E-ISSN: 2360 – 6754; ISSN-L: 2360 – 6754

European Journal of Law and Public Administration

2019, Volume 6, Issue 1, pp. 218-224

<https://doi.org/10.18662/eljpa/78>

COMPETITION AUTHORITIES, A GUARANTEE OF FREE COMPETITION ON THE INTERNAL MARKET?

Lucia IRINESCU

Covered in:

**CEEOL, Ideas RePeC, EconPapers, Socionet,
HeinOnline**

Published by:

Lumen Publishing House

On behalf of:

**STEFAN CEL MARE UNIVERSITY FROM SUCEAVA,
FACULTY OF LAW AND ADMINISTRATIVE SCIENCES,
DEPARTMENT OF LAW AND ADMINISTRATIVE SCIENCES**

COMPETITION AUTHORITIES, A GUARANTEE OF FREE COMPETITION ON THE INTERNAL MARKET?

Lucia IRINESCU¹

Abstract:

Competition plays a very important role at European and international level and legislative initiatives aimed at leading to the most competitive competition authorities are becoming more and more visible. We welcome in this respect the new European Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Keywords:

Competition; competent authorities; legislation; antitrust.

¹ Conf. Dr. Lucia Irinescu, Facultatea de Drept, Universitatea Alexandru Ioan Cuza, liirinescu@yahoo.com

1. Competent authorities. Short presentation

Given the very important role of competition and the fact that competition policy aims to create markets with fair competition and prevent the formation of monopolies that impose prices at the expense of consumers, protecting it is an objective for most countries in the world. However, in several countries it identifies itself with the national consumer protection agency, and the good practice of the competition is considered as a consumer protection measure.

Under Regulation (EC) No. 1/2003, the national competition authorities of the Member States, in parallel with the Commission, are the public bodies which ensure the application of Articles 101 and 102 of the TFEU. The National Competition Authorities and the Commission together form a network of public authorities that apply the Union competition rules (the European Competition Network) in close cooperation.

Also, the European Commission - Directorate General of Competition and International Competition Network (International Competition Network) must be mentioned here.

The International Competition Network (ICN) provides the competition authorities with a specialized but informal context for maintaining regular contacts and addressing competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards the principles of strong competition policy within the global antitrust community [1].

ICN is unique because it is the only global body dedicated exclusively to the enforcement of competition law, and its members are national and multinational competition authorities. Members produce material by engaging them in project-oriented and results-based flexible working groups. Workgroup members work together largely through the internet, telephone, teleseminar and web seminars.

The concept of the ICN came from the recommendations of the International Competition Policy Advisory Committee (ICPAC), a group formed in 1997. ICPAC was tasked with addressing global antitrust issues in the context of economic globalization and focused on issues such as multidisciplinary merger control, the interface between trade and competition and the future direction of cooperation between antitrust agencies. In its final report issued in February 2000, ICPAC requested the United States to explore the creation of a new "Global Competition Initiative" - where government officials, private firms and non-governmental organizations could consult antitrust issues. ICPAC has recommended that this global competition initiative be directed towards "greater convergence

of competition law and of common understanding, common understanding and culture."

Government officials and members of the antitrust bar recognize that the best way to promote effective enforcement of antitrust rules in the context of economic globalization was to create a network of competition authorities and international competition specialists.

On 25 October 2001, top antitrust officials from 14 jurisdictions (Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States and Zambia) launched ICN at the meeting they held in New York. Therefore, the 2001 American initiative, called the International Competition Network, is an informal network bringing together national and multinational competition authorities and the aim of the network is to develop antitrust experience and best practices, strengthen the role of competition authorities in "advocacy" field as well as international cooperation. Networks have been set up within the Network to address various issues such as the implementation of competition policy, unilateral behaviour, economic concentration and cartels [2].

2. New rules on competition authorities

Competition plays a very important role at European and international level and legislative initiatives aimed at leading to the best performing competition authorities are becoming more and more visible. In this respect, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on the provision of resources to the competition authorities of the Member States was published in order to make them more effective in enforcing the law and to ensure the proper functioning of the market on 20 January 2019. 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.

The Directive lays down certain rules to ensure that national competition authorities have the guarantees of independence, resources and enforcement powers and the fines necessary to enable them effectively to apply Articles 101 and 102 of the TFEU so that competition is not distorted on the internal market and consumers and businesses are not disadvantaged by national legislation and measures that prevent national competition authorities from being effective law enforcement bodies.

It covers the application of Articles 101 and 102 of the TFEU and the parallel application of national competition law to the same case and also regulates the cases where competition law applies exclusively. It also

establishes certain rules on mutual assistance to ensure the smooth functioning of the internal market and the close cooperation system within the European Competition Network [3].

The purpose of this new regulation derives from the fact that National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and to apply national competition law in parallel to Articles 101 and 102 TFEU. The lack of guarantees of independence, resources, and enforcement and fining powers for many NCAs to be able to apply Articles 101 and 102 TFEU effectively means that undertakings engaging in anti-competitive practices might face very different outcomes in proceedings, depending on the Member State in which they are active. They might be subject to no enforcement under Article 101 or 102 TFEU or they might only be subject to ineffective enforcement. For example, in some Member States, undertakings can escape liability for fines simply by restructuring [4].

Undertakings and consumers particularly suffer in those Member States where NCAs are less equipped to be effective enforcers. Undertakings cannot compete on the merits if there are safe havens for anti-competitive practices, for example, because evidence of anti-competitive practices cannot be collected or because undertakings are able to escape liability for fines. Undertakings therefore have a disincentive to enter such markets, to exercise their rights of establishment, and to provide goods and services there. Consumers based in Member States where there is less enforcement miss out on the benefits of effective competition enforcement. Uneven enforcement of Articles 101 and 102 TFEU, whether applied on a stand-alone basis or in parallel with national competition law, throughout the Union thus distorts competition in the internal market and undermines its proper functioning.

National administrative competition authorities should be able to carry out all necessary inspections of premises of undertakings and associations of undertakings where, in line with the case law of the Court of Justice of the European Union, they can show that there are reasonable grounds for suspecting an infringement of Article 101 or 102 TFEU. This Directive should not prevent Member States from requiring prior authorization by a national judicial authority for such inspections.

To be effective, the power of national administrative competition authorities to carry out inspections should enable them to access information that is accessible to the undertaking or association of

undertakings or person subject to the inspection and which is related to the undertaking or the association of undertakings under investigation. In order to ensure that inspections are effective, national administrative competition authorities should have the power to enter any premises, including private homes, if they can show that there is a reasonable suspicion that business records which may be relevant to prove an infringement of Article 101 or 102 TFEU are being kept in those premises.

Interim measures can be an important tool to ensure that, while an investigation is ongoing, the infringement being investigated does not seriously and irreparably harm competition. This tool is important to avoid market developments that could be very difficult to reverse by a decision taken by an NCA at the end of the proceedings. NCAs should therefore have the power to impose interim measures by decision.

To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Article 101 or 102 TFEU, either directly themselves in their own proceedings, in particular in administrative proceedings, provided that such proceedings enable the direct imposition of effective, proportionate and dissuasive fines, or by seeking the imposition of fines in non-criminal judicial proceedings.

The new regulation proposes that fines should be determined in proportion to the total worldwide turnover of the undertakings and associations of undertakings concerned. So, for this, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit. To prevent undertakings escaping liability for fines for infringements of Articles 101 and 102 TFEU through legal or organisational changes, NCAs should be able to find legal or economic successors of the undertaking liable, and to impose fines on them, for infringements of Articles 101 and 102 TFEU, in accordance with the case law of the Court of Justice of the European Union. NCAs should take into account the gravity and the duration of the infringement. Factors that might be taken into consideration include the nature of the infringement, the combined market share of all undertakings concerned, the geographic scope of the infringement, whether the infringement has been implemented, the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates and the size and market power of the undertaking concerned. The existence of repeated infringements by the same perpetrator shows its propensity to commit such infringements and is therefore a very significant indication that

the level of the penalty needs to be increased to achieve effective deterrence. Accordingly, NCAs should have the possibility to increase the fine to be imposed on an undertaking or association of undertakings where the Commission or an NCA has previously taken a decision finding that that undertaking or association of undertakings has infringed Article 101 or 102 TFEU and that undertaking or association of undertakings continues to commit the same infringement or commits a similar infringement. In accordance with Directive 2014/104/EU of the European Parliament and of the Council, NCAs should be able to take into account any compensation paid as a result of a consensual settlement. In addition, in exceptional circumstances, NCAs should be able to take into account the economic viability of the undertaking concerned. To ensure NCAs can impose dissuasive fines, the maximum amount of the fine that is possible to be imposed for each infringement of Article 101 or 102 TFEU should be set at a level of not less than 10 % of the total worldwide turnover of the undertaking concerned. This should not prevent Member States from maintaining or introducing a higher maximum fine that can be imposed.

Regarding to the leniency programmes, we have currently marked differences between the leniency programmes applicable in the Member States. Those differences lead to legal uncertainty on the part of infringing undertakings concerning the conditions under which they are able to apply for leniency, as well as uncertainty about their immunity status under the respective leniency programmes. Such uncertainty might weaken incentives for potential leniency applicants to apply for leniency. This in turn can lead to less effective competition enforcement in the Union, as fewer secret cartels are uncovered.

Evidence is an important element in the enforcement of Articles 101 and 102 TFEU. NCAs should be able to consider relevant evidence, irrespective of whether it is written, oral, or in an electronic or recorded form. This should include the ability to consider covert recordings made by natural or legal persons which are not public authorities, provided those recordings are not the sole source of evidence. This should be without prejudice to the right to be heard and without prejudice to the admissibility of any recordings made or obtained by public authorities. Similarly, NCAs should be able to consider electronic messages as relevant evidence, irrespective of whether those messages appear to be unread or have been deleted.

To ensure the effective enforcement of Articles 101 and 102 TFEU by NCAs there is a need to provide for workable rules on limitation periods. In particular, in a system of parallel powers, national limitation periods should be suspended or interrupted for the duration of proceedings

before NCAs of another Member State or the Commission. Such suspension or interruption should not prevent Member States from maintaining or introducing absolute limitation periods, provided that the duration of such absolute limitation periods does not render the effective enforcement of Articles 101 and 102 TFEU practically impossible or excessively difficult.

3. Conclusions

This Directive covers not only the application of Articles 101 and 102 TFEU and the application of national competition law in parallel to those Articles, but also covers the gaps and limitations in the tools and guarantees of NCAs needed to apply Articles 101 and 102 TFEU, because such gaps and limitations negatively affect both competition and the proper functioning of the internal market.

REFERENCES

- [1] International Competition Network. Available from:
<http://www.internationalcompetitionnetwork.org>
- [2] Consiliul concurenței România- Available from:
<http://www.consiliulconcurenței.ro/ro/activitate-internationala/cooperare-internationala/relatii-multilaterale/icn-ro.html>
- [3] Albu, E. Directiva, (UE) 2019/1 on the provision of means to the competition authorities of the Member States,
<https://www.juridice.ro/623336/directiva-ue-2019-1-privind-oferirea-de-mijloace-autoritatilor-de-concurenta-din-statele-membre.html>
- [4] Guillen Camares J- La ejecución del Derecho comunitario de la competencia por las autoridades nacionales, Revista de Derecho de la Unión Europea; 20, 2011: 15