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Florence Competition Programme Advanced Competition Seminar

*ECN+ Directive. Consequences for National
Competition Law Enforcement
EUI, Florence, 15 September 2018*

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Abstract

On 15 September 2018, the Florence Competition Programme (FCP) organised its first Advanced Competition Seminar in the context of the 2018/2019 FCP Annual Training.¹

The event discussed the proposed Directive, which aims to “empower[ing] the National Competition Authorities (NCAs) of the EU Members States to become more effective enforcers of the EU competition rules” (i.e. Directive ECN+).² In particular, the seminar aimed to discuss, from different angles, the potential impact of the proposed Directive on national competition law enforcement, at a time when this legal text is about to reach the end of its legislative process.³ The discussions were supported by NCAs’ officials, as well as academics. In addition, the discussion benefited from the input of the participants at the FCP Annual Training, who came from various jurisdictions across the world.

The proposed ECN+ Directive aims to ensure the proper functioning of the internal market of the EU through the

1. http://fcp.eui.eu/event/advanced-competition-seminars-2018-2019/?instance_id=12 (22.10.2018).

2. <http://ec.europa.eu/competition/antitrust/nca.html> (22.10.2018).

3. The European Commission published the draft legislative proposal on 22 March 2017. The legislation is subject to co-decision, and thus it has to be approved both by the European Parliament and by the Council. In June 2017, the European Parliament and the Council achieved a political agreement on the Directive, but the final text of the legislation has still not been made public.

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strengthening of the NCAs' enforcement powers, inspired by the powers currently enjoyed by the European Commission.

The participants at the seminar mentioned that the proposed Directive will be a step forward for the enforcement of the competition rules in the European Union, but they also criticized the limited scope of the changes envisaged in the draft Directive and the absence of answers to other problems that currently affect competition enforcement in the European Union. According to the speakers, the fact that the draft Directive is shy in tackling a few sensitive issues is due to the fact that it represents a response to the requests expressed by the NCAs, rather than a thorough analysis of the enforcement of the EU competition rules. There was a certain divide during the debate between the scholars and the private practitioners, who had a more critical stance on the draft legislation, and representatives of the NCAs, who were mostly supportive of the provisions of the new Directive.

The first set of criticisms regarded the failure of the proposed legislative act to address a number of issues, such as the value of the compliance programmes and the rights to defence of the undertakings.

One speaker presented the conclusions of an empirical study on the application of the right to defense by the National Competition Authorities of seven Member States from Central and Eastern Europe, and on the potential impact of the ECN + Directive to this regard. In particular, the study compared the application of the principles of legal professional privilege, the right to be heard, the right of access to file, and the privilege against self-incrimination by the seven selected NCAs, using the European Commission's best practices as a benchmark of comparison. The study concluded that the application of the right to defence in the selected jurisdictions tends to diverge; the procedural standards followed by the selected NCAs are generally 'lower' than the European Commission's standards. Unfortunately, in spite of the recent amendments introduced by the European Parliament, the ECN + Directive provides a limited harmonisation of the application of the right to defence by the NCAs.

Another speaker questioned whether the ECN+ Directive should have also tackled the competition compliance programmes, and not just the maximum amount of the fine which could be imposed by a NCA. The focus on the maximum fines, and the absence of any indication about how to use them, risks generating uncertainty and discrepancies among the sanctions imposed for the same sort of breach across different Member States. Moreover, along the same line of thought, the failure of the proposed Directive to refer to the value of the compliance programmes in the setting of the fines was considered to be a missed occasion on which to address an essential aspect of the enforcement of the EU competition rules.

Speaking of other positive examples of the NCAs that the EU legislators might have considered in drafting the Directive, another speaker referred to the successful advocacy activities by certain agencies (for instance, in Italy) the review of the effects of the commitment decisions and the frequent use of interim measures (e.g., in France). In particular, the speaker noticed that via the draft ECN + Directive the Commission only went as far as transposing its powers into the competition legislations of the Member States. The speaker further noticed that the effects of the decentralised enforcement of the EU competition rules resulting from Regulation 1/2003 are barely visible, with most decisions being issued by NCAs based on the effects in their respective territories, and only a few reallocations of the cases among NCAs/European Commission. The speaker argued that the proposed draft ECN+ Directive should have been bolder and should have proposed changes such as joint investigations by two or more NCAs, as well as the right to carry out investigations covering the whole of the European Union. Given that the effects of anticompetitive national legislation are significant in the European Union, and that their effects may be greater than the anticompetitive behaviors of the undertakings, the Directive should have included a competition advocacy mandate for all NCAs. Finally, the same speaker challenged the exclusivity retained by the European Commission in deciding when the EU



competition rules are not applicable, which suggests a lack of trust in the NCAs.

On behalf of the NCAs that were represented in the seminar, it was highlighted that even for NCAs with sufficient powers and resources, the proposed ECN+ Directive brings several benefits, such as increased possibilities to cooperate, including in matters such as dawn raids or the collection of fines, as well as with regard to leniency. These are areas in which problems of cooperation among different NCAs have occurred in the past, and the Directive aims at solving such issues.

Concluding the debate, the final speaker argued that the measures envisaged in the draft Directive may not be sufficient to ensure the independence of the competition agencies. As long as they apply the same legal provisions, the NCAs should become branches of the European Commission in the Member States and thus they should be subject to the same institutional structure.

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Robert Schuman Centre for Advanced Studies

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The Florence Competition Programme

The Florence Competition Programme (FCP) in Law & Economics is a project of the Robert Schuman Centre for Advanced Studies at the European University Institute, which focuses on competition law and economics. FCP acts as a hub where European and international competition enforcers and other stakeholders can exchange ideas, share best-practices, debate emerging policy issues and enhance their networks. In addition, since 2011, the Robert Schuman Centre for Advanced Studies organises a training for national judges in competition law and economics co-financed by DG Competition of the European Commission - ENTraNCE for Judges.



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