Association
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DRAFT EUROPEAN BUSINESS CODE

BOOK 2

MARKET LAW

ORIGINS OF BOOK 2

The objectives of Book II of the European Business Code, on market law, are based on one observation. To make Europe relevant to the public again, it became clear that it was first necessary to convey to the public everything that Europe had already brought to it. The first objective is therefore to make European market law more accessible. However, this law needed to be adapted to modern business practices and the realities of 21st-century Europe. The second objective is to improve European market law by modernising it.

- **A more accessible law**

1/ Making the law accessible by consolidating the main market law rules governing a business's operations in a single book

Allowing European businesses to have direct access to the rules that will govern their operations, which have been scattered up to this point, will necessarily bring European law closer to its target audience. But it was not possible to be exhaustive. Regarding exemption regulations, a decision was made to incorporate only the "vertical restraints" regulation, without incorporating other exemption regulations, as this is the one that European businesses need most. A decision was also made not to incorporate most of the Commission's guidelines, which are far too long and detailed.

2/ Making the law accessible by incorporating part of the case law

A large part of the standards set out in the Court of Justice's judgments have been incorporated into the Code, among other things, which will make it easier for European businesses to access the applicable law.

3/ Making the law accessible by simplifying the language used

Efforts were made to replace the somewhat technocratic language of European competition law with plainer language, without compromising the need for rigorous application of the law in the interests of legal certainty.

- **An improved law**

Making the law accessible would be meaningless if the law were not adapted to the current business environment.
Europe is more than 60 years old. Yet 60 years ago, there were no digital platforms and no online sales. Market law must necessarily evolve to keep pace with societal change. But this does not mean that everything must be changed.

1/ The substance of what has proved to be effective was retained

There is no need to change everything for the sake of modernisation. The group has retained everything that worked very well. Indeed, many texts have been assessed (see the very positive assessment of the commercial agents directive).

2/ The substance of recently adopted texts was retained

Very recent texts (such as the 2014 directive on private actions) have not been materially amended.
Once the successor to regulation 330/2010 has been adopted, by the end of May 2022 at the latest, the Group will replace the rules in the previous regulation included in the Code with these new rules.

3/ Modernisation

It was therefore also necessary to be a source of proposals, which can be described in terms of four contributions in particular.

With a view to modernisation, we are proposing to **consolidate the substantive rules governing anti-competitive practices** (cartels and abuse of a dominant position).
Currently, if the practice under review affects trade between Member States, the Member States may apply both their national law and EU law cumulatively. If there is no effect on trade between Member States, Member States apply only their national law, as EU law is not applicable. The working group felt that it was not necessary for both EU law and national law to apply cumulatively, since this must be done in accordance with the primacy principle, which has led to national laws being converged into EU law. The result is that, at present, when such cumulative application occurs, it effectively consists of applying two identical sets of laws cumulatively, which creates unnecessary complexity.
In addition, the convergence of the substantive rules of European and national law shows that the time has come to unify these substantive rules, as the GDPR has done in respect of personal data law. In this field, the EU has put in place a system of uniform law that leaves only a very residual space for the application of national law.
The working group's proposal is modelled on this. It provides that EU law will apply exclusively, regardless of whether the practice in question affects trade between Member States.
This reform, included in Title 1, would be very measured, as it would not affect:
-national institutional rules (choice of competition authority, composition, etc.), which remain subject to the principle of institutional autonomy, subject to existing limits;
-national procedural rules, which remain subject to the principle of procedural autonomy, subject to existing limits;
-the rules applicable to imposing penalties; or
-certain special substantive rules of national law on anti-competitive practices, different from the law applicable to cartels and abuses of dominant position (such as abuse of dependence, or special rules for overseas territories).

Moreover, this change is limited to the law of anti-competitive practices, and does not extend to the law of concentrations, for which the current system is retained. Transactions that cross the European notification threshold are reviewed by the Commission in accordance with European Union law as set out in this Code. Other transactions are subject to national law.

To ensure that the proposal to unify the substantive rules of the law on anti-competitive practices does not lead to a standstill, we have drafted a second, alternative version, which preserves the substantive national rules of the law on cartels and abuse of a dominant position where there is no effect on intra-European trade. EU law would thus apply where intra-European trade is affected, and national law would apply where intra-European trade is not affected.

As regards **State aid**, we propose that a competitor may bring an action against the beneficiary of an un-notified or market-distorting aid, where the beneficiary has not return the aid, even though the obligation to return it was not debatable.

As regards **distribution law**, we propose that an integrated partnership contract be created, combining franchising, concession and trade mark licensing, together with certain specific rules governing the transfer of know-how. Only special economic law rules are set out here.

Finally, with regard to **unfair commercial practices between traders**, the purpose of the change is to create a system for regulating unfair terms between traders, if the victim is a micro, small or medium-sized enterprise within the meaning of the annex to Commission Recommendation 2003/361/EC. This regulation is inspired by the regulation of "standard clauses" between traders, which already exists in many EU Member States. However, to provide predictability, a list of blacklisted clauses is proposed.

METHODOLOGY APPLIED TO BOOK 2

Book II on market law, which has been devised on a broad basis, is made up of three titles (competition law, distribution law and the law of unfair commercial practices between traders).

- **Scope of application**

However, it does not include:
-The free movement of goods, the freedom of establishment and the freedom to provide services are already included in the TFEU.
-The Digital Market Act (or DMA), which is covered in Book III;
-The law on payment periods, which is covered in Book I; or
-Unfair competition law, which is too disparate between Member States. However, unfair practices between traders are covered.

- **Direct effect**

Market law was already materially addressed in EU law. Like existing EU law, Book II is intended to have direct effect, rather than being optional.

- **Drafting guidelines**

It is important to specify the guidelines that the originators of the European Business Code established for the drafters:

- Writing the Book of a Code **without concern for its legal basis**. If political decision-makers ultimately adopt the Code, the questions of legal basis will then be settled for the portions that have been retained. In any event, the adoption of such a Code will undoubtedly require unanimity.
- **Not to refrain from proposing amendments to the texts of the Treaty**, if doing so is necessary or useful.
- Specify which texts of the acquis should be retained outside the Code and which should be repealed if the Code is adopted.

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TITLE 1: COMPETITION LAW

CHAPTER 1: GENERAL RULES

Article 2.1.1.1: Goals

The purpose of competition law is to ensure that markets operate competitively, thus increasing economic efficiency and ensuring that the benefits of such efficiency are shared by all market participants. It contributes to the proper functioning of the internal market.

Comment:

After much hesitation, the group felt that discussions on the purpose of competition law are clouded rather than clarified by the reference to "consumer welfare", an ambiguous expression that is understood in different ways, if only because "consumer welfare" does not only concern consumers. It therefore appears preferable to avoid this expression when referring to the purpose of competition law, even if the above text takes account of the interests of all market participants (including consumers) by requiring that the benefits be shared between them.

The formulation makes it possible to cover the treatment of horizontal and vertical agreements, abuses of a dominant position (with the possible exception of abuses of an exploitative dominant position, which account for barely 5% of ADP cases), concentrations and State aid. The law remains unchanged.

The economic efficiency referred to in this Article consists of three aspects: productive efficiency (optimising production conditions), allocative efficiency (allocating economic resources where they satisfy the greatest utility), and dynamic efficiency (allocating resources over time with a view to increasing economic efficiency).

Existing competition law requires the transaction to be at least neutral for third parties to the transaction (the "consumer surplus" approach). However, the idea that an increase in the "overall economic surplus" is sufficient to warrant a reduction in competition regardless of the distribution of the surplus must be rejected. This is why it is stated that the benefits must be shared between market participants.

Article 2.1.1.2: Undertaking

1. Competition law applies to undertakings, i.e. any stand-alone entity engaged in an economic activity, regardless of its legal status or how it is financed.

2. Specifically, several legally independent persons who are under common control, in particular through majority ownership, form a stand-alone entity.

In the downstream market, an intermediary is a stand-alone entity if it bears a non-negligible part of the risk of the transaction.

3. An economic activity is any activity, even if ancillary, which consists of offering goods or services on a market, excluding activities that implement public authority powers or whose function is exclusively social. Services financed by public resources and offered free of charge or virtually free of charge to the public or to certain members of the public are deemed to have an exclusively social function.

Notwithstanding the foregoing, any entity that competes with entities engaged in an economic activity is itself engaged in an economic activity.

Comment: Article 2.1.1.2 restates the concept of undertaking to define the ratione personae scope of competition law. This is a codification of the law as it stands with regard to Articles 101 and following of the TFEU as interpreted by European case law. Thus, the notion of undertaking is a stand-alone concept in competition law, reflecting the purpose of competition law by being defined not by its legal form or organisational structure, but by the economic character of an activity.

Paragraph 1 reiterates that an undertaking consists of two elements: an economic unit and an economic activity. Paragraph 2 specifies the notion of economic unit, and paragraph 3 that of economic activity.

The second paragraph codifies the case law on the unity of the undertaking with regard to its autonomy on the market. Indeed, legal entities cannot be considered as competitors when, for structural reasons, they are subject to common control. This means that relationships between subsidiaries under common control are not subject to competition law. Similarly, it is possible to attribute liability for compliance with competition law not only to the legal entity whose conduct is directly at issue, but to the ultimate parent entity.

Finally, it is worth mentioning the case law on intermediaries that stand alone from a legal perspective but are economically integrated into the organisation of the supplier on whose behalf they are acting. Without going into the details of the distinction, Article 2.1.1.2 refers to the basic criterion, namely that of the assumed risk, which goes hand in hand with its autonomy and which warrants – in the intermediary's own interest – that relations with its supplier be subject to control under competition law, and in particular the ban on cartels.

The last sentence of paragraph 3 includes within the scope of competition law activities carried out in competition, whether or not they amount to economic activities within the meaning of the previous definition. However, only a very limited number of scenarios should be covered by this rule, since services offered free of charge are typically offered on a different market from similar paid services. Of course, this does not affect the rules under which public authorities may withdraw a market from competition.

Article 2.1.1.3: Undertakings responsible for managing services of general economic interest

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Comment: Here, we propose to rely on the letter and substance of Article 106(2) of the TFEU without amendment. This provision has a proven track record in the area of State aid, enabling the financing of services of general economic interest while also ensuring that actual practice is controlled (market failure, choice of service provider, limitation of public financing to the specific costs of public service obligations, separate accounting).

According to European Commission terminology, services of general economic interest (SGEI) are a sub-category of services of general interest (SGI), which also include non-economic services and social services of general interest. From a competition law perspective, it did not seem relevant to introduce the more general concept of SGIs, since they either correspond to SGEIs or, where there is no economic activity, do not fall within the scope of competition law. This also applies to social services, which can be covered by the specific SGEI regime when they include economic activities.

Article 2.1.1.4: Member States' obligations

1. Member States must not undermine the effectiveness of the competition rules of EU law and of this Code.

2. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to competition and State aid law.

Comment: The first paragraph of Article 2.1.1.4 expresses the principle of sincere cooperation set out in Article 4(3) of the TEU with regard to competition law and adds the concept of effectiveness set out in case law. Article 2.1.1.4(2) restates Article 106(1) of the TFEU, which in turn sets out the Member States' duty of sincere cooperation with regard to public or "privileged" undertakings.

Together with the State aid regime, Article 2.1.1.4 sets out the rules on State intervention with regard to competition law.

Article 2.1.1.5: Territorial application of competition law

The rules of this Title shall apply to any practice having substantial effects on competition within the European Union, regardless of the place of establishment of the undertakings engaging in the practices.

Comment: With regard to the scope of application of EU competition law, the choice was made to codify the positive law by discarding the implementation test in favour of the qualified effects test adopted by the CJEU in the Intel judgment (CJEU, 6 Sept. 2017, Case C-413/14 P).

Article 2.1.1.6: Relationship with sector-specific regulation

Sector-specific market regulation does not preclude the application of the provisions of this Title.

Comment: Article 2.1.1.6 establishes the principle of the cumulative application of the sector-specific regulation and competition law, as provided for in the case law (CJEC, 10 Oct. 2014, Case C-295/12 P – Telefonica, para. 128). Article 2.1.1.6 is silent on the division of powers between regulatory and competition authorities, which in principle falls within the procedural autonomy of the Member States.

CHAPTER 2: ANTI-COMPETITIVE PRACTICES

Article 2.1.2.1: Unified substantive rules on anti-competitive practices in the European Union

1. Articles 101 and 102 of the TFEU apply to all practices taking place within the territory of the European Union, and national laws do not apply to such practices.

2. The preceding paragraph does not preclude the application of special national laws enacted for the territories referred to in Annex 2 to the TFEU.

3. Nothing in paragraph 1 precludes Member States from prohibiting anti-competitive practices which take the form of abuse of economic dependence.
"Dependence" means the position of an undertaking as being subjected to one or more other undertakings, characterised by the absence of a reasonably equivalent alternative available within a reasonable time, on reasonable terms and at reasonable cost, and abuse consists in imposing on the dependent undertaking services or terms which could not be obtained under normal market circumstances.

The following may be considered unfair practices:

(a) refusing a sale, purchase or other trading conditions;
(b) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(c) limiting production, markets or technical development to the prejudice of consumers;

(d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

(e) making the conclusion of contracts subject to acceptance by the other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Comment: The goal is to unify the substantive rules of competition law across the European Union. In any event, the primacy principle has led to a convergence of national law with EU law.
Such unification does not affect the rules governing the division of powers between the European Commission and the national authorities.

At present, Articles 101 and 102 TFEU apply only where intra-European trade is affected. In such a case, there is a parallel application of EU law and national law, but the latter can only be aligned with EU law, given the primacy principle. The cumulative application of the two sets of laws therefore seems unnecessary to us.
Where there is no effect on intra-European trade, national law alone applies, but over the years the substantive rules on cartels and abuses of dominant positions in national law have been converging with those of EU law.

Paragraph 1 therefore proposes to unify the substantive rules of cartel and abuse of a dominant position law throughout the EU, whether or not intra-European trade is affected.

However, some national provisions are reserved (para. 2 for island territories, which often have a structural competition deficit, and para. 3 for abuse of economic dependence).

As regards the practice of abuse of economic dependence, a definition is given to prevent the unification of cartel and abuse of a dominant position law in the EU from being circumvented by overly broad national definitions of abuse of economic dependence. The definition given of abuse of economic dependence is inspired by Belgian law (Law of 4 April 2019), itself inspired by other national laws (in particular German law (§20 GWB) and French law (Article L 420-2, para. 2 of the Commercial Code)).

Adopting this version would mean deleting the phrase “which may affect trade between Member States and” from Article 101 of the TFEU and the phrase “in so far as it may affect trade between Member States” from Article 102 of the TFEU.

Version 2: Exclusive application of Union law to all practices affecting intra-European trade

1. Articles 101 and 102 of the TFEU apply to all practices taking place within the territory of the European Union that affect or may affect trade between Member States, and national laws do not apply to such practices.

2. Practices affect trade between Member States when they have an impact on cross-border economic activities involving at least two Member States. The relevant agreement must, on the basis of a set of objective legal or factual factors, make it possible to foresee with a sufficient degree of probability that it may have a direct or indirect, actual or potential influence on the flow of trade between Member States.

Comment: In the event that version 1 leads to a standstill, version 2 would be a compromise measure. If intra-European trade is affected, only EU law would apply, and if intra-European trade is not affected, only national law would apply.
This means that the concept of affecting intra-European trade must be defined. The above definition is taken from the European Commission's Guidelines on the concept of effect on trade set out in Articles 81 and 82 of the Treaty (2004/C 101/07).
This version 2 avoids the need to amend the Treaty.

Article 2.1.2.2: Relationship between the law on anti-competitive practices and national law that has other objectives

The provisions of this Chapter do not preclude the application of national legislation, in particular that penalising unfair commercial practices or unfair competition, unless the effectiveness of Articles 101 and 102 TFEU is undermined.

Comment: The various bodies of national law have developed legislation relating to unfair commercial practices, which may in principle continue to apply (subject to the comments made in Chapter 2 of Title 3 of this Book, relating to unfair commercial practices).
However, they sometimes encroach on and even interfere with the law on anti-competitive practices. A limit has thus been included here: the application of national law on unfair commercial practices must not undermine the effectiveness of the law on anti-competitive practices.
Indeed, such a requirement to preserve the effectiveness of EU law is quite standard.

Section 1: Characterisation of practices

§ 1: Rules common to anti-competitive practices

Article 2.1.2.1.1: Concept and constituent elements of an anti-competitive practice

1. An anti-competitive practice is a practice that appreciably restricts competition.

2. A restriction of competition affects or may affect the structure or functioning of the market. The restriction may result from the object or effects of the practice.

3. A practice is considered to have an anti-competitive object when, having regard to the economic context, the objectives pursued, the means employed and the experience gained regarding the effects of the practice, it may be presumed that, because of its particularly harmful nature, it is likely to have appreciable anti-competitive effects.

4. A practice is considered to have anti-competitive effects when it can be concluded, with a sufficient degree of probability, that it harms the proper functioning of the market. The extent of the effects of the practice depends on the nature of the practice, its duration and the structure of the affected market.

Article 2.1.2.1.2: Relevant market

The relevant market includes all the services or products that the user considers to be interchangeable, in a geographical area where the conditions of competition are sufficiently homogeneous. It may also extend to the supply of goods or services which could quickly and without excessive cost be made interchangeable with those already on offer.

Article 2.1.2.1.3: Single infringement

1. Several acts constituting anti-competitive practices within the meaning of Articles 101 and 102 TFEU are punishable as a single infringement where they form part of an overall anti-competitive plan and the parties who committed them intended to contribute to that plan, even if the infringement was interrupted for one or more periods.

2. The limitation period for public prosecution only runs from the day on which the single infringement ceases.

Comment: The concept of a single infringement replaces the concepts of continuous or repeated infringements. The adjectives “continuous” and “repeated” are elements of the single infringement and not separate concepts. In essence, the concept of a single infringement as defined in Article 2.1.2.1.3 codifies the principles set out in the settled case law.
Public prosecutions are brought by the competition authorities.

§ 2/ Cartels prohibited

Article 2.1.2.1.4: Prohibition principle

Article 101 of the TFEU prohibits anti-competitive cartels between undertakings.

1) Scope of the prohibition

Article 2.1.2.1.5: Types of cartel

A cartel prohibited by Article 101 TFEU may be concluded between competitors or between non-competitors.

Article 2.1.2.1.6: Aiding and abetting a cartel

1. Aiding and abetting a cartel means any material act by an undertaking or association of undertakings contributing to the implementation of the anti-competitive practice.

2. Aiding and abetting a cartel is subject to the same penalties as the cartel itself.

Article 2.1.2.1.7: Form of the cartel

1. A cartel is any agreement between undertakings, decision by an association of undertakings or concerted practice which appreciably restricts competition.

2. A cartel takes the form of an agreement when it results from mutual consent. It takes the form of a concerted practice when the undertakings put in place a co-ordination strategy among themselves that, although it does not lead to the conclusion of an agreement, knowingly substitutes practical co-operation between them for the risks of competition. It takes the form of a decision of an association of undertakings when the decisions apparently adopted unilaterally by a group actually reflect the coordinated will of its members.

Comment: Article 2.1.2.1.7 restates the classic distinction between the three forms of cartel and, in particular, retains the decision to form an association of undertakings as a specific form of cartel. Although this last type is often covered by the concept of agreement, it is kept separate here. On the one hand, the decision to form an association of undertakings is conceptually distinct from the concept of agreement. On the other hand, this concept is used in practice with no apparent overlap with the concept of agreement between undertakings, which raises questions about the practical application of the rule.
Paragraph 2 restates the main elements of the consistent definition established by the case law.

Article 2.1.2.1.8: Cartels having an anti-competitive purpose

1. Cartels in the form of an agreement between competitors or a decision by an association of undertakings regarding the following are deemed to have an anti-competitive purpose, and evidence that there is no anti-competitive effect may not be adduced:

- prices,
- quantities,

- sharing of customers or markets, or
- boycotting an undertaking.

2. The following are deemed to have an anti-competitive purpose, unless the undertaking can prove that there is no anti-competitive effect:

- concerted practices between competitors that take the form of exchanges of strategic information on products, quantities or prices, and
- agreements between non-competitors involving hardcore restrictions referred to in Article 2.1.2.1.14.

3. These lists are exhaustive. In all other cases, the characterisation of the cartel requires proof of its anti-competitive effects.

4. This Article applies without prejudice to the possibility of block or specific exemptions.

Comment: Anti-competitive purpose has been defined as a presumption of anti-competitive effects. This presumption is sometimes simple (concerted practice relating to strategic information), sometimes irrefutable (agreement or decision of association of undertakings relating to critical elements). On this issue, the draft departs from positive law, because currently, when a restriction by object is found, it is never possible to avoid a penalty by demonstrating that there are no anti-competitive effects.
Paragraph 3 of the Article provides a positive-law solution: the concept of anti-competitive purpose is interpreted restrictively. Failing this, the practice is only subject to penalties if anti-competitive effects can be established.

Article 2.1.2.1.9: Restraints ancillary to a lawful transaction

1. A restraint that is ancillary to a main transaction that does not restrict competition or is exempted is not contrary to Article 101(1) of the TFEU.

A restraint is ancillary if it is directly related, objectively necessary and proportionate to carrying out a transaction, an activity or an organisation that do not in themselves restrict competition.

2. The following restraints, in particular, are ancillary restraints:

- Necessary and proportionate restraints on the transfer of an undertaking, such as some non-competition agreements, intellectual property licensing agreements or agreements relating to purchasing and supply obligations or restrictions;

- Restrictions on the freedom of action of undertakings competing within the framework of an agreement or organisation that are directly related, necessary and proportionate to achieving the agreement's objectives or to the operation of the organisation, such as some non-competition agreements, intellectual property licensing

agreements or agreements relating to purchasing and supply obligations or restrictions, or restrictions on membership of another organisation;

➢ Clauses in integrated partnership agreements that prevent know-how from being shared with competitors, such as:

- Clauses prohibiting the franchisee from opening, during the term of the contract or for a reasonable period after its expiry, a shop with the same or similar purpose in an area where it could enter into competition with one of the members of the network; and
- Clauses requiring the franchisor's approval for the franchisee to sell its business;

and

➢ Clauses that allow the network head to preserve the identity and reputation of the network represented by the brand, and that establish the control necessary for this purpose, such as:

- Clauses that require a franchisee to apply the sales methods developed by the franchisor and to use the know-how provided;
- Clauses requiring the distributor to sell the goods covered by the contract only in premises arranged and decorated in accordance with the network head's instructions;
- Clauses making the choice of premises and location, and any changes to them, subject to the prior approval of the network head;
- Clauses prohibiting the transfer of rights and obligations resulting from an integrated partnership contract;
- Clauses allowing the network head to control the distributor's offering;
- Clauses making all advertising subject to the network head's prior approval, provided that they relate solely to the nature of the advertising; and
- Exclusive supply clauses requiring the distributor, for the entire duration of an integrated partnership agreement, to sell only products from the network head or from suppliers selected by the network head, provided that there is no possibility of formulating objective quality specifications and that this does not prevent the distributor from obtaining these products from other distributors in the network.

Comment: This is the ancillary restraints approach, accepted by the CJEU.
We provide clarification by listing the ancillary restraints that have already been described as such in the case law. This list is not exhaustive.

2/ Exemptions

a/ General rules

Article 2.1.2.1.10: Special exemption

A practice that has an anti-competitive purpose or effect nevertheless benefits from a special exemption and is exempt from the prohibitions on cartels and abuses of dominant position, if:

1. the practice contributes to improving the production or distribution of products or to promoting technical or economic progress;
2. the users receive a fair share of the resulting profit;
3. the restraints on competition associated with them are necessary to achieving these objectives; or
4. competition is not eliminated in respect of all or a material part of the affected markets.

Comment: The group is aware that individual exemption decisions are no longer available. Such decisions have disappeared from the list of decisions that can be adopted by the Commission under Regulation 1/2003 (finding that Article 101(1) does not apply by virtue of Article 101(3)).

However, the term "exemption" remains. It remains in the block exemption regulations, and in the vocabulary used by NCAs. For example, in Decision 20-D-20 of 3 December 2020 concerning practices in the premium tea sector, the Autorité de la concurrence, the French national competition authority, ruled. Para. 264 states: "Moreover, to the extent that no such request has been made by the undertaking in question, there is no need to consider whether the practice in question can be the subject of an individual exemption on the basis of Articles 101(3) of the TFEU and L. 420-4 of the French Commercial Code."

This may warrant the continued use of this term, even if it no longer has the meaning of a constitutive decision that it had prior to Regulation 1/2003. Furthermore, using two terms, one for the exemption regulation and one for the individual justification, is not satisfactory.

However, to avoid any confusion with the former decision constituting an individual exemption, the group has decided to refer to this as a specific exemption, as opposed to a block or category exemption.

Article 2.1.2.1.11: Block exemption

A practice which has an anti-competitive purpose or effect shall nevertheless be exempt if it meets the conditions set out in a block exemption regulation adopted by the European Commission or the conditions for exemption of vertical restraints set out in this Chapter.

Comment: The Council's framework regulations empowering the Commission to adopt exemption regulations must be retained. All the exemption regulations are retained, with

the exception of the regulation on vertical agreements, which is incorporated into this Code.

b/ Block exemption for vertical restraints to competition

This document takes into account the reform of the "Vertical Restraints" Regulation by Regulation 2022/720 of 10 May 2022, which it codifies here.

Article 2.1.2.1.12: Definitions

1/"Vertical agreement" means an agreement or concerted practice between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It is concluded between an undertaking known as the "supplier" and an undertaking known as the "buyer".

Comment: Regulation 2022/720 defines "buyer" as "includ[ing] an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;" (Article 1(k) of the Regulation). It appeared to us that referring to sales on behalf of third parties was not suitable.

2/ "Vertical restraint" means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty.

3/ For the purposes of Articles 2.1.2.1.10 to 2.1.2.1.19, a "distributor" is a Buyer.

- "Selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

- "Exclusive distribution system" means a distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group.

4/ "Active sales" means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established.

5/ “Passive sales” means sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender.

Article 2.1.2.1.13: Scope of the exemption

1. The exemption applies to vertical agreements relating to the conditions under which the parties may purchase, sell or resell, in particular:

a. to vertical agreements concluded between an association of undertakings and its members, or between such an association and its suppliers, if all its members operate a retail business, and none of them has a total annual turnover of more than 50 million euros in the previous year, calculated in accordance with Article 2.1.2.1.18. However, the exemption does not cover horizontal agreements concluded by the members of the association or decisions taken by the association.

b. to vertical agreements for the licensing of intellectual property rights that are ancillary to a distribution relationship.

c. to vertical agreements concluded between competing undertakings where one of the following conditions is met: (i) the supplier is active at an upstream level as a manufacturer, importer, or wholesaler and at a downstream level as an importer, wholesaler, or retailer of goods, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods; or(ii) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

d. to exchanges of information between two competing undertakings which meet one of the two conditions referred to in the previous paragraph, provided that such exchanges are directly related to the implementation of the vertical agreement and are necessary to improve the production or distribution of the contract goods or services

Comment: Items (c) and (d) refer to the situation known as “double distribution”.

2. As an exception to 1, the exemption does not apply to:

a. vertical agreements concluded between an online intermediation service provider and its listed partner, with whom it has a competitive relationship;

b. vertical agreements that are subject to a special exemption, unless the special text so provides;

c. agreements in respect of which the Commission has declared by regulation that the exemption shall not apply to vertical agreements containing specific restraints relating to the market at issue, where parallel networks of similar vertical restraints cover more than 50% of that market;

d. agreements in respect of which the Commission, for the territory of the European Union, or a national competition authority for its territory, has withdrawn the benefit of this block exemption, on the grounds that the exempted agreement nevertheless produces effects incompatible with Article 101(3) of the Treaty. Such effects may occur, in particular, where the relevant market for the supply of online intermediation services is highly concentrated and competition between the providers of such services is restricted by the cumulative effect of parallel networks of similar agreements that restrict buyers of the online intermediation services from offering, selling or reselling goods or services to end users under more favourable conditions on their direct sales channels.

Comment: The example given after "in particular" appears in Article 6 of Regulation 2022/720. That is why it is referred to in this text.

Article 2.1.2.1.14: Conditions for the exemption

The exemption is subject to two conditions being met:

1/ On the one hand, the market share held by the supplier of the goods or services must not exceed 30% of the relevant market on which it sells the contract goods or services, and the market share held by the distributor must not exceed 50% of the relevant market on which it distributes the contract goods or services.

Comment: At the time of Regulation 330/2010, one of the Commission's objectives was, in particular, to ensure that supermarkets could not rely on the Regulation when they had a large market share. It sought to set the distributor's market share in the downstream market where it distributes products. This was poorly received by stakeholders, since the 30% market share would often have been exceeded in the downstream market, which is usually a local market. Thus, in 2010, the Commission finally accepted that a buyer-distributor's 30% market share should be assessed on the upstream market, where it obtains its supplies. The same threshold was retained in Regulation 2022/720. The group has proposed a change here, which consists of assessing the distributor's market share on the downstream market (which was a much more reasonable analysis), but increasing the threshold to 50% (such that only situations in which the distributor has a very high market share on the local downstream market would lose the benefit of the exemption).

2/ On the other hand, the vertical agreement must not contain any of the following hardcore restrictions:

- a/ a clause imposing a minimum resale price on the buyer. However, a network head or a supplier with a market share of less than 10% may impose minimum prices, even if the buyer is bound by an exclusive supply clause.

Comment:

- This proposal represents a step forward. It allows for a minimum price clause if the supplier has less than 10% market share, which is not currently possible.

- It should be noted that the expression "minimum resale price" is the established expression in competition law, although it covers a variety of situations. It includes a minimum resale price imposed on a buyer, but also, for example, a minimum price for providing services to be charged to the end consumer by a distributor who is a service provider, etc.

Version 2 (clause maintaining the existing law):

- a clause imposing a minimum resale price on the buyer.

- b/ where the supplier operates an exclusive distribution system, the restriction of the territory into which, or of the customers to whom, the exclusive distributor may actively or passively sell the contract goods or services, except:

i/ the restriction of active sales by the exclusive distributor and its direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors;

ii/ the restriction of active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;

iii/ the restriction of the exclusive distributor's place of establishment;

iv/ the restriction of active or passive sales to end users by an exclusive distributor operating at the wholesale level of trade;

v/the restriction of the exclusive distributor's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

- c/ where the supplier operates a selective distribution system:

i/ the restriction of the territory into which, or of the customers to whom, the members of the selective distribution system may actively or passively sell the contract goods or services, except:

(1) the restriction of active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;

(2) the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory where the selective distribution system is operated;

(3) the restriction of the place of establishment of the members of the selective distribution system;

(4) the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade;

(5) the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

ii/ the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade;

iii/ the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, without prejudice to points (c)(i)(1) and (3);

- d/ where the supplier operates neither an exclusive distribution system nor a selective distribution system, the restriction of the territory into which, or of the customers to whom, the buyer may actively or passively sell the contract goods or services, except:

i/ the restriction of active sales by the buyer and its direct customers into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors;

ii/ the restriction of active or passive sales by the buyer and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;

iii/ the restriction of the buyer's place of establishment;

iv/ the restriction of active or passive sales to end users by a buyer operating at the wholesale level of trade;

v/ the restriction of the buyer's ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

Comment: As Regulation 2022/720 was adopted on 19 May 2022, we considered it appropriate to restate its provisions, even if they are somewhat complex.

Article 2.1.2.1.15: Online distribution

1. A clause that prevents a distributor from making effective use of the internet to sell the contract products or services is a hardcore restriction.

Version 2: A network head that does not itself distribute the product or service online may prohibit its distributors from distributing online, provided that it informs them of this before they join the network.

Comment: This version 2 seeks to reverse the Pierre Fabre case law (CJEU 2011), where the network head does not itself distribute the product online. The group was nevertheless divided, with some (two members in particular) strongly opposed to allowing network heads to prohibit online distribution. This is why the proposed version 1 maintains the Pierre Fabre case law.

However, a network head may impose on its distributor reasonable quality standards for the website through which it distributes the product or service.

It may also impose any restrictions on online advertising, provided that these do not result in completely precluding the use of an online advertising channel.

2. Any prohibition on selling the product or service on a marketplace is exempted, provided that the network head has not reserved such sale for itself on the marketplace.

Comment: This is in line with the Coty judgment of 6 Dec. 2017: the CJEU authorised a clause prohibiting the distributor from distributing on marketplaces such as Ebay or Amazon, for example.
However, before the Coty judgment, the President of the Bundeskartellamt had noted that it was unusual for network heads to prohibit distributors from such distribution, even though they themselves were distributing the product on marketplaces.
Since the prohibition is based on damage to the product's brand image, this damage applies equally to distribution by the network head and to distribution by distributors.

In its guidelines for Regulation 2022/720, the Commission stated: “Any quality-related justifications relied on by the supplier will be unlikely to meet the conditions of Article 101(3) of the Treaty in the following situations: (a)the supplier itself uses the online marketplace that the buyer is prevented from using; ...” (para. 342).

Hence the reference in the text to the requirement that the network head must not have reserved for itself the right to sell on the marketplace.

Article 2.1.2.1.16: Clauses excluded from the benefit of the exemption

1. The exemption does not apply:

- to non-competition obligations entered into for the duration of a distribution contract, which relate to products or services that are not necessary to achieving consistency across the network;

➢ to non-competition obligations, excluding distribution contracts, if their duration is indefinite or exceeds five years. However, the limitation of the term to five years does not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier to third parties unrelated to the buyer, provided that the term of the non-compete obligation does not exceed the period during which the buyer occupies the premises and land.

For the purposes of this Article, "non-competition obligation" means:

- any obligation prohibiting the buyer from manufacturing, purchasing, selling or reselling goods or services that compete with the contract goods or services;
- or any other obligation to source more than 80% of its annual purchases of contract goods or services from the supplier or another undertaking designated by the supplier.
- any direct or indirect obligation prohibiting a buyer of online intermediation services from offering, selling or reselling goods or services to end users on more favourable terms using competing online intermediation services.

2. The exemption also does not apply:

➢ to any obligation imposed on members of a selective distribution network not to sell the brands of specific competing suppliers.

➢ to any obligation prohibiting a distributor that is present on an online intermediation platform from offering, selling or reselling goods or services to end users on more favourable terms through competing platforms.

➢ to any obligation prohibiting the distributor, at the end of the agreement, from manufacturing, purchasing, selling or reselling goods or services, or from joining a competing network, except where the following conditions are met:

a/ the obligation relates to goods or services in competition with the contract goods or services;

b/ the obligation is limited to the premises and land from which the buyer has carried on business during the term of the contract; and

c/ the term of the obligation is limited to one year from the expiry of the agreement.

This is without prejudice to the ability to impose, for an indefinite period, a restriction on the use and disclosure of know-how that has not fallen into the public domain.

Article 2.1.2.1.17: Effects of exemption or lack of exemption

1. The exemption renders the prohibition in Article 101(1) of the TFEU inapplicable.

2. Failure to meet the conditions for exemption does not render the agreement invalid. The agreement is only invalid where it is found to infringe Article 101(1), and is not exempt under Article 101(3) of the TFEU.

Comment: Restatement of the existing law.

Article 2.1.2.1.18: Calculating and applying the market share threshold

For the purposes of applying the market share threshold provided for in Article 2.1.2.1.18, the following rules apply:

a) the supplier's market share is calculated based on data relating to the value of sales on the market and the buyer's market share is calculated based on data relating to the value of sales on the downstream market. Failing this, the undertaking's market share may be determined using estimates based on other reliable information relating to the market, including the volume of sales and purchases on that market;

b) market share is calculated based on data for the previous calendar year;

c) the supplier's market share includes goods or services supplied to vertically integrated distributors for the purpose of sale;

d) if the market share is initially less than or equal to 30%, but subsequently exceeds this threshold, the exemption will continue to apply for two consecutive calendar years following the year in which the 30% threshold was first exceeded; and

e/ the market share of a joint undertaking is attributed equally to each undertaking that, directly or indirectly:

- holds more than half of the voting rights,
- has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertaking, or
- has the right to manage the undertaking's affairs.

For the purposes of Articles 2.1.2.1.10 to 2.1.2.1.19, the terms "undertaking", "supplier" and "buyer" include their respective affiliated undertakings.

The undertakings referred to in Article 2.1.3.1.4, §4 are deemed to be affiliated undertakings.

Article 2.1.2.1.19: Application of turnover threshold

Total annual turnover is calculated by adding together the turnover, excluding taxes and other charges, achieved during the previous financial year by the party to the relevant vertical agreement and the turnover achieved by its affiliated undertakings, in respect of all goods and services. For this purpose, transactions between the party to the vertical

agreement and its affiliated undertakings and transactions between such undertakings are not taken into account.
The exemption continues to apply if, over a period of two consecutive financial years, the total annual turnover threshold is not exceeded by more than 10%.

c) Block exemption for horizontal restraints

Article 2.1.2.1.20: Reference to horizontal agreement exemption regulations

Other exemption regulations apply to specific agreements, such as research and development agreements or specialisation agreements.

Comment: As indicated in Article 2.1.2.1.11, the exemption regulations for horizontal agreements have been retained. Thus, for example, the block exemption for research and development agreements is governed by Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements. The exemption of specialisation agreements is governed by Commission Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

Article 2.1.2.1.21: Block exemption for certain cartels between suppliers in the food supply chain

1. Article 101(1) of the TFEU does not apply to practices implemented by a group of food suppliers which involve collectively fixing minimum selling prices, concerted action relating to the quantities placed on the market or exchanges of strategic information allowing prices to be negotiated collectively, for the purpose of offsetting the buyer's purchasing power, provided that:

   a/ the group of suppliers is not concealed;

   b/ it does not include operators with more than 5% market share; and
   c/ it does not itself have more than 20% market share.

2. The Commission, for the territory of the European Union, or each National Competition Authority, for its territory, may withdraw the benefit of the application of this block exemption if it finds that, in a particular case, an agreement exempted pursuant to the preceding paragraph nevertheless produces effects incompatible with Article 101(3) of the Treaty.

Comment: This novel exemption proposal builds on the judgment of 14 November 2017 (Case C-671/15), in which the CJEU ruled that practices involving the collective fixing of

minimum selling prices, concerted action relating to the quantities placed on the market or exchanges of strategic information, such as those at issue in that case, may not be exempted from the cartel prohibition set out in Article 101(1) of the TFEU where they are agreed between different producer organisations or associations of producer organisations or professional organisations not having that status, which are not recognised by a Member State for the purpose of achieving the CAP's objective. However, practices which involve concerted action relating to prices or quantities placed on the market or exchanges of strategic information, such as those at issue in the case, may be exempted from the cartel prohibition set out in Article 101(1) of the TFEU where they are agreed between members of the same producer organisation or the same association of producer organisations recognised by a Member State and are strictly necessary in order to achieve one or more of the objectives assigned to the producer organisation or association of producer organisations at issue under European Union rules. This case law is supported by the Omnibus Regulation on the CAP.

The intention is to go beyond this area of the CAP, and to allow an exemption for defensive supplier cartels, provided that these suppliers individually and collectively have a market share that is not too large. **This type of cartel is less serious because the powerful buyer exerts a countervailing power, which prevents the cartel participants from profiting unduly.** This is why the exemption only applies to a powerful buyer such as a large food retailer, as the buyer's countervailing power mitigates the anti-competitive effect of the horizontal agreement.

In concrete terms, whereas in individual negotiations, suppliers obtain a price below the market price (sometimes an unfairly low price) because of the buyer's purchasing power, suppliers in a group will not be able to obtain a price above the market price, because the powerful buyer will force them not to exceed the market price.

§ 3/ Prohibition of abuses of dominant position

Article 2.1.2.1.22: Prohibition principle

Under Article 102 TFEU, it is prohibited for one or more undertakings to abuse a dominant position on the market.

Article 2.1.2.1.23: Dominant position

1. A dominant position is characterised by the absence of material competitive pressure. The degree of competitive pressure on the relevant market is measured in particular by reference to the market share held by the undertaking(s) in question compared with those held by its competitors, the barriers to entry or exit from the affected market, the outlook for the market and the undertaking in question, the undertaking's financial strength, technology leadership and data portfolio, and the market power of players upstream or downstream of the undertaking in question.

2. A dominant position may be individual or collective.

The fact that an undertaking has a stable market share greater than 40% is an indication that it is individually dominant on a market.

Several undertakings are in a position of collective dominance, in particular, where (i) there is sufficient transparency in the market to ensure that they all adopt the same course of action; (ii) the undertakings have an incentive not to deviate from the common course of action; and (iii) the common course of action cannot be challenged by actual or potential competitors or by consumers.

Comment: This Article consists of two paragraphs.
The first paragraph provides a definition of dominance that is common to both individual and collective dominant positions. A dominant position is defined by the concept of "material competitive pressure", which is new to positive law. The working group preferred this "material competitive pressure" concept to the "power to behave independently" concept.
This should not change the substance of decision-making in practice. Indeed, the indices used to measure such "competitive pressure" are the same as those currently used to measure the "power to behave independently".

However, as compared to the existing approach, the working group has included the undertaking's data portfolio as one of the indices to be taken into account, to account for the market power that this type of asset can provide.

The second paragraph defines and distinguishes between individual and collective dominance.
With regard to individual dominant positions, several decisions of the Court of First Instance and the European Court of Justice (CJEC, 3 July 1991, Akzo, Case C-62/86; CFIEC, 17 Dec. 2009, Solvay, Case T-57/01) regard having a market share of more than 50% as evidence of a dominant position. The working group chose 40%, as is the case under German and Polish law in particular. This would not prevent competition authorities from recognising a dominant position below 40%, whilst giving robust reasons for their decision.

The definition of collective dominant position is a simplified version of the test set out in the Court's case law. The phrase "in particular" has been introduced to allow greater flexibility in defining what constitutes a collective dominant position.

Article 2.1.2.1.24: Exploitative abuse of dominance

Exploitative abuse of dominance consists in subjecting one's partners or users, without legitimate and sufficient grounds, to terms that are excessively unbalanced in relation to one's own costs and the terms usually found on the market, thereby causing an

appreciable restriction of competition on the relevant market or on an upstream, downstream or related market.

Comment: The working group decided to keep exploitative abuse of dominance within the ambit of abuses of a dominant position because the decision-making practice of recent years shows that there is a resurgence of interest in this concept. The definition that has been provided meets the twin objectives of being precise and adaptable.
Thus, excessive imbalance is measured both by reference to the relevant contractual relationship and by reference to market conditions.
To ensure that the concept is adaptable, the possibility of taking account of "legitimate and sufficient grounds" has been introduced. This will allow the court to consider certain aspects of the context in which the practice takes place, for example.

Article 2.1.2.1.25: Abusive exclusionary conduct

Abusive exclusionary conduct consists of excluding or attempting to exclude competitors from the relevant market, or from an upstream, downstream or related market, by resorting to methods other than those governing competition on the merits.

Exceeding the limits of competition on the merits is demonstrated, in particular, by evidence that an exclusionary strategy has been implemented.

Abuse that takes place on a market related to the dominated market is only subject to penalties if it is shown that the abuse would not have been possible without the dominant position.

Comment: Paragraph 1 defines abusive exclusionary conduct. It restates a simplified version of the definition used by the Court of Justice since the Hoffman La Roche judgment.
The working group decided to focus this definition on two constituent elements: the practice's exclusionary power and the use of methods other than those governing competition on the merits. These elements are quite different: the first has a purely objective focus (the effect of a practice is scrutinised), the other has a subjective focus (the strategy pursued by the undertaking is scrutinised).

While there is little debate about the first element, this is not the case for the second. The working group was aware of this and considered that, despite the criticism of the concept of "competition on the merits" in the legal scholarship, this concept must remain central to the reasoning, since it allows a subjective assessment to be made of the dominant undertaking's conduct and strategy.

Paragraph 2 states that the implementation of an exclusionary strategy shows that the limits of competition on the merits have been exceeded. But this is only one example, and other circumstances could also show that these limits have been exceeded.

Paragraph 3 codifies the Tetra Pak case law (CJEC, 14 November 1996, Case C-333/94), which accepts that the abuse may take place on a market related to the dominant market but requires, in such a case, that there be specific links between the abuse and the dominant position.

Article 2.1.2.1.26: Abuse of a dominant position having an anti-competitive object or effect

1. An abuse of a dominant position may have an anti-competitive purpose or effect.

2. Pricing practices that implement a strategy of excluding a competitor that is at least as efficient are presumed to constitute abuse of a dominant position by object, and no contrary evidence may be adduced.

3. Unless the dominant undertaking can prove that there is no anti-competitive effect, the following practices by a dominant undertaking are presumed to constitute abuse of a dominant position by their object:

-providing for exclusivity clauses having excessively long terms;

-obtaining advantages without consideration upon revision of a contract;

-refusing to grant access to an essential resource that it owns, defined as a resource that is indispensable for access to a downstream or related market and that is impossible or unreasonably difficult to reproduce profitably; and

-treating themselves or their privileged partners more favourably than their competitors.

Comment: The working group sought to align the method for analysing abuse of a dominant position with that already adopted for cartels. Thus, the distinction between anti-competitive object and anti-competitive effects is worded in the same way for cartels and abuses. The idea of an abuse by object has already taken root in the most recent case law, but the point here is to establish it clearly.

This Article therefore begins by reiterating the distinction and then establishes a list of unfair practices for which anti-competitive intent is presumed, with no opportunity to prove otherwise, and a list of practices for which anti-competitive intent is presumed in a simple manner, i.e. with the possibility of proving that the practice does not restrict competition. Practices that are not listed cannot be considered as abuses of a dominant position by object; proof of their anti-competitive effects must therefore be provided.

For reasons of predictability and legal certainty, the working group wanted to list practices with an anti-competitive object. However, it deliberately chose to include only a small number of practices in this list, the aim being to preserve the restrictive nature of the concept of anti-competitive object.

Among the new developments are the "self-preference" practices, which the group has chosen to consider as giving rise to a presumption of the existence of a restriction of competition by object, with the possibility of proving the contrary. With regard to exclusivity clauses having excessively long terms, the working group considered that it was possible to provide legal certainty by including them among the practices presumed to give rise to a restriction by object, while leaving a degree of discretion with regard to the excessive term. Since this Is a simple presumption, the dominant undertaking still has the ability to show that the practice does not have appreciable anti-competitive effects.

Article 2.1.2.1.27: Efficiency gains

It is not unlawful for a dominant undertaking to conduct itself in a manner that is justifiable, in particular, on the grounds of sufficient efficiency gains from which end users benefit in whole or in part.

Comment: This provision introduces an exemption option. The burden of proving the efficiencies generated by the practice lies with the dominant undertaking. The aim here is to establish the rule introduced by the guidance on abusive exclusionary conduct of 24 February 2009, while simplifying the formulation to give competition authorities greater latitude. However, the "objective necessity" factor was not included, as the group considered that it does not fall within the scope of competition law.
The working group was divided on whether it was appropriate to introduce an exemption option for practices that serve the general interest, but ultimately decided against this for fear of creating legal uncertainty.

Section 2: Public enforcement of competition law

§ 1/ The European competition network

Article 2.1.2.2.1: Composition of the European Competition Network

The European Competition Network consists of the European Commission and the national competition authorities, which have committed to working together closely to ensure that competition rules are applied in a coordinated manner throughout the European Union.

The national competition authorities that are members of the network, which must have sufficient resources, shall be independent, exercise their powers in a fully impartial manner and in the interests of effective and uniform application of these provisions, subject to proportionate accountability requirements.

Comment: The second paragraph restates Article 4 of the ECN+ Directive.

Article 2.1.2.2.2: Principle of parallel powers

Each national competition authority is competent to enforce the prohibition of anti-competitive practices within the meaning of Articles 101 and 102 of the TFEU if and to the extent that an anti-competitive practice has an effect on its national territory.
Where a national competition authority, acting on the basis of European Union competition law, decides that there are no grounds for continuing proceedings that have been brought, issues precautionary measures, accepts commitments, finds an infringement, finds that there is no infringement or withdraws the benefit of a block exemption regulation, it shall inform the other members of the network in good time.

The European Commission is competent if an anti-competitive practice has an effect on all or part of the territory of the European Union.

Comment: This Article restates the principle of parallel powers that exists in positive law. It uses the effects doctrine to determine the competent authority. The obligation on national authorities to provide information is based on the current system (Article 11 of Regulation 1/2003), as supplemented by the ECN+ Directive (Articles 10 and 11). The requirements for this communication have been relaxed: the 30-day period before the decision is taken, which was provided for in Regulation 1/2003, appeared to be too strict and rarely followed, so a more flexible approach seemed desirable.

Article 2.1.2.2.3: Distribution of powers

Where the same anti-competitive practice has effects on the territory of more than one Member State, the powers of the competition authorities within the European Network of Competition Authorities are distributed as follows:

- the European Commission has exclusive powers if it initiates proceedings or raises a case;
- each national competition authority is competent to deal with a cross-border anti-competitive practice as regards the effects on its own territory; and
- if several EU territories are affected, the members of the network may agree that one of the relevant authorities be responsible for the proceedings.

Comment: This Article recalls the existence of the Commission's right of "pre-emption" over matters governed by EU law. It also explains that the powers of each national authority are, in principle, limited to its own territory, but formalises the possibility of appointing an authority as lead authority when several territories are affected.

Article 2.1.2.2.4: Effect of network members' decisions

1. The European Commission's decisions have effect throughout the EU.

2. When the members of the network have agreed that only one of the relevant national authorities is responsible for the proceedings, that national authority is

responsible for imposing penalties, taking into account the effects of the practices throughout the European Union. In such a case, the national authority's decision is binding throughout the European Union.

Comment: Under positive law, the decisions of NCAs are binding only on their territory (subject to the comments below regarding private actions). With regard to public action, it follows, for example, that a conviction by the German Bundeskartellamt does not prevent the French Autorité de la Concurrence from taking up the same case and issuing a new conviction against the undertakings. The ne bis in idem rule would not be breached, because the territorial scope of the decisions would not be the same, and therefore the legal interest protected would not be the same.

We propose that, **solely in the case where the members of the network have agreed that one of the relevant national authorities be responsible for the procedure**, that authority's decision should be binding throughout the EU.

If there is no agreement between the members of the network, the decision taken by an NCA will only be binding for its territory, as is the case under positive law.

Texts to be retained: communications on information exchange in the ECN.

Article 2.1.2.2.5: Rules specific to the application of antitrust law to state intervention

The Commission shall ensure the application of Article 2.1.1.4 and shall, where necessary, address appropriate directives or decisions to Member States.

Comment: This is a reproduction of Article 106(3) of the TFEU.

§ 2/ Investigations

a/ Investigations by the Commission

Article 2.1.2.2.6: Requests for information

1. The Commission may, by simple request or by decision, require persons, undertakings or associations of undertakings to provide all necessary information. In both cases, the Commission shall state the legal basis and purpose of the request, specify what information is required and fix the time limit within which it must be provided, as well as the penalties for supplying incorrect or misleading information.

2. The recipient of a request for information is required to respond only if a decision is adopted in this regard, failing which penalties may be imposed.

Comment: Restatement of the broad principles of positive law (Article 18 of Regulation 1/2003).

Article 2.1.2.2.7: Power to take statements

In the event of a simple request for information, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission shall indicate the legal basis and the purpose of the interview. Where the interview is not conducted either at the Commission's premises or by telephone or other electronic means, the Commission shall provide advance notice to the competent authority of the Member State on whose territory the interview will take place. The officials of the competent authority of the relevant Member State may, if that Member State so requests, assist the officials and other persons authorised by the Commission to conduct the interview.

Comment: Simplified restatement of Article 19 of Regulation 1/2003.

Article 2.1.2.2.8: Inspections of the undertaking's premises

1. The Commission may carry out an inspection by issuing an authorisation or a decision.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land, and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from the books and records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; and

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection, as well as the penalties in case the required books or other records related to the business are incomplete or the answers to the requests made are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

3. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties applicable if the decision is not complied with, and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

4. Officials of as well as those authorised or appointed by the competent authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

5. If the assistance of the Member State requires authorisation from a judicial authority under national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure. Where such authorisation is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations regarding the subject matter of the inspection. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Comment: Simplified restatement of Article 20 of Regulation 1/2003.

Article 2.1.2.2.9: Inspection of other premises

1. If a reasonable suspicion exists that books or other relevant records related to the business and to the subject-matter of the inspection are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court. It shall in particular state the reasons that have led the Commission to conclude that such a suspicion exists. The Commission shall take such decisions after having consulted the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged. However, the national judicial authority may not call into question the necessity for an inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 shall have the powers provided for in the preceding Article.

Comment: Article 22 of Regulation 1/2003 is incorporated in full.

b/ Investigations by national competition authorities

Article 2.1.2.2.10: Powers to inspect business premises

1. National competition authorities shall be able to conduct or cause to be conducted all necessary unannounced inspections of undertakings and associations of undertakings for the application of Articles 102 and 102 of the Treaty on the Functioning of the European Union. Officials and other accompanying persons authorised or appointed by national competition authorities to conduct such inspections shall, at a minimum, be empowered:

(a) to enter any premises, land, and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection;

(c) to take or obtain, in any form, copies of or extracts from such books or records and, where they consider it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the national competition authorities or at any other designated premises;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; and

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

2. Undertakings and associations of undertakings are required to submit to the inspections referred to in paragraph 1. Where an undertaking or association of undertakings opposes an inspection that has been ordered by a national administrative competition authority and/or that has been authorised by a national judicial authority, if national law so requires, national competition authorities shall be able to obtain the necessary assistance of the police or of an equivalent enforcement authority so as to enable them to conduct the inspection. Such assistance may also be obtained as a precautionary measure. Such assistance may also be obtained as a precautionary measure.

Comment: Restatement of paragraphs 1 and 2 of Article 6 of the ECN+ Directive.

Article 2.1.2.2.11: Powers to inspect other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove an infringement of Article 101 or Article 102 of the Treaty on the Functioning of the European Union, are being kept in any premises, land or means of transport other than those referred to in the preceding Article, including the homes of directors, managers, and other members of staff of undertakings or associations of undertakings, national administrative competition authorities may conduct unannounced inspections in such premises, land and means of transport.

2. Such inspections may only be carried out with the prior authorisation of a national judicial authority.

3. Officials and other accompanying persons authorised or appointed by national competition authorities to conduct an inspection in accordance with paragraph 1 of this Article at a minimum have the powers set out in the preceding Article.

Comment: Full restatement of Article 7 of Regulation 1/2003.

Article 2.1.2.2.12: Requests for information

National administrative competition authorities may require undertakings and associations of undertakings to provide all necessary information for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union within a specified and reasonable time limit. Such requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101

and 102 of the Treaty on the Functioning of the European Union. The obligation to provide all necessary information covers information which is accessible to such undertakings or associations of undertakings. National competition authorities shall also be empowered to require any other natural or legal persons to provide information that may be relevant for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union within a specified and reasonable time limit.

Comment: Restatement of Article 8 of the ECN+ Directive.

Article 2.1.2.2.13: Interviews

National administrative competition authorities are empowered to summon any representative of an undertaking or association of undertakings, any representative of other legal persons, and any natural person, where such representative or person may possess information relevant for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union, to appear for an interview.

Comment: Full restatement of Article 9 of the ECN+ Directive.

Article 2.1.2.2.14: Investigations carried out by one authority on behalf of another

1. A competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 101 or Article 102 of the TFEU.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary by issuing an authorisation or a decision. The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law. If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

Comment: Simplified restatement of the principles of cooperation within the European Competition Network, as set out in Regulation 1/2003 and the ECN+ Directive.

§ 3/ Referral and principle of discretionary prosecution

Article 2.1.2.2.15: Manner of referral

The European Commission and the national authorities of the network may act on their own initiative or upon a complaint filed by any person with an interest in the matter.

Matters may also be referred to national competition authorities in the manner provided for under their national law.

Comment: This provision is consistent with positive law: there are many ways of referring a matter. Any person with an interest in the matter may refer it to a member of the network.

Article 2.1.2.2.16: Principle of discretionary prosecution

The Commission and the national competition authorities shall have the power to reject such complaints, in particular on the grounds that they do not consider them to be a priority. In such a case, they shall inform the network.
This is without prejudice to the power of national administrative competition authorities to reject complaints on other grounds defined by national law.

Comment: This Article establishes the new power of discretion in prosecutions granted to national competition authorities when the ECN+ Directive was transposed into national law. It remains for the network members to define their "priorities". Restatement of Article 4(5) of the Directive.

There may be other grounds for rejecting a complaint. Under French law, Article L. 462-8 of the Commercial Code allows the Autorité de la concurrence to reject a complaint when the facts relied upon are not supported by sufficient evidence, when they can be addressed by the Minister of Economy or when they have been addressed or are in the process of being addressed by another authority in the network.

Article 2.1.2.2.17: Limitations

1. Matters may not be referred to the European Commission or the national competition authorities based on facts that date back more than five years. This period only begins to run from the day on which the practice in question ceased.

2. The limitation period is suspended if the facts set out in the referral are the subject of a legal instrument seeking to investigate, establish or impose penalties in respect of such facts, by the European Commission or by a competition authority of a Member State of the European Union.

Comment: The group chose a limitation period for prosecution, rather than a limitation period for the imposition of penalties (as the Commission does, which allows it to recognise a cartel or abuse without imposing penalties, which can have an impact on private actions).

§4/ Implementation by the European Commission and national competition authorities

Article 2.1.2.2.18: Powers of the Commission and national authorities of the network

Once a valid referral has been made, the Commission or the national network authority may:

- find an infringement and order that it be brought to an end;
- impose a fine;
- find that there has been no infringement;
- decide that there are no grounds for prosecution, on the grounds that the practice has already been the subject of a decision, that it is currently the subject of proceedings before a national authority or court, or that it is not of sufficient interest to warrant prosecution; or
- accept commitments.

Comment: In the case of national authorities, these powers are provided for in the ECN+ Directive. As regards the Commission, they are provided for in Regulation 1/2003. We simply decided to add the option of dismissing the matter, which did not exist for the Commission.

Article 2.1.2.2.19: Interim measures

The European Commission and the national competition authorities may issue interim measures, in the form of injunctions to do or not to do something, where it is likely that the practice amounts to an anti-competitive practice and where considerations of urgency and gravity warrant issuing such a measure.

Such a decision must be proportionate and apply either for a fixed period, which may be renewed to the extent necessary and appropriate, or until a final decision is made.

Each Member State has a national procedure for fast-track challenges to these measures.

Comment: Simplified restatement of the positive law stemming from Regulation 1/2003 (for the Commission) and the ECN+ Directive (for national competition authorities).

Article 2.1.2.2.20: Notice of the objections

When the Commission or the national competition authority has sufficient circumstantial evidence in its possession, it shall give the relevant undertaking notice of the objections raised against it.

Comment: This approach is consistent with positive law.

Article 2.1.2.2.21: Opening of the adversarial process and respect for fundamental rights

From the time of the statement of objections, proceedings before the Commission and the national competition authorities are adversarial and must be conducted within a reasonable time, in strict compliance with the general principles of European Union law and the Charter of Fundamental Rights of the European Union. Once a statement of

objections has been issued, the relevant undertaking shall be given access to the file of the competition authority to which the case has been referred.

Comment: This approach is consistent with positive law (Regulation 1/2003 and Art. 3 of the ECN+ Directive).

§ 5/ Penalties and negotiated procedures

a/ Penalties

Article 2.1.2.2.22: End to the infringement

Where the Commission or the national competition authorities find that there has been an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union, they may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, they may impose on them any behavioural or structural remedies proportionate to the infringement committed and necessary to bring the infringement effectively to an end. When they have a choice between two equally effective remedies, the Commission or the national competition authorities shall choose the remedy that is less burdensome for the undertaking, in accordance with the proportionality principle.

Comment: This approach is consistent with positive law (Article 7 of Regulation 1/2003 and Article 10 of the ECN+ Directive).

Article 2.1.2.2.23: Fine imposed for breach of procedural rules

The Commission or the national competition authorities may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request for information, whether made by simple request or by decision;

(b) they do not supply information within the required time limit in response to a decision requesting information;

(c) they produce the required books or other records related to the business in incomplete form during inspections or refuse to submit to inspections ordered by a decision;

(d) their representative or a member of the relevant undertaking's staff provides an incorrect, incomplete or misleading answer which is not rectified or completed within a time limit set by the Commission; or

(e) they have broken seals affixed by the Commission's authorised officials.

Comment: Restatement of the principles set out in Article 23(1) of Regulation 1/2003 and Article 13(2) of the ECN+ Directive.

Article 2.1.2.2.24: Fine imposed for breach of substantive rules

1. The Commission or the national administrative competition authorities may either impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 of the Treaty on the Functioning of the European Union

2. The amount of the fine imposed on the undertaking or association of undertakings which has infringed Article 101 or 102 of the Treaty on the Functioning of the European Union shall be determined according to the gravity of the infringement and its duration.

3. The fine shall not exceed 10% of the total turnover achieved by the undertaking or association of undertakings during the business year preceding the imposition of the penalty. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

4. Without prejudice to the preceding paragraph, the amount of the fine shall be calculated by first applying a proportion, determined according to the severity of the infringement, of the value of sales of goods or services achieved by the undertaking, in direct or indirect relation to the infringement, in the relevant geographical sector. This basic amount is increased according to the duration of the offence.

5. Aggravating or mitigating circumstances that may lead to an increase or reduction in the basic amount are then taken into account. Being a repeat offender is an aggravating circumstance that may lead to an increase of up to 50%. An undertaking subject to a penalty is a repeat offender if it or one of its constituent entities has committed a practice of the same nature in the five years preceding the statement of objections.

6. An undertaking’s lack of ability to pay may also be taken into account, upon the undertaking's request and in exceptional circumstances.

Comment: This proposal combines and attempts to consolidate elements from Regulation 1/2003 (Art. 23), the ECN+ Directive (Art. 14) and the 2006 "Fines" Guidelines.

The working group made certain choices, such as (i) not proposing a numerical multiplication factor linked to the duration element, so as to take account of the various practices of national authorities, (ii) the proposal of a "repeat offence period" (which is not a limitation period) in order to compensate for the silence of the current texts and the imprecision of the case law, and to increase legal certainty for the benefit of undertakings and finally, (iii) the reference to exceptional circumstances as a condition for taking into account the lack of ability to pay is in line with the case law, particularly French case law, under which such an argument is only taken into account where there are serious, real and documented financial difficulties.

Article 2.1.2.2.25: Periodic penalty payment

The Commission or national administrative competition authorities may, by decision, impose effective, proportionate, and deterrent periodic penalty payments on undertakings and associations of undertakings. Such periodic penalty payments shall be determined in proportion to the average daily total worldwide turnover of these undertakings or associations of undertakings in the preceding business year per day and calculated from the date set in that decision, in order to compel those undertakings or associations of undertakings to, at a minimum:

(a) supply complete and correct information requested during the investigation;
(b) appear at an interview set during the investigation;
(c) submit to an inspection;
(d) comply with a decision to bring the infringement to an end;
(e) comply with a decision ordering interim measures; or
(f) comply with a commitment made binding by an authority within the network.

Comment: Restatement of the positive law approaches (Article 24 of Regulation 1/2003 and Article 16 of the ECN+ Directive).

b/ Negotiated procedures

Article 2.1.2.2.26: Settlement

1. An undertaking which does not contest the objections of which the Commission has given it notice may be presented with a settlement submission fixing the minimum and maximum amount of the fine that is being considered. An undertaking that accepts the proposal is granted a fine reduction of up to 10% of the amount of the fine due.

2. Settlement procedures before national competition authorities are governed by national law.

Comment: Paragraph 1 incorporates the principle of settlement into the Code. It sets a maximum reduction of 10%, in line with the current maximum provided for in the Communication of 2 July 2008 on settlement procedures, paragraph 32.

Article 2.1.2.2.27: Leniency

1. An undertaking that is a cartel participant may be totally or partially exonerated from fines, where the undertaking has contributed, through its statements, to detecting or describing the cartel or identifying its members, by providing information that was not already available to the Commission, a national competition authority or a national administration. Whether the exemption is total or partial depends on the extent to which the information provided is useful.

2. A leniency application filed with the Commission or a national competition authority is deemed to be a leniency application to all the authorities in the network of competition authorities, unless the applicant expressly objects to this.

3. Where an undertaking has benefited from a total exemption from penalties as a result of the leniency programme, Member State courts may not impose a criminal or non-criminal penalty on its directors, managers or other members of its staff in their personal capacity in connection with their participation in the anti-competitive practice, if those persons have actively cooperated with the competition authority.

Comment: The first paragraph sets out the main principles of the leniency programme, with no changes to existing law.
The second paragraph does not use the summary application mechanism provided for in Article 22 of the ECN+ Directive (transposed into French law by Article R. 464-5-4 of the Commercial Code. Under this new provision, an undertaking that files a leniency application with one of the network's authorities will be able to rely on this application before the other authorities of the network to which the same practices have been referred, as regards obtaining a place in the queue with a view to benefiting from an exemption. This will strengthen the effectiveness of the European competition network.
As for the third paragraph, even though it is directed more at national legislation than European legislation, it appeared appropriate to reproduce the terms of Article 23 of the ECN+ Directive here in a simplified form. As in the ECN + Directive, both criminal and other (administrative) penalties are covered here, to take account of the differences between the national laws of the Member States.

Article 2.1.2.2.28: Limitations on using evidence obtained in the context of leniency or settlement procedures

1. Access to leniency statements or settlement submissions may only be granted to parties subject to the relevant proceedings and only for the purposes of exercising their rights of defence.

2. A party having obtained access to the file of the enforcement proceedings of the national competition authorities may only use information taken from leniency statements and settlement submissions where necessary to exercise its rights of defence in proceedings before national courts in cases that are directly related to the case for which access has been granted, and only where such proceedings concern:

(a) the allocation between cartel participants of a fine imposed jointly and severally on them by a national competition authority; or

(b) the review of a decision by which a national competition authority found an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union or national competition law provisions.

3. The following categories of information obtained by a party during enforcement proceedings before a national competition authority shall not be used by that party in proceedings before national courts before the national competition authority has closed its enforcement proceedings with respect to all parties under investigation:

(a) information that was prepared by other natural or legal persons specifically for the enforcement proceedings of the national competition authority;

(b) information that the national competition authority has drawn up and sent to the parties in the course of its enforcement proceedings; and

(c) settlement submissions that have been withdrawn.

4. In the event of an express objection by the applicant to the leniency being extended to the entire network, leniency statements shall only be disclosed to other national competition authorities with the consent of the applicant.

Comment: Paragraphs 1 to 3 of this Article restate the content of Article 31 of the ECN+ Directive.

Paragraph 4 sets out the circumstances in which leniency statements may be shared with other authorities in the network.

Whereas Article 12 of Regulation 1/2003 established the principle of free exchange of information within the network, Article 31(6) of the ECN+ Directive sets limits for leniency statements.

Paragraph 4 of our proposal reduces the scope of these limits and aims to improve the circulation of information within the network by allowing for greater consideration of the leniency applicant's wishes. In principle, since the leniency application is binding before all the authorities in the network (see the preceding Article), the statements made by the leniency applicant can be circulated freely within the network. As an exception to this, the leniency applicant may object to the principle that its application is binding before the other authorities in the network (see the previous Article); in such a case, the applicant's statements may not be sent to the members of the network unless it expressly agrees to this.

Article 2.1.2.2.29: Commitments procedure

1. The European Commission and national competition authorities may waive the statement of objections and invite the undertaking(s) concerned to give commitments to put an end to their unlawful practices in the future, if they consider these measures to be effective in addressing the competition concerns identified during the investigation.
After conducting a market test, and if the proposed commitments appear to them to be credible in addressing the identified competition concerns, the Commission and the national authorities may make the commitments binding. In such a case, the undertaking will not be subject to any penalties imposed by an authority of the network, either for the past or for the future, if it complies with the binding commitments.

2. The European Commission and the national competition authorities may reopen the procedure and revise the decision where one of the facts on which the commitments decision is based has changed materially or where the commitments decision is based on incomplete, inaccurate or misleading information provided by the parties to the procedure.

Comment: The first paragraph reproduces the commitments procedure as it exists today and was imposed on NCAs by the ECN+ Directive (Art. 12). The second paragraph allows commitments to be revised in the cases provided for in the ECN+ Directive (Art. 12). The power to impose penalties on undertakings that breach their commitments has not been included in this Article, as it is already covered by other provisions.

§ 6/ Appeals and enforcement of decisions

Article 2.1.2.2.30: Appeals

The European Commission's decision may be appealed before the General Court of the European Union.
The decisions of the national competition authorities may be appealed before the authorities or courts designated by national law.

Article 2.1.2.2.31: Enforcement of decisions

The final decision of a competition authority within the network imposing a fine or an injunction may be enforced by the competition authority of another Member State where it has been established that, after making reasonable efforts within its own territory, the authority issuing the decision has been unable to recover the fine or periodic penalty payment itself due to the undertaking in question not possessing sufficient assets within the territory of that authority.

Comment: This provision restates the principle set out in Article 26 of the ECN+ Directive, without going into further detail, as it is the responsibility of each Member State to establish the practical arrangements for requesting the enforcement of such a decision.

Section III/ Private enforcement of competition law

Comment: Repeal of the 2014 Directive and national legislation adopted to transpose it, as the text below essentially repeats the Directive.

§1/Actions

Article 2.1.2.3.1: Bringing an action for compensation

The victim of an anti-competitive practice may bring an action for compensation at any time, whether or not proceedings have already been brought before a competition authority.

Comment: Actions for compensation may be brought independently (stand-alone action) or following (follow-on action) proceedings brought before a competition authority.

Article 2.1.2.3.2: Limitations

A civil action governed by the provisions of this section will be time barred after the expiry of a period of five years. This time limit begins to run on the day on which the claimant knew or should have known all of the following:

(1) the practice and the fact that it amounts to a breach of competition law;

(2) the fact that the practice is causing it loss; and

(3) the identity of the infringer who committed the practice.

However, the limitation period does not run until the anti-competitive practice has ceased.

It does not run against the victims of the leniency beneficiary, of whom they are not the direct or indirect buyers, as long as they have not been able to take action against the leniency beneficiary under the terms of Article 2.1.2.3.9, §3, paragraph 2.

The limitation period is suspended by any act of a competition authority or court seeking to prosecute the practice that caused the loss. It is suspended for the duration of any consensual dispute resolution procedure.

Comment: Article 10 of Directive 2014/104 provides that the five-year period is the minimum period that each Member State must provide for in its national limitations law. This Article seeks to establish the minimum approach adopted by the Directive.

The start of the limitation period is delayed for victims of leniency beneficiaries who are neither their direct buyers nor their indirect buyers (sub-buyers). Indeed, actions for compensation brought by these victims, who have no contractual relationship with the leniency beneficiary, are designed to be alternative actions. The last part of Article 11(4)

of Directive 2014/104 provided for a reasonable and sufficient period for victims to take action. This proposal is more precise: the time limit does not run for the duration of any proceedings for compensation brought against cartel members who are not leniency beneficiaries.

§ 2/ Rules of evidence

Article 2.1.2.3.3: Effect of network members' decisions

1. A decision rendered by a competition authority of a Member State, by an appellate court of a Member State or by the European Commission, which has recognised the existence of an anti-competitive practice and determined that it is attributable to one or more persons, and which may no longer be the subject of a regular appeal procedure in respect of the part relating to that finding, gives rise to an irrebuttable presumption as to the existence and attribution of the practice that is binding on courts in the context of civil actions.

Comment: This is intended to extend the binding force of the competition authorities' decisions beyond what was provided for in Article 9 of Directive 2014/104. It is worth recalling that Article 9 provided that decisions rendered by a national competition authority of a country other than the one in which the civil action was brought were not binding on the court hearing the civil action. From now on, the binding force will be extended to decisions rendered by all members of the European Competition Network, in order to streamline victims' evidentiary burden in establishing an anti-competitive practice.
This approach is already recognised in German law (Article 33b of the GWB).

2. A commitment decision taken by a competition authority of a Member State or by the European Commission is relevant evidence which the court must take into account when determining whether a practice is anti-competitive.

Comment: Establishes the principles set out in the Gasorba decision (CJEU, 23 Nov. 2017, Case C-547/16, para. 29).

Article 2.1.2.3.4: Request for evidence

1. Requests for the disclosure of documents held by a party to the proceedings, a third party, or by a national competition authority must be met when they are necessary to ensure the effective implementation of the right to compensation and the effective enforcement of European Union competition law. The utility of the requested documents for the outcome of the case, the difficulties faced by the claimant in obtaining them, their confidential nature, and the interest of their holder in not disclosing them must be taken into account.

2. By way of exception to paragraph 1 of this Article, the court shall not order the disclosure or production of a document containing:

(1) a written statement or the transcript of oral statements voluntarily submitted to a competition authority by a person or on their behalf, contributing to establishing the reality of an anti-competitive practice and identifying the infringers, with the aim of benefiting from total or partial immunity from fines under a leniency procedure; or

(2) a written statement or the transcript of oral statements voluntarily submitted to a competition authority by a person or on their behalf, indicating their intention to waive contesting the facts alleged against them and the responsibility arising from them, or acknowledging their participation in an anticompetitive practice and the responsibility arising from it, prepared to allow a competition authority to use settlement or a similar abbreviated procedure.

The court shall exclude from proceedings any documents referred to in this Article that are produced or disclosed by the parties when such documents were obtained solely through access to the file of a competition authority.

Comment: A simplified version of Articles 5 to 7 of Directive 2014/104.

§ 3/ Engaging liability

Article 2.1.2.3.5: Liability principle

Any undertaking within the meaning of this Chapter is liable for loss caused by the commission of a practice contrary to Articles 101 or 102 of the TFEU.

Comment:

Establishes the principles set out in the Skanska decision (CJEU, 14 March 2019, Case C-724/17) on imputation of liability to the undertaking.

It shall be presumed, until proven otherwise, that cartels between competitors cause harm.

Comment: Restatement of Article 17(2) of Directive 2014/104.

Article 2.1.2.3.6: Full compensation principle

1. The infringer shall be ordered to provide compensation, in kind or by equivalent, for all the loss caused, whether in terms of actual losses or loss of profit.

Comment: The full compensation principle is enshrined in Article 3 of the Directive. The working group decided to introduce flexibility by allowing the judge to "take into account" the benefits of the practice for the infringer, with the aim of addressing lucrative misconduct.

2. Where it is established that the claimant has suffered harm but it is practically impossible to quantify that harm, the court shall be empowered to estimate it in order to provide the claimant with effective compensation for its loss. In such cases, courts may take into account the profits that the infringer made unfairly.

Comment: Restatement of Article 17(1) of the Directive; the working group felt that it was very useful for guaranteeing victims' effective right to receive compensation. With respect to the taking profits into account, the group was guided by the approaches adopted in Article 14 of Directive 2016/943 on trade secrets.

Article 2.1.2.3.7: Assessment of damages

Damages are assessed as at the date of the judgment, taking into account all the circumstances that may have affected the nature and value of the loss since the date on which the loss arose, as well as any reasonably foreseeable future loss.

Any misconduct by the victim that occurred after the loss was sustained and that may have contributed to aggravating the loss may be taken into account.

Comment: These assessment rules were not included in Directive 2014/104 and appear to be important. They will make it possible to take into account future loss and the victim's role.
The first paragraph was not included in the Directive, but is set out in Article L 481-7 of the French Commercial Code.
The second paragraph is a new proposal.

Article 2.1.2.3.8: Passing-on of overcharges

The passing-on of overcharges by the direct buyer to its own buyers is a defence that an infringer who has committed an anti-competitive practice may raise against the direct buyer.

Where the direct buyer is claiming compensation, the burden of proving that the overcharges were passed on lies with the defendant, the infringer who committed the practice.

When an indirect buyer is claiming compensation, it is deemed to have provided proof that overcharges were passed on to it if it has shown that the practice existed, that an overcharge was paid by the direct buyer and that the indirect buyer bought the relevant goods or services in breach of competition law, or bought goods or services derived from them or containing them. The defendant may show that the overcharge was not passed on to the indirect buyer, or that it was not entirely passed on.

Comment: A simplified version of Articles 12 to 14 of Directive 2014/104.

Article 2.1.2.3.9: Joint and several liability

1. Where several undertakings have contributed to an anti-competitive practice, they are jointly and severally liable to compensate for the resulting loss. They shall contribute among themselves to the compensation debt in proportion to the seriousness of their respective misconduct, their role in causing the loss, the benefit they derived from participating in the practice, any recourse to the leniency programme in a prior action before a competition authority and the compensation already paid by a joint and several debtor to the victims on the basis of concluded settlements.

2. Notwithstanding paragraph 1 of this Article, a small or medium-sized undertaking shall not be jointly and severally liable to compensate for loss suffered by victims other than its direct or indirect contractors where:

- its market share on the relevant market was below 5% for the entire period during which the anti-competitive practice was committed; and

- the application of paragraph 1 of this Article would irremediably jeopardise its financial viability and result in its assets becoming worthless.

This derogation does not apply where the small or medium-sized undertaking has instigated the anti-competitive practice, has coerced other persons to participate in it or has previously committed such a practice, as determined by a decision of a competition authority or an appeal court.

3. A person who has benefited from a total exemption from a financial penalty under a leniency procedure is jointly and severally liable with the other members of the cartel to compensate for the loss suffered by its direct or indirect contractors.

However, it is only required to compensate the victims of the cartel, who are the direct or indirect contractors of the other members of the cartel, if these victims have not been able to obtain full compensation for the loss they have suffered from the other undertakings involved in the same infringement of competition law, or have not reached a consensual settlement with one or more of the cartel members.

4. A victim who has entered into a consensual settlement with one of the joint and several debtors may only claim from other joint and several debtors who are not parties to such consensual settlement the amount of its loss less the contributory share in the debt of the joint and several debtor who is a party to the consensual settlement or the amount of the debt it has received under such consensual settlement if it exceeds such contributory share. Joint and several debtors who are not parties to the settlement may not claim from a joint and several debtor who is a party to the settlement a contribution towards the amount of money they have paid to the victim.

Except where the consensual settlement is invalid, the victim may not claim payment of the balance of its loss from the joint and several debtor who is party to such settlement.

Comment: For paragraphs 1 to 3: Simplified restatement of Article 11 of Regulation 2014/104. This new text sets out criteria for the definitive distribution of the debt burden between joint and several debtors, whereas the issue is currently left to national law.
For paragraph 4: This paragraph addresses the effects of a possible consensual settlement of the dispute with some of the infringers who committed the anti-competitive practice. The adopted approaches are a restatement of Article 19 of Regulation 2014/104. The last paragraph of the new text adopts the opposite approach to that set out in Article 19(3), with the objective of securing the position of the debtors who are parties to the consensual settlement of the dispute.

Article 2.1.2.3.10: No freedom of contract

The provisions of this section may not be derogated from by contract.

Article 2.1.2.3.11: Relationship with national civil liability law

In the absence of rules specifically provided for in this Section, the general principles of European law and, failing that, national rules relating to civil liability law shall apply, as appropriate, provided that they do not prejudice the effectiveness of European Union law.

Comment: To avoid any gaps, it appears important to refer, where necessary, to national laws on civil liability.

§ 4/ Invalidity

Article 2.1.2.3.12: Invalidity

Any commitment, contract or clause contrary to Articles 101 or 102 of the TFEU is invalid.
The consequences of invalidity are governed by the general principles of European law and, failing that, by the national law applicable to the contract.

Comment: Article 101(2) of the TFEU expressly covers invalidity. Article 102 of the TFEU and Directive No. 2014/104 do not refer to invalidity. It appeared important to include invalidity as a civil penalty in the European Code. The question of any restitution or whether the contract is entirely or partially invalid is a matter for the national law governing the contract.

CHAPTER 3: CONCENTRATIONS

Comment: The European Code is intended to repeal Regulation 139/2004. On the other hand, implementing legislation is necessary for the control procedure, the referral procedure and the analysis of the effects of the transaction, and should be retained.

Section 1. Notifiable transactions

Article 2.1.3.1.1: Definition of "concentration"

1. A concentration is deemed to arise from any operation that results in a lasting change of control over the whole or part of an undertaking.

2. Control is defined as the possibility of exercising decisive influence on an undertaking.

3. A concentration may take the following forms in particular:

(a) the merger of two or more previously independent undertakings;

(b) the acquisition, by one or more persons already controlling an undertaking, of direct or indirect control of another undertaking; or

(c) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Comment: This Article restates in identical form the definition of concentration in Article 3(1) to (4) of Regulation 139/2004.

Article 2.1.3.1.2: European-dimension concentration

1. Only transactions with a European dimension are covered by this Code.

2. A concentration has a European dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate European Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate European Union-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a European dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate European Union-wide turnover within one and the same Member State.

4. A concentration that meets neither the thresholds laid down in paragraph 2 nor those in paragraph 3 has a European dimension where:

(a) the value of the transaction exceeds 800 million euros, and

(b) the buyer has a total turnover of more than one billion euros worldwide and more than 250 million euros within the European Union.

Comment: This Article first restates the turnover thresholds set out in Article 1 of Regulation 139/2004.

It then introduces an additional test that extends the notification obligation by taking into account the value of the target. The idea here is to make notifiable transactions that do not meet the traditional notification thresholds, due to the lower turnover of the target undertakings, but where the value of the transaction shows that these undertakings have an economic, commercial and competitive value that is not reflected in their current turnover and which is based on the anticipation of a future market position linked to advanced innovations (this was the case for the acquisition of Waze and WhatsApp, for example).

German law has introduced this new notification requirement, with a threshold of 400 million euros (value of the consideration). Austrian law has also done so, with a threshold of 200 million euros.

The "value of the transaction" formulation has been used to capture the different ways in which the "price" can be expressed, thereby avoiding circumvention strategies.

Article 2.1.3.1.3: Limitation on the scope of application of concentration control

Control of concentrations does not apply:

(a) where credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings; or

(c) where the operations referred to in Article 1(3)(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies ([1]) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

Article 2.1.3.1.4: Calculation of turnover

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4 of this Article. Turnover, in the European Union or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the European Union or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers. However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. The following shall be used instead of turnover:

(a) For credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC(1), after deduction of value added tax and other taxes directly related to those items, where appropriate:

(i) interest income and similar income;

(ii) income from securities:— income from shares and other variable yield securities,— income from participating interests,— income from shares in affiliated undertakings;

(iii) commissions receivable;

(iv) net profit on financial operations; and

(v) other operating income.

The turnover of a credit or financial institution in the European Union or in a Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the European Union or in the Member State in question, as the case may be;

(b) For insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3), gross premiums received from European Union residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:(a) the undertaking concerned;(b) those undertakings in which the undertaking concerned, directly or indirectly:(i) owns more than half the capital or business assets, or(ii) has the power to exercise more than half the voting rights, or(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or(iv) has the right to manage the undertaking's affairs;(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint venture and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Comment: This Article restates the turnover thresholds set out in Article 5 of Regulation 139/2004.

Section 2. Referrals

Article 2.1.3.2.1: Referral of a European-dimension transaction to a Member State

1. Within 15 working days after receiving a copy of the notification, a Member State may, on its own initiative, upon invitation by the Commission or upon invitation by one of the undertakings concerned by the concentration, request the Commission to refer a notified concentration to it, where the notified concentration significantly affects or threatens to affect competition in a market within that Member State that has all the characteristics of a distinct market.

2. Before a concentration with a European dimension is notified, the undertaking(s) concerned may also request that the Commission refer review of the case, under the same conditions as those set out in paragraph 1. The Commission shall inform the Member State, which will have five working days to oppose the referral request.

3. Within fifteen working days of receiving the request for referral, the Commission shall decide whether the criteria for referral are met and shall then refer all or part of the case to one or more Member States; it shall inform the Member States and the undertakings involved in the concentration accordingly.

In the event of a referral, and if a notification file has already been sent to the Commission, it will immediately forward it to the Member State. The time limits for the national control procedure start to run on this date.

If no response is received within fifteen working days, the Commission is deemed to have accepted the referral in accordance with the terms of the referral request.

Comment: The aim here is to restate the rules set out in Articles 4 and 9 of Regulation 139/2004, setting out only the basic rules. The Commission was given a uniform period of 15 days to take a position on the referral request.
If a request is made by the notifying undertaking, there is currently a procedure for asking the MS for its agreement. The working group was divided on whether or not to remove the MS veto over the referral request. A compromise was reached: the deadline was reduced from 15 to 5 days for the MS to exercise its veto.

Article 2.1.3.2.2: Referral of a national-dimension transaction to the European Commission

1. Before any notification to the competent national authorities, the undertaking(s) concerned may request to the Commission that their transaction, if it is potentially subject to examination under the national competition laws of at least three Member States, be examined by the Commission.

2. The Commission shall inform the Member States concerned. If none of them objects within a period of fifteen working days following the notification, the concentration must be notified to the Commission, which will issue its decision on the basis of the rules applicable to concentrations with a European dimension. Any competent national authority then no longer has the power to issue a decision regarding the concentration.

Comment: This is reworking of the referral mechanism in Articles 4 and 22 of Regulation 139/2004.
Given that very few referrals have been requested by one or more Member States and that most Member States have gradually introduced control of concentrations, we propose to abolish upstream referrals at the request of one or more Member States.
The working group is aware that this proposal runs counter to the "new approach" applied to Article 22 of Regulation 139/2004 since the beginning of 2021, under which the Commission and certain Member States have taken the view that Article 22 may be used by the Commission to control non-notifiable transactions considered problematic (in particular, transactions likely to be qualified as "killer acquisitions" in certain sectors, such as pharmaceuticals and digital services).

However, this new approach renders largely obsolete the notification thresholds, which form the basis of the legal certainty that is essential for businesses.
In addition, the group has introduced a test based on the value of the transaction among the thresholds that determine whether a transaction has a European dimension (Article 2.1.3.1.2, §4). This test allows for a better assessment of transactions with a high transaction value but where one of the parties has a low turnover.
This is why the working group recommends keeping to the provisions of Article 4.5 of Regulation 139/2014, which allow undertakings themselves to request a referral to the Commission, provided that the transaction is potentially subject to the jurisdiction of at least three national competition authorities under their national law.

In any event, the first case in which the new approach to Article 22 is the subject of litigation before the EU General Court (Case T-227/21, Illumina) is currently ongoing, so this drafting proposal will have to be reviewed in light of the General Court's judgment in that case, or even a possible appeal to the European Court of Justice.

Section 3. Exercising control

Article 2.1.3.3.1: Commission decision on the compatibility of the concentration

1. A concentration which would not significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the internal market. Otherwise, the concentration shall be declared incompatible.

2. The Commission may attach to its accounting decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

3. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

Comment: This Article restates the terms of Regulation 139/2004 but changes the presentation and wording. It first restates the substantive test in Article 2 of Regulation 139/2004 and then incorporates Article 6(2) of that Regulation on decisions subject to conditions and obligations. Finally, it specifies the effects of a Commission decision with regard to "ancillary" restrictions in terms identical to those set out in the last sentence of Article 6(1) of Regulation 139/2004.

Article 2.1.3.3.2: Appraisal of a concentration

1. In reaching its decision, the Commission shall take into account:

(a) the need to maintain and develop effective competition in the internal market in view of, among other things, the structure of all the affected markets and the actual or potential competition from undertakings located either inside or outside the Union; and

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate users, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. The Commission may also take into account European industrial policy objectives when adopting a compatibility decision.

Comment: This Article reflects the appraisal test set out in Article 2 of Regulation 139/2004. However, it is innovative in that it allows European industrial policy objectives to be taken into account, which could, in very exceptional cases, lead the Commission to authorise a concentration that it would otherwise have blocked. It should be noted that industrial policy objectives must be set at European level, which means that the national industrial policy of one or more Member States cannot be taken into account.

Article 2.1.3.3.3: Decision to set up a joint venture

1. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall be notified in accordance with this section if the transaction has a European dimension.

If it has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the internal market.

2. In making this appraisal, the Commission shall take into account in particular:

— whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market; and

— whether the coordination which is the consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating or restricting competition in respect of a substantial part of the products or services in question.

Comment: The codification reflects existing law by restating Articles 2(4) and 5 of Regulation 139/2004.

Section 4. Procedural rules

Article 2.1.3.4.1: Notification

1. Concentrations with a European dimension shall be notified to the Commission following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a European dimension.

2. A concentration which consists of a merger or in the acquisition of joint control within the meaning of this Chapter shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Code, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets. It shall also, within three working days, send copies of the notifications to the competent authorities of the Member States concerned by the transaction.

Comment: This Article restates the substance of the rules set out in Article 4 of Regulation 139/2004 on the notification of concentrations with a European dimension. Paragraph 2 §1 indicates that a draft can be notified.

Article 2.1.3.4.2: Suspension

1. A concentration which is to be examined by the Commission shall not be implemented until it has been declared compatible with the internal market.

Any act fully or partially implementing a change of control of the target undertaking carried out before the decision declaring the concentration compatible with the internal market will be subject to penalties under the rules set out in this Chapter. Contractual obligations necessary to preserve the position of the target undertaking are not considered as implementing the change of control.

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission without delay, and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. Notwithstanding paragraphs 1 and 2, the Commission may, on request, authorise that the concentration be fully or partially implemented, without waiting for the compatibility decision. A request for a derogation must be supported by reasons. When deciding on the request, the Commission must take particular account of the effects that the suspension may have on one or more undertakings concerned by the concentration or on a third party, and the threat that the concentration may pose to competition. Conditions and obligations may be attached to this derogation to safeguard effective competition conditions. It may be requested and granted at any time, either before notification or after the transaction.

Comment: This Article restates Article 7 of Regulation 139/2004 and proposes a definition of the concept of "gun jumping". While the Ernst and Young judgment (Case C-633/16) defines gun jumping as any transaction that "contributes to the change in control", we propose that the more relevant formulation of "act fully or partially implementing a change of control" be adopted. Indeed, the term "contributes" was considered too broad and was warranted, in the Ernst and Young judgment, by the specific features of the case.

Article 2.1.3.4.3: Phase I examination proceedings

Within a period of 25 working days from receiving the complete notification file, the Commission shall examine the transaction and shall adopt one of the following decisions:

(a) finding, by means of a decision, that the transaction does not fall within the scope of this Code;

(b) rendering a decision that the notified transaction is compatible if the notified concentration does not raise serious doubts as to its compatibility with the internal market or if the amendments made to the transaction, as notified, by the undertakings concerned remove all serious doubts as to its compatibility with the internal market – if amendments are submitted by the parties, the deadline is extended to 35 days; or

(c) opening a phase II examination proceedings if it finds that the notified concentration raises serious doubts as to its compatibility with the internal market.

Comment: This Article codifies the time limits set out in Regulation 139/2004 for the Phase I examination **proceedings** in a manner consistent with existing law, while modifying the structure, presentation and wording in order to make it easier to read.

Article 2.1.3.4.4: Phase II examination proceedings

1. The Commission must make a decision on the compatibility of the transaction within 90 working days, which may be extended to 105 days if the parties propose amendments, beginning from receipt of the complete notification file.

The time limits set out in this Article may be extended if the notifying parties submit a request to that effect. They shall be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision or to order an inspection.

If no decision is adopted, the Commission is deemed to have declared the transaction compatible with the internal market.

Comment: This Article corresponds in identical form to the rules set out in Regulation 139/2004.

Article 2.1.3.4.5: Investigative powers

The investigative powers are identical to those described in the chapter on anti-competitive practices.

Comment: In the interests of simplification and consistency, and in order to make the concentration control proceedings more effective, the investigative powers are those available to the Commission in respect of anti-competitive practices.

Article 2.1.3.4.6: Power to order deconcentration

1. The Commission may take all appropriate measures with a view to deconcentration if it has been carried out without having obtained a compatibility decision, if, after examination, it appears that it was incompatible with the requirements of competition.

The Commission may take any appropriate interim measures to maintain or restore competition on the relevant markets during the proceedings.

2. The Commission may revoke a decision finding that a concentration is compatible if:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

Comment: We propose to summarise the dissolution and interim measures powers available to the Commission in the event that companies fail to comply with their obligations under the concentration control regime.

Article 2.1.3.4.7: Fines and periodic penalty payments

1. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration prior to its implementation, unless they are expressly authorised to do so by a decision of the Commission;

(b) implement a concentration before it is declared compatible;

(c) implement a concentration that has been declared incompatible with the internal market by a Commission decision; or

(d) breach a condition or requirement imposed by decision of the Commission.

In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.

2. The Commission may, by decision, impose on affected persons periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the affected

undertaking or association of undertakings per business day of delay, calculated from the date fixed in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision;
(b) to submit to an inspection which it has ordered by decision;
(c) to comply with an obligation imposed by decision; or
(d) to take the measures ordered by decision.

Where the affected persons have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payments at a figure lower than that which would arise under the original decision.

Comment: This Article restates the substance of Articles 14 and 15 of Regulation 139/2004, while simplifying the presentation.

Section 5: Transactions that must be notified to the Commission

Article 2.1.3.5: Non-controlling minority interests

1. Information notices must be filed for transactions with a European dimension within the meaning of this Chapter, in which an undertaking with a market share of more than 30% in the market or markets in which the target is also present acquires, directly or indirectly, a non-controlling interest greater than 25% in the share capital of the target.

2. Within twenty-five working days after receiving such an information notice, the Commission may require the undertakings concerned to notify the transaction within the meaning of this Chapter. The transaction shall not be implemented during this period.

3. If the Commission does not respond, the transaction may be implemented.

Comment: Given the disagreements and differences of opinion within the group over whether non-controlling structural ties between undertakings, and in particular the acquisition of minority shareholdings, are subject to control, it seemed inappropriate to extend the concept of concentration to minority (non-controlling) interests or to the acquisition of influence below the control threshold. However, a system for informing the Commission is proposed, which will allow it to address qualified minority shareholding transactions.

Article 2.1.4.1: Definition of State aid

1. State aid within the meaning of Article 107(1) of the TFEU means any advantage granted through State resources in any form whatsoever that favours certain undertakings or the production of certain goods.

2. An advantage is any measure favouring one or more undertakings that results from a direct or indirect transfer of State resources or from forgoing public revenue of any kind whatsoever.

3. The following are not advantages:

- measures granted by the State as a market participant under normal market conditions;

-measures needed to compensate for the additional costs incurred in providing a service of general economic interest; and

-measures granted following a competitive tendering procedure in accordance with public procurement rules.

4. A State resource is any resource directly or indirectly under the control of the State.

5. A direct beneficiary is any undertaking that receives aid.

6. An indirect beneficiary is any undertaking to which the benefit is transferred. The transferee or economic successor of a beneficiary undertaking is deemed to be an indirect beneficiary of the aid, to the extent that the payment made in return for the transfer of the beneficiary undertaking does not include the benefit.

7. The mere fact of being a party to an economic transaction with the direct beneficiary of aid does not mean that the advantage has been transferred.

Article 2.1.4.2: Unlawful aid

1. Unlawful aid is any aid which, although not covered by an exemption under a general exemption regulation or an approved scheme, has been put into effect without the Member State first obtaining a final decision from the Commission that the aid is compatible with the internal market.

2. Aid put into effect after the Commission's decision declaring the aid to be compatible is presumed to be lawful until such time as the courts of the European Union render an annulment decision. Then, on the date of such a decision, the aid in question is

deemed not to have been declared compatible by the annulled decision, such that its implementation must be considered unlawful.

3. Member States shall refrain from granting unlawful aid and shall recover such aid without delay from the direct or indirect beneficiaries thereto.

Comment: According to the Court, aid declared compatible becomes retroactively unlawful if the Commission's decision is annulled (ECJ, C-199/06 (CELF), para. 63). The scheme therefore changes with the annulment of the Commission's decision. This does not pose much of a problem, as it is clear that aid stripped of its legal basis by the annulment of the Commission's decision must be recovered in the same manner as aid that was unlawful from the outset. It is only when it comes to compensation for loss that the distinction is relevant. However, it is simply a matter of applying the principle of liability for misconduct. Indeed, the implementation of aid that has been declared compatible cannot be considered misconduct, since it is perfectly in line with the State aid scheme.

Article 2.1.4.3: Compatibility of aid with the internal market

1. Except as otherwise provided in the treaties, State aid which affects trade between Member States and which distorts or threatens to distort competition is incompatible with the internal market.

2. Aid measures granted by Member States are presumed to affect trade between Member States if the beneficiary of the aid measure carries on its business in several Member States or if it is subject, in its local activities, to effective competition from undertakings established in another Member State. The European Commission may establish categories of State aid that are deemed not to have an effect on trade between Member States, particularly in light of their low value.

3. The European Commission may establish categories of State aid which are deemed not to distort competition, having regard in particular to their low value or the specific nature of the market or activity in question.

4. The following aid is compatible with the internal market:

- aid declared compatible by a decision of the European Commission adopted in accordance with Article 107(2) or (3) of the TFEU;
- aid that meets the conditions set out in a European Commission block exemption regulation;
- aid qualifying as existing aid, subject to the procedure laid down in Article 108(1) of the TFEU; and

- aid declared compatible by a Council decision adopted in accordance with Article 108(2) of the TFEU.

Aid granted to undertakings in difficulty may be subject to derogations established by the Commission pursuant to Article 109 of the TFEU.

Where compatible aid programmes cover an entire economic sector, their compatibility extends to all undertakings in difficulty operating in that sector.

Article 2.1.4.4: Role of interested parties

1. The European Commission's procedure for controlling State aid shall comply with the adversarial principle for interested parties, beginning with the opening of the formal investigation procedure referred to in Article 108(2) of the TFEU. Any Member State or undertaking whose interests may be affected by the granting of aid, and especially the beneficiary of the aid, competing undertakings and trade associations, are deemed to be interested parties.

2. Only the Member State concerned may notify the European Commission of proposed State aid with a view to obtaining a decision on its compatibility with the internal market.

3. Notwithstanding that the European Commission has exclusive competence to determine the compatibility of State aid, national courts may review the compliance of aid with the conditions set out in an exemption regulation or an authorised State aid scheme.

Article 2.1.4.5: Competitors' rights

1. Any undertaking competing with an undertaking that is the beneficiary of an aid may bring proceedings before the competent national courts to recover from the entity which granted the aid compensation for loss resulting from the implementation of unlawful aid, whether or not that aid is declared compatible with the internal market after it is implemented. If the aid is declared compatible after it has been implemented, only the loss resulting from the anticipated implementation of the aid gives rise to compensation.

Where the aid has been put into effect following a Commission compatibility decision, the annulment of that decision cannot give rise to compensation on the grounds that the aid is unlawful, provided that it is recovered within a reasonable period of time.

2. Any undertaking competing with an undertaking that is the beneficiary of an aid may bring proceedings before the competent national courts to recover from the beneficiary of the aid compensation for loss resulting from the implementation of an unlawful aid measure, whether or not that aid is declared compatible with the internal

market after it is implemented, if the beneficiary knew or should have known that the measure was unlawful aid.

3. Any undertaking competing with an undertaking that is the beneficiary of an aid may bring proceedings before the competent national courts to require the entity that granted the aid to suspend the implementation of any un-notified aid or that does not fall within the scope of an approved scheme or a general exemption regulation.

Any undertaking competing with an undertaking that is the beneficiary of an aid may bring proceedings before the competent national courts in order to prohibit, subject to penalties, the entity that granted the aid from recovering the unlawful aid, even if the aid is subsequently declared compatible. If the unlawful aid is declared compatible after it has been implemented, the recovery obligation is limited to the benefit resulting solely from the anticipated implementation of the aid.

Comment :

Competitors' rights are as follows:

§ 1: Action for compensation before the national court against the entity that granted the aid, barred where a compatibility decision is annulled, followed by recovery within a reasonable period;

§ 2: Action for compensation before a national court against the beneficiary, barred if the beneficiary did not know (or could not have known) that the aid was unlawful;

§ 3: Application to a national court to order the entity granting the aid not to pay it or to recover it.

§1: This is a codification of case law that is beginning to emerge in France (e.g. Council of State, 22 July 2020, SIDE, no. 434446) but which appears to be isolated and still not very widespread outside France. It can, however, rely on the general principles of EU law following the Francovich case law (Case C-6/90, judgment of 19 November 1991), which apply in cases of unlawful aid (ECJ, C-199/06 (CELF)).

§2 This is a departure from positive law, aimed at making compliance with aid regulations more effective.

§3 This is the positive law resulting from the direct application of Article 108(3) of the TFEU

Article 2.2: Relationship with Member States' national laws

The matters addressed in this Title are exclusively matters of European law unless this Title provides otherwise.
Matters not covered by this Title are governed by the general principles of European law and, where no such principles exist, by the national law applicable pursuant to conflict of laws rules.

Comment:

- Issues that are not addressed are subject to private international law, and therefore to the applicable national laws (contract law, etc.).

- On the other hand, the issues addressed by this Title are addressed independently, or in their entirety, by the text below

- Integrated partnership contracts are not intended to be optional instruments. Once a contract has been concluded that falls within this definition, the European regime applies.

CHAPTER 1. INTEGRATED PARTNERSHIP CONTRACTS

Section 1. Characterisation of an integrated partnership contract

Article 2.2.1.1.1: Definition of integrated partnership

1. An integrated partnership is a contract under which a partner, known as the network head, grants its contractual counterparty, known as the distributor, which acts in its own name and on its own behalf, the right to sell products or provide services under a common brand, and may agree to transfer its know-how or provide commercial or technical assistance.

2. Franchise, concession and trade mark licensing agreements, in particular, may be characterised as integrated partnerships where the trade mark is used as a common brand.

3. A franchise is a contract under which the parties agree to work together, with the franchisor making its distinctive signs and franchisor-tested know-how available to the franchisee, in return for compensation and the franchisee's commitment to use them in accordance with a uniform commercial method, with the assistance and under the control of the franchisor. A franchise is exclusive when the franchisee has exclusive rights to a territory or customer base covered by the franchise.

Know-how is a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, "secret" means that the know-how is not generally known or easily accessible; "substantial" means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality. Know-how need not be original.

4. A trade mark licence is a contract under which the owner of a trade mark, known as the licensor, grants use of the trademark to a licensee for a specified period in return for royalties. A trade mark licence is exclusive when the licensee has exclusive rights to a territory or customer base covered by the licence.

5. A concession is a contract by which a grantor reserves to a grantee the right to sell products that it manufactures or distributes in a specific territory or to a specific customer base, in its own name and on its own behalf, under the grantor's trade mark. A concession is exclusive when the grantee has exclusive rights to the territory or customer base covered by the concession.

Comment: Integrated partnership contracts are new, in that they reflect a minimum regime common to certain contracts, such as franchises, concessions and trade mark licences. However, specific rules will also apply to franchise agreements.

Article 2.2.1.1.2: Independence of the integrated partner

1. A distributor partner is an independent reseller that commits itself in its own name in carrying out its business.

2. It is not entitled to any reimbursement from its partner for its expenses or losses incurred in carrying on its business.

3. The partner at the head of the network is not liable for the actions of the distributor partner, and vice versa.

4. All distributor partners must display the fact that they are independent professionals in their physical stores and on their websites.

Article 2.2.1.1.3: Employment law not applicable

If the contract is characterised as an integrated partnership within the meaning of this Code, it cannot be recharacterised as an employment contract. Nor is the distributor be subject to employment law.

Comment: Once a contract has been characterised as an integrated partnership contract, the purpose of this Article is to exclude special schemes, such as that governing branch

managers under French law, which create an imbalance in the contract that has been concluded.

Section 2. The pre-contractual phase

Article 2.2.1.2.1: Pre-contractual information document and draft contract

1. Where an integrated partnership contract includes an exclusive undertaking by the distributor partner, with a commitment to more than 80% of its business being treated as such an exclusive commitment, there may be no reservation of territory, conclusion, substantial amendment, renewal or transfer of the integrated partnership contract unless the network head has provided to the distributor, within 30 days, a pre-contractual information document together with a draft contract.

2. If the contract is entered into before this period has expired, the penalties referred to in paragraph 4 apply.

3. The pre-contractual information document has two parts.

The first part of the pre-contractual information document shall set out the partners' obligations. It shall also state whether the contract contains any of the following clauses and describe their scope:

(a) whether or not the integrated partnership agreement is entered into intuitu personae;

(b) the consequences of failure to perform the obligations under the contract;

(c) the method for calculating the compensation payable by the distributor and how it may be revised during the term of the contract;

(d) non-competition clauses, their terms and conditions;

(e) the duration of the business partnership agreement and the renewal terms;

(f) the prior notice and termination terms of the contract, in particular as regards costs and investments;

(g) the network head's pre-emption right or purchase option and the rules for determining the value of the business when this right or option is exercised; and

(h) the exclusive rights reserved for the distributor.

The second part of the pre-contractual information document shall contain the following information:

(a) the name or business name of the network head and its contact details;

(b) if the network head is a legal person, the identity and capacity of the natural person acting on its behalf;

(c) the nature of the network head's business;

(d) the intellectual property rights the use of which is authorised;

(e) the annual financial statements for the network head's last three financial years, or if no financial year has been completed in the last three years, the annual financial statements for the preceding financial years;

(f) the experience with integrated partnerships and the experience in operating the business outside an integrated partnership agreement;

(g) the network head's experience with other business operations;

(h) concluded or ongoing disputes between the network head and network members over the last three years;

(i) where appropriate, for each of the last three years, the number of operators who are part of the network in the country where the business is to be carried on and internationally, and the prospects for expansion of the network;

(j) where applicable, for each of the last three years, the number of business partnership agreements concluded, the number of integrated partnership agreements terminated by the network head and by the distributor, and the number of integrated partnership agreements not renewed when their term expired;

(k) the costs and investments specific to the brand that the distributor will be committed to at the beginning and during the term of the integrated partnership agreement, indicating their amount and purpose, as well as their amortisation period, the time at which they will be incurred and what will happen to them at the end of the agreement; and

(l) insolvency proceedings against the network head, or an undertaking that was previously managed by the current officer of the network head.

4. If the pre-contractual information document is not provided, incomplete, inaccurate or late, the invalidation of the contract on the grounds of lack of consent, as well as any compensation payable to the distributor, are governed by the applicable national law.

However, the mere fact that the pre-contractual information document has not been provided, is incomplete or inaccurate, or has been provided late, does not mean that the contract is null and void.

Comment: This text is inspired by Articles L 330-3 and R330-1 of the French Commercial Code, and by French case law, which provides that a contract is not null and void merely because of a failure to comply with the pre-contractual disclosure obligation. For a contract to be null and void, it will be necessary to prove a lack of consent. This will be subject to the applicable national law by virtue of the conflict of laws rule.

Article 2.2.1.2.2: Market description

1. The distributor may not validly accept the contract without first proving that it has had a description of the state of the market concerned by the agreement, both locally and nationally (or internationally if the agreement concerns several countries), prepared by a professional of its choice, who holds professional liability insurance and is independent of the future integrated partner. This description shall describe the current state of the market (number of potential customers and number of current or potential competitors whose can already be expected within less than a year).

2. The network head partner shall not directly or indirectly provide this market report. If it does, it shall be liable to pay compensation for the damage caused by depriving the other partner of access to an independent professional.

3. Any professional intending to prepare market reports must apply to be included on the official list of professionals preparing market reports. This list will be available on an official website in each Member State.

4. No such market report is required upon renewal of the contract.

Comment: There is a great deal of litigation concerning market reports. The novel idea was therefore to draw upon the analyses that have been successfully introduced in French immovable property law, to ensure that the pre-contractual obligation to provide information to immovable property buyers is effective. The new occupation of market reporter has also created jobs. Under this text, the market report will no longer be prepared by the contractual counterparty, but rather by a professional registered on a list in each Member State, who will be insured and who must be independent of both parties.

Article 2.2.1.2.3: Forecast budget

1. The distributor partner may not validly accept the contract without first providing proof that it has had a forecast budget for its business in the network prepared by a professional of its choice who is independent of the future integrated partner and has professional liability insurance.

Any professional intending to prepare forecast budgets under this Article must apply to be included on the official list of professionals preparing forecast budgets. This list will be available on an official website in each Member State.

2. To this end, the network head partner must provide the figures for at least five integrated partners operating in the network (including the pilot in franchise networks, if

there is one). If such figures do not yet exist in the network, the network head partner shall provide to the distributor partner the turnover of all the undertakings in the network to which it has access.

3. The network head partner is liable for any misleading figures it provides.

4. The independent professional responsible for the forecast budget shall always include the following reference in bold type in a box at the top of the forecast budget:

"A forecast budget is a hypothetical projection of the turnover and results that may be achieved. The figures in this budget cannot be guaranteed."

This box is only a warning and does not absolve the professional from liability. It is up to the professional to make a reasonable business forecast, based on the actual figures provided by the network head partner.

5. The costs of preparing this forecast budget shall be borne by the distributor partner.

6. The network head partner shall not directly or indirectly provide this forecast budget. If it does, it shall be liable to pay compensation for the damage caused by depriving the other partner of access to an independent professional.

7. No such forecast budget is required upon renewal of the contract.

Comment:
There is a great deal of litigation concerning forecast budgets. The idea was therefore to draw upon the analyses that have been successfully introduced in French immovable property law, to ensure that the pre-contractual obligation to provide information to immovable property buyers is effective. The new occupation of market reporter has also created jobs. Under this text, the forecast budget may no longer be prepared by the contractual counterparty, but rather by a professional registered on a list in each Member State, who will be insured and who must be independent of both parties. It is up to each Member State to determine whether these professionals must be chartered accountants.

Article 2.2.1.2.4: Distribution partner's obligation to seek information

The provision of pre-contractual documents does not affect the distributor partner's obligation to seek information.

Article 2.2.1.2.5: Confidentiality of information exchanged during the pre-contractual period

A distributor partner is bound by the confidentiality of the information it obtains with a view to concluding an integrated partnership agreement and may not use it, directly or indirectly, outside the integrated partnership agreement to be concluded.

Article 2.2.1.2.6: Any territory reservation must be in writing

The reservation agreement must be concluded in writing, failing which it is null and void.

When the payment of an amount of money is required prior to the signature of the integrated partnership contract, in order to obtain the reservation of a territory, the services provided in return for this amount shall be specified in writing, together with the reciprocal obligations of the parties in the event of withdrawal.

Section 3. Concluding an integrated partnership contract

Article 2.2.1.3.1: The contract must be in writing

An integrated partnership contract must be concluded in writing, failing which it is null and void.
The clauses of an integrated partnership agreement must be drafted in a clear and understandable manner.

Article 2.2.1.3.2: Defects in consent

An integrated partnership contract is null and void if there is a defect in consent, in accordance with the general principles of European Union law and, failing that, the national law applicable to the contract. However, a mistake as to the profitability of the distributor partner's undertaking is not in itself a defect in consent.

Comment: Provided that the partner has the benefit of a forecast budget prepared by an independent and insured third party, there is no reason to accept an error in profitability. For all other defects in consent, the law applicable to the contract will govern.

Section 4. Obligations arising from integrated partnership contracts

§1. General provisions

Article 2.2.1.4.1: Loyalty and cooperation obligation

The parties to an integrated partnership contract are bound by an obligation of loyalty and cooperation.

Article 2.2.1.4.2: Provision of a trade mark or brand name

An integrated partnership contract gives the distributor the right to use the common brand name. If the brand name has been registered as a trade mark, the contract shall include a trade mark licence.

Article 2.2.1.4.3: Obligation to respect the brand's image

Distributors shall not engage in any conduct that may damage the brand's image.

In particular, they shall not disparage the network, product or service, trade mark or brand name.

Article 2.2.1.4.4: Confidentiality obligation

A distributor that has obtained confidential information from the network head shall keep it confidential during the term of the contract and after it comes to an end.

§2. Special provisions applicable to franchises

Article 2.2.1.4.5: Franchisor's obligations.

1**.** The franchisor shall provide the franchisee with know-how as defined in this Title.

2**.** The franchisor shall provide a franchisee with initial training and ongoing assistance. The contract may specify the scope of the obligation to provide assistance.

Article 2.2.1.4.6: Franchisee's obligations

1**.** The franchisee must pay the franchisor the entry fee, if one has been provided for, and the franchise fees.

It is not unlawful for the contract to include a clause authorising the franchisor to monitor the franchisee's business results, provided that it does not result in interference in the franchisee's affairs.

2**.** The franchisee must implement the know-how provided to it. The franchisor may monitor whether the franchisee is implementing the know-how.

Section 5. End of an integrated partnership

Article 2.2.1.5: Elimination of the distinctive signs

The distributor shall remove the brand name and eliminate the distinctive signs that linked it to the network.

CHAPTER 2: SELECTIVE DISTRIBUTION

Article 2.2.2: Setting up selective distribution

Selective distribution occurs when the supplier agrees to sell the contract goods or services only to authorised distributors, and these distributors agree not to sell the goods or services to unauthorised distributors.

In setting up and implementing selective distribution, the supplier is free to choose the goods and services, the approved distributors and the requirements they must meet to resell the products or services.

Exclusivity clauses, which prohibit selective distributors and their customers from selling to unauthorised distributors who resell in the territory subject to selective distribution, are not contrary to Article 101(1) of the TFEU.

Comment: Under Regulation 330/2010, a blacklisted clause is defined as the prohibition for distributors in a selective distribution system to resell to an unauthorised distributor **located in a territory where the distribution system is not established.** The same is true of Article 4(c)(i) of the draft reform of the Regulation, which only allows "the restriction of active or passive sales by the members of the selective distribution system and their customers to unauthorised distributors located within the territory of the selective distribution system". This does not protect the network against parallel resellers (within or outside Europe) who are based outside the territory in which the system is established, but who resell in the territory in which it is established. We are therefore proposing that the place of resale rather than the place where the retailer is established should be taken into account.

CHAPTER 3: COMMERCIAL AGENCY CONTRACTS

Comment: The Commission's latest consultation in 2015 revealed that the Commercial Agents Directive is a success (rated between 7 and 10, except by the UK). That's why we started from this Directive, but did not include the options

Article 2.2.3.1: Application

The Articles of this chapter do not apply to:

- commission contracts, which are contracts under which an independent distributor known as a commission agent is commissioned to enter into transactions for the purchase or sale of goods or services in its own name and on behalf of its principal; or
- brokerage contracts, which are contracts under which an intermediary, known as a broker, puts two people in contact with a view to their entering into a contract.

Article 2.2.3.2: Definition of commercial agency

A commercial agency contract is a contract under which a natural or legal person, referred to as the commercial agent, is given ongoing responsibility, as an independent intermediary, to negotiate and, where appropriate, enter into transactions for the purchase or sale of goods or services in the name and on behalf of another party, referred to as the principal. The power to negotiate does not necessarily include the power to

change prices and, more generally, the other contractual terms of the proposed transaction.

If the commercial agency activities are ancillary to the main activities, the contract shall be characterised in the same manner as results from the main activities, unless the commercial agency activities are the subject of a separate written contract or the parties agree otherwise.

The provisions of this Chapter on commercial agency apply without prejudice to specific national laws concerning other categories of representatives.

Comment:
- CJEU judgment C-828/18 of 4 June 2021 has been reflected,
  - **services** have been added. The same is true for Germany, France, Spain and Italy
  - **The English version of this text uses the term "principal"**, as does the Directive (Art. 1). Moreover, the CJEU has ruled that the Directive does not apply to commission contracts (10 February 2004, Mavrona, C-85/03).
  - **Ancillary activities**: See Article 2(2) of the Directive: Directive option

Ancillary activities are excluded in Germany and France. This is not the case in Spain or Italy.

Article 2.2.3.3: Conclusion of the contract

A commercial agency contract arises from the parties' agreement alone.

Each party shall be entitled to receive from the other a signed written document setting out the terms of the commercial agency contract and the amendments to it. The parties may not derogate from this.

Comment: We opted for the option where the parties' are free to reach their own agreement (Directive, Art. 13(2)).
This approach has been adopted in Germany, France, Spain and Italy.

Article 2.2.3.4: Contract term

Commercial agency contracts may be for a fixed or indefinite term. A fixed-term contract that the parties continue to perform after its term becomes an indefinite-term contract.

Article 2.2.3.5: Representation of several principals

A commercial agent may represent several principals, unless otherwise agreed.

Article 2.2.3.6: Loyalty and cooperation obligation

The commercial agent and the principal are mutually bound by an obligation of loyalty and cooperation. The parties may not derogate from this.

Comment: The examples described in the Directive (Art. 3 and 4) are self-evident or do not appear indispensable.
The text has been simplified.

Article 2.2.3.7: Remuneration

1. A commercial agent is remunerated either in a fixed amount, by commission, or by a combination of the two. Any remuneration that depends on the number or value of transactions handled is a commission.

If the parties have not agreed on remuneration, the commercial agent shall be remunerated in accordance with the customary practice of the place where it carries on its business as regards the goods or services concerned. Where there is no such customary practice, the commercial agent is entitled to compensation that takes into account all the aspects of the transaction.

Comment: The structure of the Article has been changed, and the term "reasonable" has been deleted (Art. 6(1)).

2. The commercial agent is entitled to a commission for transactions concluded during the period of the commercial agency contract if they were concluded with the agent's actual or past involvement in the same type of transaction.

3. The commercial agent is entitled to a commission for any transaction concluded after the end of the contract where the order was received by the principal or by the commercial agent during the course of the contract, or where the transaction was concluded within a reasonable time after the end of the contract, mainly as a result of the commercial agent's work during the course of the contract. In such a case, the successor commercial agent is not entitled to the commission, unless it is equitable to share it between them.

Comment on the last paragraph:
Restatement of Article 9 of the Directive summarised.

Article 2.2.3.8: Transactions concluded without the agent's involvement

1. Even if the agent is not involved, a commission is payable to it for transactions concluded with persons belonging to the geographical sector or group for which the agent has been appointed. However, no commission is payable on transactions carried out without the direct or indirect involvement of the principal.

This provision is without prejudice to the application of Article 101 of the TFEU where the agent is an undertaking for the purposes of competition law.

Comment:

- Judgment of the CJEU, Chevassus-Marche, 17 January 2008, Case C-19/07
- If the commercial agent is an undertaking within the meaning of Article 101 of the TFEU, for example if it has multiple principals, this paragraph protects it against passive sales. This paragraph was in the Directive. Hence the addition of the reservation relating to the application of Article 101 when the agent is an undertaking.

2. A commission is payable to the commercial agent if the transaction has been concluded, without the agent's involvement, with a third party who has transferred to the agent the rights and obligations that it held under an agency contract.

Comment:

- Contraction / Clarification of Article 7(1) of the Directive
- Choice of a non-exclusive allocation (Directive, Art. 7(2) last §).

No exclusivity is required in Germany or France. Exclusivity is required in Spain and Italy.

- **The text of Article 7(1)(b) of the Directive** is not clear.

The CJEU has interpreted it as referring to transactions entered into as a result of the agent's involvement. The English and Italian versions are in line with the CJEU's interpretation. It appears that this is also the case for the Greek version (Greek was the procedural language of the judgment of 12/2/1996, Case C-104/95). This is also the case for the version submitted by the Commission to the European Parliament for its opinion in 1978 and the version amended by the EP. However, the French and Spanish versions do not say this and appear to deal with the situation where the right to commission arises from the transfer of a portfolio of customers. In my opinion, these versions are irreconcilable.

Should this scenario be added? This situation is different from that of a successor agent (Article 9 of the Directive).

Article 2.2.3.9: Information on commissions

The principal shall provide the commercial agent with a statement of the commissions due, no later than the last day of the month following the quarter in which they are earned. This statement refers to all the information based on which the amount of the commissions has been calculated.

A commercial agent shall be entitled to demand that the principal provide all the information the agent needs to check the amount of the commissions due to it, and in particular an extract from the accounting records.

The parties may not derogate from the provisions of this Article to the detriment of the commercial agent.

Comment: Article 12 of the Directive has been summarised.

Article 2.2.3.10: Acquiring the right to a commission

The commission is earned at the latest when one of the parties has performed or would have performed its obligation. The provisions of this Article may not be derogated from to the detriment of the commercial agent.

Comment: Part of Article 10 of the Directive summarised
The directive wanted a range (The commission is earned as soon as one of the parties has performed its obligation or the principal should have performed it.
The commission is earned at the latest when the customer should have fulfilled its obligation.)
We wished to simplify.

The commercial agent loses its entitlement to the commission only if it is established that the transaction between the customer and the principal will not be performed and that the failure to perform is not attributable to the principal. The parties may not derogate from it to the detriment of the commercial agent.

If the agent loses its entitlement to the commission, any commission already received shall be refunded to the principal.

Comment: Article 11 of the Directive
The Directive refers here to a "contract", but uses the term "transaction" more generally. We have adopted the concept of transaction.

Article 2.2.3.11: When the commission is due

The commission shall be paid not later than on the last day of the month following the quarter in which it became due. The parties may not derogate from it to the detriment of the commercial agent.

Comment: Part of Article 10 of the Directive summarised

Article 2.2.3.12: Prior notice

If the agency contract is for an indefinite period, either from the outset or because the parties have continued to perform it after its term has expired, either party may terminate it by giving prior notice. If the agency contract is for a fixed term and a tacit renewal clause has been included, the same notice period will apply to object to the contract being renewed.

The notice period is one month for each year of the contract, up to a maximum of six months.

The parties may not agree to shorter notice periods. If they agree to longer notice periods, the notice period applicable to the principal must not be shorter than the notice period applicable to the commercial agent. The parties may not derogate from this.

Each party may terminate the contract, without notice, on the grounds of failure to perform the contract or force majeure.

Comment: Simplification of the provisions of the Directive (Art. 15).
The notice period is as follows elsewhere: Germany 6, France 3, Spain 6, Italy 6

Article 2.2.3.13: Indemnity or compensation at the end of the contract

1. Unless the contract provides that the agent is entitled to compensation on termination of the contract, the commercial agent is entitled to an indemnity on termination of the contract.

The right to indemnity or compensation remains where the contract is terminated as a result of the death of the commercial agent.

It is also payable if the contract is terminated during a trial period.

In any event, the granting of this indemnity or compensation for loss suffered as a result of the termination of the contract does not deprive the commercial agent of the right to claim compensation for loss suffered for reasons other than the termination of the contract.

Comment:

- **Article 17 of the Directive:** The Directive proposes two schemes: an indemnity and compensation, but does not specify how the respective amounts are to be calculated.
All EU countries have opted for an indemnity scheme except France and Ireland (which does not mean that they calculate it in the same way). The United Kingdom provides for indemnification unless compensation is provided for.
We propose to retain the indemnity system, which means, if we keep to the spirit of the Directive, that the indemnity is in any event capped at one year's commission. A clause to the contrary in favour of the right to compensation would be possible, as in the United Kingdom, allowing those who are committed to compensation to adopt it.

- trial period: CJEU case law, 19 April 2018, C-645/16

2. The indemnity provided for in the preceding paragraph shall be payable if the agent's previous activities can continue to bring substantial benefits to the principal and to the extent that the amount is equitable.

The calculation of the amount of the indemnity shall be based first on the discounted amount of the gross commissions that the principal will save as a result of the termination of the commercial agency contract, taking into account the probable duration of the principal's relationship with the customers brought in or developed by the commercial agent and the probable progression of the turnover achieved with them. This amount shall then be adjusted, if it appears inequitable, having regard to all the circumstances of the case including, in particular, the commercial agent's non-competition obligation.

The amount thus obtained may not exceed a figure equivalent to the average annual remuneration received by the commercial agent over the last five years, or over the average of the contractual period when this is less than five years.

Comment:

Amount of the indemnity: This is essentially the system described by the CJEU in its judgment of 26 March 2009, Turgay Seme, C-348/07, inspired by the German system (Article 89B of the German Commercial Code described in the Commission's report on the application of Art. 17 of the Directive). See also the Dutch system (Supreme Court, 2 November 2012, ECLI:NL:PHR:2012:BW9865).

3. If the parties have opted for compensation for the harm suffered as a result of the termination of the contract, such harm to the commercial agent shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities, or
- which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

Comment: Article 17(3) of the Directive.

4. The parties may not derogate from the provisions of this Article to the detriment of the commercial agent even if they have agreed that the commercial agency contract is governed by the law of a State which is not a Member State of the European Union, if the commercial agent's activity which is the subject matter of the Agreement is located in a Member State.

Comment:

- Addition of the Ingmar case law, 9/11/2000, C-381/98.
- The Directive adds "before the agency contract expires", which does not seem indispensable.

Article 2.2.3.14: Loss of the right to an indemnity or compensation

The commercial agent loses the right to indemnity or compensation:

- if it has not notified the principal, within one year of the end of the contract, that it intends to assert its rights;
- if it has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which it cannot reasonably be required to continue its activities;
- if, with the agreement of the principal, the commercial agent assigns its rights and duties under the agency contract to another person.

Comment: Article 18 of the Directive.

Proposal to remove the loss of entitlement to a commission or compensation in the event of immediate termination of the contract for breach of contract by the commercial agent (Directive, Art. 18). Misconduct is often invoked improperly. The misconduct may be serious, without affecting the customer base. If the misconduct affects the benefits expected by the principal, this will be taken into account when assessing the amount of compensation, or possibly in the context of equity.

The parties may not derogate from the provisions of this Article to the detriment of the commercial agent even if they have agreed that the commercial agency contract is governed by the law of a State which is not a Member State of the European Union, if the commercial agent's activity which is the subject matter of the Agreement is located in a Member State.

Comment: Addition of the Ingmar case law, 9/11/2000 C-381/98 with deletion of the condition relating to the principal's establishment in a third country.

Article 2.2.3.15: Non-competition undertaking

A commercial agency contract may include a clause restricting the commercial agent's business activities after the end of the contract. Such a non-competition clause must have a maximum term of one year and must relate to the geographical area or group of people for which the commercial agent was responsible, as well as to the type of goods and services that the commercial agent was responsible for promoting under the terms of the contract.

The parties may not derogate from the provisions of this Article to the detriment of the commercial agent.

Comment:
Article 20 of the Directive.
The reference to special national schemes has been deleted (Art. 20(4).
The reference to a written document (Art. 20(2)(a)) has been deleted since the reference to the clause implies it.
Non-competition clauses: one year instead of two years in the Directive (Article 20(3))

TITLE 3: LAW ON UNFAIR COMMERCIAL PRACTICES BETWEEN TRADERS

Comment: The group decided not to include a provision on **unfair competition**, as this is an area that is highly case law-based and case-specific. It is therefore a matter for national law.
In the French version, rather than referring to pratiques commerciales déloyales, which creates confusion with concurrence déloyale (unfair competition), we have referred to pratiques commerciales abusives. Both are referred to as "unfair commercial practices" in the English version.

CHAPTER 1: COMMON RULES ON UNFAIR COMMERCIAL PRACTICES BETWEEN TRADERS

Article 2.3.1.1: Relationship with national laws

1. Unfair commercial practices, within the meaning of this chapter, are practices employed between commercial partners that relate to the content, performance or termination of the contractual relationship. Other practices are governed by national law.

2. Member States may not derogate from the rules on unfair commercial practices between traders set out in this Chapter, unless European Union law provides otherwise. However, they may establish rules governing the abrupt termination of established business relationships.

This Code does not cover rules on transparency, the formalisation of commercial relations or invoicing.

Comment: These provisions replace national laws on restrictive competition practices.
This Code does not cover rules on transparency, the formalisation of commercial relations or invoicing, which are governed by national law.
Payment periods are covered under "general trade" (see Directive 2011/7/EU).

Article 2.3.1.2: Strict interpretation of the law on unfair commercial practices between traders

The prohibition on unfair commercial practices between traders is an exception to freedom of contract and must be interpreted strictly.

Article 2.3.1.3: Personal scope of application

The prohibition on unfair practices between traders only applies if the victim is a micro, small or medium-sized undertaking within the meaning of European law.

Comment: Micro, small and medium-sized enterprises are defined in the Annex to Commission Recommendation 2003/361/EC.

Article 2.3.1.4: Definition of general terms and conditions and incorporation into the contract

1. General terms and conditions are all pre-drafted contractual terms and conditions for several contracts, which one party to the contract presents to the other party when the contract is entered into, other than a partnership agreement or agreement to form a group, or an immovable property lease relating to carrying on one's business.

It is irrelevant whether the general terms and conditions form part of the contractual document itself or are a physically separate part of the contract.

Comment:
Based on BGB section 305(1).
Many EU Member States have such a control over standard clauses.

2. The parties' consent to the incorporation of the general terms and conditions into their contract must be clear and precise.
The general terms and conditions shall only be incorporated into the contract in the following cases:

- where the parties have expressly accepted the general terms and conditions;
- where the general terms and conditions were sent by e-mail before the contract was entered into, and the contract was subsequently entered into without reservation;
- where they have been expressly referred to in the signed document and provided to the other party;
- where the contract forms part of an ongoing business relationship based on these general terms and conditions; or
- where the party against whom they are invoked has accepted them electronically by clicking on a link containing them.

Comment: These scenarios are inspired by the highly developed case law of the CJEU on the Brussels Convention, then on the Brussels I and then I bis Regulations regarding written acceptance of forum selection clauses, in particular:
(CJEC, 14 Dec. 1976, Case 24/76, Estasis Salotti di Colzani Aimo and Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH: CJEC Reports 1976, p. 1831; Rev. crit. DIP 1977, p. 577, note by E. Mezger; JDI 1977, p. 734, obs. by J.-M. Bischoff) and (CJEU, 3rd Ch., 21 May 2015, Case C-322/14 : JurisData no. 2015-014228; Procédures 2015, comm. 224 , C. Nourissat; Comm. com. électr. 2015, comm. 67, G. Loiseau, clicking on GTCs).

Article 2.3.1.5: Negotiated clauses not covered

A negotiated clause in general terms and conditions cannot be considered unfair. It is up to the party who drafted the general terms and conditions to prove that the clause in question was actually negotiated.

Comment: The idea is to penalise only abuses of contractual power and not poor negotiation; this is in line with the BGB and French law under Article 1171 of the Civil Code.

Article 2.3.6: Interpretation of general terms and conditions

If there is any uncertainty, the interpretation of the general terms and conditions shall be in favour of the party who did not draft them.

Article 2.3.1.7: Existence of an unreasonable disadvantage

1. Clauses in the general terms and conditions that place the party who has not drafted them at an unreasonable disadvantage, without sufficient consideration, are deemed to be unfair.

2. Such an unreasonable disadvantage cannot relate to price.

3. An unreasonable disadvantage is presumed to exist, subject to proof to the contrary, if a term limits the essential rights and obligations inherent in the nature of the contract in such a way as to jeopardise achieving the contract's objective.

4. Unreasonable disadvantage shall be assessed on an overall basis.

Comment:
Based on section 307 of the BGB
(as regards price (§2): based on Art. 1171 of the French Civil Code, and unfair terms in consumer law)

Article 2.3.1.8: Clauses presumed to be tainted by unreasonable disadvantage

The following non-negotiated clauses included in general terms and conditions are presumed to be unfair, unless it can be shown that the disadvantage is not unreasonable in light of the context or that there is sufficient consideration for it:

- those that reserve for the party who drafted the general terms and conditions the right to amend, in its discretion and without objective grounds, the clauses of the contract relating to its term and the specifications of the goods to be delivered or the service to be rendered;

- those that limit the obligation of the party who drafted the general terms and conditions to comply with the commitments made by its representatives or agents;

- those that give the party who drafted the general terms and conditions the right to determine whether or not the goods delivered or the services provided comply with the terms of the contract, or the exclusive right to interpret any term of the contract;

- those that require the party who did not draft the general terms and conditions to perform its material obligations when, conversely, the other party would not be required to perform its own;

- those that remove any right to compensation for harm suffered by the party who did not draft the general terms and conditions, if the other party breaches any of its obligations;

- those that prohibit the party who did not draft the general terms and conditions from requesting that the contract be rescinded or terminated if the other party fails to perform its material obligations; and

- those that give the party who drafted the general terms and conditions the right to terminate the contract in its own discretion, without giving the other party the same right.

Comment: Based on the blacklisted clauses for B2C unfair terms, but only those that can be transposed in the case of a business requiring protection.

Article 2.3.1.9: Penalty

Unfair terms are null and void.

Article 2.3.1.10: No freedom of contract

1. The parties may not derogate from the rules of this Chapter.
2. The rules of this Chapter apply irrespective of the law applicable to the contract.

CHAPTER 2. SPECIAL RULES APPLICABLE TO UNFAIR COMMERCIAL PRACTICES BETWEEN TRADERS IN THE FOOD SUPPLY CHAIN

Comment: To be deleted: Directive No. 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, which is restated in this Chapter.

Article 2.3.2.1: Subject matter and scope of application

1. A baseline set of unfair commercial practices that are prohibited between buyers and suppliers in the food supply chain is established.
2. These rules apply to certain unfair commercial practices that relate to the sale of foodstuffs by a supplier who is a small or medium-sized enterprise to a buyer who does not belong to this category.

Article 2.3.2.2: Definitions

For the purposes of this Chapter, the following definitions shall apply:

(a) “buyer” means any natural or legal person, established in the EU who purchases food on a commercial basis. The term ‘buyer’ may include a group of such natural and legal persons belonging to this category;

(b) “supplier” means any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells food products The term “supplier” may include a group of such agricultural producers or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations;

(c) “small and medium-sized enterprise” means an enterprise within the meaning of the definition of micro, small and medium-sized enterprises set out in the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 on the definition of micro, small and medium-sized enterprises.

(d) “foodstuffs” means the products intended for human consumption listed in Annex I of the Treaty, as well as products not listed in it but which are processed from these products and intended for human consumption; and

(e) “perishable foodstuffs” means foodstuffs which will become unfit for human consumption unless stored, treated, packaged or preserved by other means to prevent them from becoming unfit for consumption.

Article 2.3.2.3: Prohibition of unfair commercial practices

1. The following commercial practices are prohibited:

(a) a buyer paying a supplier of perishable foodstuffs more than 30 calendar days after receipt of the supplier’s invoice or more than 30 calendar days after the date of delivery of the perishable foodstuffs, with the latest date being taken into account.

This prohibition is without prejudice to:

- the consequences of late payment as defined by European Union law, and
- the possibility for a buyer and a supplier to agree on a value-allocation clause within the meaning of European Union law;

(b) a buyer cancelling orders for perishable foodstuffs at such short notice that a supplier cannot reasonably be expected to find an alternative way to market or use such foodstuffs;

(c) a buyer unilaterally and retroactively changing the terms of the supply contract with respect to frequency, timing or volume of supplies or deliveries, quality standards or foodstuff prices; and

(d) a supplier paying for foodstuff waste that occurs on the buyer’s premises through no negligence or fault of the supplier.

Comment: The consequences set out under (a) regarding late payment are set out in Directive 2011/7/EU;
Article 172a of Regulation (EU) No. 1308/2013 of the European Parliament and of the Council provides for agreement on value allocation;

2. The following commercial practices are prohibited if they are not agreed in clear and unambiguous terms when the supply contract is concluded:

(a) a buyer returning unsold foodstuffs to a supplier;

(b) a buyer making the storage, display or listing of the supplier's foodstuffs conditional upon payment by the supplier;

(c) a supplier paying for the promotion of foodstuffs sold by the buyer – before a promotion, and if this promotion is decided by the buyer, the buyer will set out the duration of the promotion and the quantity of foodstuffs it plans to order; and

(d) a supplier paying for the marketing of foodstuffs by the buyer.

3. If the buyer requires payment in the situations described in paragraphs 2(b), (c) or (d), it shall submit to the supplier, at the supplier's request, an estimate of the payments per unit or in total, as the case may be, and as regards the situations described in paragraphs 2(b) and (d), also an estimate of the costs and the basis for this estimate.

4. The prohibitions referred to in paragraphs 1 and 2 shall apply to any situation falling within their scope, irrespective of the law otherwise applicable to the supply contract between the parties.

Article 2.3.2.4: Designated enforcement authority

A public authority responsible for enforcing the prohibitions set out in the preceding Article at the national level, referred to as the "enforcement authority", shall be designated in each Member State.

Article 2.3.2.5: Complaints and confidentiality

1. Suppliers shall send any complaint to the enforcement authority of the Member State in which the buyer suspected of engaging in a prohibited commercial practice is established.

2. Producer organisations or associations of producer organisations whose members, or members of their members, consider that they have been harmed by a prohibited commercial practice have the right to file a complaint.

3. The enforcement authority shall, if the complainant so requests, ensure the confidentiality of the complainant's identity and of any other information the disclosure of which would, in the opinion of the complainant, be prejudicial to its interests. The

complainant shall indicate what this information is in any request for confidential treatment.

4. Where the enforcement authority considers that there are insufficient grounds to pursue a complaint, it shall inform the complainant of the reasons for its decision.

Article 2.3.2.6: Powers of the enforcement authority

The enforcement authority has the power to:

(a) initiate and conduct investigations on its own initiative or on the basis of a complaint;

(b) require purchasers and suppliers to provide all the information necessary to carry out investigations into prohibited commercial practices;

(c) issue a decision finding a breach of the prohibitions set out in this Chapter and ordering the purchaser to cease the prohibited commercial practice – the authority may refrain from taking such a decision if it would reveal the identity of a complainant or disclose any information which would, in the opinion of the complainant, be prejudicial to the complainant's interests, provided that the complainant has indicated what that information is;

(d) impose a financial penalty on the infringer – the penalty shall be capped at 2% of the worldwide pre-tax turnover affected by the practice and set taking into account the nature, duration and seriousness of the infringement.

Comment: The directive aims for penalties to be "effective, proportionate and have a dissuasive effect". The proposed version aims to ensure that all Member States have the same penalty ceiling, rather than aiming for penalties to be "effective, proportionate and have a dissuasive effect", which leads to very disparate treatment of undertakings in the EU. Based on the GDPR, but with lower penalties.

(e) publish its decisions relating to points (c) and (d); and

(f) inform buyers and suppliers of its activities, by means of annual reports, which specify, among other things, the number of complaints received and investigations opened and closed. For each investigation, the report shall contain a summary description of the case and the outcome of the investigation.

Article 2.3.2.7: Cooperation between enforcement authorities

Enforcement authorities shall cooperate effectively with and assist each other in investigations with a cross-border dimension.

Article 2.3.2.8: Other unfair clauses

These provisions do not preclude control of unfair terms included in general terms and conditions of contract, as referred to in the preceding Chapter. If there are unfair terms between buyers and suppliers in the food supply chain, the enforcement authorities referred to above shall be competent and shall have the powers set out in Article 2.3.2.6.

Comment: The Directive provides that Member States may adopt rules to combat unfair commercial practices that go beyond the provisions set out in Articles 3, 5, 6 and 7, provided that such national rules are compatible with the rules relating to the functioning of the internal market. But rather than having a disparate application of unfair commercial practices in B2B, it is preferable to have the same EU law applicable in all Member States, hence the proposed approach, which precludes more protective national laws (as a result of Article 1, which covers I and II), but extends supervisory authorities' powers to unfair terms in general terms and conditions between traders.