WITH INCREASED POWERS TO NATIONAL COMPETITION AUTHORITIES IN THE EU, WILL WE HAVE APPROPRIATE PROCEDURAL SAFEGUARDS TOO?

BY KAARLI H. EICHHORN[1]

1 *Advokat* (Member of the Swedish Bar), Antitrust Partner, Jones Day.

Effects-Based Analysis: Where Do We Stand on Both Sides of the Atlantic?
By Douglas Ginsburg, Robin Jacob & Jean-François Bellis

New Fault Lines in Antitrust: The Rising Threat of Growing Divergence to IP-Centric Business Practices
By Paul Lugard & David Gabathuler

Substantive Criteria and Legal Standards in Recent Abuse of Dominance Decisions in Hi-Tech Markets: EU vs. U.S. and Lessons Learned
By Yannis Katsuolacos

Abuse of a Dominant Position: A Post-*Intel* Calm?
By Giorgio Monti

With Increased Powers to National Competition Authorities in the EU, Will We have Appropriate Procedural Safeguards too?
By Kaarli H. Eichhorn

Visit www.competitionpolicyinternational.com for access to these articles and more!

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

"If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

James Madison

President of the Unites States 1809-1817 and "Father of the U.S. Constitution."

I. INTRODUCTION

In January 2019, the European Union ("EU") issued Directive 1/2019, also known as the "*ECN+ Directive*," which primarily aims to broaden the powers of the EU's national competition authorities ("NCAs"). EU Member States now have two years to implement the Directive.[2]

This is another notable step by the European Commission ("EC") to increase harmonization of competition legislation in the EU. However, increased procedural safeguards must also follow with increased powers, to ensure a genuinely effective competition regime. The author regrets that the Directive may not strike the right balance between NCA powers and procedural safeguards.

II. IMPORTANCE OF THE RULE OF LAW IN THE EU

Undoubtedly, the rule of law is one of the EU's most important priorities. It is at the foundation of the EU and enables regulatory predictability and effective enforcement of laws. In turn, this contributes to an investment-friendly environment and economic growth, employment, and innovation.

The rule of law appears to be correlated with economic prosperity and competitiveness. Jurisdictions that strongly adhere to the rule of law also perform well on competitiveness, as reflected in Transparency International's *Corruption Perception Index* ("CPI") or the World Justice Project's *Rule of Law Index* with the World Bank's *Global Competitiveness Report*. Northern Europe (the Scandinavian countries, for example) achieve particularly high scores throughout.

Any indifference to the rule of law or due process would therefore be incompatible with increasing the prosperity of our European economies and consumer welfare, which is also a key objective of our competition laws.

2 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 OJ L 11, 14.1.2019, p. 3–33.

The EU has reacted very firmly to recent systemic threats to the rule of law in some Member States. In 2014, for example, the EU adopted a "rule of law framework" to address such threats.[3] In this respect, it has engaged in dialogue with Member States, issued detailed recommendations to remedy problems, and threatened with sanctions. Specifically, the EU has recently addressed concerns regarding, *inter alia*, judicial independence in Poland and policies in Hungary on refugees, migrants, and asylum seekers. With the political landscape changing so rapidly in "new" and "old" Member States alike, societal tensions and emerging political groupings may increasingly challenge past governance principles. Arguably, the rule of law, with robust and accountable government institutions, is more important than ever today.

A. The Rule of Law also Plays a Tremendously Important Role in Competition Proceedings.

Recently, *fairness* has become an increasingly important notion of competition enforcement policy in Europe. It has mostly been referenced in the broader sense, maintaining that companies' adherence to competition laws leads to fairer markets, fairer outcomes, and a fairer deal to consumers. However, the EC's leadership has also increasingly drawn attention to procedural fairness. As emphasized by Director General Johannes Laitenberger in a 2017 speech, "fairness is important to maintain confidence in the system…if a competition authority wants to maintain credibility and trustworthiness … it must help ensure fairness and above all guarantee procedural fairness."[4]

The EC rightly highlights the crucial role of government in focusing on procedural fairness in competition proceedings. This is fundamental to the trust that citizens and companies put in public institutions. But it is also fundamental to the efficacy of competition enforcement. Integrity, credibility, and trust can lead market participants to more fully embrace competition compliance, better cooperate with authorities, and ultimately bring about better outcomes.

B. Due Process in Competition Law Proceedings is Equally Vital for Both the EC and NCAs in Europe.

Due process in competition law proceedings has long been a sensitive topic in Brussels. This is because, despite its impressive staff, resources, and formidable reputation, the fundamental structure of the EU's competition enforcement system has recurrently been put into question.

Critics argue that this system serves simultaneously as investigator-prosecutor-judge, with no meaningful internal checks and balances, and that politically selected competition commissioners generally lack any prior experience in competition laws or policies. Given this, it is questioned whether decisions formally taken by the entire College of Commissioners (in what the current EC President has called a "more political" Commission)[5] are genuinely independent of other EU policies or even Member State influence. At the same time, antitrust sanctions have increased substantially in the EU. A relatively light-handed approach against, e.g. cartels in the 1960s and 1970s shifted to higher cartel fines imposed in the 1980s. In the 1990s, combined cartel fines stood at just below €1 billion, rising to almost €13 billion in the following decade. The current period reflects a much more prominent level of fines, even if another 13-fold increase appears unlikely.

The EC has constructively responded to the critique of its procedures. Over time, it has injected various procedural improvements to strengthen due process through, for example, the introduction of hearing officers and peer reviews. It will no doubt continue in its efforts to improve and listen to outside stakeholders, *inter alia*, after the procedural deficiencies highlighted by the EU courts in *Intel* and *UPS/TNT*.[6] It has also increasingly had to stand its ground to demonstrate independence in competition proceedings.[7]

---

3 *Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, COM(2014).*

4 *EU competition law in innovation and digital markets: fairness and the consumer welfare perspective*, Johannes Laitenberger, Director-General for Competition, European Commission, October 10, 2017, available at http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.

5 "*The Commission is political. And I want it to be more political. Indeed, it will be highly political.*" A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission - Opening Statement in the European Parliament Plenary Session, Jean-Claude Juncker, Candidate for President of the European Commission, July 15, 2014.

6 Judgment in Case C-413/14 P, *Intel Corporation Inc. v. Commission*, September 6, 2017; Judgment in Case C-265/17 P, *European Commission v. United Parcel Service, Inc.*, January 16, 2019.

7 "*We will never play politics or play favourites when it comes to ensuring a level playing field.*" Keynote speech by President Juncker at the EU Industry Days 2019, Brussels, February 5, 2019.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

The EC acknowledges that rigorous due process must accompany its significant powers and an increasing level of enforcement. It sought to address inadequacies in national competition law enforcement, putting forward the proposed *ECN+ Directive* in early 2017, to strengthen powers. And yet, this Directive finally emerged with scarce details on safeguards with respect to NCA procedures.

III. THE ECN+ DIRECTIVE – STRENGTHENING NCA POWERS, BUT WHAT ABOUT RIGHTS OF DEFENSE?

The *ECN+ Directive* contains a number of important improvements to reinforce Member State competition law regimes. It sets out, for example, that agencies shall possess sufficient resources (including staff and finances) to perform their functions and be independent of political influence. Competition advocacy (i.e. the promotion of competition law compliance) should also be part of their tasks – an important new feature. The Directive also improves how leniency operates (including the availability of "markers"), and provides additional tools for cooperation between Member State authorities. Most competition lawyers could not but agree that these are accurately identified issues, and that addressing them is imperative.

The *ECN+ Directive*'s primary visible focus, however, is on beefing up NCA powers, notably through expanded rights in relation to inspections, requests for information, interviews, decisions, and fines. These are also the principal features that have been communicated by the EC when promoting the Directive.

These enhanced powers raise the issue of the need for more robust due process. As NCAs can now exercise greater powers to investigate or impose sanctions, it is all the more important for companies to know that their rights of defense are equally robust and meaningful. And, as noted above, such safeguards are crucial for the efficacy of enforcement and the credibility of the authority itself.

The EC's Impact Assessment, which accompanied its proposal for the new *ECN+ Directive*, concluded that a "majority of stakeholders… also consider that other actions should be taken to boost the effectiveness of the NCAs." The Impact Assessment emphasized:

> There is in particular a **consistent demand** from lawyers, business and business organisations that any enhancement of NCAs' enforcement powers is **counterbalanced** by increased procedural guarantees, including ensuring that **rights of defence** can be effectively exercised by having greater transparency of investigations and **effective judicial review** (e.g. companies should receive a **Statement of Objections** and have effective rights of **access to file**). Other issues raised are the request of greater coherency within the ECN in the application of the EU competition rules, the recognition of **Legal Professional Privilege (LPP) for in-house lawyers** and of **compliance programmes as a mitigating factor for fines**, that NCAs should be able to defend their cases in court, a more consistent application of the effect on trade criterion or the abolition of the power of NCAs to apply stricter rules on unilateral conduct.[8] (emphasis added)

However, even if addressed to some extent, the Directive gives little prominence to such rights of defense, particularly in contrast to the dense detail dedicated to new and expanded powers (comprising multiple pages).

IV. PROCEDURAL SAFEGUARDS IN THE FACE OF INCREASED POWERS – A MISSED OPPORTUNITY

Safeguarding the rights of defense appears in only one key provision of the Directive. Article 3 succinctly requires that Member States "shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union" and "shall [possess] appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal."

In the face of such terse and general language, some consolation can be found in more meaningful guidance on safeguards in the Directive, even if these have been demoted to a single introductory Recital (14), which supplements the operative part of the Directive. Recital 14 refers *inter alia* to (i) the necessity of a statements of objections, or a similar document, to be issued prior to a decision finding an infringement; (ii) the opportunity for parties to comment on such objections; (iii) the need for decisions to be reasoned; (iv) access to case files; (v) protection

8 Commission Staff Working Document - Impact Assessment, available at http://ec.europa.eu/competition/antitrust/impact_assessment_annexes_en.pdf.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

of business secrets; (vi) right to an effective remedy before a tribunal; and (vii) timely proceedings.

During the EU's legislative process, modest improvements were achieved by the European Parliament and Council to afford greater procedural protections and to include these in the operative part of the Directive. As a result, the protection of business secrets was injected into the Directive's provisions. Last-minute attempts were also made in the European Parliament to address important aspects of legal privilege, but unsuccessfully.

The final result is a Directive that unfortunately can be considered as falling short of safeguarding due process at the Member State level. Ideally, the Directive's procedural considerations should have appeared in its operative part and given the same weight – or perhaps even more – as expanded NCA powers.

V. GETTING THE BALANCE RIGHT DEPENDS ON THE MEMBER STATES

Member States now have approximately two years to transpose the Directive. It is important for Member States to ensure the necessary balance between powers and procedural safeguards as they now adopt national laws to confer these new rights (and obligations) on their NCAs.

Member States can do so by placing equal focus on procedural safeguards and NCAs' new and expanded powers. Indeed, national implementing measures should take primary guidance not from Article 3, but from Recital 14, with its supplementary normative nature. This recital sheds greater light on the (minimum) measures that authorities must have in place, whereas Article 3 offers incomplete and more high-level instruction. In practice, implementation will also depend on individual Member States, each with their different legislative traditions and therefore inevitable variances in transposing Directives.

The EC had an opportunity to provide an arguably more balanced Directive. Perhaps it would be misplaced to now, during the implementation phase, count on the EC alone to promote safeguards beyond the Directive's strict scope. It can still consider to engage with Member States and emphasize the importance of procedural safeguards, with the use of additional instruments, such as recommendations, communications, or guidelines. While these would not bind Member States, such measures would support the proper implementation of the Directive. Given its leading role in the ECN, and its knowledge of the NCAs' procedures, the EC is well-placed to offer additional guidance to individual Member States, as they embark on these wide-ranging legal reforms.

However, practically-speaking, the constant drive for timely transposition of EU laws will likely push Member States to move quickly. This may result in giving less consideration to areas that the EU has signaled until now as less important. Member States may also be concerned if they establish more stringent procedural safeguards, as these could be (erroneously) viewed as weakening the enforcement of EU competition rules.

With these challenges in mind, it will be important for all stakeholders (governments, corporations, competition lawyers, etc.) to closely follow the implementation of these new rules and to remain engaged in the pursuit of effective enforcement of our European competition rules.

NCAs should be enabled to control the full respect of competition laws, and in turn, to control themselves. This is key to fulfilling the *ECN+ Directive's* objective to achieve more effective competition enforcement. The end goal should be a comprehensive and thoughtful reform, worthy of our European legal traditions, as no doubt the EU also intended it to be.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.