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NOTE

From: Presidency
To: Working Party on Competition

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+)
- Examination of the Presidency Compromise Proposal: Recitals 29-34 and Articles 12-15

In view of the Working Party on Competition on 8 December 2017, delegations will find in the Annex a Presidency compromise text concerning Recitals 29 to 34 and Articles 12 to 15, following the Working Party meetings on 12 May, 12 June, 3 July, 14 and 25 September, 9 October and 20 November 2017, as well as delegations' comments.

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

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

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
to empower the competition authorities of the Member States to be more effective enforcers
and to ensure the proper functioning of the internal market

(Text with EEA relevance)

[...]

- (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~~**their own** proceedings, **in particular in administrative proceedings, provided that such national proceedings enable the direct imposition of effective, proportionate and dissuasive fines on undertakings,** 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 **on undertakings and associations of undertakings** by courts in criminal proceedings for the infringement of Articles 101 and 102 TFEU.
- (30) To ensure that undertakings and associations of undertakings **are incentivised to** comply with the ~~investigation~~**investigative** and decision-making powers of the NCAs, national administrative competition authorities must be able to impose effective fines for non-compliance **with the measures referred to in Articles 6, 8, 8a, 9, 10 and 11,** and ~~periodic penalty payments to compel compliance with these powers~~ either directly themselves in ~~administrative~~**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 such fines **on undertakings and associations of undertakings** by courts in criminal judicial proceedings.

(30a) In accordance with the principle of *ne bis in idem*, fines for infringements of Articles 101 and 102 TFEU and fines for non-compliance with measures as referred to in Article 12(2) cannot be imposed on undertakings or associations of undertakings for the same conduct both by courts in criminal proceedings and by national administrative competition authorities in their own proceedings or in non-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~~

(30b) Periodic penalty payments are a key tool to ensure that NCAs have effective means to tackle continuing and future non-compliance with their measures as referred to in Articles 6, 8, 8a, 9, 10 and 11 by undertakings and associations of undertakings. This is without prejudice to the power of NCAs to punish non-compliance with measures as referred to in Article 12(2). In accordance with the principle of *ne bis in idem*, fines for non-compliance with measures as referred to in Article 12(2) and periodic penalty payments to compel compliance with measures as referred to in Article 15 cannot be imposed on undertakings and associations of undertakings for the same conduct for the same period. Such periodic penalty payments should be determined in proportion to the total **worldwide** 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 **relevant** 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~~ **include** 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. **When a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed should not be taken into account when calculating the fine of the association.** 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~~ⁱⁿ which NCAs ~~may~~^{it is at NCAs'} **discretion to** 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~~ **dissuasive** fines, the maximum amount of the fine **for each infringement of Articles 101 or 102 TFEU** 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.

[...]

HAVE ADOPTED THIS DIRECTIVE:

[...]

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~~ **their own** proceedings, or request in non-criminal judicial proceedings the imposition of effective, proportionate and deterrent ~~pecuniary~~ **dissuasive** 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~~ **their own** proceedings, or, request in non-criminal judicial proceedings the imposition of effective, proportionate and ~~deterrent~~ **dissuasive** pecuniary fines on undertakings or associations of undertakings which are determined in proportion to their total **worldwide** turnover, where intentionally or negligently, **at least**:
- 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;
 - da) they fail to appear at an interview referred to in Article 8a;**
 - e) they fail to comply with a decision referred to in Articles **9**, 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, **the notion of undertaking applies**.

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~~ **such contributions have not been made** to ensure the full payment of **association within a time limit fixed by** the ~~fine~~ **national competition authorities**, Member States shall ensure that national competition authorities ~~are entitled to~~ **may** require the payment of the ~~outstanding amount of the fine~~ **directly** by any of the undertakings whose representatives were members of the decision-making bodies of the association. ~~To~~ **After** the ~~extent that it is still necessary~~, national competition authorities **have required payment from these undertakings, where necessary to ensure full payment of the fine, they** 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 **under this subparagraph** shall not be required from ~~those members of the association~~ **undertakings which show** that **they** did not implement the ~~infringement~~ **infringing decision of the association** 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

- 1.** Member States shall ensure that national administrative competition authorities may by decision impose effective, proportionate and ~~deterrent~~ **dissuasive** periodic penalty payments on undertakings and associations of undertakings which are determined in proportion to their **average** daily total **worldwide** turnover in **the preceding business year per day and calculated from the date appointed by the decision in** order to compel them **at least**:
 - a) ~~to submit to an inspection referred to in Article 6(2),~~
 - ba) to supply complete and correct information as referred to in Article 8,**
 - b) to appear at an interview referred to in Article 8a and to supply complete and correct information as requested during the interview.**

- 2. Member States shall ensure that national competition authorities may by decision impose effective, proportionate and dissuasive periodic penalty payments on undertakings and associations of undertakings which are determined in proportion to their average daily total worldwide turnover in the preceding business year per day and calculated from the date appointed by the decision in order to compel them at least:**
- a) to submit to an inspection referred to in Article 6(2)**
 - be) to comply with a decision referred to in Articles 9, 10 and 11.**

[...]
