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The Right of Defense in the ECN + Directive

FCP Annual Training,
Advanced Competition Seminar
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Outline

- **Objective:** assessment of the right of the defense in draft ECN + Directive.
- **Empirical data from a comparative study** on the application of the right of defense by **7 NCAs in Central and Eastern Europe (CEE)** ➤ “The Right of Defense in the Decentralized System of EU Competition Law Enforcement”. Forthcoming in Vol. 31(3) of *World Competition*, December 2018.



Right of Defense

- **Right of defense:** rights of the defendant(s) during the NCA investigations and court proceedings.
- **Due process:** procedural guarantees followed by the NCA during the investigations (e.g. confidentiality business secrets, inspections procedures).



EU Charter of Fundamental Rights

- EU Charter includes a number of **sub-rights** relevant for right of defense:
 - 1) Right to fair trial (Art. 47);
 - 2) Presumption of innocence (Art. 48);
 - 3) Non-retroactivity of the penalty (Art. 49.2);
 - 4) Proportionality of the penalty (Art. 49.3);
 - 5) *Ne bis in idem* (Art. 50).
- **Art. 51:** EU Charter applicable when Member State institutions implement EU law ➤ **EU Charter applicable to NCAs when they enforce Art. 101-102** (*Swedavia*)
- ECJ recognized that **presumption of innocence** as a **general principle of EU law** applicable to NCAs when they enforce Art. 101-102 (*Eturas*, para. 38)



The Right of Defense in EU Commission proceedings

- The right of defense introduced by **ECJ case law**:
 - 1) Right to be informed (*Francolor*);
 - 2) Privilege against Self-Incrimination (PASI – *Orkem, Tokai Carbon*);
 - 3) Legal Professional Privilege (LPP - *AM&S, AKZO Nobel*).
- Sub-rights introduced by **EU Commission soft law and Reg. 773/2004**:
 - 1) Right to be heard/Hearing Officer;
 - 2) Right to access the file.
- ECJ case law derives from **annulment proceedings** concerning EU Commission decisions ➤ **NOT directly applicable to NCAs when they enforce Art. 101-102.**



ECN + Directive - EU Commission proposal

- Right of defense mentioned in **Art. 3** ECN + Directive:
 - 1) “General principles of EU law”;
 - 2) “EU Charter of Fundamental Rights”.

- Reference to sub-rights of defense only in Explanatory Memorandum attached to Directive proposal.

- **NO added value Art. 3:**
 - 1) ECJ case law on right of defense ➤ general principles of EU law?
 - 2) EU Charter already binding for NCAs.



ECN + Directive – legislative amendments

- **Council** ➤ upheld text Art. 3 proposed by EU Commission.
- **European Parliament (EP)** ➤ **substantial amendments:**
 - 1) Art. 3: direct reference to right to be heard; Statement of Objections; right to effective judicial review.
 - 2) **Preamble:** right of defense should be enforced by NCAs “... in accordance with the ECJ case law, in particular in the contest of proceedings which could give rise to the imposition of penalties”.
- June 2018: political agreement between Council and EP, but final text Art. 3 is still not public.



Do we need harmonization right of defense?

	Right to be informed	Access to the file	Privilege against self-incrimination	Legal Professional Privilege
Bulgaria	=	-	-	-
Croatia	=	=	-	=
Czech	=	=	-	=
Hungary	=	=	-	=
Poland	=	-	-	-
Slovakia	=	=	-	=
Romania	=	-	-	=

+ : higher degree of right of defense in comparison to EU Commission.

= : right of defense equivalent to EU Commission standard.

- : lower degree of protection of right of defense in comparison to EU Commission.



Findings comparative study

- DG Competition is not “the worst inquisitor” in Europe!
- **NCA in CEEs:**
 - 1) NO country case study provides higher degree of protection of right of defense than EU Commission.
 - 2) Convergence towards EU Commission standards in relation to right to be informed and right to access the file.
 - 3) PASI and LPP are recognized only for criminal proceedings ➤ NOT applied in competition proceedings.
 - 4) Lack of Hearing Officer.



Policy conclusions

- ECN + Directive strengthens enforcement powers NCAs, BUT limited harmonization right of defence under Art. 3.
- Findings study on CEEs: application right of defense is very divergent ➤ EU Commission best practices/ECJ case law as minimum benchmark.
- **Amendments ECN + Directive proposed by EP:**
 - 1) Reference to right to be heard ➤ NOT useful
 - 2) Reference to Statement of objection ➤ NOT useful
 - 3) Reference to right to judicial review ➤ NOT useful
 - 4) Reference to ECJ case law ➤ useful



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Thank you for your attention!

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