The Contribution of the ECN+ Directive to strengthen the independence of competition agencies in Europe

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Panel:

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Outline of my presentation

1. An introduction on independence, resources, and the ECN+ Directive's provisions dealing with the independence of NCAs and their resources
2. What happened in Italy with the transposition of the ECN+ Directive.
3. Some problems that - at least in Italy – still reduce the ability of the Italian Competition Authorithy (ICA), though legally (and also de facto) independent and equipped with more than sufficient resources, to effectively apply Articles 101 and 102.
4. A bunch of final questions for our panelists.

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Why should we need NCA's independence, in the context of ECN? (1)

"the strong need for regulatory commitment and stability in competition law and policy makes independence a necessary condition for the effectiveness of competition authorities. Another important concern for independence is impartiality" (OECD 2016).

Independence is even more important in the context of a multilateral system of enforcement like the ECN. In the **internal market** we need a **level playing field from an enforcement perspective**. EU antitrust law should be enforced in **the general interest, homogenously, effectively, impartially, and with the same strength** in each Member State.

Independence is thus fundamental to prevent **unequal treatment between different economic operators**, and possible **capture.**

Mainly we need NCAs to be independent from national governments and political interference.

- **state-owned enterprises** subject of an investigation by a NCA who is also in some way dependent by the same public body.

- **Discrimination between national and non-national undertakings**.

- **Other political goals** (national champions; defense of national firms by the unfair attacks of foreign firms; employment, the fear of delocalization, keeping ownership of firms and infrastructures in the hands of national shareholders, and other less candid goals)

In sum, independence, together with sufficient resources, are fundamental tools to guarantee effective and uniform application of EU antitrust law by the NCAs.

Why should we need NCA's independence, in the context of ECN? (2)

Given that NCAs takes more than 90% of the total decisions under artt. 101 and 102, their independence is of paramount importance to **preserve the credibility and effectiveness of the EU system of enforcement**.

The problem of NCAs independence is – if not less relevant – different for mergers. The design of the thresholds and the one stop shop principle limit the jurisdiction of NCAs to mergers that are usually national in scope and less important for the internal market (but still, consider the possible prefential treatment of SOEs at national level). MSs have very limited power to change the outcome of the EU Commission appraisal process Furthermore, as the very recent *Aegon/VIG* decision testifies, the EU Commission has effective powers to condemn MSs breaching Article 21 of the EU Merger regulation, for example prohibiting a merger that was authorized by the EU Commission for reasons that cannot be reconciled with the notion of legitimate interest.

(the Hungarian government vetoed the acquisition of the insurance subsidiaries of AEGON by the Austrian firm VIG, based on tan emergency legislation on foreign direct investment introduced in the context of the coronavirus pandemic, arguing that the acquisition threatened Hungary's legitimate interests, defined as the fundamental interest of society (consider that VIG was already present in Hungary).

What do we mean for «independence»? (1)

The term independence comes from the latin verb dependere, (hang-from). Something is not dependent, or in-dependent when it is free to act and it is not linked or, better, is not subject to the authority, or the control, of any person or power, being the government, political power, the private sector, and the private practice.

Independence in this situation 'entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards the proceedings before them'

when we look at competition and competition authorities this is not enough. Lack of control can also lead to many evils, like inefficiency, self-dealing, corruption, lack of transparency, between the others.

Competition authorities have been created and have been given powers and resources to fulfil a task in the general interest, and there should be adequate controls to ensure that they use their powers and resources for that purpose. It is generally accepted that independence should go hand in hand with accountability.
NCA might also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.

What do we mean for «independence»? (2)

Since it is difficult to find a systematic and quantifiable indicator of de facto independence and the assessment of de facto independence would inevitably involve subjective judgements, independence indicators usually rely solely on the legal aspects of independence.

- term of the head of the agency and commissioners;
- conditions regarding the appointments and dismissals of the head of the agency and commissioners;
- source of budget and autonomy in spending;
- personnel policy;
- instructions from the executive;
- cooling of provisions for members and staff;

Did we have signs of lack of independence (and resources) before the ECN+ Directive?

- he Bundeskartellamt indicated that it was '**aware of several cases where the president of the NCA of a larger EU MS was dismissed ahead of the normal end of the term, reportedly because the respective MS's government did not agree with decisions taken by the authority**'.
- The Italian association of corporation "Assonime" referred to '**recent experience in some MSs** (for instance, Poland and Greece)' as showing lack of independence and excessive pressure from governments.
- Evidence of **non enforcement** or lenient enforcement in cases relating to SOE (consider for example the General Court decision T-791/19, *Sped-Pro S.A.*)
- Discriminatory enforcement to protect national firms.
- For other more concrete cases .. please read Maciej's book :-)

The same reasoning can be applied to **resources** (financial and human resources). Independence can lead to effective and non-discriminatory enforcement if and only if NCAs are provided with sufficient financial and human resources. This was a major problem in some Member States. Furthermore, in some cases, the problem was not linked to the number or skills of the human resources employed by NCAs, but mainly to the tasks they were assigned to in the context of a **multi-task** authority.

Article 4 ECN+ Directive (Independence)

- To guarantee the independence of NCAs, they should perform their duties/powers impartially and in the interests of the effective and uniform application of artt. 101 and 102, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the ECN.
- Staff and persons who take decisions should:
  - (a) Be able to perform their duties independently from political and other external influence;
  - (b) neither seek nor take any instructions from government or any other public or private entity,
  - (c) refrain from taking any action which is incompatible with the performance of their duties
  - (d) are subject to to avoid possible conflicts of interest.
  - (e) without prejudice to the right of a government of a Member State .. to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings; and
- The persons who take decisions … shall not be dismissed for reasons related to the proper performance of their duties
- Members of NCAs should be selected, recruited or appointed according to clear and transparent procedures laid down in advance in national law.
- NACAs shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU

Article 5 ECN+ Directive (resources)

- NCAs should have a sufficient number of **qualified** staff and sufficient **financial, technical and technological resources** that are necessary for the effective performance of their duties.

- NCAs shall be able, at a minimum, to conduct investigations with a view to applying Articles 101 and 102… and to co-operate closely in the ECN with a view to ensuring the effective and uniform application of Articles 101 and 102. NCAs shall also be able to advise public institutions and bodies on legislative, regulatory and administrative measures which may have an impact on competition in the internal market as well as promote public awareness of Articles 101 and 102.

- MS shall ensure that NCAs are granted independence in the spending of the allocated budget for the purpose of carrying out their duties.

- NCAs shall submit periodic reports on their activities and their resources to a governmental or parliamentary body.

Implementation

Under Art. 34 ECN+ Directive, the Directive had to be transposed by the 27 EU Member States by **4th February 2021**.

- In March 2021, the EU Commission opened infringement proceedings vis a vis a number of EU Member States, by sending a letter of formal notice, for lack of transposition of the Directive on time.
- Process is ongoing: for example, Belgium transposed the directive a couple of weeks ago (March 7, 2022).
- If Marco's information is updated, at the moment, 17 EU Member States have notified the Commission of national measures implementing the Directive, and the other EU MS will (hopefully) implement the Directive by the end of the year.
- Some improvements in the set up of NCAs (Croatia, Cyprus, Luxembourg). In other cases, there are still some doubts (for example, in Germany it seems that the implementation did not result in a clear ban on case-related political instructions.

Italy (1)

The Italian Government approved the new law (D. Lgs. n. 185/2021) transposing the ECN+ Directive in November 2021. Even if **the previous national legal framework was in line with the standards** set out in the Directive, the **Decree has codified the following additional guarantees**:

a. Prohibition of dismissal of ICA officials for reasons related to the proper performance of their duties;

b. Prohibition for ICA officials to solicit/accept instructions from any external (public and private) party;

c. Obligation to adopt a Code of Conduct (which however was already been adopted in 1995);

d. Prohibition for former officials, for 3 years following the termination of their duties, to be involved in cases with which they were dealing during their employment;

e. Independence in the spending of the ICA's allocated budget for carrying out its duties;

f. Reinforcement of the principle of discretionary action.

2 two very quick comments:

(a) A cooling-off period of 3 years may guarantee independence, but may also deter top lawyers and economists to join the Authority.

(b) The selection process can't be considered clear and transparent. The presidents of the Parliament and Senate select the **members** of the ICA jointly. There is a call, but no one knows who participate to the call, or can compare their cvs, other than the two presidents.
The same can be said about **staff**, where only a very tiny minority has been selected with an open procedure, while the majority of the staff has been transferred from other public bodies, administrative courts, and ministries.

Italy (2)

Overall, the degree of legal and *de facto* operational independence of the ICA is high and it has more than enough financial and human resources.

However:

1. **Having more than sufficient financial and human resources is not enough if these resources are employed for tasks different from antitrust enforcement**. The ICA not only have to enforce EU and national competition law, and perform many advocacy and procompetitive tasks, but at the same time has to enforce the law in many different fields, from consumer protection to misleading and comparative advertising, from abuse of economic dependency to the protection of small producers in the agri-food sector, from the evaluation of conflict of interest of government official to the legality rating of firms, not to mention the control of the sapidity of virgin oil ☺.

The new law slightly increases the number of officers and staff (+ 25), but we do not know how they will be selected and allocated in the various divisions of the ICA.

2. The **problem of resources also characterize the administrative courts in charge of the appeals** against the decisions of the ICA. We all agree that NCAs must have sufficient specialized human resources, but it seems that we have no problem entrusting judicial review of their decisions to overworked, unspecialized courts with no time to invest in studying this incredibly complex area of the law.

Italy (3)

3. The problem of effective enforcement is exacerbated by some **procedural provisions and their interpretation** by our administrative judges. These provisions seems to constitute a **systematic obstacle to the prohibition and imposition of effective fines for infringements of EU competition law**. In other words, they may render the application of the rules of EU law impossible or at least excessively difficult. Let me give you some examples:

3.1 Administrative judges believe that once a complaint or a leniency application has been received, the authority must strictly obey to the **reasonable time requirement** (which the Italian admin. law sets in 90 days). The ICA should thus almost immediately open a formal investigation, on pain of losing the power to act. This has led to the annulment of several decisions relating to leniency applications received in a simplified form. The ICA had to wait for the "go-ahead" from the EU Commission before starting the national investigation, but the judges argued that since the ICA was not legally bound to wait, it waited too long before starting the procedure, losing the power to act. The "finale" is **annulment** of the ICA decisions.

Italy (4)

3.2 Time limitation. The antitrust law does not contain specific rules on time limitation and refers to other general administrative provisions In some cases the judges have interpreted the rules on time limitation in such a way as to **compress, if not eliminate, the spaces for intervention by the Authority**.

3.2.1 On the one hand, our judges stated that in the event of an association's decision to ban comparative advertising, even if over time the companies observed this prohibition (and the association checked for compliance), the **dies a quo**, i.e. the moment from which to calculate the limitation period was that of the initial decision.

3.2.2 On the other hand, in a couple of cases, administrative judges said that the moment in which the **limitation period is interrupted** is that of the final decision in which the Authority imposes the fine.

It is clear that with these rules and these interpretations the possibility of applying the European antitrust rules by the ICA is strongly compromised.

This situation is not unique to Italy, as the recent Court ruling C-308/19 in the case of the Romanian Competition Council demonstrates. The Court ruled that the interpretation of the time limitation rules by Romanian judges compromised the effective enforcement of EU competition law by the Romanian Competition Authority, i.e. **their interpretation could present a systemic risk that infringements of that law may go unpunished**. In this case, the rule (or its interpretation) must be considered contrary to Article 4 (3) TEU and Article 101 TFEU, read in the light of the principle of effectiveness.

Some open questions

a) Do you consider Art. 4-5 ECN+ Directive sufficiently 'clear' and 'effective', in limiting political pressures by the national Government on the NCA's activities?

b) EU Directives on sector regulation also safeguard the NRA's independence; such provisions have been extensively interpreted by the ECJ case law. Should Art. 4-5 ECN+ Directive be interpreted, *mutatis mutandis*, in light of the ECJ case law concerning the independence of energy, telecom and data protection authorities?

c) The EU Commission has already opened infringement proceedings vis a vis the EU Member States that have not transposed the ECN + Directive yet. Do you expect the EU Commission might in the future start infringement proceedings against the EU Member States that de facto "limit" the independence of their NCA? Under what grounds? And what about non enforcement or discriminatory enforcement due to *de-facto* political influence?

d) Could ECJ preliminary rulings and EU Commission amicus curiae be relied upon to safeguard the NCAs' independence - i.e., alternative tools to the infringement proceedings?

e) Finally, I don't know if the situation I described for Italy (and Romania) is a common feature, but if the system of enforcement as a whole raise a systemic risk of under-enforcement, are the tools already described enough to solve the problem or should we think to more radical reforms?