

The Autorité welcomes the publication of the ECN + directive to empower the competition authorities of the Member States to be more effective enforcers

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Background

Directive n° (UE) 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, has been published in the Official Journal of the European Union.

The Autorité de la concurrence welcomes the adoption of this text which shows the common desire to strengthen the European competition policy. In view of these provisions, competition authorities of the EU Member States will thus be able to carry their actions independently and with the necessary resources, by using a common set of reinforced investigative and decision-making powers, along with broader effective mutual assistance powers. This framework guarantees a good balance between efficiency of procedures and protection for the rights of companies.

A directive that constitutes a decisive new step for European competition policy.

The draft directive followed the acknowledgement that, more than 15 years after the adoption of Council Regulation (EC) No 1/2003 which created the European Competition Network between national competition authorities and the European Commission, an ambitious new step was both possible and desirable.

The first step was the implementation of a flexible and responsive network in which the national authorities are fully competent to apply European competition law in a decentralized way, with the authorities cooperating to define which authority is best-placed to handle a case, and interacting regularly at both the investigation and decision-making stages.

This first step is a success, with good function of the mechanism for allocating cases, a harmonized implementation of the principles and a development of innovative cooperation between authorities and the Commission (with for instance the Booking.com decision issued in 2015 for which the French, Italian and Swedish authorities simultaneously accepted commitments from Booking).

The new step aimed to consolidate and reinforce national competition authorities, by harmonizing their powers, intervention means and functional rules in an ambitious way, after the model of more advanced authorities.

This directive could be adopted in a relatively short time, a consensus soon emerging on the necessity of this strengthening.

An increase of the guarantees of independence, means of actions and resources of all the competition authorities

Under the directive it would be required that each Member State ensures that each national competition authority has guarantees of independence, resources and enforcement and fining powers to allow efficient application of Articles 101 and 102 TFEU, combatting cartels and abuse of dominant position¹.

With regard to **statutory and organizational plan**, there is a need for independence and impartiality obligations applicable to members of national competition authorities. National authorities will now have the power to set their priorities in order to carry out their missions, and will be able to reject complaints lodged with them if they consider them not to be a priority (art.4). Member states will also be required to make sure that authorities have enough qualified staff along with sufficient financial, technical and technological resources (art.5) Authorities must be authorized to carry out investigations, and issue opinions on

laws and decrees and foster awareness of competition within the public. Finally, without prejudice to national budgetary rules and procedures, the authorities must be able to spend their budget independently, without any interference (same article).

Regarding the **investigative powers** plan, the directive affirms the right of national authorities to conduct unannounced inspections of undertakings and to obtain documents and information necessary to their investigations from companies (art 6 to 9.)

Regarding the **decision-making powers of Authorities, the directive will enact a considerable strengthening, by broadening the range of actions available to national authorities**. Each authority which detects an infringement must be able to require undertakings to bring the infringement to an end, and to **impose upon them any behavioural or structural remedies** (for instance a disposal of assets or of subsidiaries, or any contract modification) (art.10). Authorities must now be able to impose interim measures to prevent a risk of serious and irreparable harm to competition and this power may be exercised ex-officio without waiting for the case to be referred to them. Authorities will additionally be empowered to **accept commitments** from undertakings, to address competition issues, with effective powers to control them (art.12.)

Further, the directive provides for greater deterrence capability in relation to competition policy, by permitting competition authorities to impose "**proportionate and dissuasive fines**" on undertakings when they infringe competition law, or when they obstruct an investigation. By imposing a model of dissuasive administrative sanctions, the directive will lead several Member states to deeply revise their national law which does not currently confers such powers. The ceiling of fines must be set at a level of not less than 10 % of the total worldwide turnover of the undertaking concerned, which will again lead several Member states to significantly modify their national law which does not currently provide for such dissuasive sanctions. Further, in the case of an infringement by an association of undertakings, the ceiling must take into account the turnover of each active member thereof, which may lead to very high fines for associations of large undertakings (art.15.).

Moreover, the directive will harmonize and incentivise, at a European level, the clemency programs offering an **immunity of fines to undertakings** when they acknowledge their participation in a cartel.

Lastly, the directive reinforces **mutual assistance and cooperation tools** between national authorities, in order to ensure the efficiency of investigations and decisions made throughout the European Union.

For the French Autorité de la concurrence, the directive involves a strengthening of its powers of action, and for companies, even more dissuasive sanctions..

For the Autorité de la concurrence, this directive offers significant headway.

It is provided with new tools to be even more effective in implementing competition law.

- The Autorité will thus have the possibility to optimize its resources by allocating them to cases "recognized as a priority" ("principle of opportunity" measure).
- It will now be able to start proceedings ex-officio to impose interim measures, which is an asset to address the challenges of the digital economy.
- The directive foresees the possibility for the Autorité to impose structural remedies to companies in case of anticompetitive practices.
- All undertakings will be submitted to the same ceiling, which will lead to the suppression of the €3M ceiling which was applicable to « bodies » and associations of undertakings, such as trade unions or bar associations, which can henceforth be sanctioned up to the total amount of their members' resources.

. The directive must be transposed within two years.

What did the European Competition Network accomplished over the past 15 years?

- an uniform implementation of the European competition law (Articles 101 and 102 of the TFEU) with coordination procedures between national authorities and the Commission;
- more than 2000 procedures opened on this basis;
- The French authority has been the most active : more than 260 investigations opened on this basis since 2004 ;
- a flexible and efficient collaborative framework between national authorities and the Commission to allocate cases (best-placed Authority system);
- a strong coordination between national authorities and the European Commission on the conduct of investigations and the decisions issued, enabling a constructive dialogue and the implementation of a common vision on the implementation of competition law;
- A concrete cooperation between NCAs and the Commission in the carrying of Europe-scale investigations (enabling for instance the ADLC's case officers to provide assistance to those of the Commission in the conduct of investigations in French territory).

¹ The French authority already has certain guarantees provided by the directive such as independency, or guarantees concerning investigation and decision measures, or the possibility to impose sanctions up to 10% of the worldwide turnover of the undertakings.

> See the text of the 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

> **Press contact: Chloé Duretete +33 1 55 04 01 20/ Email**