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REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES - Contribution from the European Commission

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This contribution is submitted by the European Commission under Session III of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/rca.

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Regional Competition Agreements: Benefits and Challenges

-- European Commission --

1. Introduction

1. This paper contains the European Commission's ("Commission") contribution to the OECD Global Forum on Competition session on "*Regional Competition agreements: benefits and challenges*" scheduled for November 2018 in Paris.

2. Considerations and preconditions for the creation of the ECN

2.1. What have been your key considerations to enter into the RCA? What were your objectives? What were your expectations, and have they materialised?

2. When the Treaty of Rome was signed in 1957, the European Single Market, also known as the internal market was created. It seeks to guarantee the free movement of goods, capital, services, and labour – the "four freedoms" – within the European Union.

3. The EU competition rules are one of the defining features of the internal market: if competition is distorted, the internal market cannot deliver on its full potential and create the right conditions for sustained economic growth. A key aspect of making the internal market deeper and fairer is ensuring that the competition rules are effectively enforced so that they deliver close to the citizen.

4. Until 2004 the enforcement regime in the EU did not include a competition RCA. Regulation 17[1], which dated from 1962, was characterised by a centralised notification and authorisation system for Article 101(3) TFEU which meant that companies *ex ante* notified all the potentially anticompetitive agreements to the Commission in order to avoid any liability. Regulation 1/2003[2], which entered into force on 1 May 2004, brought about a radical change in the way in which the EU antitrust prohibitions contained in Articles 101 and 102 TFEU are enforced: it abolished this system and replaced it by a system of decentralised *ex post* enforcement, in which the European Commission and the national competition authorities of the EU Member States (NCAs), forming together the European Competition Network (ECN), pursue infringements of Articles 101 and 102 TFEU.

5. In the broad meaning of the term, the ECN is a RCA, of which the formal cooperation mechanisms are laid down in Regulation 1/2003, in the Commission's Network

[1] Council Regulation No 17 [1962] OJ 13/204 (Special English Edition 1959-62, p 87).

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

Notice[3] and in the Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities[4].

6. The decentralisation of the enforcement of Articles 101 and 102 TFEU and the creation of the ECN have been decided based primarily on three considerations:

- Resource effectiveness: given the limited resources of the European Commission, adding the resources of NCAs allows devoting substantially more resources to the detection and punishment of violations of Articles 101 and 102 TFEU.
- Better allocation of cases: the NCAs concerned are likely to have better information than the Commission for cases where the relevant markets are local, national or regional.
- Better enforcement: enforcement by several authorities allows to multiply the number of cases assessed and to create a dynamic development of close cooperation for the enforcement of the competition rules.

7. The expectations materialised: the decentralisation of the enforcement of Articles 101 and 102 TFEU to the NCAs brought about by Regulation 1/2003 has been a major success.

8. From the start of the application of Regulation 1/2003 on 1 May 2004 until 31 December 2017, the NCAs have informed the Commission and their fellow NCAs of 2013 investigations under Articles 101 and 102 TFEU, and of envisaged final decisions ordering termination of infringements, imposing fines or accepting commitments in 1031 cases[5]. During the same period, the Commission informed the Network of 348 new investigations of its own, and adopted 97 final decisions under Articles 101 and 102 TFEU. The national competition authorities have thus in quantitative terms become the primary public enforcers of Articles 101 and 102 TFEU, adopting more than 85 % of all decisions.

9. In its 2014 communication "*Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*[6]", the European Commission stated that Regulation 1/2003 had transformed the competition enforcement landscape. Indeed, the enforcement of the EU competition rules has considerably increased as a result of the achievements of the Commission, the ECN and the NCAs. There has been a dynamic development of close cooperation within the ECN, which has underpinned the coherent application of the EU competition rules throughout the EU. NCAs have become a key pillar of the application of the EU competition rules and have considerably boosted enforcement.

10. However, the communication also concluded that it is important to build on these achievements to create a truly common competition enforcement area in the EU and that it is therefore necessary, in particular to:

[3] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53.

[4] Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, available from the Council register at http://register.consilium.eu.int (document No 15435/02 ADD 1).

[5] http://ec.europa.eu/competition/ecn/statistics.html.

[6] Available at http://ec.europa.eu/competition/antitrust/nca.html

- Further guarantee the independence of NCAs in the exercise of their tasks and ensure that they have sufficient resources;
- Ensure that NCAs have a complete set of effective investigative and decision-making powers at their disposal; and
- Ensure that powers to impose effective and proportionate fines and well-designed leniency programmes are in place in all Member States and consider measures to avoid disincentives for corporate leniency applicants.

11. Accordingly, on 22 March 2017 the Commission presented a proposal intended to empower Member States' competition authorities to be more effective enforcers (the ECN+ Directive). The proposal aims to ensure that when applying the same legal basis - the EU antitrust rules - national competition authorities have the appropriate enforcement tools in order to bring about a genuine common competition enforcement area. To that end, and in light of the findings in the communication referred to above, the new rules will make sure that NCAs will:

- Act independently when enforcing EU antitrust rules and work in a fully impartial manner;
- Have the necessary financial and human resources to do their work;
- Have all the powers needed to gather relevant evidence;
- Have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules; and
- Have coordinated leniency programmes which encourage companies to come forward with evidence of illegal cartels.

12. A political agreement has been found between the co-legislators in May 2018. The legal text still needs to be formally approved by the European Parliament and Council, which is expected by the beginning of 2019[7]. The Member States will have two years to transpose the ECN+ Directive into national law. Once the future Directive is fully transposed into national law, the decentralised EU enforcement system will have reached yet another milestone.

2.2. Before entering into the RCA, did your jurisdiction define any preconditions to enter?

13. Given the specific nature of the European Union, the ECN was set up between the NCAs of Members States and the European Commission. It should not be forgotten that the EU decentralised enforcement system equals a decentralised application of primary EU law (the Treaty on the Functioning of the European Union), and that it is therefore reserved for the authorities of the EU Member States.

14. The EFTA Surveillance Authority and the competent authorities of the EFTA States, however, also participate in ECN meetings related to policy matters, with a view to

[7] The text agreed between the co-legislators is available at: http://data.consilium.europa.eu/doc/document/ST-10033-2018-INIT/en/pdf

ensuring the effective enforcement of the EEA competition rules and their uniform interpretation and application across the EEA[8].

2.3. Has your jurisdiction undergone changes to the competition laws or revised the legal framework (criminal vs. civil/administrative enforcement) to comply with, or accommodate for, the RCA?

15. Regulation 1/2003 does not lay down any harmonized procedure for the enforcement of Articles 101 and 102 TFEU by NCAs, meaning that NCAs' proceedings are mainly governed by national procedural law[9]. This includes such fundamental dimensions as rules on standing and commencement of proceedings, powers of investigation, level of fines, and remedies against decisions concluding the investigation.

16. Indeed, Regulation 1/2003 only contains very limited harmonizing measures as regards national procedures. Article 2 provides that the burden of proving an infringement of Article 101(1) and 102 TFEU lies with the party or the authority alleging the infringement, and that the burden of proving that the conditions in Article 101(3) TFEU are satisfied lies with the undertaking claiming the benefit of the application of that provision. Article 5 spells out the powers of the NCAs and the decisions that they may adopt. Articles 11, 12, and 13 lay down provisions on cooperation between the Commission and NCAs having an impact on the procedure governing domestic proceedings.

17. In its Staff Working document attached to the communication on the 10 years of the ECN "*Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*[10]", the Commission noted that "*voluntary convergence can be achieved if Member States decide to align their procedures and/or sanctions with a common EU model, despite the absence of harmonisation by legislation. Indeed, many Member States have voluntarily aligned their procedures for the enforcement of competition law to a greater or lesser extent with those set out for the Commission in Regulation 1/2003.*"

18. To a certain extent procedural convergence has also been enhanced in the context of agreements on financial support from the EU with the so called Programme Countries[11] (mainly the introduction of priority setting, more effective investigatory powers for the

[8] Protocol 23 of the EEA agreement concerning co-operation between the Commission and ESA under Articles 53 and 54, Article 1A.

[9] Except for the fact that, according to Article 5 of regulation 1/2003, all NCAs must be able to adopt cease-and-desist orders, order interim measures, accept commitments and impose fines and other penalties as provided for under national law.

[10] Available at http://ec.europa.eu/competition/antitrust/nca.html

[11] Commission Staff Working document - Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, para 49. Euro area member states that are experiencing financing difficulties or are threatened by such difficulties can receive financial support via the European Stability Mechanism - a financial institution set up by the euro area member states. Decisions to release tranches of financial assistance are taken by the Eurogroup following reviews of the progress achieved in implementing a programme.

NCA or the introduction of binding commitment decisions). Other reforms have been spurred by recommendations in the framework of the European Semester[12].

19. Outside the European Semester framework, bilateral contacts have been used to foster convergence, often prompted by requests from NCAs for informal reactions to policy measures under preparation. Examples include consultations from NCAs to the ECN members on draft leniency programmes.

20. Importantly, multilateral work within the ECN has been a major catalyst in encouraging Member States and/or NCAs to ensure greater convergence. This has resulted in the production of comparative reports as well as policy and guidance documents aimed at enhancing convergence in the areas of procedures, leniency and fines[13].

21. However "*there are limits to what can be achieved by voluntary convergence and 'soft tools' developed in the ECN, as well as the means to foster convergence in the context of cross-cutting EU programmes. Where procedural differences are rooted in national legal traditions, national fundamental right standards or other general principles, it may be difficult to achieve convergence with a common standard through the use of 'soft tools', including in the context of economic adjustment programmes*[14]."

22. The insufficiency of convergence through soft tools is one of the main reasons for ECN+. The ECN+ Directive, soon to be adopted, will lead to further harmonisation in relation to e.g. NCAs fining powers. Currently there are different sanctioning systems in place in the Member States. Whereas most Member States provide for a system of administrative sanctions against undertakings, in some of them sanctions are primarily imposed by civil or criminal courts. Experience shows that in the purely criminal systems in Europe, there is very limited enforcement of the EU competition rules. To tackle this, the Directive gives Member States which have fully criminal enforcement systems the option of allowing NCAs to impose fines in administrative proceedings (model used by the large majority of Member States) or to seek the imposition of fines before civil courts (currently used in Austria, Finland and Sweden). This would work as an add-on to the current criminal route.

23. Moreover, as will be discussed below, the ECN+ Directive contains targeted provisions to ensure that all NCAs have a leniency programme in place, containing core principles that are common across the EU.

[12] Ibid, para 50. The European Semester provides a framework for the coordination of economic policies across the European Union. It allows EU countries to discuss their economic and budget plans and monitor progress at specific times throughout the year.

[13] See ECN recommendation on investigative powers, enforcement measures and sanctions in the context of inspections and requests for information, available at http://ec.europa.eu/competition/ecn/documents.html

[14] Commission Staff Working document - Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, para 53.

3. Benefits of the ECN

3.1. What have been the benefits for your jurisdiction and/or competition agency as a result of the RCA? Has there been a convergence in competition laws and practices? Has the RCA significantly enabled receiving/providing support from/to other competition authorities?

24. The need to ensure the coherent application of Articles 101 and 102 throughout the internal market was one of the main drivers behind the creation of the ECN and a number of the supporting cooperation mechanisms contained in Regulation 1/2003. Prior to the adoption of Regulation 1/2003 there was widespread fear that the empowerment of national courts and competition authorities to apply Articles 101 and 102 in full would lead to inconsistent application of EU competition law.

25. To address these concerns, Regulation 1/2003 created a number of mechanisms which constitute the backbone of the ECN's framework for ensuring consistency. The network itself, however, is not regulated by the Regulation in any detail. Article 11(1) merely requires the Commission and the competition authorities of the Member States to apply the EU competition rules in close cooperation. Recital 15 further provides that the Commission and the competition authorities of the Member States should form together a network of public authorities applying the EU competition rules in close cooperation, and that for that purpose it is necessary to establish arrangements for information exchange and consultation. It also states that further modalities for cooperation within the network will be laid down and revised by the Commission in close cooperation with the Member States: these are contained in the Network Notice.

26. The three key mechanisms which seek to ensure the coherent and effective application of the EU antitrust rules are: (a) the obligation on NCAs under Article 11(3) to inform the Commission about a new investigation before, or without delay after, commencing the first formal investigative measure; (b) the obligation under Article 11(4) on NCAs to inform the Commission about envisaged decisions; and (c) the possibility of the Commission to intervene if there is a serious risk of incoherence, by relieving the NCA of its competence to act through opening its own investigation in the same case (Article 11(6) of Regulation 1/2003).

27. We will focus on Article 11(4), which provides that NCAs are obliged to inform the Commission no later than 30 days before adopting decisions requiring that an infringement be brought to an end, accepting commitments, or withdrawing the benefit of a block exemption Regulation. The types of decision covered by Article 11(4) are the national equivalents of the decisions adopted by the Commission under Articles 7 and 9 of Regulation 1/2003, i.e. cease-and-desist orders and commitment decisions. There is no obligation to inform the Commission of rejections of complaints and other types of decisions whereby NCAs decide that there are no grounds for action on their part. The ECN+ Directive adds that the ECN shall be informed of any adopted interim measures (Article 11) and of any closing of proceedings (Article 10 paragraph 2).

28. When making a submission to the Commission the NCAs must provide it with a summary of the case, the envisaged decision, or, in its absence, any other document indicating the proposed course of action. In addition, they must provide either a draft decision or, in its absence, any other document indicating the proposed course of action. This latter option is particularly relevant where the NCA does not itself draft the final

decision but rather submits a statement of objections or a writ or indictment to another authority including a court that adopts the final decision.

29. Under Article 11(4) the Commission is the main interlocutor. NCAs are obliged to provide the Commission with the specified information and allow the Commission 30 days to scrutinize the documents submitted. There is no equivalent obligation in respect of the other NCAs. There is a right but no obligation to inform them, although in practice this occurs as a matter of routine.

30. The purpose of the procedure established by Article 11(4) is to enable the Commission (and the NCAs) to detect potential problems of inconsistent application and cure them preventively. To date, the Commission has sought to ensure coherency through dialogue. Observations may range from purely technical points to, in rather rare cases, the suggestion to re-examine the line taken with respect to particular allegations. Such observations are necessarily advisory in nature and leave the responsibility of the authority dealing with the case entirely intact, but they often lead to very fruitful discussions and in practice to a very high level of convergence. In this context, Regulation 1/2003 further provides the Commission with formal powers to counter a serious risk of incoherence by itself initiating proceedings in the same case, thereby relieving the NCA of its competence to deal with this case. This situation is distinct from the scenario where the Commission initiates proceedings as part of its own enforcement action. To date, the Commission has not used the power to initiate proceedings after the reception of an envisaged decision pursuant to Article 11(4) over the entire period of application of Regulation 1/2003, essentially for the reason that case practice in the ECN has developed in a broadly coherent manner and more upstream means of interaction have shown to be more efficient.

31. Different related ECN work streams impacting the approach of the NCAs well before the stage of informing the Commission under Article 11(4) have also played a key role in ensuring coherence. For example Horizontal working groups and sector-specific sub-groups have been set up, where case handlers from the ECN authorities exchange views and learn from each other's experiences with particular issues or particular sectors. Through joint learning and sharing of experience these discussions help to minimise the risk of incoherent application of EU competition law. The ECN is a forum that ensures a high degree of exchange of experience and cross-fertilisation of ideas, as well as a framework for more intense coordination regarding sectors or cross-cutting questions, in particular in areas where new business models or other forms of economic or technological innovations bring up new questions for antitrust enforcement.

32. Fluency of cooperation (including work sharing between the enforcers) and coherent outcomes benefit from upstream cooperation and early exchanges, over and above the formal cooperation mechanisms that play a role at a relatively advanced stage.

3.2. To what extent has the RCA been used as a tool against cross-border anti-competitive practices and transactions and has it significantly contributed to increasing the level of enforcement and improving its quality?

3.3. Have you undertaken joint investigations with other jurisdictions participating in the RCA? If so, what was the nature of the co-operation (exchange of information, joint dawn raids, etc.)?

33. From the outset of competition enforcement by the Commission, NCAs have been involved in the decision-making process of the Commission through the consultation of the Advisory Committee which is composed of representatives of NCAs. They are called upon to provide the Commission with their expert advice and experience and the Commission is to take utmost account of the opinion of the Advisory Committee.

34. However, without the cooperation mechanisms of Regulation 1/2003 for inspections (and other investigatory measures) and exchange of information, it would have been significantly more difficult or even impossible for NCAs to obtain all necessary evidence to apply Articles 101 and 102 effectively. The result would have been that all cases where the evidence is spread over more than one Member State would have had to be dealt with by the Commission or by several NCAs in parallel.

35. The possibility to exchange information, including confidential information, has facilitated cooperation among enforcers in the EU at all stages of antitrust proceedings. Among NCAs, the possibility to request another authority to carry out investigatory measures in their territory on behalf of the requesting authority has proven to be very useful and is well used in practice.

36. Indeed, Regulation 1/2003 introduced, in Article 22(1), the possibility of NCAs to carry out inspections or other fact-finding measures in their territory at the request and for the benefit of another NCA. Previously, only the Commission could request such assistance from an NCA. Together with the possibility of exchanging information and using it in evidence pursuant to Article 12 of Regulation 1/2003, this new mechanism was necessary to bring about efficient work sharing within the ECN and thus effective enforcement of the EU competition rules.

37. Article 22(1) permits enforcement by the single NCA considered well placed to deal with the case. According to experience gathered so far by the Commission and the NCAs, assistance pursuant to Article 22(1) has become a very useful tool within the network. Assistance was requested and granted frequently. It is provided mainly in the context of inspections, witness interviews and requests for information. Because of the obligation of 'close cooperation' within the ECN, which is 'dedicated to the effective enforcement of EU competition rules', an NCA would only refuse such assistance in exceptional circumstances. When an NCA carries out an inspection or another fact-finding measure on behalf of another NCA, it does so under its national law and pursuant to its own rules of procedure, and under its own powers of investigation. Thus, the question whether information was collected legally is determined by the national law of the assisting NCA that has collected the information. However, Article 12 of Regulation 1/2003 governs the subsequent exchange and use of the information collected in an investigation pursuant to Article 22(1).

38.

39. Article 12 of Regulation 1/2003 empowers ECN members both to exchange information and to use that information as evidence in their cases. The right of NCAs to exchange and to use information flows directly from the Council Regulation and because of the primacy of European law, it can neither be jeopardized nor conditioned by a national provision.

3.4. Regarding the application of remedies in cross-border merger cases, do you take into account remedies in other jurisdictions that are participant in the RCA? If so, how has this affected your own merger assessment? Do you actively discuss the potential need and scope of a remedy with other jurisdictions to ensure that remedies imposed by different jurisdictions are not inconsistent?

40. In the EU, mergers are either reviewed by the Commission or by the national authorities of the Member States, but not by both at the same time. As a result, there is no potential for conflict between remedies accepted by the Commission and remedies accepted by the national authorities in relation to the same merger.

41. If a merger falls under the Commission's jurisdiction, the Commission has sole jurisdiction to take decisions in relation to that merger (Article 21(2) of the EU Merger Regulation). Conversely, if a merger does not fall under the Commission's jurisdiction, only the authorities of the Member States will have jurisdiction to review it and clear it with remedies. Whether a merger falls under the Commission's jurisdiction depends on whether the merger has an EU dimension. This, in turn, depends on whether the merger meets the turnover-based thresholds set by the Merger Regulation. In some circumstances, mergers with an EU dimension can be referred from the Commission to the national competition authorities and, conversely, mergers without an EU dimension can be referred from the national competition authorities to the Commission. However, even in case of a referral, there is no possibility of conflicting remedies because, after the referral, the merger will either be subject to the Commission's sole jurisdiction or that of the national competition authorities.

42. Although there is no potential of conflicting remedies, the Commission nonetheless closely liaises with the authorities of the Member States when it reviews mergers, including when it assesses remedies. When the merging parties submit remedies to the Commission, the Commission forwards a copy of the remedies to the competent authorities of the Member States, pursuant to Article 19(1) of the EU Merger Regulation.

3.5. Are you taking into consideration sanctions that are imposed in other jurisdictions? If so, how has this affected your sanctioning?

43. In the framework of the enforcement of competition rules within the EU by the ECN, in most cases where more territories than one Member State are affected, it will be the Commission that takes up the case. The Commission is considered as particularly well placed the infringement have effects on competition in more than three Member States.

44. However, under the Network Notice, "*parallel action by two or three NCAs may* [also] *be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.*" In parallel actions, each NCA will fine for its respective territory.

45. However, single action of an NCA might also be appropriate "*where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end*". In such case, one NCA might be willing to act on behalf of another NCA by finding an infringement, and fining for effects in the territory of the latter. Such a situation could occur where the latter NCA does not wish to deal with a case or stops dealing with a case.

46. Infringement decisions by NCAs under EU competition law preclude further proceedings under EU competition law by other NCAs or the Commission relating to the same facts (e.g. the same territory) and the same undertakings further to the general EU law principle of *ne bis in idem*.

47. The 2006 Guidelines on the method of setting fines provides predictability and transparency of the Commission's fining methodology. They state that the basic amount may be increased where the Commission finds that there are aggravating circumstances, such as where an undertaking continues or repeats the same or a similar infringement after the Commission or a NCA has made a finding that the undertaking infringed Article 101 or 102. In such case, the basic amount will be increased by up to 100 % for each such infringement established.

3.6. Has there been a convergence of leniency programmes in the region between the different jurisdictions that are participating in the RCA?

48. The entry into force of Regulation 1/2003 coincided with, and contributed to, a general stepping up of enforcement against secret cartels. By 2004, leniency programmes were increasingly recognised as an important tool to detect secret cartels. At the same time, the creation of the ECN enhanced information-sharing among enforcers in the EU and the possibility to re-allocate cases to another well-placed authority within the Network was introduced, including the possible reallocation of cases from the Commission to one or several NCAs.

49. Against this background, potential leniency applicants are encouraged to seek leniency coverage from all authorities in the ECN that may be competent and well-placed to act on a given case. As a leniency application to one authority cannot be considered as an application to any other authority, this means in practice that leniency applicants need to file for leniency separately with each authority that may be well-placed to act.

50. In 2006, the ECN endorsed the non-binding ECN Model Leniency Programme (MLP), which aimed at addressing stakeholders concerns related to the need for such multiple applications. It was subsequently revised in 2012[15]. By endorsing the MLP, the heads of the ECN authorities have agreed to use their best efforts to align their current and future leniency programmes and practices with the MLP.

51. It provides the Member States / the NCAs with a cohesive model of rules and procedures. As a result, virtually all Member States have introduced leniency programmes and a significant process of alignment with the MLP has taken place, even though divergences remain.

52. Importantly, the MLP undertook to alleviate the burden of multiple filings in cases where the Commission is particularly well placed to deal with a case, i.e. when cartels have effects on competition in more than three Member States. To this end, it introduced the

[15] http://ec.europa.eu/competition/ecn/documents.html.

system of summary applications. This allows undertakings that are applying for leniency with the Commission to file simplified applications with NCAs to reserve a place in the leniency queue should the case (or part of it) ultimately be pursued by the NCA e.g. as a result of the Commission not pursuing the case and one or more NCAs taking it up (re-allocation). Summary applications were introduced in many Member States, even if the number of (summary) leniency applications varies widely across NCAs[16]. Under the 2012 revision of the MLP, the availability of summary applications has been extended from the sole immunity applicant to all leniency applicants, so as to take account of the fact that a case may be re-allocated at a stage when more than one undertaking has already applied for leniency within the ECN.

53. However, achievements through the MLP are made through 'soft' convergence and remain fragile as soft instruments are not helpful where divergences are rooted in national legal traditions. In the judgment in *DHL Express (Italy) S.r.l. and Others v Autorità Garante della Concorrenza e del Mercato and Others*[17], the Court of Justice held that soft instruments adopted in the context of the ECN are not binding. As a result, Member States are not required to incorporate provisions of the ECN Model Leniency Programme in their leniency systems and, they are not precluded from adopting rules not present in that model programme or which diverge from it.

54. In addition, despite the MLP, divergences remain. For example, summary applications are still not available before some NCAs. On core leniency features, divergences continue to exist regarding which companies can benefit from leniency and under which conditions. This leads to different outcomes when it comes to deciding which companies benefit from immunity, a reduction of fines or no reduction at all and in what order their applications are assessed as adding value for the case.

55. Therefore, the ECN+ Directive contains targeted provisions to ensure that all NCAs have a leniency programme in place, containing core principles that are common across the EU. It translates the main principles of the ECN Model Leniency Programme into law and fully harmonises, for secret cartels, the conditions for granting immunity and reduction of fines, the form in which NCAs should be able to accept leniency statements, the possibility for applicants to submit leniency statements in relation to full or summary applications as well as requests for markers, the possibility for companies wishing to apply for immunity to initially apply for a marker (place in the leniency queue) and the system of protection of employees of immunity applicants from administrative and criminal sanctions.

[16] See Annex XII of the ECN+ Impact Assessment - Number of leniency and summary leniency applications submitted before NCAs.

[17] Case C-428/14, EU:C:2016:27.

4. Obstacles to and challenges for the success of the ECN

4.1. Are there any obstacles that (have) prevent(ed) your jurisdiction from reaping the full benefits of the RCA or more benefit from the RCA?

4.2. What solution(s), if any, do you see to address these obstacles? What are the possible costs of implementing this/these solution(s)?

56. The obstacles to the full development of the ECN and the reasons for the adoption of the ECN+ Directive have been discussed above. As mentioned in the Impact Assessment accompanying the ECN+ Directive proposal[18], although NCAs have significantly boosted the enforcement of the EU competition rules since 2004, they could do more.

> *"There are four underlying problem drivers that affect the ability of NCAs to be more effective enforcers and the decentralized system put in place by Regulation 1/2003:*
>
> 1. *lack of effective competition tools*
> 2. *lack of effective powers to impose deterrent fines*
> 3. *divergences in leniency programmes discourage companies from coming clean across Europe*
> 4. *lack of safeguards that NCAs can act independently when enforcing the EU competition rules and have the resources they need to carry out their work."*

57. The ECN+ Directive will tackle those issues.

58. As regards the need for an effective enforcement toolbox, the ECN+ Directive will fill the gaps in the patchwork that exists in Europe. All authorities will have the core set of future-proof investigative and decision-making tools they need to tackle infringements. For example, all authorities will be able to access evidence, irrespective of which new IT device it is stored on.

59. As regards effective powers to impose deterrent fines, the ECN+ Directive will give all Member States the option of allowing their administrative competition authorities to impose fines directly themselves or to go to a non-criminal court to ask for them to be imposed. This will work as an alternative to their current criminal routes.

60. As regards divergences in leniency programmes, the ECN+ Directive will fully harmonise, for secret cartels, the conditions for granting immunity and reduction of fines, the form in which NCAs should be able to accept leniency statements and the system of protection of employees of immunity applicants from administrative sanctions[19]. As regards the place in the leniency queue, Member States will be free to give the possibility for companies to initially apply for a marker.

[18] Commission staff working document - Impact assessment accompanying the document 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, SWD(2017) 114. Available at http://ec.europa.eu/competition/antitrust/nca.html

[19] In principle, Member States will also ensure full protection of employees of immunity applicants from criminal sanctions but derogations will be possible for the Member States where full protection in all cases would not be in conformity with existing basic principles of their legal systems.

61. The ECN+ Directive will also roll out a binding system of summary applications across Europe. This means that when a company files a full leniency application with the Commission that covers more than three Member States, it will only have to file short summary applications to the relevant NCAs. This has key benefits for companies: the administrative burden on them is reduced and if the Commission decides not to take up all or part of a case, their place in the leniency queue before the national authority is still protected.

62. Moreover, the ECN+ Directive addresses the problem that companies are less likely to come forward and apply for leniency if their employees face sanctions, such as director disqualifications or even imprisonment for their involvement in the cartel. Companies' leniency applications depend on their employees cooperating fully and revealing what they have up to. The Directive thus provides for the protection of employees and directors of immunity applicants from administrative and criminal sanctions.

63. Finally, under the ECN+ Directive, national competition authorities will benefit from key legal guarantees of independence when applying the EU competition rules:

- To take decisions independently from political and external influence;
- Not to seek nor take instructions from public/private entities;
- To refrain from any action incompatible with the performance of their duties;
- Members of the decision making body can only be dismissed if they do not fulfil conditions required for performance of duties/serious misconduct; and
- Authorities will be able to set their priorities in full, so that they can focus on the most serious infringements.

64. As regards resources, the ECN+ Directive will give national competition authorities the basic guarantee of the staffing and funding they need to perform their tasks.