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Publication of the ECN+ Directive aimed at strengthening European competition policy

Since the entry into force of Regulation 1/2003^[1] on May 1, 2014, the National Competition Authorities (“NCAs”) of the 27 Member States and the European Commission form the “*European Competition Network*” which aims at ensuring the effective enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)^[2].

15 years after entry into force of this Regulation, it appeared necessary to extend it in order to standardize the statuses of the NCAs for the purpose of unifying the enforcement of EU competition law. In this context, Directive 2019/1^[3] to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market was published on December 18, 2018

1. The findings made

- **The national involvement of NCAs in the protection against unfair competition**

The application of Articles 101 and 102 TFEU is, in particular, achieved by the European competition network. Generally speaking, the European Commission takes actions when practices or agreements affect competition in at least three Member States while NCAs are involved when competition is affected within their territory.

The important role played by the NCAs in the protection against unfair competition is now well-established: *“NCAs have the expertise on how markets work in their own Member State. That knowledge is of great value when enforcing the competition rules. Action at national level promotes support by society at large for competition enforcement.”*^[4]

- **The French Competition Authority**

In 2017^[5] the French Competition Authority issued not less than 605 decisions and opinions, including 307 opinions on regulated professions, 236 merger review decisions, 49 enforcement decisions (anticompetitive practices) and 13 opinions. The total amount of fines levied stands at 497,803,200 euros.

In its 2018 annual report, the French Competition Authority mentioned among the new perspectives to come the draft Directive ECN+ and acknowledged the necessity to *“launch a vast program to bring the powers of various national competition authorities to the “required level”*”.

- **The difficulties encountered by the NCAs**

The need for standardization of the statuses of the NCAs of the Member States became evident for the purpose of homogenizing the enforcement of EU competition rules since, according to the powers respectively granted to the NCAs, this enforcement has been limited or even restricted in the past.

Indeed, *“National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively”, and consequently “undertakings engaging in anti-competitive practices might face very different outcomes in proceedings, depending on the Member State in which they are active”*^[6].

The lack of independence, resources and powers granted to the NCAs *“results in missed opportunities to remove barriers to market entry and to create fairer competitive markets throughout the Union where undertakings compete on their merits”*^[7].

- **The adoption of Directive ECN+**

In view of these considerations, a European consensus has rapidly emerged for the purpose of transforming the statuses of the NCAs.

In May 2017, the Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market was adopted. Less than a year later, the so-called “ECN+ Directive” was adopted on December 11, 2018 and published in the Official

Journal of the European Union on January 14, 2019.

It shall enter into force on the twentieth day following that of its publication and must be transposed into national law by February 4, 2021 at the latest.

2. The main changes brought about by the ECN+ Directive

Member States have from now on the obligation to ensure that the NCAs have the necessary resources to enforce European Union competition rules.

As such, Member States must ensure that the NCAs *“have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 of the Treaty on the Functioning of the European Union”*^[8].

• Independence and resources

Article 4 of the ECN+ Directive imposes on Member States the obligation to ensure that NCAs *“perform their duties and exercise their powers impartially”*.

For this purpose, the NCAs must have the power *“to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU”* and also the possibility *“to reject complaints on the grounds that they do not consider such complaints to be an enforcement priority”*. As a result, NCAs will have full autonomy to appraise the opportunity to prosecute.

Regarding resources, the ECN+ Directive requires each Member State to ensure that *“the NCAs have a sufficient number of qualified staff and sufficient financial, technical and technological resources”* that are necessary for the effective performance of their duties^[9].

NCAs shall be able, at a minimum, to conduct investigations and to adopt decisions with a view to applying Articles 101 and 102 TFEU, and to cooperate closely in the European Competition Network. In addition, to the extent provided for under national law, NCAs shall also be able to give their opinions on domestic competition and antitrust law.

The ECN+ Directive also provides that NCAs must be granted *“full independence”* in the spending of the allocated budget for the purpose of carrying out their duties.

• Powers

Articles 6 to 12 of the ECN+ Directive strengthens the powers conferred on the NCAs.

It imposes on Member States the obligation to ensure that NCAs *“are able to conduct all necessary unannounced inspections of undertakings and associations of undertakings for the application of Articles 101 and 102 TFEU”*^[10]. It also details the minimum powers that must be granted to NCA officials to carry out their

duties (to enter premises, to examine any documents related to the business of the company, to take or obtain copies of or extracts from information in that respect, to seal premises, books or records, etc.).

Pragmatically, noting that *“business records may be kept in the homes of directors, managers and other members of staff of undertakings or of associations of undertakings”*^[11], the ECN+ Directive authorizes NCA officials to conduct *“unannounced inspections”* in the home of such persons^[12]. On this point, NCAs must however obtain the prior authorization of a national judicial authority.

The powers of the NCAs are strengthened insofar as once they have identified an infringement, the ECN+ Directive requires Member States to ensure that NCAs *“may by decision require the undertakings and associations of undertakings concerned to bring that infringement to an end. For that purpose, they may impose any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.”*^[13]

In addition, in case of urgency *“due to the risk of serious and irreparable harm to competition”*, the NCAs shall be empowered to act on their own ^{initiative}^[14].

Lastly, in order to promote the amicable resolution of disputes, the ECN+ Directive imposes on Member States the obligation to ensure that NCAs may, subject to conditions, *“make commitments offered by undertakings or associations of undertakings binding, where those commitments meet the concerns expressed by the national competition authorities.”*^[15]

- **Fines and periodic penalty payments**

Member States must ensure that the NCAs *“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”*^[16]. As such, NCAs' actions have an increased deterrent effect.

The ECN+ Directive sets the maximum amount of the fine that NCAs may impose, such fine being determined on the basis of the resources of the infringing company or each company of the association of companies participating in an infringement. The fine shall indeed *“be not less than 10 % of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision”*. Where an infringement by an association of companies relates to the activities of its members, the maximum amount of the fine shall be not less than 10 % of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association^[17].

Lastly, the ECN+ Directive harmonizes the “leniency programs” that are designed to encourage businesses to disclose their participation in a cartel, by offering them the possibility, for example, to reduce the amount of the fine^[18].

[1] Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[2] Articles 101 and 102 TFEU prohibits cartels and abuses of dominant position.

[3] Directive (EU) 2019/1 of The European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

[4] Extract from page 2 of the Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – March 22, 2017

[5] Annual Report of the French National Competition Authority published in June 2018

[6] Recital 5 – (EU) Directive n° 2019/1

[7] Recital 6 – (EU) Directive n° 2019/1

[8] Article 1 – (EU) Directive n° 2019/1

[9] Article 5 – (EU) Directive n° 2019/1

[10] Article 6 – (EU) Directive n° 2019/1

[11] Recital 34 – (EU) Directive n° 2019/1

[12] Article 7 – (EU) Directive n° 2019/1

[13] Article 10 – (EU) Directive n° 2019/1

[14] Article 11 – (EU) Directive n° 2019/1

[15] Article 12 – (EU) Directive n° 2019/1

[16] Article 13 – (EU) Directive n° 2019/1

[17] Article 15 – (EU) Directive n° 2019/1

[18] Article 17 – (EU) Directive n° 2019/1

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