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# ECN+ Directive Consequences for Fines and Compliance Programmes

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# Reasons for and objectives of the ECN+ Directive - Fines

- Imposition of fines represents an essential enforcement tool for NCAs. In 2009, in fact, the CJEU ruled that:

*"the effectiveness of the penalties imposed by NCAs and the Commission is a condition **for the coherent application of the EU competition rules**".*

- There is no doubt that there are a number of complex issues affecting the level of enforcement of Articles 101 and 102 TFEU in different EU's countries.



# Assessing the Effectiveness of Fine Imposition across EU

- In some EU Member States, companies can restructure to escape paying fines. In some other States, simply there are little or no fines imposed for antitrust infringements.
- Overall, the level of fines imposed seems to vary greatly: the penalty for the same offence can be much higher in one State than another. **Most often, such differences are simply not justified by objective circumstances.**
- In the proposal of a Directive to ensure the proper functioning of the internal market ('ECN plus') the Commission attempts to address these issues.



# Regulation of Fines under the ECN+ Directive

One declared objective of the Directive is to make sure that NCAs have the **power** to impose **proportionate and deterrent sanctions** (with reference to fines and also periodic payments) for breaches of EU competition rules.

- Calculation of the amount of the fine for an infringement of Article 101 or Article 102 TFEU made by NCAs should take into consideration both to the *gravity* and to the *duration* of the infringement (**Chapter V, Art. 13 - Calculation of the fines**).
- The maximum amount of the fine a NCA may impose on each undertaking shall be at least 10% of its total worldwide turnover in the business year preceding the decision; thus, EU Member States may establish an even higher threshold if they wish to do so (**Chapter V, Art. 14 - Maximum amount of the fine**).



# Regulation of Fines under the ECN+ Directive

- Is this attention to the maximum fine the right way to pursue the national imposition of **proportionate and deterrent sanctions** for breaches of **the same** EU competition rules in different countries?
- It could have been possible to work more on **appropriate or expected fines** for certain breaches of competition law? Clearly the case by case nature of competition law would have rendered this very difficult but some creativity may have helped.
- On the other hand also **some more elaborated indication on the way to determine the fines could have given more guidance to NCAS.**



# Antitrust Compliance Programmes and Fines

- A **specific area of discussion** (and disagreement) about the relation with fines is the existence of **compliance programmes**. Should they be taken into consideration for the purposes of the administrative fine calculation?
- An antitrust compliance programme is an internal business policy designed by a company to educate directors and employees to avoid risks of anticompetitive conduct.
- The proposal for the ECN + Directive does not deal directly with this aspect: is it a relevant hole? Which lesson can be drawn from national experience?
- Some jurisdictions have introduced policies allowing NCAs to consider those programs as a **mitigating circumstance** in the fines' calculation.



# Antitrust Compliance Programmes and Fines

- EU Courts have observed that *“even though **the measures to ensure compliance with competition law are important, they cannot affect the reality of the infringement committed.** Thus, the adoption of a compliance programme (...) does not oblige the Commission to grant a reduction in the fine”* (Joined Cases T-101/05 and T-111/05 BASF and UCB v Commission, para. 52).
- Harmonised regulatory provisions regarding antitrust compliance programmes would also need to address the potentially diverging requirements currently existing in different jurisdictions. How could a programme qualify as **“rigorous”, “strong” or “effective”**?



# Antitrust Compliance in Italy

- In **Italy**, on April 26<sup>th</sup> 2018, the AGCM has published its new draft “Guidelines on antitrust compliance”. The Authority may give credit to certain compliance programs with a **possible reduction of the fine of up to 15%**. If the compliance programme is adopted by a company after the launch of an investigation (but before the statement of objections), it entitles to a **possible reduction of the fine up to max 5%**.
- Across Europe, only competition authorities in **the UK and Switzerland** adopted a similar approach as Italy, while the EU Commission values compliance programmes positively but does not consider them as mitigating circumstance.





# Antitrust Compliance in France

- **France** has been concerned with antitrust compliance for many years. In 2012, the FCA published its Framework-document on Antitrust Compliance Programmes clarifying that in the event of a settlement, if the “*Autorité accepts a commitment to set up a compliance programme that meets the best practices set forth in the present framework document (...) the Autorité will reduce the financial penalty (...) by up to 10%*”
- However, on 19 October 2017 the Authority issued a statement holding that compliance programmes by now should be part of the day-to-day management of companies, therefore **no fine reduction will be awarded for commitments to implement such programmes from now onwards**, especially in the case of serious competition law infringements.



# Other NCAs and Antitrust Compliance

- In **Germany**, the Bundeskartellamt does not reward the existence of a compliance programme at the time of the infringement (or the commitment to set up and implement such plan during the investigation). However, the German Authority has emphasised that **an effective antitrust compliance programme can ease the detection of an infringement and the gathering of information** which indirectly can result in the reduction of fines under the leniency programme.
- Similar to this approach, the **Dutch ACM** actively promotes antitrust compliance programmes, although it has not granted any fine reduction yet (on the contrary, it increased the fine in one case as the defendant's programme was ineffective, ACM/KPN, Case number: 11.0183.29).



# Conclusion

- In the end the goal of any antitrust compliance programme is to **minimise antitrust risks and liability.**
- Clearly, the existence and implementation of such programmes may lead to positive indirect rewards related to:
  - **the prevention or early discovery of the infringement;**
  - **the limitation of the duration of the infringement;**
  - **the filing of a leniency application.**
- Although there are jurisdictions where the existence of the programme is directly rewarded with fines' reductions, the current dominant trend in the EU probably is to recognise them only some significant but *informal value*.
- **In any case the ECN+ Directive misses the occasion to give an EU clear indication**



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***Many thanks for your attention!***