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The Danish ECN+ Implementation: Overturning Legal Traditions

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The *ECN+ Directive* requires all EU Member States to confer upon their national competition authorities certain enforcement and sanctioning powers. The Danish implementing act, no. L 116 (link only available in Danish), was passed by the Danish Parliament on 9 February 2021.

Although the *ECN+ Directive* was adopted on 11 December 2018, and therefore well-known in advance, the implementation in Danish law has caused an intensive debate, not least because it fundamentally changes the sanctioning system from a criminal law-based system to an administrative one. Due to a significant number of comments and questions posed during a rather short public consultation procedure and the subsequent reading in the Danish Parliament as well as its Trade and Industry Committee, the effective date of implementation in Danish law was slightly postponed until 4 March 2021, although the *ECN+ Directive* formally required implementation no later than 4 February 2021.

The requirements set by the *ECN+ Directive* causes significant changes to the pre-existing Danish competition law regime, and certain of the changes somewhat conflicts with basic Danish legal traditions. In this article, we explore the most significant changes and briefly outline relevant concerns to be borne in mind during the future application of the amended Danish *Competition Act*. All views expressed are the authors' own.

An interesting feature of the political agreement on the amendments of the Act was that the Minister for Industry, Business and Financial Affairs has agreed with the Trade and Industry Committee to evaluate the Danish implementing act within three years of its effective date. This agreement is likely a result of the significant changes embodied by the act and the relatively short reading process.

Introducing civil fines, entailing a two-tier system

The *ECN+ Directive* requires national competition authorities being granted the power to impose fines on undertakings, either directly themselves or by seeking the imposition of fines in non-criminal judicial proceedings. This conflicts with the Danish legal tradition, in which undertakings infringing the competition rules are fined by the Danish courts in criminal proceedings initiated by the Danish State Prosecutor for Serious Economic and International Crime, based on the preceding

investigation by the Danish Competition and Consumer Authority.

Accordingly, and as the most significant change brought to the Danish competition law regime by the *ECN+ Directive*, competition cases will still be imposed in a court procedure, but this procedure will from now on be civil in nature and initiated directly by the Danish Competition and Consumer Authority without the involvement of the State Prosecutor, but possibly by the involvement of the civil court's system. The system will function so that if an undertaking wants to challenge a fine, the Competition and Consumer Authority will need to bring the case before the Maritime and Commercial Court that is to rule on the matter. The *ECN+* amendments provide the Danish Competition and Consumer Authority with new responsibilities, for which reason it has announced to establish a new *Competition Law, Investigation and Litigation Centre*. We note that it remains possible for the undertakings to admit infringements and accept out-of-court fines, and the level of fines also remains unchanged.

As undertakings infringing the competition rules will then face civil proceedings, not criminal, such undertakings will, at least in theory, not benefit from the right against self-incrimination as applicable in traditional criminal law proceedings.

Natural persons, however, might be charged for infringements as well. Such infringements will remain criminal in nature. As it is the case today, such proceedings will therefore continue to be investigated and handled by the Danish State Prosecutor for Serious Economic and International Crime in accordance with criminal law principles, including the right against self-incrimination.

As criminal charges pressed against a natural person will typically be based on an allegation that the natural person has aided and abetted the undertaking's infringement, the new two-tier structure entails that criminal proceedings against natural persons need to await the outcome of the separate civil proceedings against the undertaking. This will protract the overall duration of the proceedings, which is hard to explain from a due process perspective, especially in respect of the affected individuals.

Investigations – when does a personal suspicion arise?

The two-tier character of the system extends not only to the sanctioning but also to the investigation of infringements. The *ECN+ Directive* requires national competition authorities being empowered to carry out unannounced inspections (dawn raids) in private homes if there is reason to believe that evidence of a competition law infringement committed by an undertaking is being kept at such private premises.

In the pre-existing regime, only the Danish State Prosecutor for Serious Economic and International Crime was authorised to search private homes under the Danish *Administration of Justice Act*, whereas the Danish Competition and Consumer Authority could only inspect premises of undertakings. Following the amendment, however, the Authority will become able to obtain a court order to inspect private homes as well. Going-forward, the Authority will therefore conduct all dawn raids.

A major point of discussion during the legislative process was how to duly ensure that investigations of natural persons are in practice conducted by the State Prosecutor only, subject to criminal law protection. It was emphasised by multiple parties that if a natural person is or

becomes personally under suspicion, any search of his/her private home must be undertaken by the State Prosecutor and not the Authority. In practice, this demarcation may prove very difficult.

The problem arises when a natural person is questioned by the Danish Competition and Consumer Authority without being under personal suspicion but as a representative of an undertaking being under suspicion. In such a situation, the person will be obliged to cooperate and will not enjoy the customary right against self-incrimination. If the very same natural person, however, subsequently becomes under personal suspicion and is therefore investigated by the State Prosecutor, he/she might suddenly face criminal charges. During the criminal proceedings, the authorities may use all of the information from and about that specific person obtained at the initial stage, i.e. before he/she became under personal suspicion, and before the right against self-crimination became applicable to protect the individual in question.

This poses a risk in respect of the fundamental rights of the individuals in question, and in practice, it may prove difficult, yet impossible, to determine with certainty whether a personal suspicion may eventually arise. During the legislative process, the Minister for Industry, Business and Financial Affairs advised that the Danish Competition and Consumer Authority has been instructed to draft an internal guidance paper for its employees to be aware of that exact problem, including when to hand over the investigation of natural persons acting as representatives of undertakings to the State Prosecutor. This, however, does not alleviate the concern that information provided by such individual under his/her duty to cooperate as a representative of an undertaking might be used against the very same person in potential subsequent criminal proceedings, thus *de facto* rendering the right against self-incrimination inapplicable. The problem is that the rights conferred upon a person depend on the degree of suspicion mounted against him, and this is a decision to be made by those who investigate the undertaking with a broad margin of discretion.

Recently, the Grand Chamber of the European Court of Justice ruled in a case of relevance to this exact issue (although not in a competition law context), C-481/19, *Consob*. The Court of Justice held that the right against self-incrimination also applies in administrative procedures if such can lead to criminal sanctions. The legal qualification of the infringement under national law, the intrinsic nature of the infringement, and the level of severity of the sanction that the person is liable to incur, are relevant criteria in this assessment. It remains to be seen whether the mere nature of the proceedings in this new two-tier system warrants the duality in respect of natural persons' fundamental rights, or if, in line with *Consob*, Articles 47(2) and 48) of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights will necessitate further actions than a mere guidance paper on the authorities' practical administration of the law to duly safeguard the problem. The *Consob* ruling does not provide any indication as to exactly *when* the right against self-incrimination ought to become effective, which is the primary problem in the new Danish regime, but only *under which conditions* the protection kicks in. The European Commission's enforcement of the EU competition rules does not give rise to the same problem, because neither undertakings nor natural persons are investigated in criminal proceedings at an EU level.

Making appeals to the Danish Competition Appeals Tribunal optional

Initially, the proposed implementation upheld the Danish Competition Appeals Tribunal as the first level of appeal, stipulating that if an undertaking had not brought the Danish Competition and

Consumer Authority's decision before the Tribunal, the Authority could request the Court to stay proceedings and refer the undertaking to initiate an appeal before the Appeals Tribunal. The *ECN+ Directive* is silent on such administrative appeals procedures, leaving room for specific national measures.

During the reading of the bill, concerns were voiced that the suggested possibility for the Competition and Consumer Authority to request a stay of proceedings would protract the overall duration of competition law proceedings, be ineffective in terms of procedure, and not be in line with the necessary checks and balances of the court procedure, thereby not serving any reasonable purpose. Ultimately, the Danish Minister for Industry, Business and Financial Affairs accepted that it is not necessary to involve the Tribunal in every single case. Accordingly, the act as passed abolishes the right for the authorities to request a referral back to the Appeals Tribunal and makes it optional for the undertakings to utilise this specific option. Notwithstanding whether the substantive decision has been brought before the Tribunal, it is now clear that the courts will be able to carry out a full judicial review of the substantive case when hearing the proceedings for fines and/or upon the undertaking's appeal of the matter.

Expanding the concept of interim measures with a structural scope

The pre-existing Danish *Competition Act* already conferred on the Danish Competition and Consumer Authority's a right to issue interim measures, as required by the *ECN+ Directive*. Although not required by the Directive, the implementing act expands this concept of interim measures with a structural scope.

Hence, under the new regime, the Danish Competition and Consumer Authority will be able to force undertakings to divest certain assets etc. This is a criticisable gold-plating measure as such temporary structural orders – which will not be stayed on appeal – will inevitably cause permanent changes to the market, rendering the temporary nature itself illusory.

Extending liability

In general, the implementing act causes a significant extension of liability, as it lowers the basis of liability from gross to ordinary negligence. Although required by the *ECN+ Directive*, this is a major deviation from the generally applicable Danish legal principles and traditions.

Furthermore, to comply with the *ECN+ Directive*, the implementing act introduces the possibility to impose liability of fines within associations of undertakings, such as trade associations. The members of an association will be liable for fines imposed on the association itself, should the association prove insolvent. This includes undertakings that have not been involved in the infringement unless such undertakings can prove not to have knowledge of the infringing behaviour or to actively have condemned it. As such, the burden of proof shifts, which gives rise to concerns from a due process perspective.

***Gold-plating* of the regulation to also apply to merely national matters**

Being a piece of EU regulation, the requirements established by the *ECN+ Directive* obviously only applies to competition law infringements capable of affecting trade between Member States. However, the Danish Parliament opted for a uniform approach and made the amendments caused by it applicable regardless of the effect on trade between Member States and thereby also to matters merely national in scope. This gold-plating measure serves not to have multiple investigations and sanctioning systems, and as such, it is, in our view, reasonably from a practical perspective.

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