Reports

Implementation of the ECN+ Directive

Implementation of the ECN+ Directive in 23 Member States: An Introductory Overview

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I. Introduction

Regulation 1/2003 decentralised EU antitrust enforcement by giving also the national competition authorities of the Member States (NCAs) and national courts the power and obligation to apply Articles 101 and 102 TFEU. This is often portrayed as a remarkable success story.¹ A little more than one and a half decades later, the NCAs have become – at least in quantitative terms – the main public enforcers: around 90% of all decisions based on the EU antitrust rules are today adopted at the national level.

All that glitters is not gold, however. Ever since its first report on the functioning of Regulation 1/2003, the European Commission identified a number of critical issues hampering the effectiveness of antitrust enforcement within the European Competition Network (ECN). The Regulation made the NCAs co-enforcers, but it did not ensure that they would have the operational means to fully perform their tasks. Soft law, in the form of ECN Recommendations, proved insufficient to ensure that all the NCAs have, for instance, adequate investigation and decision-making tools (aligned with those of the Commission) or well-designed leniency programmes. The Commission was also concerned about NCAs struggling with insufficient human and financial resources. And in some Member States, national laws prevented the NCA from imposing effective fines for breaches of EU antitrust law.² The result: a very uneven enforcement landscape and thus level playing field for businesses and consumers. Depending on which NCA took up the case, the outcome of an antitrust proceeding could be quite different.

This prompted the Commission to launch a public consultation (between November 2015 and Febru-

ary 2016) and eventually propose EU legislative action to achieve a higher level of harmonisation: the so-called ECN+ Directive. The European Parliament and the Council adopted Directive (EU) 2019/1 'to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' in December 2018.³ The Directive complements Regulation 1/2003 by providing all the NCAs with a minimum common toolkit and set of enforcement powers to effectively apply Articles 101 and 102 TFEU (and in parallel the national equivalent provisions). In particular, it aims to make sure that the NCAs benefit from the same guarantees of independence and adequate resources, have effective investigative and decision-making powers, are able to impose proportionate and deterrent fines, have coordinated leniency programmes, and provide each other with mutual assistance to safeguard the system of close cooperation within the ECN.

The ECN+ Directive had to be transposed by 4 February 2021. Given that six months have passed since

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1 See eg European Commission, 'Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003' (2009) COM(2009) 206 final and the accompanying Staff Working Document.

2 Ibid; Commission, 'Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' (2014) COM(2014) 453 and the accompanying Staff Working Documents.

3 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 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 [2019] OJ L 11/3 ('Directive (EU) 2019/1').

that deadline, we – the editorial team of CoRe – wanted to take stock of the implementation of the Directive in all the EU Member States. We asked our country correspondents and other national experts to report on the most significant changes that the ECN+ Directive has brought (or will bring) to the competition law regime in their Member State. The result is a unique, comprehensive, and up-to-date overview of the (anticipated) implementation of the ECN+ Directive in all the 23 Member States that started the transition process.⁴ The national reports in this special section were drafted according to a similar structure and format.

The purpose of this introductory article is, firstly, to give an update on the transposition status of the ECN+ Directive so far (Section II.) and, secondly, to present the main provisions of the Directive as well as to offer general observations on how they are (being) implemented in the Member States (Section III.). The overview ends with some concluding remarks (Section IV.).

II. Member States' Progress: Where Do Things Stand Now?

Only five Member States (Germany, Hungary, Lithuania, Sweden, and the Netherlands) adopted their national implementing measures before the deadline for transposition of the Directive. On 18 March 2021, the European Commission opened infringement proceedings against 22 Member States.⁵ Since then, eight more Member States have transposed the Directive: Bulgaria, Croatia, Denmark, Finland, France, Malta, Slovakia, and Spain. It follows that, six months after expiry of the transposition deadline (4 August 2021), as many as 14 Member States are still in the process of implementation.

Table 1. Date of transposition of Directive (EU) 2019/1

Member State	Adoption of main implementing measure	Entry into force of main implementing measure
Hungary	10/04/2020	01/01/2021
Lithuania	25/06/2020	01/11/2020
The Netherlands	10/11/2020	18/02/2021
Germany	14/01/2021	19/01/2021
Sweden	27/01/2021	01/03/2021
Denmark	09/02/2021	04/03/2021
Bulgaria	26/02/2021	26/02/2021
Croatia	16/04/2021	24/04/2021
Spain	27/04/2021	29/04/2021
Slovakia	11/05/2021	01/06/2021
France	26/05/2021	27/05/2021
Finland	18/06/2021	24/06/2021
Malta	23/07/2021	TBD
Austria, Belgium, Cyprus, Czech Republic, Estonia, Greece, Ireland, Italy, Latvia, Luxembourg, Poland, Portugal, Romania, Slovenia	ongoing	

In most of the 14 Member States that did not yet transpose the Directive (ten in total), the legislative process is ongoing or, at the very least, draft legislation has been published. As this offers a sufficient basis for a discussion of the anticipated changes that the Directive will bring about, we have included reports on all of these Member States. These national reports, and in particularly those for Member States that are still in the early stage of the legislative process, should evidently be read with a caveat: the legislative proposals discussed are subject to change

⁴ The overview includes all EU Member States that have, at the very least, published a draft of the legislation (and other implementing measures) transposing the Directive before the cut-off date of 1 August 2021.

⁵ Those 22 EU Member States did not include Denmark, which adopted its implementing measures on 9 February 2021 (and they entered into force on 4 March 2021), but included Sweden for failing to communicate information on its timely transposition of the Directive.

prior to final adoption. This is always indicated in the introduction of the report. In four Member States (Belgium, Greece, Ireland, and Romania), no draft legislation has yet become (publicly) available. National reports for those Member States are therefore not included.

III. Overview of the Directive and National Implementing Measures

In the following subsections, we briefly introduce the ECN+ Directive's main provisions and make some observations about the (anticipated) implementing measures, highlighting general trends and interesting national peculiarities. The Directive addresses the following key issues and the discussion below, as well as the 23 national reports, are structured accordingly: (1) safeguards to ensure respect for fundamental rights; (2) guarantees of independence and adequate resources; (3) investigatory and decision-making powers; (4) powers to impose fines and periodic penalties; (5) leniency programmes; and (6) mutual assistance.

1. Fundamental Rights

The Directive gives more power and instruments to the NCAs, but it counterbalances this by requiring that appropriate procedural safeguards are in place to ensure respect for fundamental rights. Article 3 refers in particular to the rights of defence of the undertakings under investigation: they should have, *inter alia*, an effective right to be heard and effective judicial remedies to challenge the legality of enforcement decisions. The right to good administration also requires that antitrust proceedings are conducted within a reasonable time frame.

Since the 23 Member States consider that their competition law regime is already (largely) in line with the EU Charter on Fundamental Rights (CFR), the implementation of Article 3 of the Directive generally does not (or will not) bring about meaningful changes. In some cases, no amendments were deemed necessary (eg France, Hungary, and The Netherlands). Other Member States decided (or plan) to limit implementation primarily to the introduction of an explicit reference to the CFR in their competition law (Bulgaria, Croatia, Lithuania, Malta, Por-

tugal, and Spain). The national reports of Estonia, Germany, Luxembourg, and Poland do identify some relevant changes or issues. Interestingly, in Bulgaria and Slovakia, the legislator introduced time limits for antitrust proceedings.

2. Resources and Independence of the NCA

To ensure the operational independence of the NCAs, Article 4 of the Directive provides for a detailed list of minimum guarantees that are aimed at protecting the staff and management of NCAs from undue external influence. Member States must ensure, for example, that they neither seek nor take any instructions from government or private entities when carrying out their tasks for the enforcement of the EU antitrust rules. Similarly, management (or more broadly: the members of the decision-making body) should be selected, recruited or appointed according to clear and transparent criteria and cannot be dismissed for reasons related to the proper performance of their duties.

Although other national laws may already safeguard such operational independence, it appears that most Member States (plan to) implement Article 4 by introducing these various requirements, almost literally, in their competition laws. For some Member States, such as Croatia and Cyprus, this does seem to considerably enhance the independence of staff and management. Certain ambiguities and controversies remain, however. In Germany, the implementation did not result in a clear ban on case-related political instructions. And in Austria, the legislator uses the opportunity to impose a new obligation on the NCA to inform the relevant minister about the fulfilment of its tasks.

The additional requirement that the NCAs must have the power to set both positive and negative priorities will in several competition law regimes abolish their legal duty to consider all the formal antitrust complaints that they receive. The NCAs in Bulgaria, Croatia, France, France, Spain, and Slovakia will now have the power to reject such complaints on priority grounds.

Article 5 of the Directive requires Member States to ensure that the NCAs have the human, financial, and technical resources they need to perform their tasks (and that they can independently decide

how to spend their allocated budget). Certain Member States chose to include this guarantee in their competition laws (eg Bulgaria, Lithuania, and Malta). The national reports suggest, however, that most Member States consider it unnecessary to adopt any specific implementing measure in this respect, despite often voiced concerns that the NCAs lack sufficient resources to be effective.

In Luxembourg, the independence requirements imposed by Articles 4 and 5 of the Directive will result in the creation of a new competition authority with its own budget and with legal as well as administrative autonomy. To ensure impartiality, the Portuguese NCA will no longer be (partly) funded by the fines it imposes for competition law infringements.

3. Enforcement Toolbox of the NCA

The investigatory and decision-making powers of most NCAs were already more or less aligned with those set out for the European Commission in Regulation 1/2003. Some NCAs, however, lacked certain important tools to detect infringements and bring them effectively to an end. The Directive provides that all the NCAs should have, as a minimum, the investigative power to inspect business and non-business premises (Articles 6-7), to issue requests for information (Article 8), and to conduct interviews (Article 9). In addition, NCAs should have the following minimum decision-making powers: to adopt prohibition decisions (Article 10); to issue interim measures (Article 11); and to adopt commitment decisions (Article 12).

The implementation of the Directive mostly introduces important changes in relation to two investigative powers: inspections and interviews.

Firstly, the NCAs in Bulgaria, Denmark, Italy, and Poland are now (or will be) empowered to inspect non-business premises. In Finland and Hungary this was already possible, but subject to very stringent threshold requirements, which now have been lowered. The Directive subjects this power to two requirements: (1) the NCA must show that there is ‘a reason-

able suspicion’ that business records, ‘which may be relevant to prove an infringement’, are being kept in the premises; and (2) the NCA must obtain prior judicial authorisation.⁶ In the Netherlands, this called for stronger safeguards as judicial authorisation was only needed for residential premises (and not, for instance, vehicles). Several NCAs now (will) have the power to ask the police to assist them during a dawn raid (eg Czech Republic and Latvia) and to continue the inspections at their premises (eg Cyprus, Malta, Poland, and Sweden).

Secondly, Article 9 of the Directive will empower quite a number of authorities, for the first time, to summon any legal or natural person to appear for an interview, in so far as they ‘may possess’ relevant information for the enforcement of the EU antitrust provisions (eg Croatia, Cyprus, Denmark, Poland, Slovenia, and Spain). It also prompted the Finnish, Lithuanian, and Maltese legislator to extend the range of individuals that may be summoned by the NCA.

With regard to decision-making powers, the main novelty that the Directive brings about is the possibility to impose structural remedies for the infringement of Article 101 or 102 TFEU (eg Croatia, Denmark, Finland, France, and Lithuania). However, the principle of proportionality still demands that the NCA, when choosing between two equally effective remedies, must choose the remedy that is least burdensome for the undertaking.⁷ In relation to interim measures, the implementation of Article 11 of the Directive mostly requires technical changes to the applicable conditions and procedure. They do make quite a difference, however. For instance, the French NCA can now also impose interim measures *ex officio* and the Finnish NCA is no longer obliged to conclude its antitrust proceedings within 90 days after issuing an interim order - which obviously was a prohibitive requirement. The maximum duration of interim measures is now limited to 12 months (but, contrary to Croatia where the same limit now applies, the Finnish NCA can prolong this period). Denmark and Luxembourg opt(ed) to grant the NCAs more extensive powers than those foreseen by the Directive: they are not required to show that there is ‘serious and irreparable harm to competition’ before adopting interim measures. In the Netherlands, the NCA regained the possibility to impose interim measures (after being stripped of that power in 2014).

6 Directive (EU) 2019/1, art 7(1) and (2).

7 Directive (EU) 2019/1, art 10(1) and recital 37.

4. Powers to Fine Undertakings

Articles 13-16 and Article 29 of the Directive seek to address shortcomings in the NCAs' fining powers. Member States must ensure that NCAs can impose 'effective, proportionate and dissuasive fines' on (associations of) undertakings - either directly themselves (in their own proceedings) or by requesting the imposition of such fines in civil judicial proceedings. The Directive thus remains neutral in respect of the choice for an administrative or judicial enforcement model. However, it does oblige those Member States with a purely criminal system, ie where the NCA or the prosecutor seeks the imposition of fines before a court in criminal proceedings, to introduce an additional non-criminal system for imposing fines.⁸ This affects Denmark, Ireland, and Estonia. In Denmark, the legislator chose to make the procedure civil in nature: the NCA can now, following its investigation, initiate civil judicial proceedings requesting the imposition of antitrust fines. A somewhat similar change occurred in Malta in 2019. In Estonia, the NCA will be empowered to directly levy administrative fines.

The Directive's provisions on fines also impact the institutional design of certain other Member States. Sweden as well decided to introduce an administrative model and thus transfer the power to impose antitrust fines from the civil court to the NCA. Slovenia seeks to abolish the distinction between 'supervisory proceedings' (administrative) and subsequent 'minor offence proceedings' (quasi-criminal) and unite them in a purely administrative model. And although most fines in Austria will still be imposed by a court in civil proceedings, the NCA's power to directly levy fines for procedural breaches will be expanded.

To give teeth to their investigative and decision-making powers, the Directive provides indeed that NCAs must be able to impose (administrative or civil) fines not only for infringements of Articles 101 and 102 TFEU, but also for non-compliance with procedural rules. As a minimum, NCAs should be able to sanction the procedural infringements for which also the Commission, pursuant to Regulation 1/2003, can impose fines (such as failing to cooperate during inspections, failing to appear for an interview, and supplying incorrect, incomplete or misleading information).⁹ For most Member States this implies a considerable expansion of the list of procedural fines. Pursuant to Article 16 of the Directive, periodic penal-

ty payments for non-compliance with investigative measures or enforcement decisions have been (or will be) introduced in eg Croatia, Czech Republic, Poland, and Slovakia.

To prevent undertakings escaping liability from fines through restructuring, Member States must ensure that the concept of undertaking is applied in line with the case law of the Union courts.¹⁰ To this end, the definition of 'undertaking' contained in the Croatian and Slovakian competition laws has now been amended.

Finally, the Directive further harmonises rules on the calculation of fines (Articles 15 and 16) and limitation periods for imposing fines (Article 29). These provisions have been or are being implemented (almost) literally. It is noteworthy that the detailed rules on fines levied on associations of undertakings (Article 14(3) and (4)) appears to bring significant changes in most if not all Member States, surely increasing the deterrent effect of such fines. For instance, prior to the implementation of the Directive, such fines were determined on the basis of the (usually very low) turnover of the association (eg Finland and Poland) or the total value of membership fees (eg Italy) or otherwise generously capped (eg France).

5. Leniency Programmes

Malta was the only Member State that, until very recently, did not have a leniency programme for the detection of secret cartels. There were marked differences between the existing leniency programmes applicable in the different Member States, however. This undermined the attractiveness for potential leniency applicants to come forward. To increase legal certainty about their immunity status under the different national leniency programmes, the Directive aligns those programmes by codifying the main principles of the non-binding 2012 ECN Model Leniency Programme.

The detailed requirements of Articles 18-23 fully harmonise the rules and procedures of the national

8 This is without prejudice to national laws that provide for criminal sanctions for the violation of arts 101 and 102 TFEU, provided that this does not affect the effectiveness and uniformity of EU antitrust enforcement. Directive (EU) 2019/1, recital 40.

9 Directive (EU) 2019/1, art 13(2).

10 Directive (EU) 2019/1, art 13(5).

leniency programmes and this results in more or less technical changes, depending on the extent to which there already was convergence with the ECN Model Leniency Programme. A novelty is that in various Member States, leniency programmes, typically implemented in specific guidelines, are now (or will be) enshrined in law (eg Czech Republic, France, Germany, and Portugal).

The Directive does not affect the substantive scope of the national leniency programmes, at least in the sense that Member States are entitled to offer immunity or a reduction in fines also for infringements other than secret cartels.¹¹ For instance, in Austria and Estonia, the leniency programme remains applicable to all infringements of Article 101 TFEU (and its national equivalent provision). The same holds true for the brand-new leniency programme in Malta. In Sweden, the previous (theoretical) possibility of applying for leniency for abuses of a dominant position has now been scrapped, but leniency remains applicable to all collusive practices. The implementing measures in the Czech Republic and Latvia will expand leniency to (hardcore) vertical agreements.

Germany and Spain decided, for the time being, not to implement Articles 23(2) and (3) of the Directive, although relevant to their competition law regimes. These provisions stipulate that Member States should ensure that the immunity of a successful leniency applicant extends to criminal liability for the applicant's current and former directors, managers, and other staff members. If this cannot be accommodated in their legal system, the competent authorities must at least ensure that criminal sanctions are mitigated. The degree of protection should be relative to the contribution of the individuals to the detection and investigation of the secret cartel.

6. Other Aspects

Some of the national reports also discuss other relevant changes to the competition law regime that the Directive brings about. These mostly relate to Articles 24-28 that provide for closer cooperation between the NCAs and, in particular, for arrangements for cross-border assistance with respect to investigative measures or the enforcement of decisions.

While the majority of Member States limit(ed) themselves to the transposition of the Directive in national law, some have used the opportunity to bring about other important changes, both substantial and procedural. The following changes are particularly noteworthy. In Germany, the legislator gave the NCA new instruments to deal with digital markets and potential market power and revisited the notification thresholds for merger control. In Austria, various changes are anticipated relating to how a dominant position is established, the consideration of environmental benefits of agreements, and the substantive test and notification thresholds for merger control. Bulgaria also aligned the substantive test for the evaluation of concentrations with the EU Merger Regulation. And finally, as already mentioned, Luxembourg will see a complete overhaul of the institutional framework for competition law enforcement.

IV. Concluding Remarks

Six months after the transposition deadline set out in the ECN+ Directive, less than half of the EU Member States (13) have fully implemented its provisions into national law. It is therefore too early to draw up any sort of comprehensive balance sheet. However, the 23 national reports in this section do give us a great deal of insight into the main changes that the Directive will bring about for public antitrust enforcement throughout the EU. This prompts two tentative remarks. First, it is clear that all the NCAs are (being) given broad investigatory, decision-making, and fining powers - closely aligned with those conferred upon the European Commission by Regulation 1/2003. Divergences in the (anticipated) national implementing measures can mostly be observed in relation to interim measures, one of the areas where the Directive gives the Member States considerable leeway. Second, the unqualified obligation of the Member States to ensure that the NCAs have adequate resources appears to produce the least meaningful impact. So far, most Member States consider it unnecessary to adopt any specific implementing measure in this respect, notwithstanding often voiced concerns about several NCAs being understaffed due to financial constraints. This may well prove to be a lasting impediment to bring about 'a genuine common competition enforcement area'. After all, there is only so much that a shiny new toolbox can deliver.

¹¹ Directive (EU) 2019/1, arts 17(1) and 18(1).