

# **THE ECN+ DIRECTIVE AND ITS IMPACT ON THE HELLENIC COMPETITION COMMISSION**

**Prof. Dr. Dimitris Tzouganatos LL.M. (Mich.)  
National and Kapodistrian University of Athens  
Law School / Attorney at Law  
dtzouganatos@tzouganatoslaw.gr**

## Art. 3 para. 3: Reasonable timeframe for of Arts. 101 and 102 TFEU proceedings

Art. 3 para. 3 (as amended by the EP) requires MS to ensure that proceedings of NCAs concerning the application of Arts. 101 and 102 TFEU are conducted within a reasonable timeframe.

Reasonable time limits are certainly difficult to quantify and may also be often difficult to keep.

Nevertheless, by exercising pressure upon the HCC time limits may improve the Authority's efficiency and at the same time strengthen its status of independence, since successful Authorities are not easily influenced by political or business interests.

For NCAs as the HCC which has been often criticized for too lengthy investigations or for decisions issued years after the last hearing of a case Art. 3 para. 3 is very positive.

## Art. 4 para. 2. a and b: Supervision

EU legislation in telecoms, energy or railways contains requirements regarding national supervisory authorities. In three cases the CJEU clarified the limits of supervision.

In *C-288/12 Commission v. Hungary* the Court held that “the mere risk that the state scrutinizing authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter in the independent performance of their tasks” (para. 53).

The Directive could be more specific about the content of supervision. Granting the government an unconditional right to information on the authority’s activities should be seen as an infringement of its independence.

## Supervision *continued*

The HCC is formally supervised by the Minister of Development. The extent of the supervision is not further specified.

Formal supervision alone may not prove an NCA's lack of independence. E.g. the BKartA although under the supervision of the Minister of Economics is independent.

The importance of independence in practice does not render legal restrictions on the supervision of NCAs' unnecessary since the existence of such restrictions may operate as a disincentive for members of NCAs who would otherwise be willing to follow governmental instructions.

## Art. 4 para. 2. d, ea: Appointment - dismissal of members of the board and staff of the NCA

Art. 4 para. 2 ea) introduced by the European Parliament: the members of the decision-making body of NCAs “are selected and appointed according to clear and transparent selection and recruitment procedures laid down in advance”.

For NCAs, as the HCC, this would be a significant progress.

HCC: the Chairman and the Vice-Chairman are selected by the Parliament’s Chamber of Presidents; all other members of the board are chosen and appointed by the Minister of Development, following a hearing before a Parliamentary Committee.

The involvement of the Parliament gives the impression of a clear and transparent selection but the selection does not follow a procedure open to candidates meeting the legal requirements.

## Art. 4 para. 2. d, ea) and Members of the Board

The political dimension of the selection became apparent two years ago, when the Government passed a bill setting at 73 the age at which the Chairman had to withdraw and providing that board members should not have blood or marriage relations with members of the Hellenic or the European Parliament in order to dismiss the Chairman and the Vice-Chairman. Both would have left office absent the reactions of the HCC the EU Commission.

Better guaranties could be provided by a regime similar to that of the ESCB. However, the CJEU held in case C-40/15 *ISTAT* that NRAs could not be subject to the same independence regime as NCBs because of their “*fundamentally different functions*”. The differences found by the Court between NRAs and NCBs most probably also apply between the NCBs and NCAs.

## Art. 4 para. 2. d, ea) and Members of the Board and Staff

As regards the Staff:

The HCC provides examples of political influence also at the staff level: Members of staff are seconded to minister or members of the Parliament cabinets. They sometimes do not return to their original position but are upgraded to Members of the Board.

Art. 4 para. 2 of the Directive should specifically require MS to hinder the creation of links between government and the authority in the above described way either by generally prohibiting secondment or by introducing a time-ban analogous to that of Art 4 para. c), i.e. by providing that a staff member seconded to a minister's cabinet may not return to the HCC before a reasonable time after the end of his/her secondment.

## (d) Art. 5 para. 2b: Accountability

Accountability is important for the improvement of the NCA's effectiveness only if it is substantial.

Given that

- *there is no satisfying definition of what an effective NCA is and*
  - *it is not clear when, and to what extent, qualitative criteria prevail over quantitative ones*
  - *Hearings before Parliamentary Committees are not very helpful since they are usually conducted by politically motivated persons who have no competence in competition enforcement,*
- ***the MS should ensure that NCAs undergo peer reviews by international institutions, e.g. by the OECD, quite regularly.***



## (e) Judicial review

Another form of accountability is the judicial review of enforcement decisions taken by the NCAs.

**Judicial review strengthens NCAs' independence:** It may reduce political pressure on the NCAs since their decisions may be annulled or amended. Judicial review may also counterbalance the political nature of the agency leadership selection.

Conclusions about the quality of NCA decisions from the number of decisions that are affirmed or dismissed on appeal are not safe. Exceptional **dismissals of NCA decisions may well-reasoned decisions but they could also demonstrate lack of a qualified judiciary system.**

## (e) Judicial review of the HCC's decisions

The Athens Administrative Court of Appeals (AACCA) which hears appeals against HCC decisions consists of judges without expertise in competition law. They usually **refrain from reviewing cases on the merits** and annul the HCC decisions for reasons of formal legality.

The Competition Act of 2011 provided that **competition law chambers** could be established at the AACCA but the Decree necessary for the establishment of the chambers, has never been issued.

The Directive remains silent on the judicial review of NCA decisions. This seems contradictory given that independence of NCAs and effective judicial review of their decisions are inextricable (*Vickers: “the ultimate independent competition authority is the independent judiciary”*)

The organization of judicial review in the MS is a politically sensitive but should not be left out of the NCA independence project.