Editorial

ECN+ Ante Portas

During the annual summer break, the Berlaymont building in Brussels is a rather lonely place, as most of the EU Commissioners and officials travel back to their home countries or elsewhere around the world. The same is true for the European Parliament and the Council. This usually leads to a serious slow-down of the legislative activities within the EU, but also to a 'rat race' for pending projects before the holiday season starts, not least due to the upcoming end of the Council presidencies.

The recent political agreement on the proposed 'ECN+ Directive' is a good example for a pre-summer achievement, although the legislative process is not yet complete. This Directive will have an important impact on the way the competition rules are enforced across the EU. It might ultimately lead to a stricter enforcement system through more harmonized procedures and more cooperation.

On 20 June 2018, the Committee of Permanent Representatives (Coreper) endorsed an agreement between the Council and the Parliament on new provisions to strengthen the legal positions and powers of the national competition authorities of the EU Member States (NCAs). The Commission immediately welcomed this achievement, which comes as a follow-up to its legislative proposal of March 2017.¹

This can be considered a relatively fast process, which at first sight demonstrates a general consensus about the content and objectives of this legislative initiative. The Council and the European Parliament are expected to adopt the Directive after the summer break, and it will then be published in the EU's Official Journal. Following its entry into force, national governments will then have two years to incorporate the new provisions into their domestic laws. This might occur around the end of 2020. Depending on its effective exit date, the UK might thus not be bound anymore by this obligation.

The ultimate goal of the ECN+ Directive is to make competition law enforcement more effective across the EU by way of more decentralisation. This process started in May 2004 when Regulation 1/2003 entered in force and has made a lot of progress since. EU competition rules are being enforced by NCAs in parallel to the Commission. Together they form a European network of competition authorities (ECN), to ensure that competition rules are applied in a consistent manner, despite many remaining differences in the national legal systems.

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¹ European Commission, 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 (22 March 2017) COM(2017) 142 final <http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf> accessed 29 June 2018.

Indeed, there still is a lot of divergence among the Member States regarding the roles and powers of NCAs, either in the national law or in the enforcement practice. Today, companies engaged in anti-competitive practices can face different outcomes depending on the country in which they are active. For example, businesses can in certain jurisdictions avoid fines by way of corporate restructuring, while in others this is not possible. A striking example of this is the ‘sausage gap’² which appeared in Germany due to unclear rules on parental liability for anti-competitive conduct.

The ECN+ Directive is therefore geared towards more EU-wide harmonisation of competition law enforcement according to certain fundamental principles. Under the new rules, NCAs shall be better equipped to detect prohibited agreements, decisions or concerted practices as well as abusive conduct by dominant companies. The Directive also ensures that the NCAs have sufficient independence when enforcing the antitrust rules, without interferences from government or industry that would put at risk their impartiality.

The NCAs shall be given more effective powers and resources needed to collect relevant information in their investigations and adequate tools for imposing sanctions for infringements. In addition, they shall put in place more coordinated leniency programs so as to encourage companies to reveal secret cartels by applying common criteria for granting immunity or reductions of fines. Last but not least, the new rules shall also enhance cooperation between the national enforcers and the Commission.

All in all, this is maybe not a major reform of the competition enforcement regime in the EU, but rather an attempt to level out certain imbalances between national systems resulting from the earlier decentralisation process without additional safeguards or minimum standards. The need for more harmonisation certainly also arose due to the fact that in some of the new Member States, NCAs may not have a similar level of independence, resources and experience as in others.

The Commission will obviously have to monitor the implementation of the ECN+ Directive and may sue Member States in case they fail to do so in a timely, complete or correct manner. By contrast, the Commission will not gain additional rights and competences vis-à-vis the NCAs to directly oversee what they are doing. This is an important difference compared to certain sector-specific developments we have witnessed over the past years.

In the electronic communications sector, a lot of power and responsibilities were put in the hands of national regulators. When it appeared that the implementation in practice led to very divergent outcomes in the Member states, the Commission managed to get heavily involved in the details of ex ante regulation, by way of a mandatory consultation process introduced in 2003. This even allows the Commission to block certain national decisions if they are not compatible with the EU rules.

2 See Anja Nauman, ‘Fines and files – news of the German sausage cartel’ (*CoRe Blog*, 16 April 2018) <<http://coreblog.lexxion.eu/fines-and-files-news-of-the-german-sausage-cartel/>> accessed 29 June 2018.

Similarly, in the gas and electricity sector, Member States were given a number of options with regard to the unbundling of vertically integrated operators, but the Commission retained for itself the right to verify, in each individual case, full compliance with the EU rules of the Third Internal Market Package, before issuing certification decisions to the transmission system operators, so that they can start to operate in the market.

These sector-specific examples show a coherent governance model across different policy areas, whereby the (unwarranted) effects of initial decentralisation have been contained by a subsequent harmonisation with additional powers for the Commission. This trend certainly has some beneficial effects for a more coherent and foreseeable implementation of the common EU rules, but has also been criticised for being too centralistic. It remains to be seen whether something similar might occur in the field of competition law enforcement, if the implementation of the ECN+ Directive leaves too many gaps and shortfalls.

Without taking long summer breaks, CoRe will continue to explore all these topics with further analysis and critical comments. In this issue, we again present an interesting mix of articles, country reports, case note and book reviews. Global cartels may trigger parallel investigations in different jurisdictions, and thus it is always interesting to compare the substantive concepts in different countries, as shown by *Jung Won Han*, *Caroline Buts* and *Tony Joris* for South Korea, the EU and the US. Third party access to postal networks in the EU can be relevant both under the competition rules and under sector-specific provisions, which are being described and analysed by *Yvan Desmedt* and *Karl Stas*. The highly relevant interface between merger control and sector-specific rules in the ever increasing convergence between fixed and mobile telecommunication is highlighted by *Kalpana Tyagi*.

Our country reports from Bulgaria and Spain, by *Mariya Papazova* and *Jeronimo Maillo* respectively, focus on civil damages, while *Aleksander Stawicki* and *Aleksandra Dziurkowska* address a recent amendment of the law in Poland. *Lukas Šimas* and *Georgia Tzifa*'s case note on C-179/16 *F. Hoffmann-La Roche v AGCM* deals with yet another episode of the 'by objects' saga. Finally, we have reviews of two notable books – Angela Daly's *Private Power, Online Information Flows and EU Law: Mind the Gap* (reviewed by *Julian Nowag*) and Daniel Sokol's *Patent Assertion Entities and Competition Policy* (reviewed by *Igor Nikolic*).

These diverse topics should definitely make this issue of CoRe an interesting read over the summer. Looking ahead, we are planning another conference in Brussels dealing with antitrust and regulation in digital markets. More information about this event will soon be available on the CoRe website.

Robert Klotz
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