

JOINT STATEMENT OF THE HEADS OF THE NATIONAL COMPETITION AUTHORITIES OF THE MEMBER STATES OF THE EUROPEAN UNION

22 November, 2018

1. The heads of the national competition authorities of the Member States of the European Union¹ (“NCAs”) wish to convey the following joint statement as regards the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)218) (“Draft Directive”).
2. The NCAs wish to express their warm support for the underlying aim of the Draft Directive which is to improve the protection of reporting persons. Since the early days of the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“EU competition rules”), many individuals, having often remained unknown to the public, have reported breaches of EU competition rules to NCAs. Over the years such reports have often led to investigations, which have substantiated the allegations made by the individuals. Many individuals have thereby significantly contributed to the enforcement of competition law for the public benefit throughout the EU.
3. The Draft Directive refers to the European Commission’s anonymous “whistleblower tool” in the area of the enforcement of the competition rules.² Several NCAs have put in place similar tools or procedures which are aimed at providing high degrees of confidentiality or even anonymity in respect of reporting persons. A number of NCAs³ provide for financial rewards for reporting persons under certain conditions.⁴
4. In light of their experience and their task as enforcers the EU competition rules, the NCAs wish to point out the following as regards the text of the Draft Directive:
 - The NCAs are concerned about the condition under Article 13, paragraph 2, of the Draft Directive to the effect that it requires reporting persons, in order to be eligible for protection, to first report internally, while only allowing them in second order or under specific circumstances to report externally.

An obligation for reporting persons to first report internally may, in the view of the NCAs, jeopardise the effectiveness of their investigative actions. Early engagement by an NCA with a reporting person is often desirable to protect the integrity of any potential evidence and to avoid the contamination of it by others. The exception currently included under Article 13, paragraph 2, sub e, for situations where the reporting person has “*reasonable grounds to believe that the internal*

¹ As referred to in Article 35 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the [Treaty on the Functioning of the European Union] (OJ L 001, 04/01/2003, p.1).

² Recital 15 of the Draft Directive.

³ HU, SK, UK.

⁴ The NCAs understand that the Draft Directive shall not apply to national rules that offer financial rewards to reporting persons.

reporting channels could jeopardise the effectiveness of investigative actions by competent authorities” does not remove this concern. This exception places the individual in a position in which he or she must make a complex assessment which will determine whether or not he or she is eligible for protection. It is the NCAs joint view, that such an obligation may deter reporting by many individuals altogether, including in important cases where direct external reporting would serve the public good. The NCAs would like to point out that they do not advocate a converse hierarchy placing external reporting above internal reporting. The NCAs would like to advocate for a Directive that provides a free choice for reporting persons in this respect. In view of the above, the NCAs believe it is necessary to have a rule which allows reporting persons to be offered the protective measures provided for in the Directive, at least as regards possible breaches of the EU competition rules, irrespective of whether they choose to submit the report directly via external reporting channels, or via internal reporting channels.

- The NCAs believe it would be necessary to expressly designate them in the envisaged Directive as authorities competent to receive and handle reports through external reporting channels, in respect of cases where the subject-matter of the report is a possible breach of EU competition rules. It is crucial for NCAs to establish quick and direct contacts with reporting persons who wish to provide relevant information to them, with as little intermediate bodies as possible between the reporting person and the NCA in question. Consequently, a uniform approach to such designation of NCAs across the EU will ensure the proper functioning of the cooperation among the NCAs under Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the [Treaty on the Functioning of the European Union].