ECN+ Directive misses the boat on compliance and one-stop-shop leniency programmes

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This directive, the first one in 2019, introduces minimum harmonisation rules allowing competition authorities to have common investigative and enforcement powers. As the Commission mentioned when proposing the directive, national differences in calculating fines might lead to fines diverging up to 25 times for the same type of infringement. The directive seeks to strengthen the cooperation between national competition authorities and the Commission within the framework of the European Competition Network (ECN). When the directive is transposed into national law, it will give national competition authorities enforcement powers similar to those enjoyed by the Commission. The ECN+ Directive is not so much about what it will harmonise, but much more about what it fails to deliver, especially in terms of leniency and compliance.

Background

EU Regulation 1/2003 allows national competition authorities (NCAs) and courts to apply EU competition rules within their jurisdictions. That regulation does, however, not regulate how to enforce those powers. Directive 2019/1, also known as the ECN+ Directive, mirrors the EU Commission’s existing enforcement regime. It allows national competition authorities to raid private premises if there is a reasonable suspicion: that company documents are being held there, to ask for details and clarifications from any member of staff of an undertaking being raided, to summon persons for interviews, and to request information concerning its investigation from any third party. Each Member State must ensure that its competition authority: can impose interim measures, accept and make binding any commitments offered by undertakings, and re-open investigations where commitments were accepted on based on incomplete or misleading information. Fines can be imposed for infringements committed intentionally or negligently by either undertakings or associations of undertakings, with the maximum fine being no less than 10% of the turnover in the preceding year. In addition, NCAs can request other NCAs to enforce the fines imposed in their jurisdictions.

There is little debate that the ECN+ regime aims to bring about a level playing field among the various national competition authorities and to elevate national competition authorities to become enforcers of European competition rules. For some member states, this reform could translate to a non-reform in practice, since their NCAs already enjoy Commission-like powers.

Member States have until 4 February 2021 to implement any changes to their national systems needed to give effect to the ECN+ Directive’s provisions.

Divergences remain in rewarding compliance programmes

One point of criticism is that the ECN+ does not address compliance regimes. The European landscape varies, with national competition authorities generally following the Commission’s approach of not rewarding compliance programmes. There are some exceptions. The British CMA has a programme awarding up to a 10% fine reduction for undertakings demonstrating that they are taking adequate steps to comply with EU rules. The Italian AGCM’s 2018 guidelines introduced the possibility of receiving up to a 15% fine reduction for undertakings adopting a compliance programme before dawn raids take place. In this case, the amount of the fine reduction is determined on a case by case basis. In contrast to the Italian and British approaches, the French competition authority seems to be moving in the opposite direction. In 2017, it stopped rewarding undertakings for implementing compliance programmes.

No one-stop-shop leniency programme

The Directive’s handling of leniency programmes is also marked by one clear omission: the one-stop-shop for leniency application. The proposal for the ECN+ Directive started taking form around the same time that the discussions around the DHL Express case were at their height. In that case, DHL had applied for leniency separately to both the Commission and the Italian competition authority. However, it did not apply for leniency in the market on road freight forwarding services to the Italian competition authority, having done so in its application to the Commission. In the meantime in Italy, another company applied for leniency on road freight forwarding services and was granted full immunity. The Court of Justice of the EU held that the application to the Commission was not binding on the Italian competition authority. After that, calls to introduce a one-stop-shop increased. However, the ECN+ Directive’s new rules on leniency regimes fall short of what was asked. The directive does introduce rules allowing undertakings to rely on fully fledged applications submitted to the Commission when submitting summary applications to all other potentially relevant competition authorities. This solution remains problematic because many competition authorities still do not accept applications in English and the ECN+ Directive does not force them to accept those applications. Nevertheless, one step forward in the area of leniency can also be seen. The broader provision of the ECN+ Directive covers the application of Articles 101 and 102 TFEU by national competition authorities in parallel with national competition law. The EU legislature seeks to extend protections for undertakings seeking leniency even in cases where only national rules are applied. In effect, the Directive harmonises access to and the use of leniency statements and settlement submissions even for purely national cases. It raises the threshold of access by strictly limiting the use to the parties in the proceedings to exercise their rights of defence.

Immunity for whistleblowers

Finally, the ECN+ Directive extends whistleblower protection so as to increase the number of leniency and fine reduction applications. It fully protects current and former directors, managers and other staff members of undertakings applying for immunity from sanctions imposed in administrative and non-criminal judicial proceedings for their involvement in anti-competitive behaviour. Article 23(2) of the ECN+ Directive protects these individuals from criminal prosecution, provided
they cooperate with the relevant prosecution authority. In the original drafting of the directive, this requirement seemed like a bold step towards ensuring that the effectiveness of leniency programmes was not undermined by national criminal law rules targeting individuals in key positions to self-report. A last-minute change in the legislative text, however, greatly reduces the impact of this article. Article 23(3) allows Member States to replace immunity from criminal sanctions for criminal prosecution of the individuals concerned either without the imposition of a sanction, or with the imposition of a mitigated sanction.

**ECN plus or minus?**

Regulation 1/2003 empowered national competition authorities and national courts to apply EU competition rules and introducing new forms of cooperation in the framework of the ECN. Not all national enforcement authorities were equally able to deliver on the European enforcement ideal. From 2004-2017, the French competition authority investigated 630 cases, 45 more than the Commission, while countries like Poland or the Czech Republic did not even hit the three figure mark. The percentage of cases closed also counts, with large variations across Member States, ranging from around 40% in Austria, Hungary, Latvia, and Sweden, to as low as 12% in the Czech Republic or 7% in Spain, according to the [Commission’s own statistics](#).

When cast in this light, the omissions of the ECN+ Directive are more easily balanced with the small victories it seeks for younger enforcement agencies. In some countries, the ECN+ Direction sets or re-sets the tone of conversation between national enforcement agencies and the government. Its introductory articles seek to ensure independence and impartiality of national competition authorities, as well as adequate funding and staffing to carry out enforcement activities. And it requires competition authorities to conduct investigations in a reasonable timeframe.