



Rialtas na hÉireann
Government of Ireland

Public Consultation on Aspects of the Competition (Amendment) Bill 2021

January 2021

Appendix: Background material to forthcoming Competition
(Amendment) Bill – ECN+ Directive transposition elements

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1. Existing Provision

1.1 European Competition Network (ECN) and Regulation 1/2003

National Competition Authorities (NCAs) from each Member State and the Commission together form a network called the European Competition Network (ECN) which was established in 2004 when Council Regulation (EC) 1/2003 (Regulation 1/2003) entered into force. The ECN is intended to ensure effective and consistent application of the EU laws with close cooperation by its members.¹ The ECN provides a forum for the coordination of ongoing investigations, as well as the ability to pool experience and identify best practices. It aims to provide an effective and responsive mechanism to counter companies engaged in EU cross-border competition restricting practices to the detriment of consumers. The decentralisation of EU competition law enforcement also enables the Commission to dedicate its resources to curbing the most serious infringements of EU competition law.²

1.2 National Competent Authorities for Regulation 1/2003

The State has designated the following bodies as NCAs as required by Article 35(1) of Regulation 1/2003:

- the Competition Authority (now the Competition and Consumer Protection Commission – the “CCPC”),³
- the Director of Public Prosecutions (“DPP”),⁴
- the courts (or, as appropriate, the office of the relevant court),⁵ and
- the Commission for Communication Regulation (“Comreg”).⁶

In 2007, ComReg was designated as an NCA and has parallel powers to the CCPC to investigate breaches of European competition law for matters within its specific remit. Under Regulation 1/2003, the courts, along with the NCAs are empowered to apply Articles 101 and 102 TFEU in full. The courts⁷ were designated an NCA⁸ given the requirement on NCAs to impose financial sanctions and penalties in Article 5 of Regulation 1/2003⁹ as the CCPC and ComReg do not currently have this power.

Article 35(2) of Regulation 1/2003 allows that different powers and functions can be allocated to those bodies designated as NCAs: “When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.”

¹ For the operation of ECN see Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/03

² Regulation 1/2003, recital 3

³ European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 SI 2004/195, reg 4 (2)(a) (SI 2004/195)

⁴ SI 2004/195 reg 4(2)(b)

⁵ Regulation 1/2003, art 6

⁶ European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) (Amendment) Regulations 2007, SI 2007/525 reg 3(iii)

⁷ District Court, Circuit Court, High Court, Court of Criminal Appeal and the Supreme Court.

⁸ For the purposes of article 35 Regulation 1/2003.

⁹ SI 2004/195, reg 4(2)(c)

1.3 Importance of Effect on Trade between Member States

EU competition law applies where when the alleged breach may affect trade between Member States¹⁰ and/or where EU competition law must be taken into account. An NCA must consider whether to apply Articles 101 and 102 TFEU to a case which is not under investigation by the Commission by determining whether the agreement or conduct in question could affect trade between Member States. If there is no effect on intra-Member State trade, EU competition law does not apply, and the case may be decided exclusively on the basis of national competition law.

Conversely, if it is considered that there is an effect on trade between Member States, Article 3(1) of Regulation 1/2003 obliges the NCA to apply Articles 101 and 102 TFEU in conjunction with national law. The legality of the simultaneous application of EU and national law resulting in imposition of fines in a single decision by the same national competition authority has been recently upheld.¹¹ In Ireland, a breach of EU law which is prosecuted under the Competition Acts can result in criminal liabilities and can also apply to natural persons such as directors who can be subject to criminal sanction.

1.4 Review of the Operation of Regulation 1/2003

In 2013, the EU Commission began its assessment of the functioning of the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. Based on the results of this analysis, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*¹² (Commission Communication) found that there is scope for the NCAs of EU Member States to be more effective enforcers and identified a number of areas for action to boost effective enforcement by the NCAs. These include guarantees that NCAs have adequate resources and are sufficiently independent, have an effective enforcement toolbox, can impose effective fines and have effective leniency programmes. The Commission highlighted divergences in national powers, procedures and sanctions available to NCAs, which has resulted in uneven enforcement of EU competition rules.¹³ The Commission made direct reference to the inability of Irish NCAs to impose civil fines: 'Firstly, in one Member State it is currently not possible to impose deterrent civil/administrative fines on undertakings.'¹⁴

Arising from the findings of the Commission Communication and following additional stakeholder engagement and consultation, the Commission presented its formal proposal for a Directive¹⁵ on 22 March 2017. The Directive was adopted by the European Parliament on 11 December 2018 and subsequently published in the Official Journal on 14 January 2019.

10 Regulation 1/2003, art 3(1)

11 Case C-617/17 Powszechny Zakład Ubezpieczeń na Życie (Court of Justice, 3 April 2019), para 39

12 COM (2014) 453 final (Commission Communication)

13 *ibid* 9, 30-34

14 Commission Communication, 10, 37

15 Commission, 'Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM (2017) 0142 final

2. ECN+ Directive and Proposed Legislation

2.1 Introduction

The *Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*¹⁶ (ECN+ Directive) must be transposed into national law by 4 February 2021.¹⁷ The Minister for Enterprise, Trade and Employment intends to transpose the ECN+ Directive by primary legislation.¹⁸ It is also intended to introduce further provisions beyond what is mandated by the ECN+ Directive to provide coherence between national competition law and corresponding responsibilities in EU law. This consultation is related only to some of those further provisions. However the main objectives of the ECN+ Directive are set out for information purposes as is the Department's policy direction regarding the Directive's transposition.

2.1 Main objectives of the Directive

The central aim of the ECN+ Directive¹⁹ is to ensure that National Competition Authorities (NCAs) have guarantees of independence, sufficient resources and appropriate powers of enforcement, including the ability to issue fines, for breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Alongside the application of Articles 101 and 102, the Directive also covers the parallel application of national competition law to the same case and (in Articles 31(3) and (4))²⁰ the application of national competition law on a stand-alone basis. The Directive sets rules on mutual assistance to ensure close cooperation within the European Competition Network (ECN).

The Directive aims to achieve the following specific objectives:

- ensuring all NCAs have effective investigation and decision-making tools
- ensuring that all NCAs are able to impose effective deterrent fines
- ensuring that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions, and
- ensuring that NCAs have sufficient resources and can enforce EU competition rules independently.

The main objective of the ECN+ Directive is to make sure that the full potential of the decentralised system of enforcement of EU competition rules put in place by Regulation 1/2003 is realised thus boosting effective enforcement of the EU competition rules. It also aims to underpin close cooperation in the European Competition Network (ECN).

¹⁶ [2019] OJ L11/3 (ECN+ Directive)

¹⁷ ECN+ Directive, art 34

¹⁸ Parliamentary Question 24596/19 (<https://www.oireachtas.ie/en/debates/question/2019-06-13/121/>)

¹⁹ ECN+ Directive, Recital 3

²⁰ These articles relate to the rules on access to leniency statements and settlement submissions.

2.3 Scope of the Directive

The Directive puts in place a framework of rules to ensure that NCAs have the necessary powers and resources to effectively apply Articles 101 and 102 of the Treaty. The Directive also puts in place rules on mutual assistance to ensure close cooperation within the ECN. Legal advice was previously sought in relation to the scope of the ECN+ Directive which was received from DBEI legal advisers on 10th January 2019. A summary of this advice is that the ECN+ Directive will only apply in circumstances where the NCAs consider provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and when there is also an element of inter-state trade involved. The ECN+ Directive will not apply when the NCAs are considering a potential infringement of Irish competition law on a stand-alone basis, with the exception of article 31(3) and (4).

2.4 Cross Application of Measures to National Competition Law

The Minister of Enterprise, Trade and Employment aims to introduce these new measures and powers from the ECN+ Directive into Irish competition law in the most coherent manner possible and to avoid parallel systems of inspection, investigation, enforcement and sanction in operation. For this reason, it is intended that the primary legislation will bring the same powers, tools and recourse to sanction for the NCAs irrespective of whether there is EU cross-border effect. This approach reflects the fact that it may not be apparent at the beginning of an investigation whether there is cross-border effect in the matter under investigation, which could leave NCAs uncertain of the powers at their disposal in the preliminary investigation of a possible offence.

The Department is of the view that a robust suite of powers should be available for the investigation of competition law offences. The powers and sanctions that will be available arising from the transposition of the ECN+ Directive will be incorporated into national law, in so far as is possible, in order to avoid a divergence of outcomes depending on whether national or EU competition law is being applied.

3. Main features of ECN+ Transposition

3.1 Powers of Inspection

The ECN+ Directive grants NCAs the power to conduct unannounced inspections of undertakings and associations of undertakings, including the power to enter any premises or vehicles and to examine any books and other records irrespective of the medium on which they are stored, including electronic communications and records stored in the Cloud. NCAs will also be able to seal any premises, vehicle or equipment pending later re-entry to the extent necessary for the inspection.

The transposition of the ECN+ Directive will mandate such powers for any investigation where it relates to provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and when there is also an element of inter-EU Member state trade involved. The legislation transposing ECN+ will ensure that NCAs investigating a potential infringement of Irish competition law without a cross-border element will be drawing from an identical set of powers.

NCAs have the power to investigate breaches of sections 4 and 5 of the Competition Act 2002 (2002 Act) on both a civil and criminal basis. Once the ECN+ Directive is transposed, NCAs should be in a position to use their search powers in the context of either a civil/administrative or criminal investigation.

3.2 Interim Measures

In order to ensure that an infringement of Article 101 or 102 TFEU does not seriously harm competition while an investigation is ongoing, the Directive seeks to give an NCA the power to take interim measures by decision. This power is considered important to avoid market developments that would be difficult to reverse at the end of an investigation. A decision imposing interim measures should be valid only for a specified period, either until the conclusion of the proceedings by an NCA, or for a fixed time period which can be renewed insofar as it is necessary and appropriate. Interim measures, or injunctions, are increasingly promoted by the European Commission as a way to intervene quickly in problematic markets.

Article 11 of the ECN+ Directive requires that NCAs be empowered to act of their own initiative to order by decision the imposition of interim measures by prima facie finding of an infringement. DBEI has obtained confirmation from the European Commission that the drafting language used in Article 11 of the ECN+ Directive refers to NCAs as a collective noun which can be understood by applying Article 35(1) of Regulation 1/2003. In keeping with Article 35(2), the relevant functions required by Article 11 can be assigned to different NCAs as appropriate.

The proposed legislation transposing ECN+ provides that a national administrative competition authority (as defined in the ECN+ Directive) should of its own initiative and arising from an ongoing investigation, introduce interim measures by way of prohibition notice which can be appealed to the court.

3.3 Fines

3.3.1 Introductions of Fines

A central objective of the Directive is to ensure that NCAs in all Member States can impose 'effective, proportionate and dissuasive fines' for breaches of Articles 101 and 102 TFEU. The inclusion of these provisions in the ECN+ Directive is of specific importance for transposition in an Irish context as it will present a sea change in the enforcement capabilities of Irish NCAs. There are two types of fines required by the ECN+ Directive, non-criminal financial sanctions provided for in Article 13(1) and periodic payment penalties as in Article 16.

3.3.2 Non-criminal Financial Sanctions

Article 13(1) of the ECN+ Directive requires that Member States must ensure non-criminal financial sanctions can be imposed for breaches of EU competition law.²¹ This obliges Member States, such as Ireland with a purely criminal regime for levying fines arising from convictions for competition law breaches, to introduce an additional non-criminal system. Article 13(1) specifies that an NCA must be able either to impose fines in its own administrative proceedings, or to seek the imposition of fines in non-criminal judicial proceedings. Recital 40 clarifies that the relevant system introduced arising from the requirements of Article 13(1) will be without prejudice to criminal proceedings under national law which can also result in the levying of fines.

3.3.3 Cross Application of non-criminal financial sanctions to Irish law

In order to ensure coherence with EU competition law, and in instances where there is a parallel application of EU and Irish law, the proposed legislation will allow for the introduction of a robust system for non-criminal financial sanctions arising from the Directive which can be cross applied to Irish competition law with appropriate constitutional and procedural safeguards.

3.3.4 Periodic Penalty Payments

Article 16 relates to periodic penalty payments with a view to tackling continuing and future non-compliance by undertakings without prejudice to the power of NCAs to punish non-compliance using measures arising from Article 13(2).²² It should be noted that Article 16, in allowing for periodic payment penalties, distinguishes between national administrative competition authorities in 16(1)²³ and national competition authorities²⁴ in 16(2). This means that the CCPC and ComReg as national administrative competition authorities will be required to impose periodic penalty payments for failure of an undertaking/undertakings to supply information requested under Article 8 or to appear at an interview requested under Article 9. For the purposes of transposition, based on legal advice, the application of Periodic Penalty Payments will have two separate approaches depending on whether it is EU or Irish

21 Further elaboration on this matter can be found in recitals 40-43 and 45-46.

22 ECN+ Directive, recital 44

23 'national administrative competition authority' means an administrative authority designated by a Member State to carry out all or some of the functions of a national competition authority. ECN+ Directive, art 2(1)(2)

24 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003 as being responsible for the application of Articles 101 and 102 TFEU; Member States may designate one or more administrative competition authorities (national administrative competition authorities), as well as judicial authorities (national judicial competition authorities). ECN+ Directive art 2(1)(1)

competition law that is being infringed. A decision to impose a periodic penalty payment in the case of an infringement of Irish competition law will require confirmation by the appropriate court.

3.4 Leniency and Immunity

The ECN+ Directive requires that Member States have a leniency programme for cartels which enables NCAs to grant immunity from fines, for disclosure of participation in a cartel, as well as a reduction in fines in certain circumstances for undertakings that do not qualify for immunity. The introduction of the leniency programme for cartels will ensure that the main principles of the ECN Model Leniency Programme²⁵ come into operation in Ireland. The leniency programme required by the ECN+ Directive will be a novel departure as Ireland is currently the only country that does not have such a leniency programme for competition law in place.²⁶ There is an additional measure in Article 18(3) in relation to the possibility to grant additional reductions in fines for compelling evidence submitted by the undertaking to the NCA which results in a higher fine levied on the participants in a cartel.

The introduction of both immunity and leniency on a statutory basis is also being implemented in the proposed legislation for civil infringements of national competition law, as the incentive to apply for leniency could diminish if the NCA's investigation were to subsequently establish that the cartel was not capable of affecting trade between EU Member States and breached Irish competition law only.

25 Further information on the ECN Model Leniency Programme is available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

26 Joint Oireachtas Committee on Business, Enterprise and Innovation Debate 13 February 2018

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January 2021

