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The Role of National Competition Authorities in the Regulation of Business' Activities

Rola krajowych organów do spraw konkurencji
w regulowaniu działalności gospodarczej

Abstract

The present contribution aims to scrutinize the recent Directive 2019/1 on the empowerment of National Competition Authorities, looking at the main innovations provided for, as their structure, roles, competences and powers. The concluding remarks analyse the impact of the Directive, with regard to the future implementation and application of the Directive, adding a general appreciation to the harmonization process.

Key words: EU Competition Law; Public Enforcement; ECN+ Directive; National Competition Authorities

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Streszczenie

Celem artykułu jest szczegółowa analiza postanowień dyrektywy 2019/1 w sprawie kompetencji krajowych władz ds. konkurencji. Skupiono z nim uwagę na najważniejszych, wprowadzonych dyrektywą, innowacjach dotyczących struktury tych władz, ich ról, zakresu ich władzy i uprawnień. W uwagach końcowych zawarto analizę wpływu dyrektywy na działalność gospodarczą z uwzględnieniem kwestii jej przyszłego wdrażania i stosowania. Podkreślono przy tym jej znaczenie dla procesu harmonizacji.

Słowa kluczowe: prawo konkurencji UE; publiczne egzekwowanie prawa; Dyrektywa ECN+; NCAs (krajowe władze ds. konkurencji)

The decentralisation of the public enforcement of EU Competition Law: from Regulation 1/2003 to ECN+ Directive

The present paper aims at scrutinizing some recent developments in the public enforcement of EU Competition Law. Directive 2019/1 (hereafter: ECN+ Directive), on the empowerment of the competition authorities of the Member States¹, is the last step towards the decentralization of the public enforcement of EU Competition Law. ECN+ Directive aims at improving the application of Articles 101 and 102 of the TFEU, strengthening the structure, the role and the powers of National Competition Authorities (hereafter: NCA(s)). Moreover, it increases the cooperation among NCAs within the European Competition Network (hereafter: ECN), as between NCAs and Courts vested with competence to apply EU Competition Law.

The new piece of legislation constitutes a sort of logical consequence to Regulation n. 1/2003 on the implementation of the rules on competition (hereafter: the Regulation)²,

which decentralized the public enforcement of EU Competition Law. The Regulation had a strong impact in many Member States. Indeed, at that time, some did not provide any internal system of control over the application of national competition law, that could be compared to the one established at the Community level. Other Member States had already created internal control bodies, whom different powers, roles and functions were conferred. This is the case, for example, of the Italian Competition Authority, established in 1990.

In the aftermath of the entry into force of the Regulation, doubts arose as to its suitability to confer such powers and competences directly upon the NCAs. On the one hand, it was argued that it had effects without implementation being needed, due to its immediate applicability (Chieppa, 2005; Libertini, 2008, p. 57). Then, it was pointed out that national rules were essential in order to specify such powers and to regulate the internal administrative procedure, pursuant to the principle of procedural autonomy of the Member States (Guerri, 2005, p. 135; Donati, 2006, p. 57; Pera, 2008, p. 62). For example, Italy followed the latter approach³.

Main divergences after the national reforms following the Regulation

Member States had created NCAs according to two models: administrative or jurisdictional bodies (Commission, 2014a; Commission, 2014b). Among the former, two different organizational structures can be distinguished. In one, investigative and decisional powers are separated and conferred upon different sections of the same body. This is, for example, the French or the Spanish model. Alternatively, in another and more broadly adopted structure, the body is unitarian and there is a distribution of roles and competences within the same case, as seen, for instance, in Poland and Italy.

In the latter model, instead, a specialized Court is the only body vested with competence to impose sanctions. A claim can be lodged by an administrative authority that has merely investigative powers. This model is followed in Austria, Estonia, Ireland and Sweden, although with some differences.

The Regulation only dedicated a few provisions to NCAs' functioning (Idot, 2003, pp. 283 *ff.*), so that early practical experiences in its application revealed some gaps. The Regulation often referred to national law, even within key provisions, as Article 22 on NCAs' investigations. National legislation appeared to be granted a high margin of appreciation. Therefore, in the end the real possibility for NCAs to work properly depended on national legislation, according to the principle of Member States' procedural autonomy, to be balanced with the principle of effectiveness (of the application of EU Competition Law), as stated by Article 35 of the Regulation.

Consequently, some national legislations lack proper rules on the structure of their own NCAs, including some basic requisites such as independence. In some cases, human and financial resources are not enough for the proper functioning of the body. In other cases, NCAs are not empowered with main competences to investigate, decide, execute, inspect and issue remedies. The global system of sanctions is not homogeneous, thus jeopardizing the effectiveness of the application of EU Competition Law and the legal certainty (Almunia, 2014). The simple listing of their decisional powers within the Regulation leaves Member States free to establish internal procedures, type of sanctions and their calculation. Except for its Article 5, the Regulation does not provide for investigative and sanctioning powers.

The drawbacks of this system have led to the new reform of public enforcement, the ECN+ Directive. It aims at completing the decentralization of the application of EU Competition Law, through the empowerment of NCAs, stating very specific provisions on all the issues discussed above. Its transposition will require substantial reforms in national systems.

The strengthened role of decentralised public enforcement: the ECN+ Directive

Independence and resources

Chapter III of ECN+ Directive is dedicated to independence and resources. It is applicable to NCAs with

administrative nature, because independence should be a connatural requisite to jurisdictional bodies⁴, and the EU cannot influence financial and economic resources of the Courts, it being a matter of Member States' exclusive competence. Granting full independence to administrative bodies is not an easy task and the CJEU has already intervened in cases related to bodies whose institution is laid down by EU Law. In *si.mobil*⁵ the Tribunal verified only the functional independence of the Slovenian NCA, that must be established by the law and granted with the powers conferred to the body. The analysis is therefore quite brief. The two cases related to the Austrian and the Hungarian supervisory authorities for the protection of personal data, to be established pursuant to Article 28 of Directive 95/46 on the protection of "privacy"⁶, rise more sensitive issues. Functional autonomy is deemed to be unsatisfactory, in that the independence of the key staff shall be assured, too. Consequently, the appointment and the suspension of the Authorities boards shall be consistent with exigence of independence⁷.

Considering the difficulties to balance the duty to establish these bodies under EU Law, on one hand, and to regulate their institution and functioning according to the principle of Member States procedural autonomy on the other, the length of Article 4 is not surprising. It affects various aspects related to the creation and the functioning of NCAs, as the selection and the appointment of the members of the board; independence's duties from political interferences laid down on persons responsible to issue some decisions within their powers; a cooling off period.

Furthermore, para. 5 establishes the power for NCAs to determine priorities in the implementation of their competences, that might lead to the dismissal of cases that do not appear particularly relevant or of manifestly unfounded complaints⁸.

The condition of adequate resources is functional to the independence (Article 5). Indeed, NCAs must not depend economically or financially on any other national body, that would effectively make the latter a controller of the NCA. In *Commission v. Austria*, above, the Court criticizes the fact that the staff of the authority is composed of officials of the Federal Chancellery that makes the necessary equipment available. This manner of organization risks creating a State influence on the body's work. That does not mean that the NCA must have an autonomous budget, but the availability of resources must not impair its organic independence. Accordingly, Article 5 of ECN+ Directive establishes that NCAs must be autonomous in the spending of the allocated budget.

NCAs' powers

Once an independent NCA is established, ECN+ Directive confers it powers and competences upon it. Article 5(2) recalls the minimum powers, whose conferral should be already clear from the Regulation, as: to conduct investigations with a view to applying Articles 101 and 102

TFEU; to issue decisions based on Article 5 of the Regulation; to cooperate in the ECN. NCAs shall also have consultative powers in favor of public institutions and bodies, but the provision leaves the advisory competence under national legislation.

The new investigative powers are listed in Articles 6–9. Their formulation recalls Articles 17–21 of the Regulation, that grant similar powers to the Commission.

ECN+ Directive impacts on the decisional powers of NCAs with jurisdictional nature, too. Indeed, the specification of the powers already granted by the Regulation does not affect the judiciary, rather it reinforces it. For these powers, too, the model is represented by Commission, in that Articles 10–12 retrace Articles 7–9 of the Regulation. Yet, there are some main differences between the two sets of provisions.

ECN+ Directive does not specify that structural remedies shall be considered more burdensome with respect to behavioral remedies (Article 7(1) of the Regulation). However, Article 10(1) of ECN+ Directive recalls the principle of proportionality, of which Article 7(1) can be a specification, and thus the same balance shall be applicable to NCAs, too.

Article 11 of ECN+ Directive concerning interim measures is much more precise than parallel Article 8 of the Regulation or Article 10 of the Directive's Commission Proposal. The main divergence consists in the mention of the principle of proportionality as a limit both to the content and to the duration of the measure. However, this difference in the formulation of Article 8 of the Regulation and Article 11 of ECN+ Directive does not seem particularly relevant for the practice. Indeed, the Commission's power to issue interim measures was recognized and limited by the CJEU in the sense of balancing the interests at stake⁹. Therefore, the Commission's powers are not as extensive as might seem from the formulation of Article 8 of the Regulation.

The last meaningful difference regards findings on inapplicability, which remain a Commission's exclusive competence. Nevertheless, Article 10(2) strengthens the cooperation, establishing that NCAs must communicate the Commission the closing of enforcement proceedings because there are no grounds to proceed. By that, the Commission is better informed of the proceeding undertaken by NCAs, in order to verify their activities both for statistical purposes and for the new opening of enforcement proceedings in doubtful cases.

The harmonization of the sanctioning powers (Chapter V of ECN+ Directive) is based on the same uniformity purposes.

Leniency programs

A lengthy part of ECN+ Directive is dedicated to leniency programs (Chapter VI). According to the Commission, these are the most efficient tools in order to have knowledge and to put an end to secret cartels (Commission, 2014a, para. 217). Therefore, these means must be available to all NCAs.

Since the 2006 Commission's Model Leniency Program, many Member States have introduced these programs (Melloni, 2015, p. 48), whose contents and procedures have been partly harmonizing thanks to the cooperation within the ECN (Chiripoiu, 2017, p. 3). Thus, ECN+ Directive fills the remaining gaps and inconsistencies related to some specific aspects that emerged in the application of leniency programs. Chapter VI deals with the quality of the contribution offered by the whistle-blower, the favorable treatment to be granted, its relationship with the Authorities with which it has not filed a request of application, the possible benefits for the other undertakings' cooperation with the authority. These provisions are inspired by the 2012 ECN Model Leniency Programme which has played a role as a guideline for NCAs, although it not being binding.

The setting of uniform conditions for the benefiting from the immunity or the reduction of the sanctions avoids the distortion of the potential "forum selection" from the whistle-blower, that might prefer to lodge an application to a NCA whose requisites are less rigorous. In this new uniform legal framework, rules on NCAs competence to decide seem less needed, since the final decision should be at least similar, notwithstanding the seized NCA. The sole difference rests in the seizure of the Commission with an application covering more than three Member States, because Article 22(3) of ECN+ Directive accords it a preference with an estoppel effect.

ECN+ Directive provides for a procedural harmonization, too, having regard to the beginning of the procedures and the coordination with Commission's activity. Nevertheless, ECN+ Directive includes only some of the elements already stated in the Leniency Model Program, while Member States continue to be free to introduce a legislation corresponding to the Model.

Some concluding remarks

One of the targets of ECN+ Directive is the uniformity of powers within Authorities, so that NCAs shall benefit from the same competences and powers, as already granted to and implemented by the Commission. Indeed, its positive practice in the detection and the sanction of antitrust infringements leads to an extension of this working model to other Authorities responsible for the application of the same Treaty rules. This approach had already been criticized in its general terms, because NCAs would be the bodies with the best capacity to apply Competition Law and so they should not be a mere extension of the Commission (Rusu, 2015, p. 163). Nevertheless, an accordance with the Commission's decision appears suitable for the uniform application of EU Competition Law. This shall not depend on the authority investigating the case and issuing a decision. Therefore, if slight differences stem from the European or national, administrative or judicial nature of the authority, or from peculiarities of national jurisdiction, the output of the control procedure must not be divergent. The consequences risk

being unforeseeable for undertakings and associations of undertakings when operating in the market or even calculating the costs/benefits of the infringement(s).

The impact of ECN+ Directive on Member States varies according to the structure and the powers already conferred on each NCAs pursuant to the Regulation. A strong difference as for the effects can be established depending on the jurisdictional or administrative nature of the NCA. In the former case, the most important novelty is that referring to sanctions that is able to strengthen the available enforcement tools, thus modifying the current sanctioning powers of the judiciary within this specific competence. In the latter case, ECN+ Directive can have an all-around impact, so that Member States might need to radically reform the organisation, the functioning and the powers of their NCAs.

Some studies detailing the different impact of the Directive in various Member States have already been published (Malinauskaite, 2020, on Central and Eastern European Member States; Marino, 2019, p. 537, on Italian NCA).

The last meaningful remark relates to the precise formulation of most of the Directive's provisions. Therefore, a direct effect can be quite easily determined, especially with regard to the investigative and sanctioning powers and to the cooperation within the ECN. Hopefully, the detailed character of ECN+ Directive provides incentives to Member States to implement it correctly and on time, so as not to incur in infringement proceedings and into a legislation derived from the direct effect and not from although limited national regulatory choices.

Przypisy/Notes

¹ OJ L 11, 14.01.2019, pp. 3 ff.

² OJ L 1, 04.01.2003, p. 1 ff.

³ Law decree 223/2006 (GURI n. 153, 04.07.2006).

⁴ CJEU, case C-286/12, Commission v. Hungary [2012] ECLI:EU:C:2012:687; CJEU, case C-64/16, Associação Sindical dos Juizes Portugueses [2018] ECLI:EU:C:2018:117; CJEU, case C-619/18, Commission v. Poland [2019] ECLI:EU:C:2019:531.

⁵ CJEU, case T-201/11, si.mobil [2014] ECLI:EU:T:2014:1096.

⁶ OJ L 281, 23.11.1995, pp. 31 ff.

⁷ CJEU, case C-614/10, Commission v. Austria [2012] ECLI:EU:C:2012:631; CJEU, case C-288/12, Commission v. Hungary [2014] ECLI:EU:C:2014:237.

⁸ In CJEU, case T-24/90, Automec [1992] ECR II-2223, para. 77 the General Court has expressed favor towards the Commission's power to set priorities, it being functional to the rational use of its resources.

⁹ CJEU, case 792/79, Camera Care [1980] ECR 119; CJEU, cases 228 e 229/82, Ford [1982] ECR 2849; CJEU, case T-184/01R, IMS Health Inc [2001] ECR II-3193.

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PWE POLECA



Książka, którą oddajemy do rąk Czytelników, stanowi ukoronowanie niespełna dwuletnich badań prowadzonych przez kilkunastu studentów i doktorantów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, działających w ramach Koła Naukowego Filozofii Prawa i Filozofii Społecznej IVR.

Pojęcie interregnum w symboliczny sposób oddaje istotę zagadnień podjętych w ramach niniejszej monografii. Jej przedmiot stanowi analiza XX-wiecznych transformacji ustrojowych, które dokonały się w kręgu euroatlantyckiej kultury prawnej. Celem badań było uchwycenie najistotniejszych elementów zmiany ustrojowej ujmowanej możliwie szeroko, a zatem obejmującej przekształcanie się reżimów monarchicznych w ustroje o charakterze republikańskim, procesy liberalizacji lub demokratyzacji reżimów autorytarnych czy wreszcie formowanie się całkowicie nowych bytów państwowych. Opisywane metamorfozy ustrojowe zostały uchwycone in statu nascendi, w perspektywie dynamicznej, w okresie kształtowania się nowych form ustrojowych, a zatem ścierania się starego porządku z nowym. Monografia ma walor nie tylko informacyjny, przejawiający się w opisie biegu zdarzeń składających się na poszczególne procesy zmiany ustrojowej. Podejmuje także uniwersalne problemy związane z napięciem między legalnością a legitymizacją ustroju w warunkach doniosłej zmiany politycznej lub społecznej.

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