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Global Competition Law Centre

**Report on the Enforcement by
National Competition Authorities (“NCAs”) and
the European Competition Network (“ECN”)**

Group IV: Agenda

- 1. Assignment and Methodology of Group IV**
- 2. Institutional Issues**
- 3. Case Allocation and Consultation among NCAs**
- 4. Circulation of Information and Mutual Assistance within the ECN**

1. Assignment and Methodology

- **Group IV focused on the functioning of the European Competition Network (ECN). Main concerns:**
 - **Lack of transparency**
 - Diverging standards and risk of erosion of **rights of defence**
- **Fact-finding:**
 - Questionnaire sent out to all NCAs
 - Interview with DG COMP representatives in charge of the ECN
- **Group IV recommends:**
 - 12 modifications to **Reg. 1/2003**
 - Various modifications to the **ECN Notice**
 - Adoption of various **best practice rules**

2. Institutional Issues : Composition of the ECN

- **Legal basis of ECN:**
 - Chap. IV of Reg. 1/2003 (Arts. 11 to 16)
 - Notice on cooperation within the ECN (ECN Notice)
- **ECN consists of “the Commission and the national competition authorities designated by the Member States“**
 - Few requirements as regards the designation process
 - Tendency to favour enforcement by **integrated administrative bodies**

2. Institutional Issues :

Composition of the ECN (*cont.*)

- Group IV **recognizes** that:
 - the ECN seems to operate in a satisfactory and efficient manner
 - Member States shall continue to have a considerable margin of discretion as regards the choice of a particular competition enforcement model
- However, Group IV **recommends** :
 - amending Art. 35(2) of Reg. 1/2003 to the effect that:
*“Member States shall ensure that the competition authority or authorities designated pursuant to paragraph 1 are in a position to exercise their powers **independently, impartially and transparently**”*.

2. Institutional Issues: Lack of Transparency of the ECN

- **General lack of transparency**
 - ECN is a reality, no reason for being secretive
 - Functioning mode, e.g. use of intranet
 - Relationships between Advisory Committee and ECN
 - Unclear status of Notice
- **Recommendations**
 - New Article 11(1): the Commission and NCA's must issue a Network Notice that shall regularly be reviewed
 - Notice should impose reporting obligation

3. Institutional Issues

The Powers of the NCA's

- **ECN does not and should not have decisional powers**
 - Always NCA decision
 - Traceability for *ex post* judicial control
 - Article 5 does not confer NCAs the power to adopt “findings of inapplicability” of competition provisions
- **Reason for change**
 - Commission monopoly on Art. 81(3)
 - Lack of positive decisions by Commission
 - Positive national decisions may offer guidance and practical experience
- **Recommendation**
 - Change Article 5 and corresponding consultation provisions

3. Case Allocation and Consultations among NCAs

- **Existing rules:**
 - Art. 11 (case allocation) & Art. 13 (consultations)
 - Recital 18 : “each case should be handled by a single authority”
 - Para. 7 of ECN Notice: “*network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible.*”
- **Practice**
 - Three re-allocation cases
 - One case on double proceedings

3. Case Allocation and Consultations among NCAs (*cont.*)

- **Inconsistency between vertical and horizontal allocation rules**
 - One Commission procedure, but several national ones?
 - Contrary to spirit of Recital 18
- **Inefficient**
 - Mechanism of arts. 12 and 22 enables one NCA to deal with issue
 - Provided that NCA has effective enforcement powers
 - Duty for Member States to appoint effective enforcer

3. Case Allocation and Consultations among NCAs (*cont.*)

- **Double proceedings contrary to *ne bis in idem* principle**
 - Article 50 Charter of Fundamental Rights
 - Principle applicable to arts. 81/82 proceedings (*PVC II*)
 - “*the threefold condition of identity of facts, unity of offender and unity of the legal interest protected*” (*Cement*)
- **Two scenarios**
 - Parallel prosecution by NCA’s on the basis of the same legal norm (arts. 81/82)
 - Parallel or subsequent prosecution on the basis of national competition law

3. Case Allocation and Consultations among NCAs (*cont.*)

- **Scenario 1: applying same norm to the same facts**
 - Facts and norms do not differ as a function of the prosecutor
 - The identity of the infringement does not differ as a function of its effects
 - Efficiency considerations are not legal considerations
- **Scenario 2: applying national law to the same facts**
 - Is *Walt Wilhelm* still good law?
 - National competition law serves same interest as arts. 81/82
 - Squeeze between Art. 3 (duty to apply) and Art. 11(6)

3. Case Allocation and Consultations among NCAs (*cont.*)

- **With only one NCA, the need for proper allocation rules**
 - Not a matter for parties
 - No reason to go for lowest standard
 - Allocation process should be traceable and subject to *ex post* judicial review
- **Recommendation and suggestions**
 - Amend Recital 18
 - Main allocation principles in Regulation and to be worked out in Notice
 - Best practice rules on traceability

4. Circulation of Information & Mutual Assistance within the ECN

- **The mechanism of Arts. 12 and 22**
- **The problem of diverging standards**
 - ECHR just a minimum standard
 - Different rules on fact finding, use of information, sanctions, procedures and position (liability?) of individuals
- **Important consequences:**
 - Evidence which cannot be used by one NCA can be used by another NCA
 - Individuals/undertaking that can be sanctioned by one NCA cannot necessarily be sanctioned by another

4. Circulation of Information & Mutual Assistance within the ECN (*cont.*)

- Need to strike a right balance between efficient enforcement and effective judicial protection of undertakings and individuals
- The exposition of undertakings to “**double standards**” calls for “**double safeguards**”
 - Control of legality: before the competent authorities and/or courts of the transmitting NCA (under its national law)
 - Control of admissibility: challenge of the admissibility as evidence before the competent body and according to the domestic law of the Member State of the receiving NCA

4. Circulation of Information & Mutual Assistance within the ECN (*cont.*)

- Control of **legality** in transmitting State
 - Where available and possible
 - Transmitting NCA should inform receiving NCA of pending litigation
- Control of **admissibility** in receiving State
 - During procedure or *ex post*
 - Position of third parties
 - Even in the absence of illegality in transmitting state
 - Traceability of information flow is the condition *sine qua non*

4. Circulation of Information & Mutual Assistance within the ECN (*cont.*)

- **Recommendations**

- Modification of Arts. 12 and 22
- Guidance in ECN Notice on the practical application of the double safeguards
- Best practices on traceability
- Study to identify the main differences and bottle necks

4. Circulation of Information & Mutual Assistance within the ECN (*cont.*)

Three remaining issues

- Need for a “one stop shop” for leniency applications: a “**multilateral marker system**” should be implemented (by amending Section 2.3.3. of the ECN Notice)
- Protection of individuals: clarifying criteria of Art. 12(3)
- *Roquette* type of review for NCA that is requested to organize inspection on behalf of other NCA (Art. 22)

CONCLUSIONS

Need for:

- **Transparency and reviewability**
- **Making all NCA's efficient, fair and capable of dealing as Community bodies**
- **Only one authority per infringement**
- **Double standards call for double safeguards**