

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA Comment

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

1. INTRODUCTION

1. The EEA EFTA States (Iceland and Norway¹) refer to 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.
2. Based on the Agreement on the European Economic Area (the EEA Agreement), the EEA EFTA States are fully integrated into the internal market. The objective of the EEA Agreement is to establish a homogenous internal market. The Agreement provides, inter alia, for equal conditions of competition for businesses and common competition rules across the entire EEA. Common rules on competition and uniform and effective enforcement of those rules are fundamental to safeguard a level playing field and thereby to ensure a well-functioning internal market. EEA relevant EU legal acts in the field of competition are therefore adapted and incorporated into the EEA Agreement in order to maintain homogeneity.

2. GENERAL COMMENTS

3. Without prejudice to the future assessment of the EEA relevance of the proposed Directive, the EEA EFTA States welcome the Commission's initiative and fully support the overall objective of the proposal to create a genuine common competition enforcement area in the internal market.

¹ Liechtenstein does not have a national competition authority and therefore, the position communicated in this Comment only reflects the stance of two of the three EEA EFTA States, namely Iceland and Norway.

4. The EEA EFTA States share the Commission's view that mutual assistance between National Competition Authorities (NCAs) is considered *indispensable* to ensure the effective application of EU/EEA competition law. However, the EEA EFTA States firmly believe that without effective cross-pillar mutual assistance, i.e. between EU NCAs and EFTA NCAs, there cannot be a level playing field for companies with activities in both EU Member States and EEA EFTA States, and the proper functioning of the internal market is hampered as a consequence. Enabling EU NCAs and EFTA NCAs to effectively provide each other with mutual assistance would ensure a more level playing field in the entire EEA. The EEA EFTA States would like to stress that cooperation between NCAs across the EU- and the EFTA-pillars is the key to establishing a true EEA-wide competition policy area.

3. EEA RELEVANCE AND CROSS-PILLAR APPLICATION

5. The proposal presupposes decentralised enforcement of Articles 53 and 54 of the EEA Agreement, which correspond to and are identical in substance with Articles 101 and 102 TFEU, and is thus inherently linked to Regulation 1/2003.
6. However, the current incorporation of Regulation 1/2003 into the EEA Agreement does not provide for full application of all its provisions. Firstly, the enforcement of Articles 53 and 54 EEA were only decentralised in the EFTA-pillar, and not in the EU-pillar. Secondly, Articles 12 and 22, which allow NCAs to provide one another with and use in evidence confidential information and to carry out inspections and other fact finding measures on behalf of each other, do not apply cross-pillar between the EFTA NCAs and the EU NCAs. Hence, there is currently no legal basis in the EEA Agreement for NCAs to provide mutual assistance cross pillar under Regulation 1/2003. This implies that the Norwegian and German NCAs cannot cooperate in the same way as for example the German and the French NCAs. These powers are considered essential for an effective enforcement of the EU/EEA competition rules at national level and for the proper functioning of the internal market.
7. The lack of cross-pillar application of Regulation 1/2003 will have a direct impact on the incorporation of the proposed Directive into the EEA Agreement. The EEA EFTA States would like to point out that the proposal will only be considered EEA relevant for incorporation into the EEA Agreement, insofar as it will be applied cross-pillar. Several provisions of the legislative proposal have cross-border and cross-pillar implications, including the provisions on mutual assistance between NCAs and limitations periods. If these provisions are not applied cross-pillar, the Directive will not have effect throughout the entire EEA, and accordingly, the aims of the proposal, which are to ensure effective enforcement of competition law and a proper functioning of the internal market, cannot be achieved throughout the entire EEA. Similar considerations with regard to EEA relevance also apply to Directive 2014/104/EU on damages (the Damages Directive).
8. The EEA EFTA States are very concerned with the lack of cross-pillar application of Regulation 1/2003, and the detrimental effect this has on the effective competition enforcement at national level and the proper functioning of the internal market. If the current situation is not resolved, the incorporation of the two abovementioned Directives

and subsequent acts into the EEA Agreement, would be put at risk. This would lead to a substantial and further widening of the gap between the EU and the EEA competition law and enforcement, which may affect the proper functioning of the EEA Agreement.

9. The EEA EFTA States believe that this is not only or primarily a problem for the EEA EFTA States, but that it would also be very much in the interest of the EU Member States to find solutions to the cross-pillar issue and to extend the cooperation with the EEA EFTA States.
10. There are viable solutions to any identified legal and technical challenges. By decentralising the enforcement of Articles 53 and 54 EEA also in the EU-pillar, cross-pillar effect of Regulation 1/2003, the Damages Directive, the current proposal for a new Directive and possible future EU acquis in the field of competition, would also follow. Full and symmetric decentralised enforcement of the competition rules of the EEA Agreement could be achieved by adopting an EEA Joint Committee Decision amending the Protocols to the EEA Agreement.

4. INTERPLAY BETWEEN LENIENCY PROGRAMMES AND SANCTIONS ON NATURAL PERSONS

11. The EEA EFTA States find that the provision regulating the interplay between individual criminal sanctions and corporate leniency should be designed so as to both deter companies and individuals from anti-competitive conduct, and facilitate the cooperation with the enforcer where the law has been infringed. Individual sanctions are important to ensure deterrence, and it is of great importance that the Directive does not undermine the deterrent effect of criminal sanctions in national legal orders. When sufficiently flexible, providing individuals with a clear incentive to cooperate with the enforcer, individual sanctions may also both contribute to destabilising cartels, and to facilitate enforcement.
 12. The EEA EFTA States recommend that Article 22 of the proposed Directive should be clearly restricted to employees of the undertaking that receives full immunity, and that there is a strict obligation on the employee who has been involved in the transgression to cooperate with the enforcer, in order to receive individual immunity from prosecution.
 13. The EEA EFTA States stress that these are initial comments based on the draft proposal of the Commission, and may be adjusted according to internal EU developments and amendments by the European Parliament and the Council.
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