

Newsletter

Antitrust Department

The ECN+ Directive and the tightening of antitrust fines. The case of trade associations.

Introduction

On 3 February 2019 the Directive (EU) 2019/1 of the European Parliament and of the Council, so called European Competition Network+ directive ("**ECN+ Directive**") entered into force. Its implementation at national level must be completed by 4 February 2021.

The ECN+ Directive aims to create a system in which the National Competition Authorities have equal guarantees of independence, resources, investigative and sanctioning powers when applying Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**").

New investigative powers and tightening of antitrust fines

Following to the implementation of the ECN+ Directive, the Italian Competition Authority ("**ICA**" or the "**Authority**") will have more effective investigative powers.

In particular, it will be introduced the possibility for the ICA to conduct **unannounced inspections in the homes** of directors, managers, and other members of staff of undertakings or associations of undertakings, if a reasonable suspicion exists that documents relevant to prove an infringement of Article 101 or Article 102 TFEU are being kept in such premises. In any case, such inspections will not be carried out without the prior authorization of the judicial authority (Article 7 of the ECN+ Directive).

Furthermore, the ECN+ Directive intends to **increase the degree of deterrence of antitrust fines**.

In this last regard, it is to be considered that, currently, the Authority can impose fines whose **maximum amount is 10% of the total worldwide turnover** achieved by the undertaking or the association of undertakings during the business year preceding the decision imposing the fine.

Following to the implementation of the ECN+ Directive, **the 10% of the turnover will represent the minimum amount** of the maximum fine applicable by the ICA (Article 15 of the ECN+ Directive). In short, **what is now the “ceiling” of the antitrust fine will turn into its “base”**.

Furthermore, the ECN+ Directive provides for a **significant tightening of the sanctioning framework vis-à-vis trade associations**, which will be discussed in detail.

The antitrust fines vis-à-vis trade associations

Currently, the antitrust fines imposed by the ICA to trade associations are based on the **total value of the membership contributions paid by their members** (point 10 of the ICA resolution no. 25152 of 2014 containing the Guidelines on fines), with the consequence that, usually, **the amount of the fines is very limited**.

Such framework is destined to change radically following to the implementation of the ECN+ Directive, which introduces at national level what already occurs in the proceedings before the European Commission.

In fact, it is provided that, if the infringement committed by an association of undertakings concerns the activities of its members – *i.e.*, in the great majority of cases - the maximum amount of the fine should not be less than 10% **“of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association”** (Article 15 paragraph 2).

Furthermore, **in case the association is not solvent**, the latter is obliged to call for contributions from its members to cover the amount of the fine (Article 14 paragraph 3).

In fact, where the fine has not been paid in full by the association of undertakings within the time limit fixed by the ICA, the latter:

- may require the payment of the fine directly **by any of the undertakings whose representatives were members of the decision-making bodies of that association**, and
- where necessary to ensure full payment of the fine, after having required payment from such undertakings, it may also **require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred**, except for the undertakings which show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started (Article 14 paragraph 4).

The ECN+ Directive provides, however, some “correctives” to these provisions; for example, according to recital 48:

- when a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed *should not be taken into account when calculating the fine of the association*, and
- should the members' joint and several liability be activated, *the National Competition Authorities should have regard to the relative size of the undertakings that belong to the association and, in particular, to the situation of small and medium-sized enterprises*.

In any case, **the picture appears to be significantly penalizing for trade associations**, and not only because of the natural increase in the amounts of fines, but also because of the joint and several liability of the members, which indeed makes **much more delicate the participation in the associative fora and in particular in their decision-making bodies**.

The importance of adopting effective antitrust compliance programs

It is therefore essential for trade associations to make themselves ready for the transposition of the ECN+ Directive into Italian law (within 4 February 2021), with their relevant activities already fully compliant with the rules aimed at protecting competition. This has the dual aim of avoiding the massive fines that will soon be introduced and the erosion of the membership base.

To prevent anti-competitive offenses, it is necessary that the trade associations have in place an **effective antitrust compliance program**, that is a program which - although it may be linked to systems of control and management of other risks to which the association is exposed - is **tailor-made for the prevention of antitrust risks**.

An antitrust compliance program is effective when, *inter alia*:

- it is explicitly supported by **top management**;
- **sufficient resources** are dedicated to its design, implementation and monitoring;
- it is identified a **responsible** who is autonomous, independent, endowed with adequate resources and tools, who reports directly to top management;
- includes **training activities**, on a periodic basis, adapted to the size and context in which the association operates, and to the antitrust risks to which it is exposed;
- provides internal **reporting** systems for the timely identification of risks;
- includes **disciplinary measures and incentives** to guarantee the compliance with the program itself, and
- its implementation is constantly **monitored** and its content **updated** whenever necessary.

Furthermore, a compliance program structured as above can be functional to the timely discovery of an antitrust violation and to its possible communication to the ICA in order to benefit from the **non-imposition of the fine** (so-called leniency).

Conclusions

The application of competition law at national level is about to change considerably over the next two years with the implementation of the ECN+ Directive. The tightening of fines that accompanies this change requires that companies, and trade associations in particular, have suitable and effective tools to make their activities compliant with the rules protecting competition.

Contacts

Stefania Bariatti

Of Counsel – Chiomenti
EU law, International law and Competition law
department
T. +39 02 721 5 7410
stefania.bariatti@chiomenti.net

Cristoforo Osti

Partner – Chiomenti
EU law, International law and Competition law
department
T. +39 02 7215 71
cristoforo.osti@chiomenti.net

Emilio Cucchiara

Counsel – Chiomenti
EU law, International law and Competition law
department
T. +39 02 7215 7457
emilio.cucchiara@chiomenti.net
