



**2017/0063(COD)**

18.9.2017

**\*\*\*I**

## **DRAFT REPORT**

on 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)0142 – C8-0119/2017 – 2017/0063(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Andreas Schwab

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

#### **Amendments by Parliament set out in two columns**

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

#### **Amendments by Parliament in the form of a consolidated text**

New text is highlighted in ***bold italics***. Deletions are indicated using either the **■** symbol or ~~strikeout~~. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on 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)0142 – C8-0119/2017 – 2017/0063(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2017)0142),
  - having regard to Article 294(2) and Articles 103 and 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0119/2017),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the reasoned opinion submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality by the Czech Senate, by the Spanish Parliament, by the Portuguese Parliament and by the Romanian Senate, asserting that the draft legislative act does not comply with the principle of subsidiarity,
  - having regard to Rule 59 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on the Internal Market and Consumer Protection (A8-0000/2017),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

### **Amendment 1**

#### **Proposal for a directive Recital 12**

*Text proposed by the Commission*

(12) The exercise of the powers conferred on NCAs should be subject to

*Amendment*

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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.

appropriate safeguards which at least meet the standards of general principles of EU law and the Charter of Fundamental Rights of the European Union, *in particular in the context of proceedings which could give rise to the imposition of penalties*. These safeguards include the right to good administration and the respect of undertakings' rights of defence, an essential component of which is the right to be heard. In particular, NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU prior to taking a decision which adversely affects their interests and those parties should have an opportunity to effectively make their views known on these objections before such a decision is taken. Parties to whom preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU have been notified should have the right to access the relevant case file of NCAs to be able to effectively exercise their rights of defence. This is subject to the legitimate interest of undertakings in the protection of their business secrets and does not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission. Moreover, the addressees of final decisions of NCAs applying 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.

Or. en

## Amendment 2

### Proposal for a directive Recital 12 a (new)

*Text proposed by the Commission*

*Amendment*

***(12a) In order to exercise the rights of defence, it is essential that the undertakings under investigation are made aware of their alleged wrongdoing in detail. Therefore, they should receive at least a statement of objections setting out all objections on which the NCA intends to rely in its final infringement decision.***

Or. en

## Amendment 3

### Proposal for a directive Recital 12 b (new)

*Text proposed by the Commission*

*Amendment*

***(12b) The protection of the confidentiality of communications between lawyer and client is an essential corollary to the full exercise of rights of defence, as established by the case law of the Court of Justice of the European Union. Therefore, NCAs should at least respect the confidentiality of written communications between a client and its lawyer, provided that such communications are made for the purposes, and in the interest, of the client's rights of defence in competition proceedings and that they emanate from independent lawyers. Such confidentiality obligation should not prevent a client from disclosing written communications between lawyer and client if the client considers that it is in its interest to do so.***

### *Justification*

*The exclusion of certain communications between lawyers and clients from enquiry derives from the general principles of law common to the laws of the Member States as clarified by the EU Courts. Given that a large majority of Member States foresees already the legal professional privilege and it is an essential corollary for the exercise of the defence rights, it is necessary to create a Union-wide minimum standard.*

## **Amendment 4**

### **Proposal for a directive**

#### **Recital 17**

#### *Text proposed by the Commission*

(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.

#### *Amendment*

(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 rejection of a complaint should be subject to effective remedies.*** 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.



## Amendment 5

### Proposal for a directive Recital 22

#### *Text proposed by the Commission*

(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.

#### *Amendment*

(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. ***This Directive does not prevent Member States from requiring prior authorisation by a judicial authority for such inspections.***

Or. en

## Amendment 6

### Proposal for a directive Recital 26

#### *Text proposed by the Commission*

(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

#### *Amendment*

(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 ***and insofar as the addressee does not as a result incriminate itself in respect of an infringement of Articles 101 and 102***

consumers in the market, can also be a valuable source of information for informed and robust enforcement and NCAs should encourage this.

*TFEU*. 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.

Or. en

### *Justification*

*It is necessary to ensure that undertakings can rely on the privilege against self-incrimination and are not obliged to incriminate themselves by admitting an infringement of Articles 101 and 102 TFEU.*

### **Amendment 7**

#### **Proposal for a directive**

#### **Recital 27**

##### *Text proposed by the Commission*

(27) NCAs should have effective means to restore competition on the market by imposing proportionate structural and behavioural remedies.

##### *Amendment*

(27) NCAs should have effective means to restore competition on the market by imposing proportionate structural and behavioural remedies. ***Interim measures can be an important tool to ensure that, while an investigation is ongoing, the investigated infringement does not seriously and irreparably harm competition, thereby leading to market developments that would be very difficult to reverse by any decision taken by a NCA at the end of the proceedings. This Directive does not prevent NCAs from imposing interim measures in other appropriate cases.***

Or. en

### **Amendment 8**

#### **Proposal for a directive**

#### **Recital 27 a (new)**

***(27a) With a view to further ensuring that competition is not irreparably harmed while an investigation is ongoing, the Commission should examine the options available to either accelerate proceedings before competition authorities for the application of Articles 101 and 102 or to simplify the adoption of interim measures. It should conduct a study and present the results to the European Parliament and to the Council by the end of 2020, and, if appropriate, submit a legislative proposal. Furthermore, Member States should create the conditions necessary to ensure that NCAs can make use of interim measures in practice.***

Or. en

## Amendment 9

### Proposal for a directive Recital 28

(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

(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. ***In principle, such commitment decisions are not appropriate in cases of serious infringements and secret cartels, in respect of which NCAs should impose a fine. 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.

and decide upon a case.

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. *NCA should have the effective means to monitor or verify compliance with commitments and, in the event of non-compliance, have the effective means to impose sanctions. In particular, where there has been a material change in any of the facts on which a commitment decision was based, or an undertaking acts contrary to its commitments, or the commitment decision was based on incomplete, incorrect or misleading information provided by the parties, NCAs should have the power to reopen proceedings.*

Or. en

#### *Justification*

*Given the increasing number of cases, in which competition authorities adopt a commitment decision, it is appropriate to give the NCAs the tools to monitor and verify the compliance with such commitments and enable them, where necessary, to reopen proceedings.*

### **Amendment 10**

#### **Proposal for a directive**

##### **Recital 29**

###### *Text proposed by the Commission*

(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

###### *Amendment*

(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 **their own** 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.

imposition of sanctions by courts in criminal proceedings for the infringement of Articles 101 and 102 TFEU.

Or. en

### *Justification*

*It is necessary to ensure that Member States are not required to adopt new procedural laws. The implementation of Article 12 in its current form would create difficulties in some Member States, which foresee fining decisions by national administrative competition authorities in quasi-criminal proceedings and which would have to introduce a new procedural law for administrative fines.*

## **Amendment 11**

### **Proposal for a directive Recital 32**

#### *Text proposed by the Commission*

(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

#### *Amendment*

(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.

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. ***When determining the amount of the fine for an infringement, NCAs should take into account the size of the undertaking that committed the infringement, in particular whether it is a small and medium-sized enterprise (SMEs) with a limited product portfolio. In addition, the NCAs should take account of the economic viability of the undertaking concerned and of any compensation paid as a result of a consensual settlement, in accordance with Article 18(3) of Directive 2014/104/EU of the European Parliament and of the Council.<sup>1a</sup>***

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***<sup>1a</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1).***

Or. en

## Amendment 12

### Proposal for a directive Recital 34

#### *Text proposed by the Commission*

(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.***

#### *Amendment*

(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 10% of the ***relevant*** turnover of the undertaking concerned.

Or. en

#### *Justification*

*Given that in practical terms all Member States already foresee a percentage of 10% as a maximum amount of the fine and this is considered, among others in academia, a reasonable limit compared to the usual illicit gains obtained by infringing undertakings, it is appropriate to apply a maximum amount of 10 % in all Member States in order to create a more uniform Union-wide approach and a predictable system.*

## Amendment 13

### Proposal for a directive Recital 36

#### *Text proposed by the Commission*

(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.

#### *Amendment*

(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 ***by ensuring that all NCAs can grant immunity and reduction from fines and accept summary applications under the same conditions. In order to guarantee an even greater degree of legal***

*certainty for undertakings in the internal market and to boost the attractiveness of leniency programmes across the Union, further efforts by the Member States on aligning their leniency conditions are needed.*

Or. en

## **Amendment 14**

### **Proposal for a directive**

#### **Recital 38**

*Text proposed by the Commission*

(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.

*Amendment*

(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. ***Moreover, in order to reduce administrative and other considerable burdens in terms of time relating to multiple applications, it should be possible for applicants to submit leniency applications not only in an official language of the relevant NCA, but also in one other working language of the Union.***

Or. en

## **Amendment 15**

### **Proposal for a directive**

#### **Recital 39**

*Text proposed by the Commission*

(39) Applicants which have applied for

*Amendment*

(39) ***In view of the shared competences***



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.

*between the Commission and the NCAs for the enforcement of Articles 101 and 102 TFEU, it is key to have in place a system of summary applications that functions smoothly.* 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, *except where it would adversely affect the integrity of an investigation.* 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.

Or. en

#### *Justification*

*It is necessary to ensure that NCAs do not inform an applicant about a prior summary application, where an unannounced inspection has not taken place yet, as it would otherwise undermine the confidentiality of such inspection.*

#### **Amendment 16**

#### **Proposal for a directive Recital 40**

*Text proposed by the Commission*

(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.

*Amendment*

(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 cooperating **effectively** with the NCAs concerned and the immunity application predating the start of the criminal proceedings.

Or. en

**Amendment 17**

**Proposal for a directive**  
**Recital 42**

*Text proposed by the Commission*

(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.

*Amendment*

(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. ***To ensure that NCAs make reasonable attempts to enforce a decision imposing fines or periodic penalty payments before requesting mutual assistance, the requested authorities should be required to enforce such decisions only to the extent that the***

*undertaking concerned does not have a legal presence, or evidently does not have sufficient assets, in the Member State of the NCA requesting mutual assistance. In order to ensure that NCAs devote sufficient resources to the requests for mutual assistance, the requested authorities should be able to recover the related costs.*

Or. en

## **Amendment 18**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 8**

*Text proposed by the Commission*

(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*;

*Amendment*

(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;

Or. en

*Justification*

*Given that a dynamic reference to the case law of the Court of Justice of the European Union potentially blurs the boundaries of legislative and judiciary and that such a reference is unusual in EU legislative acts, it should be deleted.*

## **Amendment 19**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 14**

*Text proposed by the Commission*

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

*Amendment*

*(Does not affect the English version)*

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;

Or. de

*Justification*

*(Does not affect the English version)*

**Amendment 20**

**Proposal for a directive  
Article 3 – paragraph 1**

*Text proposed by the Commission*

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.

*Amendment*

The exercise of the powers referred to in this Directive by national competition authorities shall respect ***the*** general principles of Union law and the Charter of Fundamental Rights of the European Union.

Or. en

**Amendment 21**

**Proposal for a directive  
Article 3 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***In particular, Member States shall ensure that the exercise of those powers is subject to appropriate safeguards in respect of***

*undertakings' rights of defence, such as the right to access the file, the right to be heard, the right to an effective remedy before a tribunal and the right to a fair trial.*

Or. en

*Justification*

*It is necessary to guarantee appropriate safeguards for undertakings along with the strengthening of enforcement powers of the NCAs. It is not sufficient to mention a number of safeguards in a recital. They should rather be concretely spelled out in the text of the Directive. This is crucial in order to guarantee fair proceedings and a uniform standard throughout the EU.*

**Amendment 22**

**Proposal for a directive  
Article 3 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

*In accordance with the right to good administration, Member States shall ensure that proceedings of national competition authorities concerning the application of Articles 101 and 102 TFEU are conducted within a reasonable timeframe.*

Or. en

*Justification*

*In accordance with the right to good administration, proceedings should be conducted within a reasonable timeframe.*

**Amendment 23**

**Proposal for a directive  
Article 3 – paragraph 1 c (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that national competition authorities respect at least the confidentiality of written communications between a client and its lawyer, provided that such communications are made for the purposes, and in the interest, of the client's rights of defence in proceedings for the enforcement of Articles 101 and 102 TFEU and that the communications emanate from independent lawyers.***

Or. en

*Justification*

*The exclusion of certain communications between lawyers and clients from enquiry derives from the general principles of law common to the laws of the Member States as clarified by the EU Courts. Given that a large majority of Member States already foresees the legal professional privilege and it is an essential corollary for the exercise of the defence rights, it is necessary to create a Union-wide minimum standard.*

#### **Amendment 24**

##### **Proposal for a directive Article 3 – paragraph 1 d (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that national competition authorities adopt a statement of objections in proceedings for the application of Articles 101 and 102 prior to taking a decision pursuant to Article 9 of this Directive, which adversely affects the interests of an undertaking.***

Or. en

*Justification*

*A statement of objections, containing all objections on which NCA intends to rely upon in its final infringement decision, is key prerequisite for an undertaking to defend itself. It is necessary to guarantee it throughout the EU, so as to ensure undertakings have de facto the same safeguards in every single Member State.*

## Amendment 25

### Proposal for a directive

#### Article 4 – paragraph 2 – point e

*Text proposed by the Commission*

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.

*Amendment*

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. ***The rejection of a complaint shall be subject to effective remedies in accordance with national law.***

Or. en

#### *Justification*

*It is necessary to ensure that rejections of complaints by NCAs on the ground that it is no priority for them are subject to judicial control in accordance with the national laws.*

## Amendment 26

### Proposal for a directive

#### Article 5 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that national competition authorities submit periodic reports on their activities to a governmental or parliamentary body.***

Or. en

### *Justification*

*In order to ensure the credibility and legitimacy of the actions of the NCAs, they shall submit periodic reports on their activities and enforcement record to a governmental or parliamentary body.*

### **Amendment 27**

#### **Proposal for a directive**

#### **Article 6 – paragraph 1 – introductory part**

##### *Text proposed by the Commission*

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:

##### *Amendment*

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 ***in accordance with national law***. Member States shall ensure that the officials and other accompanying persons authorised by national competition authorities to conduct an inspection are at minimum empowered:

Or. en

### *Justification*

*Given that a prior judicial authorisation is needed in some Member States, it is necessary to ensure that the level of protection in these Member States is not undermined by this Directive.*

### **Amendment 28**

#### **Proposal for a directive**

#### **Article 7 – paragraph 2**

##### *Text proposed by the Commission*

2. Such inspections ***cannot*** be carried out without the prior authorisation of a national judicial authority.

##### *Amendment*

2. Such inspections ***shall be conducted in accordance with national law and shall not*** be carried out without the prior authorisation of a national judicial authority.

Or. en



### *Justification*

*In order not to interfere with national procedural law, it is necessary to add that inspections shall be conducted in accordance with national law.*

### **Amendment 29**

#### **Proposal for a directive Article 8 – paragraph 1**

##### *Text proposed by the Commission*

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.

##### *Amendment*

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 *reasonable* time limit *and insofar as the addressee of the decision does not as a result incriminate itself in respect of an infringement of Articles 101 and 102 TFEU*. This obligation shall cover information which is *in the possession of* the undertaking and association of undertakings.

Or. en

### *Justification*

*It needs to be ensured that the time limit given by the NCAs is reasonable in relation to the information requested. This paragraph should be complemented by the privilege against self-incrimination in order to ensure that undertakings are not obliged to incriminate themselves by admitting an infringement of Articles 101 and 102 TFEU. Moreover, undertakings should not be obliged to obtain information, which is not in their possession, in order to ensure that requests for information remain within reasonable limits.*

### **Amendment 30**

#### **Proposal for a directive Article 9 – paragraph 1 a (new)**

##### *Text proposed by the Commission*

##### *Amendment*

*Where national competition authorities decide that there are no grounds to*

*continue proceedings for the application of Articles 101 and 102 TFEU and as a result close the proceedings, Member States shall ensure that the national competition authorities inform the Commission accordingly.*

Or. en

## **Amendment 31**

### **Proposal for a directive Article 11 – paragraph 1**

#### *Text proposed by the Commission*

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.

#### *Amendment*

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 ***on the basis of a thorough market test*** 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.

Or. en

#### *Justification*

*The NCAs must verify that the commitments offered address the identified competition concerns and, at the same time, that these commitments do not manifestly go beyond what is necessary to address these concerns. Therefore, commitments offered by undertakings should be only made binding after a thorough market test in order to ensure that the commitments form the basis for a satisfactory solution to the competition concerns.*

## **Amendment 32**

### **Proposal for a directive Article 11 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that national competition authorities have at their disposal effective powers to monitor the implementation of commitment decisions.***

Or. en

*Justification*

*Given the fact that commitments are increasingly used across the EU instead of prohibition decisions, it is necessary that NCAs can effectively monitor the implementation of such commitments. Where undertakings concerned do not comply with the commitments, NCAs should be able to impose effective sanctions and to reopen proceedings.*

### **Amendment 33**

**Proposal for a directive**

**Article 11 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that national competition authorities may impose effective sanctions in the event of non-compliance with a commitment. decision Where the undertaking concerned acts contrary to a commitment decision, national competition authorities may reopen proceedings.***

Or. en

*Justification*

*Given the fact that commitments are increasingly used across the EU instead of prohibition decisions, it is necessary that NCAs can effectively monitor the implementation of such commitments. Where undertakings concerned do not comply with the commitments, NCAs should be able to impose effective sanctions and to reopen proceedings.*

### **Amendment 34**

**Proposal for a directive**

**Article 12 – paragraph 1**

*Text proposed by the Commission*

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.

*Amendment*

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 **their own** 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.

Or. en

*Justification*

*It is necessary to ensure that Member States are not required to adopt new procedural laws. The implementation of Article 12 in its current form would cause major difficulties in some Member States, which foresee fining decisions by national administrative competition authorities in quasi-criminal proceedings and which would have to introduce a new procedural law for administrative fines.*

**Amendment 35**

**Proposal for a directive**

**Article 12 – paragraph 2 – introductory part**

*Text proposed by the Commission*

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

*Amendment*

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 **their own** 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:

negligently:

Or. en

### *Justification*

*It is necessary to ensure that Member States are not required to adopt new procedural laws. The implementation of Article 12 in its current form would create difficulties in some Member States, which foresee fining decisions by national administrative competition authorities in quasi-criminal proceedings and which would have to introduce a new procedural law for administrative fines.*

## **Amendment 36**

### **Proposal for a directive**

#### **Article 13 – paragraph 1 – subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

*When determining the amount of the fine for an infringement, national competition authorities shall take into account any compensation paid as a result of a consensual settlement in accordance with Article 18(3) of Directive 2014/104/EU.*

Or. en

## **Amendment 37**

### **Proposal for a directive**

#### **Article 14 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

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.

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 ***is*** set at 10% of its ***relevant*** turnover in the business year preceding the decision.

*Justification*

*Given that in practical terms all Member States already foresee a percentage of 10% as a maximum amount of the fine and this is considered, among others in academia, a reasonable limit compared to the usual illicit gains obtained by infringing undertakings, it is appropriate to apply a maximum amount of 10 % in all Member States in order to create a more uniform Union-wide approach and a predictable system.*

**Amendment 38****Proposal for a directive  
Article 14 – paragraph 2***Text proposed by the Commission*

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.

*Amendment*

2. Where an infringement by an association of undertakings relates to the activities of its members, the maximum amount of the fine shall be set at 10 % of the sum of the **relevant** 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.

Or. en

**Amendment 39****Proposal for a directive  
Article 16 – paragraph 3 a (new)***Text proposed by the Commission**Amendment*

**3 a. Member States shall ensure that national competition authorities inform the immunity applicant in writing whether or not the relevant evidentiary threshold is met. In the case of rejection, the applicant concerned may request the national competition authority to consider its**

*application for a reduction of the fine.*

Or. en

## **Amendment 40**

### **Proposal for a directive**

#### **Article 16 – paragraph 3 b (new)**

*Text proposed by the Commission*

*Amendment*

**3b.** *Member States shall ensure that no fines are to be imposed on an applicant that has been granted conditional immunity, provided that the conditions laid down in Article 18 are fulfilled during the procedure and that there is no finding that the applicant acted as a coercer.*

Or. en

*Justification*

*It is necessary to clarify that successful immunity applicants are provided a conditional immunity first, which is conditional upon the fulfilment of the conditions laid down in Article 18.*

## **Amendment 41**

### **Proposal for a directive**

#### **Article 18 – paragraph 1 – point b – point i**

*Text proposed by the Commission*

*Amendment*

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;

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, ***in particular:***

***- the name and address of the legal entity submitting the immunity application;***

***- the names of all other undertakings that participate or participated in alleged***

*secret cartel;*

*- a detailed description of the alleged cartel, including the affected products, the affected territories, the duration and the nature of the alleged cartel conduct;*

*- evidence of the alleged cartel in its possession or under its control;*

*- information on any past or possible future leniency applications made to any other national competition authority or to the Commission in relation to the alleged cartel.*

Or. en

#### *Justification*

*With a view to enabling all NCAs to carry out targeted inspections, the information that immunity applicants should be able to provide to the national competition authorities in relation to the alleged cartel should be specified in more detail.*

#### **Amendment 42**

##### **Proposal for a directive**

##### **Article 19 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that applications for leniency may be submitted in one of the respective official languages of the relevant NCA or in one of the working languages of the Union.***

Or. en

#### *Justification*

*In order to further facilitate the application for leniency and thereby boost the attractiveness of the programmes, undertakings concerned should be able to submit their leniency applications not only in one of the respective official languages of the NCA, but also in one other working language of the EU. This would enable undertakings to submit identical or similar requests to several NCAs at the same time, which they consider well placed to deal with the case. This would significantly reduce the time and effort needed to create multiple applications.*



## Amendment 43

### Proposal for a directive

#### Article 20 – paragraph 1 – subparagraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that applications for a marker may be submitted in one of the respective official languages of the relevant NCA or in one of the working languages of the Union.***

Or. en

#### *Justification*

*In order to facilitate the submission of a marker, undertakings should be able to submit their marker not only in one of the respective official languages of the relevant NCA, but also in one other working language of the EU. This would enable undertakings to submit identical or similar requests to several national competition authorities, which they consider well placed to deal with the case. This would significantly reduce the time and effort needed to create multiple applications.*

## Amendment 44

### Proposal for a directive

#### Article 20 – paragraph 2

*Text proposed by the Commission*

*Amendment*

2. Member States shall ensure that national competition authorities have discretion whether or not to grant a marker.

2. Member States shall ensure that national competition authorities have discretion whether or not to grant a marker. ***A marker may be granted only if the undertaking provides the national competition authority with all of the following:***

***(a) the name and address of the applicant;***

***(b) the basis for the concern which resulted in the leniency application;***

***(c) the names of all other undertakings that participate or participated in the alleged secret cartel;***

- (d) the affected products;*
- (e) the affected territories;*
- (f) the duration and the nature of the alleged cartel conduct;*
- (g) information on any past or possible future leniency applications made to any other competition authority in relation to the alleged secret cartel.*

Or. en

#### *Justification*

*Corresponding to the minimum standard created for requirements on summary applications, it is necessary to create a Union-wide minimum standard on the requirements for a marker.*

#### **Amendment 45**

##### **Proposal for a directive Article 20 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

**3 a. Member States shall ensure that an undertaking wishing to make an application for a reduction of fines can initially apply for a marker to national competition authorities. In respect of such a marker, paragraphs 1-3 shall apply *mutatis mutandis*.**

Or. en

#### **Amendment 46**

##### **Proposal for a directive Article 21 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Member States shall ensure that applicants that have applied for leniency, either by applying for a **marker** or by submitting a full application, to the

1. Member States shall ensure that applicants that have applied for leniency, either by applying for a **marker** 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.

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.

Or. en

## Amendment 47

### Proposal for a directive

#### Article 21 – paragraph 1 – subparagraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that summary applications may be filed in one of the respective official languages of the relevant NCA or in one other working language of the Union.***

Or. en

## Amendment 48

### Proposal for a directive

#### Article 21 – paragraph 2

*Text proposed by the Commission*

*Amendment*

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:

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 ***information referred to in point (a) and points (c) to (g) of Article 20(2), as well as information on the Member State where the evidence is likely to be located and the applicant's other past or possible future leniency applications in relation to the alleged secret cartel.***, 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 affected 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.*

Or. en

#### *Justification*

*Article 20 contains almost nearly the same conditions as Article 21. Therefore reference should be made to that Article.*

#### **Amendment 49**

##### **Proposal for a directive Article 21 – paragraph 5**

###### *Text proposed by the Commission*

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.

###### *Amendment*

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, *except where it would adversely affect the integrity of the investigation.*

Or. en

*Justification*

*Prior to an inspection, NCAs should not inform an applicant if there is a prior summary application, as it would risk undermining confidentiality prior to an unannounced inspection otherwise. Therefore, applicants should only be informed as long as it does not affect the NCAs' investigative powers.*

**Amendment 50**

**Proposal for a directive**

**Article 25 – paragraph 2 – subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Member States shall ensure that the requested authority may claim reimbursement of the costs of enforcement from the applicant authority.***

Or. en

*Justification*

*As the enforcement of fining decisions is usually a cost-intensive process, it is necessary to ensure that the assisting authority can claim reimbursement of these costs.*

**Amendment 51**

**Proposal for a directive**

**Article 25 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

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.

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, ***and when it has made reasonable attempts to enforce the decision in its own territory.***

Or. en

*Justification*

*Given the obligation for the requested authority to assist in enforcement of decisions*

*imposing fines or periodic penalty payments, there is a risk that NCAs do not make reasonable attempts to enforce a fine in their own territory first. Therefore, it is necessary to ensure that authorities imposing the fine attempt to enforce this fine on its own before they ask for assistance.*

## **Amendment 52**

### **Proposal for a directive Article 32 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 32 a**

##### **Review**

***By ... [five years after the adoption of the Directive], the Commission shall present a report to the European Parliament and to the Council on the transposition and implementation of this Directive, accompanied, if necessary, by appropriate legislative proposals.***

Or. en

## EXPLANATORY STATEMENT

### 1. Background

On 22 March 2017, the European Commission adopted this proposal intending to complement Regulation (EC) No 1/2003, which has empowered national competition authorities (NCAs) to apply the EU competition rules alongside the Commission and has created thereby a decentralized system of EU competition rules enforcement. NCAs have since been responsible for the large majority of enforcement decisions in the EU. However, it has been found that NCAs lack important tools to fully enforce EU competition rules. The level of enforcement of these rules varies as a consequence widely across the EU and companies cannot thus compete fairly on their merits.

Given that guaranteeing a level playing field is an essential element of a functioning internal market, it is necessary to further create a uniform enforcement of EU competition rules throughout the EU. Therefore, minimum guarantees and standards need to be created across the EU, which ensure that NCAs have (1) effective investigation and decision-making tools, (2) the power to impose effective and deterrent fines, (3) well-designed leniency programs facilitating the application for cross-border leniency, and finally (4) sufficient independence and resources to enforce EU competition rules.

### 2. Procedure in the European Parliament

In accordance with the ordinary legislative procedure, the European Parliament decides with the Council. The ECON Committee was appointed as the lead Committee to deal with the proposal. The IMCO Committee will be giving an opinion.

### 3. Draft Report

Your Rapporteur fully supports the overall objectives of the proposed Directive, namely to boost competition enforcement and market functioning in the EU by enabling NCAs to fully apply EU competition rules. In his view, public enforcement of competition rules is a fundamental element of the social market economy, as anti-competitive agreements and the abuse of market dominance render one of its main pillars, i.e. fair competition, impossible. It is consequently crucial that all NCAs have the right tools to effectively enforce the common competition rules, thus ensuring a genuine level playing field in the EU. In view of these considerations, your Rapporteur welcomes the proposal and suggests strengthening some elements of the proposed Directive with the following main modifications.

#### 3.1. Safeguards

Your Rapporteur agrees that the NCAs' increased enforcement powers need to be counterbalanced by increased procedural guarantees. However, he believes that a reference to the Charter of Fundamental Rights of the European Union and the general principles of Union law is not sufficient. Therefore, he suggest setting out the key safeguards in relation to proceedings for the application of Articles 101 and 102 TFEU. In particular, your Rapporteur considers that – in order to exercise the rights of defence – it is essential for the parties under

investigation to be informed of the preliminary objections against them under Article 101 and 102 TFEU prior to a decision adversely affecting their rights. In this context, your Rapporteur also believes that it is important to guarantee that certain communications between lawyers and clients are excluded from enquiry, as established in the general principles of law common to the laws of the Member States and as clarified by the EU Courts.

### 3.2. Inspection of business premises

While your Rapporteur recognises that the power to inspect the premises of both undertakings and associations does not need to be subject to prior judicial authorisation according to case law of the Court of Justice of the European Union, he considers it important not to lower the standards existing in certain Member States. In order not to interfere with existing procedural law and not prevent Member States from requiring a judicial authorisation, your Rapporteur therefore suggests to clarify that inspections of business premises should be conducted in accordance with national laws.

### 3.3. Commitments

Given the increasing number of cases, in which competition authorities take a commitment decision, your Rapporteur proposes to give the NCAs the effective means to monitor and verify compliance with such commitments. In addition, NCAs should have the effective tools to reopen proceedings, in particular in those cases where there has been material changes in the facts on which the decision was based, the undertakings act contrary to their commitments or the decision was based on incomplete, incorrect or misleading information provided by the parties.

### 3.4. Fines

The proposed Directive intends to enable NCAs to set deterrent fines based on a common set of core parameters, which your Rapporteur supports. However, when setting a fine, NCAs should be able to take into account the particularities of the undertaking concerned and the given case. Pursuant to Directive 2014/104/EU on Damages Actions NCAs should be able to consider compensation paid, resulting from a consensual settlement and prior to their decision imposing a fine, to be a mitigating factor. Moreover, given that in practical terms all Member States already foresee 10% of the relevant turnover as a maximum fine and academic opinion considers it a reasonable limit compared to the usual illicit gains obtained by infringing undertakings, your Rapporteur suggests setting out a maximum amount of 10% of the relevant turnover in all Member States in order to create a more uniform approach across the EU and a predictable system.

### 3.5. Leniency

There is a unanimous academic opinion that leniency programs are the most efficient tool in detecting cartels. In order to create more incentives to cooperate with the Commission and the NCAs, it is essential to increase legal certainty for undertakings. Your Rapporteur fully supports that to this end differences between national leniency programmes should be reduced by ensuring that all NCAs can grant immunity and reduction from fines and accept summary applications under the same conditions. With the aim of creating even more certainty, he proposes setting out also the specific requirements for immunity, summary and marker



applications, based on the ECN Model Leniency Programme. Considering that cross-border leniency applications entail administrative effort and considerable burdens in terms of time for undertakings wanting to come clean, your Rapporteur suggests that applicants should have the possibility to submit leniency applications not only in one of the respective official languages of the relevant NCA, but also in one other working language of the EU.

### 3.6. Mutual assistance

Your Rapporteur welcomes the rules on mutual assistance in view of strengthening the close cooperation within the European Competition Network, creating a level playing field for companies active in more than one Member State and thereby contributing to the proper functioning of the internal market. However, in his opinion, NCAs need to undertake reasonable attempts to enforce a decision imposing fines or periodic penalty payments before requesting mutual assistance. In addition, he believes that the requested authorities should be able to recover the related costs, as the enforcement of such fining decisions is usually a cost-intensive process.