

SOME THOUGHTS ABOUT FUNDAMENTAL RIGHTS AND THE ECN+ DIRECTIVE*

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INTRODUCTION

At the end of 2018, Directive (EU) 2019/1 was adopted to empower the competition authorities of the Member States to be more effective enforcers and hence to ensure the proper functioning of the internal market. The so-called ECN+ Directive seeks to reinforce the European Competition Network (ECN), harmonizing powers of investigation and competition enforcement tools in favour of the National Competition Authorities when applying EU antitrust rules. The Directive must be implemented in the national legal orders by 4 February 2021.

According to Recital 14 of the Directive, “the exercise of these powers should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union (the Charter), in accordance with the case-law of the Court of Justice of the European Union”. This imposes significant limits to the powers established in the ECN+ Directive.

EMPOWERMENT OF NCAS (*PRIORITIZATION*)

According to Recital 23 and Article 5 of the ECN+ Directive, National Competition Authorities are allowed to prioritize the handling of the complaints in the framework of the application of Articles 101 and 102 of the Treaty on

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the Functioning of the European Union (TFEU). Accordingly, they can reject complaints merely on the grounds that they concern issues or sector which are not a priority for the relevant National Competition Authority, with the only exception of “complaints lodged by public authorities which share competence with a national administrative competition authority for enforcing Articles 101 and 102 of the TFEU and national competition law, where applicable”.

This empowerment may result in discrimination as complaints may be accepted or not depending on opportunity criteria, and in legal uncertainty as investigations will merely depend on the priorities that the relevant National Competition Authority will set from time to time. On the other hand, this may clash with obligations under national antitrust law (applicable to purely national cases), according to which the relevant National Competition Authority may be obliged to investigate all complaints (for instance, it is not fully clear if in Spain the administration can freely decide when to use or not to use sanctioning powers). Finally, this power may increase the costs of medium and small companies.

Although the frequent lack of resources of the National Competition Authorities may explain this power (see Recital 24 of the ECN+s Directive), it may, however, provide a significantly wide margin of discretion that may turn into arbitrariness. As a result, such power may be considered to violate Article 41 of the Charter which enshrines the right to good administration in the sense that investigations shall be handled impartially, fairly and within a reasonable time. Sufficient and effective measures should be adopted to guarantee the respect of this principle.

INSPECTIONS

ECN+ Directive obliges Member States to modify their legislations in order to ensure that National Competition Authorities are able to conduct all unannounced inspections deemed necessary for the application of Articles 101 and 102 of the TFEU. Among the powers of inspections granted in Article 6 of the ECN+ Directive to officials, National Competition Authorities can search for any documents, files or data, in all formats and regardless of whether they have been deleted. In light of this broad power, the rights of defence of the affected companies must be respected at all times. In particular, National Competition Authorities must be in a position to show that there are reasonable grounds for suspecting an infringement of Article 101 or 102 of the TFEU.

Furthermore, the inspection can take place at the premises of the companies, those of the relevant National Competition Authority or any other designated premises. Indeed, Article 6.1.c) of the ECN+ Directive indicates that the National Competition Authorities are allowed to continue searching and selecting documents at their own premises or any other, which implies seizing information that cannot be reviewed at the premises of the investigated companies and therefore is taken out of their control. Recital 33 indicates that this power aims at minimizing the unnecessary prolongation of inspections; however, this objective could eventually render the protection of the rights of defence a very complex and expensive task, in particular where the companies' premises are located far from those of the relevant National Competition Authority. On that basis, in our opinion, the possibility to continue the assessment of information at the premises of the National Competition Authority should be an exceptional rule.

ACCESS TO INFORMATION BY NATIONAL COMPETITION AUTHORITIES

Article 8 of the ECN+ Directive allows National Competition Authorities to require undertakings and any other natural or legal person all necessary information for the enforcement of Articles 101 or 102 of the TFEU, including emails and instant messaging system messages, irrespective of where it is stored, provided that it is accessible to the undertaking.

In the exercise of this power (Article 8 of the ECN+ Directive), National Competition Authorities must guarantee the protection of the undertakings' right against self-incrimination (Article 47 of the Charter) because the burden to prove any infringement lies with the relevant National Competition Authority. They must also respect the principle of proportionality (Article 49 of the Charter), which prevents National Competition Authorities from going beyond the subject matter of the investigation. Furthermore, the information provided by a natural person cannot be used as evidence to impose sanctions on that natural person or her or his close relatives (Article 31 of the ECN+ Directive).

National Competition Authorities shall ensure that the confidentiality of the information acquired from the undertakings on the basis of the ECN+ Directive (through inspections, requests of information, etc.) is protected. One may wonder how this principle can be balanced with the necessary publicity of the decisions of the National Competition Authorities, which

frequently describe the pieces of evidence in full detail, sometimes even including photographs of them.

Finally, nothing is said about the right of third parties to protect their private communications (Article 7 of the Charter), which may be included as pieces of evidence in a file.

SANCTIONS

Chapter V of the ECN+ Directive obliges Member States to ensure that National Competition Authorities can impose effective, proportionate and dissuasive fines on undertakings in case of infringement of Article 101 or 102 of the TFEU.

As a limit to this power, it is established that the fines can only be imposed where the infringement has been committed intentionally or negligently (principle of culpability). Recital 42 refers to a very relevant limitation on this front: although the ECN+ Directive is without prejudice to national laws under which the finding of an infringement is based on the criterion of objective liability, this can only be accepted to the extent that it is compatible with the case-law of the Court of Justice of the European Union (for instance, rebuttable presumptions).

On the other hand, Member States shall ensure that National Competition Authorities consider gravity and duration of the infringements when calculating the fines. Likewise, the maximum amount of the fines cannot be less than 10% of the total worldwide turnover of the undertaking. These powers are ultimately subject to the principle of proportionality (Article 49.3 of the Charter), which raises at least the question of whether different limits can be imposed in relation to infringements of different nature (i.e., horizontal/vertical agreements, abuses of a dominant position).

CONCLUSION

The ECN+ Directive harmonizes some procedural and substantial aspects of the enforcement of Articles 101 and 102 of the TFEU, in particular the investigative and sanctioning powers of the National Competition Authorities.

In the application of a system that may lead to very serious consequences for undertakings and associations of undertakings, the fundamental rights – as established by the Charter of Fundamental Rights of the European Union

and the case-law of the European Court of Justice – are of the utmost relevance. Some of them, such as the right to be heard (Article 3.2 of the ECN+ Directive), are already well established in the majority of Member States. Others are explicitly stated in the ECN+ Directive. However, in relation to particular issues, the ECN+ Directive may to a certain extent be questionable. The power of the National Competition Authorities to reject complaints on the mere grounds that they do not comply with their priorities or the possibility to continue inspecting and selecting data at their own premises are very good examples.