Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 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)

DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2018

to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

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

(2) The public enforcement of Articles 101 and 102 TFEU is carried out by the national competition authorities (NCAs) of the Member States in parallel to the Commission pursuant to Council Regulation (EC) No 1/2003[(3)]. Together, the NCAs and the Commission form a network of public authorities that apply the Union competition rules in close cooperation (the ‘European Competition Network’).

(3) Article 3(1) of Regulation (EC) No 1/2003 obliges NCAs and national courts to apply Articles 101 and 102 TFEU to agreements, to decisions by associations of undertakings, to concerted practices or to the abuse of a dominant position which are capable of affecting trade between Member States. In practice, most NCAs apply national

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

competition law in parallel to Articles 101 and 102 TFEU. Therefore, this Directive, the objective of which is to ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively, inevitably has an impact on national competition law when it is applied in parallel by NCAs. Furthermore, the application by the NCAs of national competition law to agreements, to decisions by associations of undertakings or to concerted practices, which may affect trade between Member States, should not lead to a different outcome to the one reached by the NCAs under Union law pursuant to Article 3(2) of Regulation (EC) No 1/2003. Therefore, in such cases of parallel application of national competition law and Union law, it is essential that the NCAs have the same guarantees of independence, resources, and enforcement and fining powers necessary to ensure that a different outcome is not reached.

(4) Moreover, providing NCAs with the power to obtain all information related to the undertaking subject to the investigation, including in digital form, irrespective of the medium on which it is stored, would also affect the scope of the NCAs' powers when, at the early stages of their proceedings, they take the relevant investigative measure on the basis of national competition law applied in parallel to Articles 101 and 102 TFEU. Providing NCAs with inspection powers of a different scope, depending on whether they will ultimately apply only national competition law or also apply Articles 101 and 102 TFEU in parallel, would hamper the effectiveness of competition law enforcement in the internal market. Accordingly, the scope of the Directive should cover both the application of Articles 101 and 102 TFEU on a stand-alone basis and the parallel application of national competition law to the same case. As regards the protection of leniency statements and settlement submissions, this Directive should also cover the application of national competition law on a stand-alone basis.

(5) National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and to apply national competition law in parallel to Articles 101 and 102 TFEU. For example, under national law many NCAs do not have effective tools to find evidence of infringements of Articles 101 and 102 TFEU or to fine undertakings which break the law, or do not have adequate human and financial resources and operational independence to apply Articles 101 and 102 TFEU effectively. This is capable of preventing NCAs from taking any action at all or limiting their enforcement actions. The lack of guarantees of independence, resources, and enforcement and fining powers for many NCAs to be able to apply Articles 101 and 102 TFEU effectively means that undertakings engaging in anti-competitive practices might face very different outcomes in proceedings, depending on the Member State in which they are active. They might be subject to no enforcement under Article 101 or 102 TFEU or they might only be subject to ineffective enforcement. For example, in some Member States, undertakings can escape liability for fines simply by restructuring.

(6) Uneven enforcement of Articles 101 and 102 TFEU, whether applied on a stand-alone basis or in parallel with national competition law, results in missed opportunities to remove barriers to market entry and to create fairer competitive markets throughout

the Union where undertakings compete on their merits. Undertakings and consumers particularly suffer in those Member States where NCAs are less equipped to be effective enforcers. Undertakings cannot compete on the merits if there are safe havens for anti-competitive practices, for example, because evidence of anti-competitive practices cannot be collected or because undertakings are able to escape liability for fines. Undertakings therefore have a disincentive to enter such markets, to exercise their rights of establishment, and to provide goods and services there. Consumers based in Member States where there is less enforcement miss out on the benefits of effective competition enforcement. Uneven enforcement of Articles 101 and 102 TFEU, whether applied on a stand-alone basis or in parallel with national competition law, throughout the Union thus distorts competition in the internal market and undermines its proper functioning.

(7) Gaps and limitations in the tools and guarantees of NCAs undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, which is designed to work as a cohesive whole based on close cooperation within the European Competition Network. This system depends on authorities being able to rely on each other to carry out fact-finding measures on each other's behalf in order to foster cooperation and mutual assistance among the Member States. However, it does not work well when there are still NCAs that do not have adequate fact-finding tools. In other key respects, NCAs are not able to provide each other with mutual assistance. For example, in the majority of Member States, undertakings that operate across borders are able to evade paying fines simply by not having a legal presence in some of the territories of Member States in which they are active. This reduces incentives to comply with Articles 101 and 102 TFEU. The resulting ineffective enforcement distorts competition for law-abiding undertakings and undermines consumer confidence in the internal market, particularly in the digital environment.

(8) In order to ensure a truly common competition enforcement area in the Union that provides a more even level playing field for undertakings operating in the internal market and reduces unequal conditions for consumers, there is a need to put in place fundamental guarantees of independence, adequate financial, human, technical and technological resources and minimum enforcement and fining powers for applying Articles 101 and 102 TFEU and for applying national competition law in parallel to those Articles so that national administrative competition authorities can be fully effective.

(9) It is appropriate to base this Directive on the dual legal basis of Articles 103 and 114 TFEU. This is because this Directive covers not only the application of Articles 101 and 102 TFEU and the application of national competition law in parallel to those Articles, but also covers the gaps and limitations in the tools and guarantees of NCAs needed to apply Articles 101 and 102 TFEU, because such gaps and limitations negatively affect both competition and the proper functioning of the internal market.

(10) Putting in place fundamental guarantees to ensure that NCAs apply Articles 101 and 102 TFEU uniformly and effectively should be without prejudice to the ability of Member States to maintain or introduce more extensive guarantees of independence and

Status: *EU Directives are being published on this site to aid cross referencing from UK legislation. After exit day no further amendments will be applied to this version.*

resources for national administrative competition authorities and more detailed rules on the enforcement and fining powers of NCAs. In particular, Member States should be able to endow NCAs with additional powers beyond the core set provided for in this Directive to further enhance their effectiveness, such as powers to impose fines on natural persons or, by way of exception, the power to carry out inspections with the consent of those subject to inspection.

(11) Conversely, detailed rules are necessary in the area of conditions for granting leniency for secret cartels. Undertakings will only disclose secret cartels in which they have participated if they have sufficient legal certainty that they will benefit from immunity from fines. The marked differences between the leniency programmes in the Member States lead to legal uncertainty for potential leniency applicants. This may weaken their incentives to apply for leniency. If Member States were able to implement or apply clearer and harmonised rules for leniency in the area covered by this Directive, this would not only contribute to the objective of maintaining incentives for applicants to disclose secret cartels, in order to render competition enforcement in the Union as effective as possible, but would also guarantee a level playing field for undertakings operating in the internal market. This should not prevent Member States from applying leniency programmes that cover not only secret cartels, but also other infringements of Article 101 TFEU and equivalent provisions of national competition law, or from accepting leniency applications from natural persons acting in their own name. This Directive should also be without prejudice to leniency programmes that exclusively provide for immunity from sanctions in criminal judicial proceedings for the enforcement of Article 101 TFEU.

(12) This Directive should not apply to national laws insofar as they provide for the imposition of criminal sanctions on natural persons, with the exception of the rules governing the interplay of leniency programmes with the imposition of sanctions on natural persons. It also should not apply to national laws that provide for the imposition of administrative sanctions on natural persons that do not operate as an independent economic actor on a market.

(13) Pursuant to Article 35 of Regulation (EC) No 1/2003, Member States can entrust the enforcement of Articles 101 and 102 TFEU exclusively to an administrative authority, as is the case in most jurisdictions, or they can entrust this to both judicial and administrative authorities. In the latter case, the administrative authority is at least primarily responsible for conducting the investigation, while the judicial authority is typically entrusted with the power to take decisions imposing fines and can have the power to take other decisions, such as finding an infringement of Articles 101 and 102 TFEU.

(14) The exercise of the powers, conferred by this Directive on NCAs, including the investigative powers, should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union, in accordance with the case law of the Court of Justice of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and

the respect of undertakings' rights of defence, an essential component of which is the right to be heard. In particular, NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU in the form of a statement of objections or a similar measure prior to taking a decision finding an infringement, and those parties should have an opportunity to make their views on those objections known effectively 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 exercise their rights of defence effectively. The right to access the file should be subject to the legitimate interest of undertakings in the protection of their business secrets and should not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission. Moreover, for decisions of NCAs, in particular those decisions finding an infringement of Article 101 or Article 102 TFEU, and imposing remedies or fines, the addressees 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 decisions 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. Moreover, in accordance with the right to good administration, Member States should ensure that, when applying Articles 101 and 102 TFEU, NCAs conduct proceedings within a reasonable timeframe, taking into account the specificities of each case. The design of those safeguards should strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced.

(15) The exchange of information between NCAs, and the use of such information in evidence for the application of Article 101 or Article 102 TFEU, should be carried out pursuant to Article 12 of Regulation (EC) No 1/2003.

(16) Empowering national administrative competition authorities to apply Articles 101 and 102 TFEU impartially and in the common interest of the effective enforcement of the Union competition rules is an essential component of the effective and uniform application of those rules.

(17) The operational independence of national administrative competition authorities should be strengthened in order to ensure the effective and uniform application of Articles 101 and 102 TFEU. To this end, express provision should be made in national law to ensure that when applying Articles 101 and 102 TFEU, national administrative competition authorities are protected against external intervention or political pressure that is liable to jeopardise their independent assessment of the matters before them. For that purpose, the grounds regarding the dismissal from the national administrative competition authority of those persons who take decisions exercising the powers referred to in Articles 10, 11, 12, 13 and 16 of this Directive should be laid down in advance in national law in order to remove any reasonable doubt as to their impartiality and their imperviousness to external factors. Similarly, clear and transparent rules and procedures for the selection, recruitment or appointment of those persons should be laid down in advance in national law. Moreover, to ensure the impartiality of national