Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
(COM (2017) 142 final)

APPROVED FINAL DOCUMENT

The Committees on Justice and on Economic Activities, Trade and Tourism of Italy's Chamber of Deputies,

Having examined, pursuant to Rule 127 of the Rules of Procedure of the Chamber of Deputies, the proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (COM (2017)142);

Taking cognisance of the information and analyses acquired through the hearings that the Committees conducted in the course of considering the document in question;

Whereas:

- The scrupulous and consistent application of the European Union's competition regulations is the most effective means of ensuring that markets are competitive, innovative, protective of consumers from price fixing and capable of delivering an ample choice of goods and services;
- Regulation EC 1/2003 introduced a substantially decentralised system for combatting anti-competitive practices by assigning responsibilities to national competition authorities (NCAs), thus relieving the European Commission of certain tasks and allowing it to focus on more serious violations of a cross-border nature;
- However, Regulation EC 1/2003 has failed to resolve certain issues relating to the fact that EU regulations and the related fines are applied differently from one EU Member State to the other. Although some Member States have aligned their rules to the provisions of the Regulation, significant differences persist between the different national regimes, largely owing to the varying levels of independence of their NCAs;
- The proposal for a Directive seeks to assimilate the instruments and powers available to the NCAs of Member States to the those assigned to the European Commission for the prosecution of matters within its remit, but some NCAs lack sufficient independence, human resources and funding;
- As a result of the divergences mentioned above, anti-competition proceedings against undertakings may lead to different outcomes that depend on the Member State in which they are conducted. The uneven application of EU competition rules distorts the internal market and undermines the system of decentralised enforcement;

Mindful that the present final document needs to be forwarded without delay to the European Commission as part of the political dialogue, as well as to the European Parliament and the Council,

Expresses a

FAVOURABLE OPINION

with the following remarks:

a) Overall, the objective of strengthening national competition authorities (NCAs) by increasing their independence and harmonising their scope of action is to be commended. In the process of harmonising the instruments and powers of the NCAs, advantageous use should be made of the more advanced systems, such as Italy's, that are already in place;

b) The principle of independence of NCAs affirmed in Article 4 of the proposal for a Directive and described in Recitals 13 to 17 must be realised, including in national law, through the adoption of open and transparent systems for the selection of candidates and for the appointment of members of the management boards and senior positions of the NCAs, and through the adoption of a transparent system for the control and prevention of incompatibilities and conflicts of interest;

c) Consideration needs to be given to the possibility of conducting an analysis of the discrete repercussions of the provision of Article 4.2 e) regarding the delegation to the NCAs of the power to reject formal complaints not deemed a priority by the NCA, subject to Recital 17 concerning 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;

d) To promote the transparency and accountability of the NCAs, it might be opportune to add a new provision requiring NCAs to forward periodic reports on their activities, as already required under Italian law, and as already mooted in Recital 16;

e) In view of the obligation imposed on the Member States under Article 5 of the proposal for a Directive to ensure that NCAs have the human, financial and technical resources they need to discharge their duties and exercise their powers, a comparative analysis should be made of the various NCA funding models with a view to identifying best practices and thus helping national legislators to make the right choices. In particular, it might be well for the Directive to seek a fair balance between funding from the State budget and from the market, and possibly to include, for financial reporting purposes, a provision such as envisaged in Recital 16 to the effect that NCAs should be subject to financial control or oversight, provided that doing so does not prejudice their independence;

f) For the strengthening of the powers of the NCAs referred to in Chapter IV of the proposal for a Directive (Articles 6 to 11), it is first necessary to analyse what is meant by the "appropriate safeguards" referred to in Article 3 in light of the related prescriptions of Recital 12. The cross-jurisdiction inspection activities of the NCAs, which also affect the spheres of personal freedoms and constitutionally protected rights, and the incidence of these activities on any future judicial proceedings therefore become questions of considerable importance;

g) In particular, the requirements of balance and juridical guarantees should be such that the Italian legal system can include safeguards also for providers of out-of-court advisory and auxiliary services who are not attorneys but are bound by contract to the undertaking, and can likewise accommodate

rules governing the powers of NCAs to carry out investigations and issue decisions that comply with Article 7 of Legislative Decree 3 of 19 January 2017 relating to the effects that definitive antitrust decisions have on suits for damages, and on the related judicial review;

h) With regard to the need to strike a balance between, on the one hand, the powers of an NCA to investigate and inspect and, on the other, guarantees of fundamental rights and the principle of the inviolability of the legal sphere, Article 6.1 of the proposal, which refers to NCA powers to inspect the premises of undertakings, should be interpreted also with reference to constitutional case law (Constitutional Court Rulings 10/1971 and 56/1973) and, especially, Ruling 10/1971, which stipulates that "inspectors are not free to perform the functions of both administrative oversight and investigative policing at the same time" and, with respect to controls and the requisition of records referred to in letters b) and c) of the same Article of the proposal, reference should also be made to Article 52 of Presidential Decree 633 of 1972, which sets the legal basis for the investigative procedures of the AGCM [the Italian NCA];

i) With reference to Article 6.2 relating to the assistance that an NCA may seek from a law-enforcement body to carry out an inspection, it may well be necessary to add the specification that, where contemplated by national law, the prior authorisation of a national judicial authority shall also be required, as already provided for by Article 20.7 and 20.8 of Regulation EC 1/2003;

j) With further regard to safeguards, the current wording of Article 7 relating to the power to inspect other premises on grounds of "reasonable suspicion," subject to the prior authorisation of a national court, needs to be recast in light of the more precise definition given in Article 21.2 and 21.3 of Regulation EC 1/2003, which, moreover, already serves as the model for authorising the inspections of the European Commission and for issuing judicial authorisation. With reference to Article 7.3 of the proposal, the term "national courts" should be replaced with the term "judicial authority" so that when the Regulation is transposed into law, the power of authorisation may be delegated to the Prosecutor's Office;

k) With reference to Article 9 on the finding and termination of infringements, the principle that NCAs "may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end" needs to be modified in light of Article 7 of Regulation EC 1/2003, which affirms: "Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy;"

l) With reference to Chapter V of the proposal for a Directive (Articles 12 to 15) dealing with fines and periodic penalty payments, and without prejudicing the Directive's aim of bringing about a partial convergence of fines and penalties, it seems advisable also to seek out some "soft-law" solutions, which may be gleaned from an evaluation of best practices and included in the proposal;

m) With reference again to Chapter V, a careful reappraisal needs to be made of the provision whereby fines levied on associations of undertakings shall no longer be based on the size of members' contributions but, as stated in Recital 33, based instead on "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." The provision further specifies that an NCA "may require payment of the fine from the members of the association where the association is not solvent" as mooted in Articles 12, 13 and 14. With regard to the preceding point, it needs to be remembered not only that a structural

difference exists between the turnover and the financial results of associations of undertakings that rely on membership fees, but also that no clarity exists about what actually constitutes an association of undertakings;

n) Furthermore, paragraph 3 of Article 12 needs to be reformulated for the sake of precision and expositive clarity. The purpose of its reference to "the notion of undertaking … for the purpose of imposing fines on parent companies and legal and economic successors of undertaking" is to prevent undertakings from circumventing their liabilities by making legal or organizational changes to their business activities, but the effect must not be to introduce a presumption of liability. With respect to relations between parent companies and subsidiaries, the meaning of the Article must remain firmly based on the case law of the European Court of Justice relating to the exercise of decisive influence;

o) To narrow the margins of discretion in rulings and thus prevent excessive disparities of treatment, Article 14 needs to specify the minimum and maximum amounts of the fines that an NCA may impose. As Article 14 itself states (paragraphs 1-2): “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. 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.” The minimum fine seems excessive and disproportionate also with respect to the fines that the Commission is authorised to impose under Regulation EC 1/2003, which, in Article 23.2 accords it the power to impose fines for the infringement of Article 81 or Article 82 of the Treaty (now Articles 101 and 102 TFEU) on an undertaking or association of undertakings, but specifies that the fines may not exceed 10% of the total turnover of the undertaking/association in the preceding business year. Regulation 1/2003, which may be used as a frame of reference, sets 10 percent of total (non-worldwide) turnover as the effective maximum fine that can be levied. Further, the rules on the imputation of liability in the aforementioned Article need to be clarified also in respect of the meaning of an "association of undertakings,” a term that, moreover, appears repeatedly in various parts of the proposed Directive. As is well known and has been established both by European Court of Justice case law and by domestic statute, the term has broad and flexible connotations;

p) With reference once again to the matter of fines, Italian experience in this area strongly suggests that the proposal for a Directive needs to include recognition of the adoption and observance of antitrust compliance programmes by undertakings;

q) Substantial changes need to be made to Chapter VI of the proposed Directive (Articles 16 to 22) on leniency programmes under which NCAs may grant immunity from fines to undertakings, because, as it stands, the proposal does not uphold the principle of the autonomy of national programmes or the principle of loyal cooperation between the European Commission and NCAs. The regulatory framework set out in the proposal looks to be an almost rule-by-rule codification of the European Competitiveness Network (ECN) model, and, as such, may excessively restrict the autonomy of Member States and adversely affect the capacity of the institution itself to adapt flexibly to national specificities. In particular, Article 21 is a cause of serious misgivings to the extent that it allows applicants who have sought leniency from the European Commission to submit simplified petitions to NCAs that they consider better suited to handling their case. In such cases, the NCA in question may find itself obliged to accept applications for leniency without any corroborating evidence, even when the NCA, rather than the European Commission, is best placed to conduct investigations.

Furthermore, the same Article deprives the NCAs of the power to demand additional information from an undertaking before the presentation of the completed application, and prescribes that additional specifications to the application (which are currently subject to the discretion of the prosecuting authority) may not take place until the European Commission has informed the national authorities that it does not intend to take action;

r) With further reference to Chapter VI of the proposal, the provisions laid down in Article 22 become particularly delicate where they refer to special immunity for employees and directors who report infringements by the undertakings they work for. It would be preferable in this regard, and more consonant with our national law, to allow for an alternative mitigating circumstance;

s) With respect to Article 23, which deals with mutual assistance between national competition authorities, it should be noted that the Article itself specifies that officials authorised by a foreign 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 of the proposal for a Directive. Neither the exceptional nature of these forms of active participation nor the potential liability of the State is entirely consistent with the current legal framework, because they imply that the powers of the officials appointed by a foreign NCA may exceed those of the officials authorised by the Commission pursuant to Article 22.2 of Regulation EC 1/2003, which limits itself to affirming that "officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned;"

t) Article 27 risks allowing excessively long suspensions of the limitation periods for the imposition of fines or periodic penalty payments by the national competition authorities for the duration of proceedings before national competition authorities of other Member States or the Commission in respect of an infringement. We therefore suggest, also in the light of the provisions of Article 25 of Regulation EC 1/2003, which states that "the limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice," that an addition be made to the proposal for a Directive to set a maximum limitation period;

u) With reference to the provisions of Article 29 limiting the use of information collected pursuant to the provisions of the proposal for a Directive itself, reference should be made to what Directive 2014/104/EU prescribes for the acquisition of evidence.