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THE ECN+ DIRECTIVE: MAIN FEATURES AND POTENTIAL IMPACT ON ITALY'S LEGAL SYSTEM

On 4 December 2018, the Council of the European Union approved the **ECN+ Directive**, with the stated aim of “empower[ing] the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market”.

This alert summarises: (a) the main features of the ECN+ Directive, and (b) its potential impact on Italy’s legal system.

I. MAIN FEATURES

The objective of the ECN+ Directive is to ensure that national competition authorities (“**NCAs**”) have the guarantees of independence, resources, and enforcement and fining powers necessary to effectively apply Arts. 101 and 102 TFEU (“**EU Antitrust provisions**”). The main features are as follows:

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 - Compliance with fundamental rights:** All proceedings opened by NCAs must comply with the general principles of EU law, the Charter of Fundamental Rights of the EU and should be in accordance with the caselaw of the CJEU. For instance, NCAs must: (a) ensure enforcement proceedings are completed within a reasonable time, and (b) inform the parties under investigation of the preliminary objections raised against them in the form of a **statement of objections** or similar measure before issuing a decision finding an infringement.
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 - Independence of NCAs and the resources at their disposal:** NCAs must be able to carry out their duties and exercise their powers independently from any political or other external influence. To that end, support staff and decision-makers within NCAs should – for a reasonable period after leaving an NCA – refrain from dealing with enforcement proceedings that could give rise to conflicts of interest (aka, a cooling-off period).

NCAs shall also:

- o have a sufficient number of qualified staff and sufficient financial, technical and technological resources; and

- be able to conduct investigations with a view to applying EU antitrust rules, to adopt decisions applying those rules based on Art. 5 of Regulation (EC) No. 1/2003, and to liaise closely with the ECN to ensure an effective, uniform application of EU antitrust rules.



- **Powers of NCAs:** NCAs shall be able to: (a) carry out all necessary unannounced inspections of undertakings; (b) examine the books and other business records irrespective of the medium stored on; and (c) access all information accessible to the entity under inspection¹. NCAs must also be able to request information within a specified, reasonable time. When carrying out inspections, the officials of the NCAs must have access to copies, in any form, of extracts from books and records; and, if considered necessary, they can continue such searches at the NCA's premises or other designated premises. Inspections may also be conducted at the homes of directors, managers, and other staff of undertakings or associations of undertakings. Whenever a representative of an undertaking may have relevant information, NCAs has the power to summon him/her for an interview.

Inspections may also be conducted at the home of board members, managers and staff



- **Fines and periodic penalty payments:** The maximum amount of the fine that an NCA may impose on each undertaking participating in an infringement of EU antitrust rules must be at least 10% of the undertaking's total worldwide turnover in the business year preceding the decision.

Periodic penalty payments are included

NCAs must also impose effective, proportionate and dissuasive periodic penalty payments to be determined in proportion to the average daily total worldwide turnover of the undertaking in the preceding business year, calculated from the date set out in the relevant NCA's decision. NCAs may impose periodic penalty payments to compel undertakings to supply complete, correct

¹ According to Recital 30:

[T]he investigative powers [...] should enable NCAs to obtain all information related to the undertaking or association of undertakings which is subject to the investigative measure in digital form, including data obtained forensically, irrespective of the medium on which the information is stored, such as on laptops, mobile phones, other mobile devices or cloud storage [emphasis added].

NCA's may find legal and economic successors of undertaking liable and impose fines on them

information in response to a request, to submit to an inspection, to comply with a decision, or to attend an interview.

As to **parental liability**, Member States are required to apply the EU rules on the notion of 'undertaking' which designates an economic unit even if it consists of several legal or natural persons².



- **Leniency programmes:** NCAs must have leniency programmes in place that enable them to grant undertakings immunity from fines if they disclose their participation in cartels. The Directive also emphasises that NCAs must make these programmes more attractive throughout the EU.

NCAs must comply with three requirements in dealing with leniency applicants:

- specify the minimum amount of information to be provided in order to meet relevant evidential thresholds, so that a marker can be granted immunity;
- inform the applicant whether conditional immunity has been granted to him; and
- specify – without delay – the information and evidence to provide the NCA.

NCAs must accept oral leniency statements; statements may also be submitted in a foreign language

Member States must also ensure that their NCAs have a system that enables them to accept also oral leniency statements; Applicants may also submit leniency statements in an EU language agreed between the NCA and the applicant.

² This recital goes on to specify the following:

NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit. To prevent undertakings escaping liability for fines for infringements of Articles 101 and 102 TFEU through legal or organisational changes, NCAs should be able to find legal or economic successors of the undertaking liable, and to impose fines on them, for infringements of Articles 101 and 102 TFEU, in accordance with the case law of the Court of Justice of the European Union [emphasis added].

Art. 13, para. 5, also states that “Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, **the notion of undertaking applies**” (emphasis added).

Lastly, Member States must ensure that current and former directors, managers and other staff of applicants are fully protected from sanctions in administrative and non-criminal court proceedings.

Mutual assistance includes cross-border notification and enforcement of fines



- **Mutual assistance between NCAs:** Member States must ensure that if an NCA (“**Requested NCA**”) carries out an inspection or interview for another NCA (“**Applicant NCA**”), officials and other accompanying individuals authorised or appointed by the Applicant NCA are permitted to attend and actively assist the Requested NCA in the inspection/interview. Mutual assistance also ensures cross-border notification of key procedural acts and mandatory cross-border fine enforcement.

II. POSSIBLE IMPACT ON ITALY’S LEGAL SYSTEM

The Directive’s impact will vary greatly from one Member State to another. **As to Italy’s**, transposing the Directive will entail the following main changes:



- Independence requirements: A **cooling-off** period now applies also to the Italian Competition Authority (“**ICA**”). This is to ensure that ICA staff and other individuals who exercise decision-making and sanctioning powers³ refrain – for a reasonable period after leaving the ICA – from dealing with enforcement proceedings that could give rise to conflicts of interest.



- Investigative powers: The ICA now has broader investigative powers, meaning it can now:
 - inspect also mobile phones, other mobile devices (e.g., tablets) and cloud storage⁴, and the homes of directors, managers, and other staff; and



It is unclear whether personal devices may be inspected

³ More precisely, under Art. 4, para. 2(c), of the Directive, the cooling-off period concerns “the staff and persons who take decisions exercising the powers in Articles 10 to 13 and Article 16 of this Directive in national administrative competition authorities”.

⁴ It is unclear from the wording whether this power concerns only business devices or also personal ones.

Structural and behavioural remedies are not expressly provided under Italian legislation

Periodic penalty payments and broader power to impose them

- use more – and stronger – coercive instruments to guarantee the successful exercise of its powers, such as the power to summon people for an interview (as explained above).



- Decision-making powers: The ICA may avail itself of clear references in the Directive to impose:

- behavioural and structural remedies necessary to bring an infringement to an end⁵; and
- periodic penalty payments in proportion to the undertaking's daily turnover, which will enable the ICA to compel an undertaking not only to comply with a decision, but also to provide complete and correct information⁶.



- Fines and penalties: The ICA now has the power to:

- extend the scope of application of fines to some situations previously excluded, e.g., when official seals are broken and when undertakings fail to comply with an inspection⁷; and
- require the members of an association of undertakings to pay a fine imposed on the association as an alternative and only at certain conditions (e.g., when the association is not solvent).

⁵ These remedies are not expressly provided by Italian competition law (Law No. 287/1990 and Presidential Decree No. 217/98). Nevertheless, the ICA has included remedies in some of its decisions. An explicit provision granting NCAs power to impose remedies is thus a significant step.

⁶ Italy's legal system does not currently provide for periodic penalty payments; indeed, Art. 15, para. 2, of Law No. 287/1990 states only that if an undertaking fails to comply with an ICA warning or sanction, the ICA can impose: (a) a one-off fine of up to 10% of the undertaking's turnover; or, in the case of an unpaid fine (b) another fine of at least double the amount of the original fine. The directive thus ushers in two important changes: (a) periodic penalty payments, and (b) the possibility to impose penalty payments under a broader set of circumstances.

⁷ Currently, under Art. 14, para. 5, of Law No. 287/1990, fines may be imposed only when an undertaking refuses or fails to provide requested information or documents or submits untruthful information or documents.