPTER VII

MUTUAL ASSISTANCE

Article 23

Cooperation between national competition authorities

Member States shall ensure that when national administrative competition authorities carry out an inspection on behalf of and for the account of other national competition authorities pursuant to Article 22 of Council Regulation (EC) No 1/2003, officials and other accompanying persons authorised by the requesting national competition authority shall be permitted to attend and actively assist the requested national competition authority in the inspection by exercising the powers referred to in Articles 6 and 7.

Article 24

Requests for the notification of preliminary objections and decisions

1. Without prejudice to any other form of notification made by a national competition authority of the applicant Member State in accordance with the rules in force in that Member State, Member States shall ensure that at the request of the applicant authority, the requested authority shall notify to the addressee on behalf of the applicant authority preliminary objections to the alleged infringement of Articles 101 or 102 TFEU and decisions applying those Articles, as well as documents which relate to the enforcement of decisions imposing fines or periodic penalty payments.

2. The requested authority shall ensure that notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State.

Article 25

Requests for the enforcement of decisions imposing fines or periodic penalty payments

1. Member States shall ensure that at the request of the applicant authority, the requested authority shall enforce decisions imposing fines or periodic penalty payments adopted in accordance with Articles 12 and 15 by the applicant authority. This shall apply only to the extent that:

   a) the undertaking against which the fine or periodic penalty payment is enforceable does not have a legal presence in the Member State of the applicant authority; or

   b) it is obvious that the undertaking against which the fine or periodic penalty payment can be enforced does not have sufficient assets in the Member State of the applicant authority.

2. The requested authority shall ensure that enforcement in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the requested Member State.

3. The applicant authority may only make a request for enforcement when the decision permitting its enforcement in the applicant Member State is final and can no longer be appealed by ordinary means.

4. Questions regarding periods of limitation shall be governed by the laws in force of the applicant Member State.

5. The requested authority shall not be obliged to enforce decisions pursuant to paragraph 1 if this would be manifestly contrary to public policy in the Member State in which enforcement is sought.

Article 26

Disputes concerning requests for notification and for the enforcement of decisions imposing fines or penalty payments

1. Disputes concerning the lawfulness of a measure to be notified or a decision imposing fines or periodic penalty payments in accordance with Articles 12 and 15 made by an applicant authority shall fall within the competence of the competent bodies of the applicant Member State and be governed by the national rules of that State.

2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by the requested authority shall fall within the competence of the competent bodies of the requested Member State and be governed by the rules in force of that State.

CHAPTER VIII

LIMITATION PERIODS

Article 27

Suspension of limitation periods for the imposition of penalties

1. Member States shall ensure that limitation periods for the imposition of fines or periodic penalty payments by the national competition authorities pursuant to Articles 12 and 15 shall be suspended for the duration of proceedings before national competition authorities of other Member States or the Commission in respect of an infringement concerning the same agreement, decision of an association or concerted practice. The suspension shall start to run from the notification of the first formal investigative measure to the undertaking subject to the proceedings. It shall end on the day the authority concerned has closed its proceedings and informed the undertaking thereof. The duration of this suspension period is without prejudice to absolute limitation periods provided for under national law.

2. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of a competition authority is the subject of proceedings pending before a review court.

CHAPTER IX

GENERAL PROVISIONS

Article 28

Role of national administrative competition authorities before national courts

1. Member States which designate both a national administrative competition authority, which is competent to investigate infringements of Articles 101 or 102 TFEU, and a national judicial competition authority, which is competent for adopting a decision finding the infringement and/or imposing the fine, shall ensure that the action before the national judicial competition authority can be brought directly by the national administrative competition authority.

2. To the extent that national courts act in proceedings brought against enforcement decisions of national competition authorities applying Articles 101 or 102 TFEU, Member States shall ensure that the national administrative competition authority is of its own right fully entitled to participate as a prosecutor, defendant or respondent in those proceedings and to enjoy the same rights as such public parties to these proceedings.

Article 29

Limitations on the use of information

1. Information collected on the basis of the provisions referred to in this Directive should only be used for the purpose for which it was acquired. It should not be used in evidence for the imposition of sanctions on natural persons.

2. Member States shall ensure that access will be granted to leniency statements or settlement submissions only for the purposes of exercising the rights of defence in proceedings before a national competition authority. Member States shall ensure that information taken from such leniency statements and settlement submissions may be used by the party having obtained access to the file only where necessary for the exercise of its rights of defence in proceedings before the courts of the Member States in cases that are directly related to the case in which access has been granted, and which concern:

   a) the allocation between cartel participants of a fine imposed jointly and severally on them by a national competition authority; or

   b) the review of a decision by which a national competition authority has found an infringement of Article 101 TFEU or national competition law provisions.

3. Member States shall ensure that the following categories of information obtained during proceedings before a national competition authority shall not be used in

proceedings before national courts until the national competition authority has closed its proceedings against all parties under investigation by adopting a decision referred to in Article 9 or Article 11 or otherwise has terminated its proceedings:

a) Information that was prepared by other natural or legal persons specifically for the proceedings of the national competition authority; and

b) Information that the national competition authority has drawn up and sent to the parties in the course of its proceedings.

4. Member States shall ensure that leniency statements will only be exchanged between national competition authorities pursuant to Article 12 of Regulation (EC) No 1/2003:

a) with the consent of the applicant; or

b) where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority; or

c) where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the applicant, on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme, or on any employee or former employee of any of the above mentioned persons;

and provided that the protection against disclosure granted by the receiving national competition authority is equivalent to that conferred by the transmitting national competition authority.

5. When a competition authority transmits information provided voluntarily by an applicant pursuant to Article 12 of Regulation (EC) No 1/2003 without the consent of the applicant, Member States shall ensure that receiving national competition authorities are able to provide the commitment referred to in paragraph 4(c).

6. Paragraphs 2-5 apply regardless of the form in which leniency statements are submitted pursuant to Article 19.

Article 30

Admissibility of evidence before national competition authorities

Member States shall ensure that the types of proof admissible as evidence before a national competition authority include documents, oral statements, recordings and all other objects containing information, irrespective of the medium on which the information is stored.

Article 31

Costs of the European Competition Network System

The costs incurred by the Commission in connection with the maintenance and the development of the European Competition Network System and cooperation within the European Competition Network shall be borne by the general budget of the Union within the limit of the available appropriations.

CHAPTER X

FINAL PROVISIONS

Article 32

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two year period for transposition] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 33

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 34

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

1.2. Policy area(s) concerned in the ABM/ABB structure

1.3. Nature of the proposal/initiative

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LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

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.

1.2. Policy area(s) concerned in the ABM/ABB structure[1]

Policy area: Title 03 – Competition policy.

Activities: 03 02 – Policy coordination, European Competition Network and international cooperation.

03 05 – Cartels, anti-trust and liberalisation.

1.3. Nature of the proposal/initiative

The proposal/initiative relates to **a new action**.

1.4. Objective(s)

1.4.1. The Commission's multiannual strategic objective(s) targeted by the proposal/initiative

General Objective A: A New Boost for Jobs, Growth and Investment.

1.4.2. Specific objective(s) and ABM/ABB activity(ies) concerned

Specific objective No 2: Effective and coherent application of EU competition law by NCAs and by national courts.

ABM/ABB activity(ies) concerned: 03 02 - Policy coordination, European Competition Network and international cooperation, and 03 05 - Cartels, anti-trust and liberalisation.

1.4.3. Expected result(s) and impact

1.4.4. The main impact of the initiative will be on NCAs, businesses and consumers, as explained in section 2 of the Explanatory Memorandum. Indicators of results and impact

The table below shows possible indicators that could be used to measure results and impact.

Objectives	Core indicators
Ensuring all national competition authorities ("NCAs") have effective investigation and	Legislative action 1. Availability of the core investigation and

[1] ABM: activity-based management; ABB: activity-based budgeting.

decision-making tools.	decision-making tools per NCA. 2. Availability of the key procedural guarantees per NCA. 3. Use of new investigation tools per NCA. 4. Number of enforcement decisions per type of decision (e.g. prohibitions, commitments, interim measures). Soft action: 1. Application by NCAs of recommended practices/guidance, when applicable, to be endorsed by the ECN.
Ensuring that all NCAs are able to impose effective fines.	Legislative action: 1. In Member States currently imposing fines on undertaking in criminal judicial proceedings: - Availability of fines in administrative proceedings / non-criminal judicial proceedings. - Ability of NCAS to bring/defend cases before courts. - Number of fines vs. number of cases compared to previous period when primarily fines imposed in criminal judicial proceedings were imposed. 2. Application of the prescribed legal maximum for the level of fines per NCA. 3. Changes in the level of fines compared to the situation prior to the entry into force of the Directive. 4. Total amount of fines imposed. 5. Application/non-application of the notion of undertaking for the purpose of imposing fines on parent companies and legal and economic successors of undertakings. Soft action: 1. Application by NCAs of recommended practices/guidance, when applicable, to be endorsed by the ECN.

Guaranteeing that all NCAs have a well-designed leniency programme in place which also facilitates applying for leniency in multiple jurisdictions.	Legislative action: 1. Availability per NCA of effective guarantees that leniency applicants can safeguard their place in the leniency queue. 2. Availability per NCA of rules to protect employees of leniency applicants from sanctions. 3. Number of leniency applications per NCA. Soft action: 1. Application by NCAs of recommended practices/guidance, when applicable, to be endorsed by the ECN.
Ensuring that NCAs have sufficient resources and they can enforce the EU competition rules independently.	Legislative action: 1. Availability per NCA of rules ensuring that NCAs do not receive instructions from public or private bodies. 2. Survey of whether NCAs have been subject to attempts to undermine their independence. 3. Survey of whether NCAs have adequate human and financial resources to perform their tasks, including trend and comparison of levels of staff and budget.
Extra costs for NCAs.	1. Additional costs incurred as a result from enhanced powers (training, etc.) 2. Cost of NCAs' antitrust enforcement activity (costs vs. amount of fines imposed).

1.5. Grounds for the proposal/initiative

1.5.1. Requirement(s) to be met in the short or long term

The main objective of this legislative initiative is to make sure that the full potential of the decentralised system of enforcement of EU competition rules put in place by Regulation (EC) No 1/2003 is realised, by empowering the NCAs to be more effective enforcers. This will boost effective enforcement of the EU competition rules. It will also underpin close cooperation in the European Competition Network.

This requires the achievement of the following specific objectives:

1. ensuring all NCAs have effective investigation and decision-making tools;

2. ensuring that all NCAs are able to impose effective deterrent fines;

3. ensuring that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions; and

4. ensuring that NCAs have sufficient resources and can enforce the EU competition rules independently.

1.5.2. Added value of EU involvement

There are several reasons justifying the involvement of the EU to achieve the objectives described in section 1.5.1 and realise the full potential of the decentralised system of enforcement of EU competition rules, as explained in section 2 of the Explanatory Memorandum.

1.5.3. Lessons learned from similar experiences in the past

Regulation (EC) No 1/2003 empowered NCAs to apply the EU competition rules. As a result, enforcement of the EU competition rules is now taking place on a scale which the Commission could never have achieved on its own. Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%. The legislative proposal is based on the enforcement experience of the NCAs and additional fact finding since 2004.

1.5.4. Compatibility and possible synergy with other appropriate instruments

The legislative proposal is compatible with Regulation (EC) No 1/2003 and it will have strong synergies with it, as it will allow NCAs to achieve their full potential in the decentralised system of enforcement of EU competition rules provided for by this Regulation.

1.6. Duration and financial impact

Proposal/initiative of **unlimited duration**

1.7. Management mode(s) planned[2]

Direct management by the Commission and its departments.

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

The appropriations will serve to maintain, develop, host, operate and support a central information system (European Competition Network System) in compliance with the relevant confidentiality and data security standards. They will guarantee close cooperation with between the NCAs and the Commission in the European Competition Network through various means. The reporting rules of the Directorate-General will apply.

[2] Details of management modes and references to the Financial Regulation may be found on the website of the European Commission's Directorate General for Budget: http://ec.europa.eu/budget/index_en.cfm.

2.2. Management and control system

2.2.1. Risk(s) identified

As regards IT; risk that the IT-systems fail to effectively support the operation of the European Competition Network.

2.2.2. Information concerning the internal control system set up

IT: Effective IT-governance processes, which actively involve the systems' users.

Expenditures: the internal control processes are aimed to ensure the adequate management of the risks relating to the legality and regularity of the underlying transactions, and the nature of payments. Furthermore, the control system consists of different building blocks, such as reporting to senior management, ex-ante verification by central financial team, internal advisory committee for procurements and contracts, ex-post controls and audits from the Internal Audit Service and the European Court of Auditors.

2.2.3. Estimate of the costs and benefits of the controls and assessment of the expected level of risk of error

Expenditure: The costs of controls are estimated to be less than 3% of total expenditure. The benefits of controls in non-financial terms cover: better value for money, deterrence, efficiency gains, system improvements and compliance with regulatory provisions.

The risks are effectively mitigated by means of controls put in place, and the level of risk of error is estimated to less than 2%.

2.3. Measures to prevent fraud and irregularities

The fraud risks are mitigated by specific controls. Activities and operations at a higher risk of fraud are subject to more in-depth monitoring and control. The above-mentioned control system and the nature of the expenditures under direct management mode allow assessing the probability of fraud as being low.

All transactions are subject to first level ex-ante controls in accordance with our financial circuits. The controls are both operational and financial, the operational initiation and verification is performed by the operational directorate, whereas the financial initiation and verification is performed by the financial cell in Unit COMP R2.

The risk of fraud is assessed each year in the context of the risk management exercise.

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

Existing budget lines

In 2016, the information systems supporting the operations of the European Competition Network were funded from the ISA^2 program under the ABCDE action. Other costs incurred

in connection with the functioning of the European Competition Network are funded under administrative expenditures. The same will apply in 2017 until 2020. The modalities of the budgetary impact of the proposal beyond 2020 will be subject to the Commission's proposals on the next MFF and to the final outcome of the negotiations on the MFF post 2020.

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line		Type of expenditure		Contribution	
	Heading 1a	Diff./Non-diff. [3]	from EFTA countries[4]	from candidate countries[5]	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	26.030100	DIFF.	YES	YES	NO	NO

Heading of multiannual financial framework	Budget line		Type of expenditure		Contribution	
	Heading 5	Diff./Non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	03.010211	NON-DIFF.	NO	NO	NO	NO

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

Heading of multiannual financial framework	Number 1a	'Competitiveness for growth and jobs'

EUR million (to three decimal places)

DG: COMP			Year 2018	Year 2019	Year 2020	**Subsequent years (payments)**	**TOTAL**
• Operational appropriations							
Budget line 26.030100[6]	Commitments	(1)	1,000	1,000	1,000		**3,000**
	Payments	(2)	0,700	0,900	1,000	**0,400**	**3,000**

[3] Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.
[4] EFTA: European Free Trade Association.
[5] Candidate countries and, where applicable, potential candidates from the Western Balkans.
[6] These amounts are indicative, under reserve of the annual budgetary procedure and of the priorities set under the annual ISA² Work Programme.

Appropriations of an administrative nature financed from the envelope of specific programmes[7]							
TOTAL appropriations for DG COMP	**Commitments**	=1+1a +3	1,000	1,000	1,000		**3,000**
	Payments	=2+2a+ 3	0,700	0,900	1,000	**0,400**	**2,600**
• TOTAL operational appropriations	Commitments	(4)	1,000	1,000	1,000		**3,000**
	Payments	(5)	0,700	0,900	1,000		**3,000**
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)	**0**	**0**	**0**		**0**
TOTAL appropriations under HEADING 1a of the multiannual financial framework	**Commitments**	**=4+ 6**	1,000	1,000	1,000		**3,000**
	Payments	**=5+ 6**	0,700	0,900	1,000	**0,400**	**3,000**

Heading of multiannual financial framework	**5**	'Administrative expenditure'

EUR million (to three decimal places)

		Year **N**	Year **N+1**	Year **N+2**	**Subsequent years (payments)**	**TOTAL**
DG: COMP						
• Human resources		0,759	0,759	0,759		**2,277**
• Other administrative expenditure		0,500	0,550	0,550		**1,600**
TOTAL DG COMP	Appropriations	1,259	1,309	1,309		**3,877**

[7] Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

TOTAL appropriations under HEADING 5 of the multiannual financial framework	(Total commitments = Total payments)	1,259	1,309	1,309		**3,877**

EUR million (to three decimal places)

		Year **N**[8]	Year **N+1**	Year **N+2**	**Subsequent years (payments)**	**TOTAL***
TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework	Commitments	2,259	2,309	2,309		**6,877**
	Payments	1,959	2,209	2,309	**0,400**	**6,877**

3.2.2. Estimated impact on operational appropriations

The proposal/initiative requires the use of operational appropriations, as explained below:

It is not possible for DG Competition to provide an exhaustive list of outputs to be delivered by means of financial interventions, average cost and numbers as requested by this section as this is a new initiative and there is no previous statistical data to draw from.

To underpin close cooperation in the European Competition Network and to optimally achieve the objectives, we foresee among other things the following expenditures:

- to maintain, develop, host, operate and support a central information system (European Competition Network System) in compliance with the relevant confidentiality and data security standards. The European Competition Network relies on interoperability for its effective and efficient functioning.
- other administrative costs incurred in connection with the functioning of the European Competition Network, such as:
  - costs related to the organisation of meetings;
  - providing training for national competition authorities;
  - printed material translated to all languages;
  - issuing recommended practices/guidance translated into all languages;
  - follow-up surveys/studies/evaluations.

[8] Year N is the year in which implementation of the proposal/initiative starts.

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.3.1. Summary

The proposal/initiative does not require the use of additional appropriations of an administrative nature.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints. The same applies for the appropriations needed to cover other administrative expenditure.

3.2.3.2. Estimated requirements of human resources

The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full time equivalent units

		Year **N**	Year **N+1**	Year **N+2**	Year **N+3**	Unlimited duration (see point 1.6) (see point 1.6)
• Establishment plan posts (officials and temporary staff)						
XX 01 01 01 (Headquarters and Commission's Representation Offices)		5,5	5,5	5,5	5,5	5,5
XX 01 01 02 (Delegations)						
XX 01 05 01 (Indirect research)						
10 01 05 01 (Direct research)						
• External staff (in Full Time Equivalent unit: FTE)[9]						
XX 01 02 01 (AC, END, INT from the 'global envelope')						
XX 01 02 02 (AC, AL, END, INT and JED in the delegations)						
XX 01 04 **yy** [10]	- at Headquarters					
	- in Delegations					
XX 01 05 02 (AC, END, INT - Indirect research)						
10 01 05 02 (AC, END, INT - Direct research)						
Other budget lines (specify)						
TOTAL		**5,5**	**5,5**	**5,5**	**5,5**	**5,5**

XX is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

9 AC= Contract Staff; AL = Local Staff; END= Seconded National Expert; INT = agency staff; JED= Junior Experts in Delegations.

10 Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

Description of tasks to be carried out:

Officials and temporary staff	AD – Monitoring, coordination European Competition Network AST - IT project manager of systems supporting the operation of ECN network, coordination European Competition Network meetings
External staff	N/A

3.2.4. Compatibility with the current multiannual financial framework

The proposal/initiative is compatible with the current multiannual financial framework and the present financial programming of the ISA[2] programme, no additional resources are necessary.

3.2.5. Third-party contributions

The proposal/initiative does not provide for co-financing by third parties.

3.3. Estimated impact on revenue

The proposal/initiative has no financial impact on revenue.