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Editorial Office

Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
e-mail: cars@wz.uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

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GRZEGORZ MATERNA
ANNA PISZCZ

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ELIPSA Publishing House
PL – 00-189 Warszawa, 15/198 Inflancka St.
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E-mail: elipsa@elipsa.pl; www.elipsa.pl

YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
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Editorial foreword

It is a real pleasure to present the newest volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2019, 12(20)). With this issue, the YARS continues to present original works discussing the developments of competition law mostly from the Central European perspective, but not only. This time such approach results in interesting contributions concerning competition law enforcement in Hungary, Italy, Lithuania, Poland, Slovakia, and UK, along with reflections regarding European-wide legal issues.

Contributors to this issue elaborated on diverse topics of relevance for competition law. A significant part of this volume of YARS reflects the editors' idea to extend the debate over one of the most remarkable recent legislatives initiatives, which is – from the competition law perspective – decisively the enactment of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the so-called 'ECN+ Directive'). The aforementioned Directive will surely result in significant changes in national laws of the EU Member States and thus debating it is even more justified.

The focus on the implementation the ECN+ Directive into national legal systems of selected Member States of the EU is the hallmark of the current volume of YARS. Thanks to our Authors' insights, readers can learn how the implementation of the Directive is going to impact national laws in individual EU Member States, and which of the Directive's aspects are going to be the most challenging for legislatures and national competition authorities (NCAs). The articles collected within this volume give us valuable opinions on whether the transposition of the ECN+ Directive may affect the effectiveness of the NCAs. A particular feature of the current volume is the fact that contributions regarding national competition law of Central and Eastern European Member States can be confronted with articles presenting the perspective of the implementation of the ECN+ Directive in one of the founding Members States of the European Communities, namely Italy.

The volume begins with a paper referring to the ECN+ Directive's perspective in Poland. Patrycja Szot discusses the current state of the Polish

leniency programme and the amendments required in order to implement the ECN+ Directive. The next Author (Katalin Cseres) examines, from the perspective of Hungary, whether the aim of the Directive – which is to empower NCAs to be more effective enforcers and to ensure the proper functioning of the internal market – is likely to be achieved. This paper is focused on the institutional aspects of the Directive and the enforcement of Articles 101 and 102 TFEU, in particular the mechanisms for ensuring independence and accountability of the NCAs. The following two contributions reveal the Italian perspective of the future implementation of the ECN+ Directive. Giacomo Dalla Valentina assesses whether and to what an extent the ECN+ Directive should affect the enforcement of competition law in Italy, in particular in the field of fundamental guarantees of independence and effectiveness of the NCA; Marialaura Rea concentrates on the right of defence in antitrust procedures, which is also subject to harmonization. The Slovak perspective on the implementation of the ECN+ Directive is the subject of the next two articles. Our contributors have chosen to elaborate on the issue of independence of the competition authority (Mária Patakyová) as well as on the compliance with safeguards as predicted in Article 3 of the Directive, the regulation of conflict of interest and the effectiveness of enforcement (Hana Kováčiková). The last contribution to deal with the implementation of the ECN+ Directive refers to the Lithuania's perspective (Gintarė Surblytė-Namavičienė) with the Author's insight on the legal challenges while implementing the Directive and critical view on some of the amendments that have already been made.

The next part of the issue, which is dedicated to legislation and case-law analysis, opens with the contribution by Jagna Mucha referring to the European Commission Proposal of 2018 for a Directive on Representative Actions, which aims to modernize the existing European collective redress system. The paper presents the Author's critical evaluation of the solutions put forward in the Proposal, comparing it to the already existing legal solutions. The review is followed by four comments on recent judgments of European and national courts. The range of subjects covered by these papers spans from the cumulative enforcement of European and national competition law (comment by Mario Libertini to the CJEU Judgment, C-617/17 *PZU na Życie*), through the issue of collective proceedings for damages in UK Competition Law (Kathryn McMahon's comment to the UK's Court of Appeal Judgment in case *Merricks v Mastercard*), application of the principle of economic continuity to private enforcement of competition law (comment by Vasiliki Fasoula to the CJEU Judgment, C-724/17 *Skanska Industrial Solutions*) and cases of non-exclusionary secondary line discrimination on grounds other than nationality (comment by Jan Szczodrowski to the CJEU Judgment, C-525/16 *Meo-Serviços de Comunicações e Multimédia*).

Traditionally, book reviews are also included in the YARS. For the current volume, Václav Šmejkal reviewed one of the most recent publications of the University of Warsaw Faculty of Management Press: Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries (edited by Anna Piszcz and Adam Jasser).

The last part of the current YARS volume consist of conference reports, concerning: (i) the Third Annual Conference: Innovation Economics for Antitrust Lawyers, which was organized by the Concurrences Review in partnership with King's College London (London, 1 March 2019); and (ii) the scientific seminar entitled 'Cartel facilitating as a special form of participation in anticompetitive agreements under EU and Polish competition law', organized by the Department of Competition Law of the Institute of Law Studies of the Polish Academy of Sciences (Warsaw, 3 April 2019).

All authors of the contributions to the current volume as well as all peer-reviewers deserve our deep gratitude. Hopefully the readers will find this joint effort useful.

Grzegorz Materna
Institute of Law Studies, Polish Academy of Sciences, Warsaw
Anna Piszcz
University of Białystok
YARS Volume Editors

A R T I C L E S

The Polish Leniency Programme and the Implementation of the ECN+ Directive Leniency-related Standards in Poland

by

Patrycja Szot*

CONTENTS

* Patrycja Szot, LL.M., PhD, Warsaw Bar; e-mail: p.szot@lawyer-competition.eu; all views expressed in this article are strictly personal. Article received: 14 August 2019; accepted: 29 August 2019.

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Abstract

This publication discusses the current state of the Polish leniency programme and the amendments required in order to implement the ECN+ Directive (in particular in the area of specific conditions for leniency, individual sanctions, protection of leniency statements or leniency plus) as well as harmonisation flaws (primarily lack of one-stop-shop, universal language, failure to lay down rules regulating the reduction of fines or fully coordinating rules on immunity from individual sanctions, lack of harmonisation regarding applications in non-cartel cases). The author's view is that the Polish system in broad terms corresponds to the majority of the harmonised standards owing to soft harmonisation based on the Model Leniency Programme and the EU leniency programme. Further, the implementation will not bring about revolutionary changes, unless combined with *de lege ferenda* improvements and enhancements in the general level of anti-cartel enforcement.

Résumé

Cette publication traite de l'état actuel du programme de clémence en Pologne et des modifications nécessaires pour mettre en œuvre la directive ENC+ (en particulier dans le domaine des conditions spécifiques de clémence, des sanctions individuelles, la protection des déclarations effectuées en vue d'obtenir la clémence ou «Leniency plus»), ainsi que des lacunes en matière d'harmonisation (principalement absence d'organe centralisé, de langage universel, absence de règles régissant la réduction des amendes ou de règles pleinement coordonnées en matière d'immunité des sanctions individuelles). Selon l'auteur, le système polonais correspond globalement à la plupart des normes harmonisées grâce à une harmonisation «douce» fondée sur le programme modèle du REC en matière de clémence et sur le programme de clémence de l'UE. Sa mise en œuvre n'entraînera pas de changements drastiques, à moins d'être combinée à des améliorations de *lege ferenda* et à une amélioration générale dans le niveau de lutte contre les ententes.

Key words: ECN+, leniency, Polish leniency, leniency plus, private enforcement, ring-leader, NCA, summary application, marker, individual sanctions, UOKiK, immunity, reduction of fines, enforcement of competition law.

JEL: K21

I. Introduction

This publication discusses the current state of the Polish leniency programme and the amendments required in order to implement the ECN+ Directive. It is based on a comparative method of analysis. The author's view is that the Polish system in broad terms corresponds to the majority of the harmonised standards, because in many aspects it follows the suggestions of the European Competition Network's (hereinafter: ECN) Model Leniency or the EU model. Nonetheless, a detailed analysis reveals the need for a number of adjustments. Those concern, in particular, the specific conditions that the applicant must meet in order to benefit from immunity or a reduction of fines (with emphasis on the standard of relevant evidence), requirement to provide for immunity from criminal sanctions for individuals or to further limit the use of information derived from leniency statements to specific instances.

The author also briefly discusses *de lege ferenda* proposals unrelated to the harmonisation, for instance narrowing down the scope of the Polish leniency programme to cartels, hub and spoke arrangements and limited vertical infringements, removing uncertainties regarding the scope of ring leaders included among potential immunity recipients or clarifying some procedural issues. Critical views are expressed in relation to the harmonisation flaws, in particular failure to introduce one-stop-shop or at last an option to use a universal language, or to fully coordinate requirements for immunity from individual sanctions, and lack of rules regulating the reduction of fines or harmonisation regarding applications in non-cartel cases.

The following sections present (i) the main rationale behind the ECN+ Directive, (ii) a brief look on the background of the Polish leniency programme and (iii) a discussion of each area subject to harmonisation (following the ECN+ Directive's order), that is, leniency conditions, requirements as to the form, marker, summary application, individual sanctions, protection of leniency information (iv) brief look at the harmonisation flaws and (v) conclusions.

The author's view is that an introduction of immunity for bid-riggers may bring about noticeable effects. Otherwise, the implementation of the ECN+ Directive's rules concerning leniency will not advance the effectiveness of Polish leniency, or overall Article 101 enforcement, in a revolutionary way.

In this area, in the first place a visible change in approach to enforcement policy is required, in particular increasing enforcement actions against cartels.

II. The ECN+ Directive

The ECN+ Directive[1] was adopted in December 2018. Its objective is to boost the national competition authorities' powers to ensure that EU competition law is effectively applied and enforced across the EU. Following the entering into force of Regulation 1/2003[2] on 1 May 2004, national competition authorities (hereinafter: **NCAs**) have powers and the obligation to directly apply EU competition law (prohibition of anticompetitive agreements and abuse of a dominant position) alongside the EU Commission (hereinafter: **Commission**). The review of public enforcement showed that this decentralisation has enhanced the enforcement of Union's competition law.[3] However, the state of affairs was far from ideal and the system's efficiency continued to by undermined by disparities in the enforcement tools available to the NCAs across the EU, differences in substantive law and enforcement practice.[4] The ECN+ Directive's objective is to remove this problem by introducing a set of union-wide minimum standards. The areas addressed comprise guarantees on (i) independence and adequate resources (financial, technical and technological) of the NCAs, (ii) the NCAs' investigative, decision-making and enforcement powers, in particular power to impose fines and periodic penalties, (iii) mutual assistance among the NCAs, (iv) the

[1] Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published on 14 January 2019 *(*OJ 2019 L 11, p. 3–33), (hereinafter: **ECN+ Directive**).

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), (hereinafter: **Regulation 1/2003**).

[3] See conclusions and recommendations in the Communication from the Commission to the European Parliament and the Council. Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives {SWD(2014) 230}_{SWD(2014) 231}, (hereinafter: **Communication Ten Years of Reg. 1/2003**), retrieved from http://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf (accessed on 30.06.2019) and Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance) {SWD(2017) 114} {SWD(2017) 115} {SWD(2017) 116}, (hereinafter: **Commission Proposal**), retrieved from http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (accessed on 30.06.2019).

[4] *Infra*. Król-Bogomilska, 2018, p. 13–14, discussed in detail the flaws of the current system in the specific context of penalties.

NCAs' role before national courts and (v) the requirement to comply (while enforcing Article 101 and 102 TFEU)[5] with general principles of Union law and to respect fundamental rights, in particular the right to defence.

Additionally, a considerable part of the ECN+ Directive is dedicated to a core problem of this publication, namely creating a level playing field in respect of programmes providing for immunity from or reduction of fines (collectively hereinafter: **leniency programme** or **LP**).

The ECN+ Directive addresses only cases in which EU law is applied (alone or in parallel with domestic competition law). Solely the rules restricting access to leniency statements and settlement submissions, and the use of them, apply also in purely domestic cases.[6] The Member States have to implement the ECN+ Directive until 4 February 2021.

III. Leniency programme in the ECN+ Directive

The Commission, while reflecting on antitrust enforcement under Regulation 1/2003 and the proposal for the ECN+ Directive, noted the general increase of actions against secret cartels and the growing importance of leniency programmes in this respect.[7] In particular, it emphasised that all Member States (with exception of Malta) introduced leniency programmes, which are to a significant degree aligned with the Model Leniency Programme (hereinafter: **MLP**). The latter is a 'soft' harmonisation tool developed within the ECN with a view of enhancing effectiveness of domestic leniency programmes by providing a state-of-the-art leniency model. It sets out the core rules of substance and procedure.[8] The Commission emphasised that the MLP led to the introduction of summary applications into domestic leniency regimes. This measure makes it possible for undertakings that applied for leniency before the Commission to take steps to reserve a place in the

[5] *Consolidated version of the Treaty on the Functioning of the European Union* of 13 December 2007, OJ 2008/C 115/01, (hereinafter: **TFEU**).

[6] See Article 1(2) and Article 31(3)–(4) of the ECN+ Directive; the latter are discussed in more detail in Section V.7 below.

[7] See paras. 78–88 of the Commission Staff Working Document. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues Accompanying the document Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives {COM(2014) 453} {SWD(2014) 230}, (hereinafter: **CSWD Enhancing Competition Enforcement**), retrieved from http://ec.europa.eu/competition/antitrust/swd_2014_231_en.pdf (accessed on 30.06.2019) and paras. 39–40 of the Communication Ten Years of Reg. 1/2003.

[8] The MLP was endorsed in 2006 and revised in 2012.

queue before a NCA by filing a simplified application, should the Commission ultimately refrain from pursuing the case (or part of it).[9] Hence, a summary application (if completed) alleviates the burden of multiple simultaneous (full) applications and provides some response to the ever reoccurring problem of the lack of a one-stop-shop system for leniency applications in the EU.

Nonetheless, the Commission made important points about the deficiencies of the current situation. In the first place, it stressed that sufficient legal certainty concerning the leniency status is a key factor determining undertakings' willingness to report cartels. In this context, the multijurisdictional nature of cartels (cartels often extend beyond national borders) requires creating a level playing field for potential leniency applicants across the EU. Otherwise deficiencies of a single (national) leniency programme(s) may undermine the collective effectiveness of the entire EU leniency-based enforcement.[10] Possible applicants need to be assured that their decision to come forward to the Commission or a particular NCA will not expose them or their staff to severe fines in another Member State. Such situation may arise if leniency advantages are not available in another Member State or because they offer substantially different levels of protection.[11] Against this background, the Commission noted that while the leniency programmes currently in force achieved a certain level of alignment,[12] differences continue to subsist. In particular, the conditions under which leniency is available very and not all

[9] Summary applications can be submitted with respect of cartels affecting at least three Members States. For a more detailed discussion of this institution see Section V.5 below and Gauer and Jaspers, 2007, p. 37.

[10] See Section 2.2.3. of the Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market {COM(2017) 142} {SWD(2017) 115} {SWD(2017) 116}, (hereinafter: **Impact Assessment Report**), retrieved from http://ec.europa.eu/competition/antitrust/impact_assessment_report_en.pdf (accessed on 30.06.2019). Hansberry-Bieguńska, Krasnodębska-Tomkiel and Materna, 2016, p. 34 emphasise that differences between national LPs undermine effectiveness of those programmes. See for a detailed discussion of typical differences by Król-Bogomilska, 2012, p. 7–9.

[11] More importantly these decisions are weighted against the risk of liability for damages, albeit reduced to certain extent by Article 11 (4) to (6) of the Directive (EU) No 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1–19), (hereinafter: **Damages Directive**).

[12] It is worth noting that in the documents relating to the assessment of the ten years of competition enforcement under Regulation 1/2003, the Commission refers to a 'significant process of alignment' of national leniency programmes with the MLP (see para. 80 of the CSWD Enhancing competition enforcement). Later however, in the documents setting out the rationale behind the proposal for ECN+ Directive, the language is less positive. In there, the Commission

NCAs accept summary applications.[13] More importantly, however, there are no legal guarantees that existing convergence will not be lost. This is because **there is no requirement under EU law to maintain at a national level leniency programmes applicable to Article 101 TFEU** infringements.[14] In the same vein, the Member States are not under an obligation to incorporate the MLP rules into domestic laws,[15] including to honour summary applications concerning cartels affecting more than one territory.

Secondly, there are significant differences regarding the protection of leniency and settlement material. The Commission pointed to such examples as availability (in some Member States) of leniency statements to public prosecutors and/or the police with a view of using it in proceedings unrelated to enforcement of EU competition law or to civil courts for purposes other than private enforcement.[16]

Thirdly, the Commission emphasised that the lack of convergent standards on protecting staff employed by the applicants deters undertakings from reporting cartels. At the same time, it hinders such undertakings' ability to collect relevant information and evidence with a view of preparing leniency applications. Employees facing potential individual sanctions may be unwilling to cooperate or may be tempted to destroy evidence pointing to their involvement in an infringement and hence potential liability. An important risk-enhancing factor is that an employee may be held accountable in any Member States affected by the cartel, not only the one where its company applied for leniency. This circumstance multiplies the need for harmonisation of the rules governing the interplay between corporate leniency and individual sanctions.

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stated that the non-binding MLP achieved only 'some degree of convergence' (see the Impact Assessment Report, p. 24).

[13] See Impact Assessment Report, p. 24.

[14] See para. 40 of the Communication Ten Years of Reg. 1/2003.

[15] As confirmed in judgment of 20 January 2016, Case C-428/14 *DHL Express (Italy) S.r.l. and Others v Autorità Garante della Concorrenza e del Mercato and Others*, ECLI:EU:C:2016:27, where it was held that the MLP as a soft harmonisation measure adopted within the framework of the ECN is not binding upon the Member States. Hence they may put in place leniency programmes diverging from it. In this case DHL applied for leniency to the Commission and in Italy. The scope of these applications differed in that one of the markets was not included in the application to the Italian competition authority. The later market was covered by the application of another undertaking that eventually benefited from full immunity in this respect whereas DHL could not (because it was not the first to report the infringement on this particular market). Similarly, in the earlier *Pfleiderer* case, the Court of Justice (**CJEU**) pointed out that neither the MLP nor the Commission leniency notice have binding effect at national law (judgment of 14 June 2011, Case C-360/09 *Pfleiderer v Bundeskartellamt*, ECLI:EU:C:2011:389, para. 21–22); see also Kulesza, 2015, p. 93 and critical comments relating to judgment by Stephan, 2011.

[16] See Impact Assessment Report, p. 24.

In light of the above consideration the Commission proposed to harmonise the leniency programmes by **transposing the main principles of the MLP into the ECN+ Directive.** Hence, the following issues have been addressed in the ECN+ Directive eventually adopted by the European Parliament and the Council: (i) obligation to provide for a leniency programme, (ii) conditions for immunity from and reduction of fines, including instructions regarding the duty of cooperation, (iii) form of leniency statements, (iv) markers, (v) summary applications, (vi) interplay between immunity applications and sanctions on natural persons and (vii) protection of leniency materials. The requirements concerning transposition and implementation of those rules into the Polish legal system are discussed in the same order in Section V below (it corresponds to the order adopted in the ECN+ Directive).

IV. The leniency programme in Poland

Poland introduced its first leniency programme[17] on the day it accessed the EU (1 May 2004).[18] It was modelled on the 2002 Commission leniency notice.[19] The provisions of the first leniency programme have been subsequently transferred into the new Act on Competition and Consumer Protection of 2007[20] without any substantial change (Molski, 2014, s. 1405) and any reference to the 2002 Commission Leniency Notice (Korycińska-Rządca, 2018, p. 65)

[17] Commentators consider that Article 89 of the Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2003, No. 86, item 804; hereinafter: **2000 Competition Act**) could not qualify as a leniency programme due to its limited application (cartels were outside its scope) and because the undertaking could plead guilty only if called to do so by the competition authority (Turno, 2013, p. 361; Kulesza, 2015, p. 85 – 86).

[18] Act of 16 April 2004 Amending the Act on Competition and Consumer Protection and Certain Other Acts (Journal of Laws 2004, No. 93, item 891; hereinafter: **2004 Amendment**. This law amended the 2000 Competition Act.

[19] Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), hereinafter: **2002 Commission Leniency Notice**, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002XC0219(02) (30.06.2019). The justification of the draft legislation clarified that the 2004 Amendment's aim was to implement rules 'analogues' (hence not identical) to the ones set out in the 2002 Commission Leniency Notice (see IV term Sejm paper No. 2561, p. 38, available in Polish at: http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/2561/$file/2561.pdf (30.06.2019).

[20] Act of 16 February 2007 on Competition and Consumers Protection (consolidate text: Journal of Laws 2019, No. 369), hereinafter; **2007 Competition Act**. The provisions were not adjusted to the updated Commission notice of 8 December 2006 on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), hereinafter: **2006 Commission Leniency Notice**, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN (30.06.2019).

or adopting the principles set forth in the MLP (2006 version). The Polish leniency programme (hereinafter also: **PLP**) was partly adjusted to the MPL in 2009 by force of a Regulation of the Council of Ministers (a lower-rank legislative act)[21] and non-binding leniency guidelines.[22] This development spurred criticism because the 2009 Procedural Regulation exceeded the scope of the legislative authorisation by laying down requirements for leniency applications and modifying leniency conditions.[23] In any case, neither the documents of this rank, nor the non-binding notice, was the appropriate way to impose new obligations on undertakings (Król-Bogomilska, 2010, p. 12; Kulesza, 2015, p. 96 and literature cited therein).

This 2009 leniency programme was substantially amended in 2014[24] to match the updated (in 2012) version of the MLP among others (Kulesza, 2015, p. 96).[25] The 2014 Amendment also sorted out some of the above

[21] The rules on the leniency procedure were set out in the Regulation of the Council of Ministers of 26 January 2009 on the procedure pertinent to applications filed with the President of the Competition and Consumer Protection Office for immunity or reduction of fine (Journal of Laws 2009, No. 20, item 109), hereinafter: **2009 Procedural Regulation**.

[22] The Leniency Guidelines of the Polish Competition Authorities' President, applicable as of 24 February 2009; hereinafter: **2009 Polish Guidelines**. Available in Polish at: www.uokik.gov.pl/aktualnosci.php?news_id=526 (30.06.2019).

[23] For instance, markers and summary applications, introduced by that regulation, were not foreseen in the 2007 Competition Act (a higher-rank act). Yet, by effectively modifying the rules on priority, they could deprive the undertakings that considered from the outset submitting a full leniency application of the right to benefit from immunity (because marker or summary applicants would be better placed in an immunity queue); critically Król-Bogomilska, 2010, p. 12–13, Król-Bogomilska, 2012, p. 10. Those provisions have been subsequently incorporated into the 2007 Competition Act (see comments further down)., which improved the situation from the perspective of proper legislation. However, this does not change the fact that marker option in principle places more diligent applicants (submitting full application in the first place) in disadvantageous position.

[24] See the Act of 10 June 2014 Amending the Competition and Consumers Protection Act and the Civil Procedure Code (Journal of Laws 2014, No. 945, hereinafter: **2014 Amendment**. The new rules have been supplemented by the Regulation of the Council of Ministers of 23 December 2014 on the procedure pertinent to applications for immunity or reduction of fine (Journal of Laws 2015, item 81), hereinafter: **2014 Procedural Regulation** that replaced the 2009 Procedural Regulation.

[25] The justification of the draft 2014 Amendment pointed to the MLP and experience of other jurisdictions to explain the reasons for which strict requirement to end infringement on the day the infringer submitted application was replaced (by a more lenient requirement) to end involvement in such infringement immediately following the leniency application at the latest. The MLP is also mentioned to justify the decision to include the initiator of an infringement among potential beneficiaries of immunity. Additionally, the Polish NCA relied on the MLP to substantiate its responses to comments provided within the framework of the draft legislation public consultation process. See: (VI term Sejm paper No. 1703, p. 70, 127), available in Polish at: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1703 (30.06.2019).

controversies by incorporating into the 2007 Competition Act certain provisions of the 2009 Procedural Regulation. The law is supplemented by updated leniency guidelines.[26] It is argued that the Polish leniency rules currently in force correspond to the MLP (2012) and are a result of 'soft harmonisation'.[27] Nonetheless, a number of differences between the Polish system and the ECN's model (MLP) persists (Kulesza, 2015, p. 97, Korycińska-Rządca, 2018, p. 68–77). The ECN+ Directive transposes the main principles of the MLP, hence those divergences will have to be addressed in the implementation process.

V. Implementation of the ECN+ Directive's provisions on leniency programmes in Poland

1. Scope of leniency programme

Pursuant to the ECN+ Directive, each NCA should have in place a leniency programme applicable at least with respect to secret cartels with the EU dimension.[28] The Member States may, but do not have to, foresee leniency programmes applicable to other Article 101 TFEU infringements (and its national equivalents) or to natural persons.[29]

The PLP covers all practices infringing Article 101 and its Polish equivalents (cartels, and other horizontal restrictions, for instance commercialisation or standardisation agreements as well as vertical restrictions)[30] and it provides for a possibility to extend the leniency benefits onto natural persons. In this

[26] The Leniency Guidelines of the Polish Competition Authorities' President dated May 2017, hereinafter: **2017 Polish Guidelines**. Available in Polish at: t http://www.uokik.gov.pl/download.php?plik=9486 (30.06.2019).

[27] I.e. voluntary harmonisation (as opposed to legislative or judicial harmonisation). Kowalik-Bańczyk, 2014, p. 147–148 explains the concept in detail and how it is applied in the area of competition law.

[28] The definition of a secret cartel is provided in Article 2(11–12) of the ECN+ Directive. References in this publication to a 'cartel' should be understood as references to a 'secret cartel' unless stated otherwise.

[29] See Article 17(1) and 18(1) of the ECN+ Directive. See comments in Section V.6 below concerning availability in Poland of leniency options to natural persons.

[30] See Article 113a and 4(5) of the 2007 Competition Act. Kulesza, 2015, p. 87, considers that this might be a result of a misunderstanding rather than a well-thought policy decision to broaden the scope of the leniency programme, i.e. the Polish NCA while drafting the first leniency rules in 2004 relied on an overly broad definition of cartels referring to any agreements restricting competition that was used in the Polish NCA's 2004 brochure entitled *Leniency*.

respect it differs from the MLP which is limited to secret cartels, including hub and spoke arrangements.[31] In the light of the final wording of the ECN+ Directive, Poland does not have to narrow down the PLP's current scope.[32] Therefore views to the contrary, based on the earlier drafts of the ECN+ Directive (Materna, 2018, p. 44), lost importance.[33] Nonetheless, the question of whether Poland should consider limiting the scope of the PLP to cartels, hub and spoke arrangements and very limited vertical restraints at the most, remains valid.[34] It is considered that leniency benefits should not apply to restrictions other than cartels because the former are normally less difficult to detect or investigate with use of standard powers (inspections, information requests, complaints from market participants, open-source intelligence, etc). In particular, in the context of vertical restraints, potential infringers' interests are usually divergent, hence there is no element of solidarity that needs breaking by exceptional means such as leniency. Moreover, the legal assessment of vertical restraints or non-cartel arrangements is not straightforward (Molski, 2014, p. 1407; Sitarek, 2014, p. 209, 210). For instance, economic considerations that play an important role in such assessment, at the end of the day often alter the initial conclusions in favour of the restriction. A broadly applied leniency system may therefore transform into an informal clearance scheme, which would be an unwelcome development (see MLP, 2006, p. 11).[35] In any

[31] Similarly to the majority of the national LPs in the EU, see Rumak, Sitarek, 2009, p. 103, Król-Bogomilska, 2015, p. 7; Piszcz, 2016, p. 214 (who discusses examples of approaches taken in other jurisdictions) and Korycińska-Rządca, 2018, p. 68.

[32] The ECN+ Directive explicitly states now that the requirement to put in place LPs applicable to secret cartels is without prejudice to national provisions on leniency programmes applicable to other infringements (Article 17(1), 18(1) and Recital (11) of the ECN+ Directive. Similar option was foreseen already in the Commission Proposal, however only in recitals (recital number 10), which in fact also mentioned the possibility of extending such programmes to the abuses of a dominant position (Article 102 TFEU and equivalent national provisions).

[33] Albeit not entirely, see the extended reading of this interpretation in section V.2 below. Król-Bogomilska, 2018, p. 20 argued that Poland could preserve the current *status quo* and continue to extend leniency to non-cartel infringements (of Article 101 TFEU and its national equivalents) also based on the earlier drafts of the ECN+ Directive precisely because those drafts failed to address in whatsoever manner the issue of LPs' possible broader application.

[34] This opportunity was missed on the occasion of the 2014 Amendment (Piszcz, 2016, p. 214; Skoczny, 2015, p. 170).

[35] Turno, 2013, p. 460–465, advances similar arguments in criticism of the broad scope of the PLP's application. He additionally emphasises that such approach undermines the system's deterrent effect and effective operation, i.e. leads to low number of applications and infringement decisions. In the period 2004–2019 (until 26 September 2019) in total 83 applications were submitted (according to information provided by the Polish NCA on the author's request). Poland was placed in the second from the top group of Member States in terms of a number of applications received in years 2004–2014 (Annexes to the Impact Assessment Report, available at: http://ec.europa.eu/competition/antitrust/nca.html (30.06.2019). Unfortunately,

case, vertical restraints are in principle less harmful than cartels. The idea of extending leniency benefits to let wrongdoers go unpunished, without gaining clear and crucial benefits, does not sit comfortably with the consideration of natural justice.[36] In view of these considerations, an overly broad scope of a LP's application may undermine the effectiveness of EU competition law enforcement in contravention of the *Schenker* ruling[37] (Sitarek, 2014, p. 208, 210)[38] in the same way as overly lenient application of LPs may weaken the whole system.[39]

In light of the above, it is submitted that Poland, on the occasion of the ECN+ Directive's implementation, limits the application of its LP to cartels, including hub and spoke arrangements and to vertical price-fixing and bid-rigging at the most.[40] In this case, it would be necessary to introduce into the 2007 Competition Act a definition of a cartel (and secret cartel) corresponding to Article 2 (11–12) of the ECN+ Directive. In this way, the

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Poland's relatively good result can be traced back to applications made with respect to vertical cooperation. The majority of the Polish NCA decisions based on leniency applications related to vertical restraints, see Turno, 2013, p. 624–648 (in particular pricing agreements, the author discussed decisional practice spanning from 2004 to 2012), Hansberry-Bieguńska et al., 2016, p. 53, citing the relevant decisions in footnotes 150 and 151; Skoczny, 2015, p. 170; Turno, 2016, p. 1483).

[36] In those situations, the benefits might not outweigh disadvantages, as it is the case in LPs applied to cartels where the interest of consumers in ensuring that secret cartels are detected and punished is balanced against the interest in imposing fines on those undertakings who made cartel discovery possible (2009 Commission Leniency Notice, para. 3). '[A]rgumentation based on natural justice should not lead to the creation of a scheme which is neither just nor effective' (Rumak, Sitarek, 2009, p. 104).

[37] Judgment of 18 June 2013, Case C-681/11 *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, ECLI:EU:C:2013:404, hereinafter: **Schenker**. In Schenker, the CJEU held that infringements of Article 101 TFEU may be left unpunished based on national leniency programmes only exceptionally and provided there is no harm to the uniform and efficient enforcement of this Article (para. 46, 47 and 49 of Schenker, see detailed comments Sitarek, 2014, p. 206–207).

[38] The broad scope of the PLP's application was assessed positively by Sołtysiński, 2004, p. 41. Hansberry-Bieguńska et al., 2016, p. 23 also note that the broad scope of the PLP's application led to the discovery of many harmful infringements. However, this is illustrated by an example of hub-and-spoke type of arrangements with inherent horizontal effects (decisions of the Polish NCA no DOK 107/06 of 18.09.2006, DOK-4/2010 of 24.05.2010 and DOK-12/2010 of 31.12.2010).

[39] The system may be self-detrimental if the leniency benefits are easy to obtain, in particular including during or after the inspection and even if the authority collected a compelling piece of evidence. In such a situation, the undertakings are unwilling to report because they may avoid fines by coming clear as late as when opening the door to the inspectors.

[40] A similar compromise has been endorsed also in the literature, e.g. Turno, 2013, p. 461; Turno, 2016, p. 1487 (who emphasises also that the UK's system is based on the same approach); Molski, 2014 p. 1408 (in favour of hub and spoke only).

list of infringements covered by leniency could simply refer to 'cartels' next to a few vertical restraints proposed above.[41]

2. Conditions for granting immunity from or reduction of fines

2.1. Method of harmonisation

The ECN+ Directive specifies the conditions under which immunity from fines or a reduction of fines can be granted (Article 17 to 19). In this respect, the wording of the relevant provisions becomes more demanding, as it is stipulated that the Member States shall ensure that immunity from and a reduction of fines is granted **only** where the applicant fulfils the conditions set out in Article 17(2) and 18(2) of the ECN+ Directive. The ECN+ Directive is primarily based on the minimum and non-exhaustive harmonisation approach (Monti, 2017, p. 8; Rusu, 2017). The language used in Article 17(2) and 18(2) suggests, however, that the Member States are not allowed to 'gold-plate' the assumed standard (Rusu, 2017; Materna, 2018, p. 37, 44, the same approach seems to be endorsed by Dobosz, Scheibe, 2017, p. 99 and Król-Bogomilska, 2018, p. 20). Materna came to the above conclusion by analysing this language in the context of the allowed scope of LPs. As explained in Section V.1. below, at a later stages of the legislative process a clear disclaimer was added regarding the Member States' rights to provide for broader application of LPs. This clarified the situation only half-way, as the remaining text continues to require that leniency benefits are available **only** under conditions specified in the ECN+ Directive.

Hence, the question is whether the ECN+ Directive's premise is that national LPs applicable to cartels should provide for uniform requirements, whereas the Member States enjoy more or complete flexibility in cases of other infringements. Such approach appears inconsistent. The relevant Recital 11 of the ECN+ Directive does not bring much clarity to the issue either. It refers to 'clearer and harmonised rules for leniency in the area covered by [the] Directive' without specifying the nature of harmonisation (minimum or maximum). It also perceives **marked** (but not any) differences between them as an obstacle to better operation. However the context of this recital is very suggestive. Recital 11 opens by the following statement: 'Conversely,

[41] The term 'cartel' (but not a 'secret cartel') has been already defined in the same way in the Article 2(3) of the Act of 21 April 2017 on actions for damages for infringements of competition law (Journal of Laws 2017, item 1132), hereinafter: **Damages Act**, implementing the Damages Directive. The 2007 Competition Act's status is similar to the status of an act codifying a particular branch of law and therefore it should include all systemic definitions that come within its realm.

detailed rules are necessary in the area of **conditions** for granting leniency for secret cartels.' This sentence juxtaposed with the preceding Recital 10 (that obviously refers to minimum harmonisation) suggests that in relation to leniency a maximum harmonisation approach applies.[42] The supposition is reinforced by the language of Recital 51[43] and Article 17(2) and 18(2)). Hence, the conclusion is that the Member States should **implement uniform (set forth in Article 17(2) and 18(2) and 19 of the ECN+ Directive) conditions for granting leniency for secret cartels where maximum harmonisation applies**[44] and may depart from those standards in cases of non-cartel infringements (if they opt for an extended application of their LPs).[45]

2.2. Specific conditions for immunity

Pursuant to the ECN+ Directive, in order to be eligible for immunity from or a reduction of fines an applicant must fulfil a set of specific and a set of general conditions. Specific immunity conditions differ from specific conditions for a reduction of fines. The general conditions are common for both types of leniency applications and for this reason are discussed later (Section V.2.4. below).

A successful immunity applicant must fulfil the following specific conditions (Article 17(2) of the ECN+ Directive): (a) not have **coerced** (or taken steps to coerce) others to join or remain in the cartel and (b) be first among the cartel

[42] Similar conclusion can be reached based on the French language version. Polish and German language versions are less conclusive in this respect. Alternatively, this phrase can be also understood as merely arguing that minimum standards with respect to conditions for leniency should be more detailed than minimum standards applicable in the area discussed in recital 10.

[43] '[…] It is therefore appropriate to increase legal certainty for undertakings in the internal market and to boost the attractiveness of leniency programmes across the Union by reducing these differences by enabling all NCAs to **grant immunity and reduction** from fines and accept **summary applications** under the **same** conditions. Further efforts by the European Competition Network to align leniency programmes could be needed in the future', emphasis added.

[44] This view was endorsed by E. Aresnidou (the Commission's representative from DG Competition) during the Polish – German Academic Conference concerning the ECN+ Directive, held at Warsaw University on 17 October 2019.

[45] Bearing in mind considerations set out in Section V.1. (risk of undermining the effectiveness of Article 101 TFEU enforcement), a departure from the directive's standard should be towards more stringent requirements only. Another words, the leniency benefits should not be applicable in overly relaxed manner. Król-Bogomilska, 2018, p. 20, emphasised that differences (across the EU) between LPs applicable to non-cartel infringements might have equally deterrent effect on the undertakings willingness to report as in case of cartels. Hence, by allowing those differences to subsist, the ECN+ Directive objective to enhance enforcement of competition law is weakened.

participants to submit **relevant evidence.** The threshold of relevant evidence is met if the applicant provides the evidence that:

(i) enables the NCA to carry out a **targeted inspection**, or (if the NCA already had in its possession evidence sufficient in that regard or had already carried out a targeted inspection)[46]

(ii) an evidence sufficient (in the NCA's view) **to find an infringement,** provided that the NCA did not yet have in its possession an evidence sufficient in that regard and that no other undertaking previously qualified for immunity pursuant to point (i) (i.e. by providing evidence enabling a targeted inspection to take place).

The PLP does not correspond to some of these requirements.[47]

2.2.1. Concept of relevant evidence and relevant information

In the first place, the Polish concept of relevant evidence is based on the 2002 Commission Leniency Notice. Secondly, also submitting relevant information (not evidence) may qualify for immunity (but not a reduction of fines), provided other conditions are met (Molski, 2014, p. 1416; Korycińska-Rządca, 2018, p. 70).[48] In Poland (in the context of immunity applications), two alternative thresholds for relevant evidence apply (Article 113b(2) of the 2007 Competition Act): it is the evidence that (i) enables the Polish NCA to **launch a full-fledged investigation**[49] or (ii) which **significantly contributes to finding of an infringement**[50] (if such investigation was already launched). In each of these cases, the relevant information is the one that enabled the Polish NCA to collect relevant evidence. That 'evidence' or 'information' must be new to the Polish NCA.

[46] The time when the NCA receives the application is relevant to assess the value of such evidence in this respect.

[47] For the English language version of the 2007 Competition Act the reader is kindly referred to the Polish NCA's official site: https://www.uokik.gov.pl/competition_protection.php (30.06.2019).

[48] In order to facilitate further analysis, Annex 1 contains a tabular comparison of the PLP's and the ECN+ Directive's requirements concerning relevant evidence and relevant information in the context of applications for immunity and a reduction of fines.

[49] As opposed to a 'preliminary investigation' which the Polish NCA may launch in Poland. Formally there are no parties to a preliminary investigation because, at least in theory, it is not directed at specific undertakings. A preliminary investigation may but does not have to precede a full-fledged investigation. The latter corresponds in broad terms to a typical enforcement investigation (Article 47 of the 2007 Competition Act).

[50] According to para. 17 and 14 of the 2017 Polish Guidelines it is an evidence that represents **significant added value for the purposes of proving an infringement** and is **relative** to the evidence already in the Polish NCA's possession, meaning that it proves certain facts and increases the level of detail of that information.

The above rules will have to be amended in order to correspond to the requirements of the ECN+ Directive. The standard for the relevant evidence (defined in respect of threshold one) should be modified to the 'evidence that enables a targeted inspection' (and not 'institute an investigation').[51] These are two different procedural developments, even if at the end of the day the scope of information required to substantiate such evidence is comparable.[52] In practice, and according to paragraphs 13 and 16 of the 2017 Polish Guidelines, an evidence (or information) enabling the Polish NCA to instigate an investigation is the evidence that enables a targeted inspection or the launch of a full-fledged investigation.[53] Turno, 2016, p. 1514, proposed that in the latter case, the threshold of relevant evidence could be met even if it corresponds at least to the standard notification of an infringement that any market participant may submit to the authority (Article 86 (2) 1–5 and 86(3) of the 2007 Competition Act. However, the standard notification may contain very laconic information on the facts. Hence, in principle the leniency applications should be more substantiated.

Hansberry-Bieguńska et al., 2016, p. 33 refers to evidence enabling a targeted inspection as a subcategory of evidence allowing the Polish NCA to open an investigation.[54] Material indicating the place where other evidence significant for the establishment of an infringement is located, and hence where the search should take place, is a good example of the former. The particular significance of this specific type of evidence steams from the ever increasing role of safeguards in respect of fundamental rights, including prohibition to conduct fishing-expeditions (Hansberry-Bieguńska et al., *op. cit*). It also may significantly contribute to substantiating a request for a court authorisation to conduct an inspection.[55]

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[51] Para. 8 if the 2006 Commission Notice was upgraded in a similar way, which also corresponds to para. 5 of the MLP.

[52] In the light of para. 9 of the 2006 Commission Leniency Notice, para. 6 of the MLP and Article 19 (b) of the ECN+ Directive, on the one hand, and Article 113a (2) of the 2007 Competition Act, on the other. See for more details Section 2.4. below and Turno, 2016, p. 1515.

[53] Additionally, the 2017 Polish Guidelines clarify that it concerns the evidence that confirms the statements regarding the existence of an infringement contained in the application (para. 12 of the 2017 Polish Guidelines).

[54] Depending on the circumstances (more precisely, on the results of the inspection), evidence enabling a targeted inspection may be more or less valuable for advancing the case than evidence enabling the opening of an investigation.

[55] In Poland judicial authorisation is always required to carry out an inspection in private premises, land or means of transport (see Article 7(2) and 91 of the 2007 Competition Act; the former makes such requirement mandatory). To the author's best knowledge the Polish NCA has not yet searched private premises. Otherwise, judicial authorisation is not compulsory but, if granted, it enables the inspectors to collect evidence independently of consent, assistance or cooperation of an undertaking subject to such forced inspection. In cases of unauthorised

Additionally, it should be made clear that providing the Polish NCA with **relevant information is not enough** to benefit from immunity. In other words, it must be necessary to substantiate the application with a concrete piece of evidence to qualify for immunity, which normally should be accompanied by supporting information. The ECN+ Directive (similarly to the MLP) requires that the undertaking furnishes ready evidence which is sufficient to achieve the objectives specified in Article 17(2)(c) and additionally insider information. The expectation pursuant to the PLP rules currently in fore is to some extent similar[56], but it must be clearly set out in binding law to enhance certainty and transparency. Moreover, the scope of the relevant information required for threshold one and two overlaps. It is considered that in both cases it can be information that permits the authority to collect evidence enabling a targeted inspection.[57] This approach is inconsistent. It contradicts the assumption (behind the MLP[58] and hence the ECN+ Directive) that immunity is easier available under the lower threshold. In other words, the obligations of an infringer that 'enabled' a targeted inspection are easier to meet than the obligations in threshold two. This is to create an incentive to cease and report an unknown cartel as quick as possible.

The last comment in the context of the relevant information requirement also relates to threshold two. Pursuant to the current wording, the applicant furnishes the relevant information on the Polish NCA's request.[59] If the application would have to be based exclusively on the relevant information, it simply does not make sense to expect that such information is provided on the authorities' request. In this context, removing the requirement to provide the relevant information altogether would eliminate this inconsistency.

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inspection, cooperation of the inspected entity is indispensable (Article 105n of the 2007 Competition Act; Turno, 2016, p. 1367–1368). This steams from the fact that an inspection in Poland may have two forms: control or forced search (inspection) (Polish: *kontrola* and *przeszukanie*). The prevailing practice is that the Polish NCA seeks judicial authorisation and conducts forced inspection.

[56] Owing to the comparable scope of information generally required, see comments in footnote 53 above.

[57] Nonetheless, in practice inspections are rarely conducted after the full-fledged investigation was instituted. Turno, 2016, p. 1517, proposed that information that enabled the authorities to send 'targeted' information requests would be the other example of information required to satisfy threshold two. The 2017 Polish Guidelines does not clarify what the relevant information for the purposes of threshold two is, it addressed this requirement only with respect to threshold one (in detail in para. 13 and in para. 16).

[58] See para. 18 of the MLP explanatory notes.

[59] See Article 113b (2) item b (towards the end). No such condition is provided with respect to threshold one for the relevant evidence or information (Article 113b (2) item a).

2.2.2. Novelty concept

The PLP's requirement relating to the novelty of the evidence also should be reformulated for the purposes of the implementation. Following the literal interpretation of Article 113b(2) *in fine*, in Poland the applicant is required to submit the evidence (or information) that was not in the Polish NCA's possession. Technically, it means that an applicant is successful where it submits new evidence (or information) that is sufficient to institute an investigation or find an infringement, even if the Polish NCA at the time of the submission was already in possession of **other** evidence meeting the same objective[60] (Molski, 2014, p. 1416 expressed a different opinion, namely that the Polish NCA must not possess at that time sufficient evidence; this is how this requirement is interpreted in practice).

The ECN+ Directive's standard is clearly high in that regard. It concentrates on **new and sufficient** evidence, instead of merely new evidence. According to this requirement, the NCA **must not be in possession of an evidence sufficient** to conduct a targeted inspection or find an infringement, which does not necessarily have to be the same as the evidence offered by the applicant (Article 17(c)(i)–(ii)).

The 2017 Polish Guidelines attempted to remove the above shortage of the PLP by clarifying in paragraph 17 that the relevant evidence and information should not only be new but also represent a significant added value relative to materials already in the Polish NCA's possession. This explanation concerns only the threshold two requirements, but probably was intended to have a broader application. In the interest of transparency and certainty, the wording of relevant PLP's provisions should be corrected to unequivocally reflect the above, even if the Polish NCA's practice may follow the approach set out in the ECN+ Directive. This is the more so because the practice may always change. Additionally, the competing applicant may argue for a literal interpretation of current provisions in case of a dispute who should be better placed in an immunity queue.

2.2.3. Evidence significantly contributing to finding of an infringement v. sufficient evidence

Conversely to the PLP, the ECN+ Directive does not require that the evidence that enables the finding of an infringement (threshold two), contributes to this outcome in a '**significant**' way. It is enough if the evidence provided is **sufficient**

[60] Article 113b(2) *in fine* of the 2007 Competition Act reads as follows: 'provided that the Polish NCA was not in possession of **that** evidence or information'. It should at least be changed to 'provided that the Polish NCA was not in possession of **such** evidence or information'.

to issue an infringement decision.[61] Even if in practice the interpretation of these terms may point to converging results, the wording of the PLP should be aligned with the ECN+ Directive in the interest of clarity and certainty.

Moreover, the perception of the 2017 Polish Guidelines of the relevant evidence required for the purposes of threshold two is almost the same as in the case of evidence required for a reduction of fines. Resigning from the condition that evidence (information) under immunity 'threshold two' should contribute in a significant way towards finding of an infringement and adapting the ECN+ Directive's approach, would help to differentiate the two requirements.

2.2.4. Scope of the ring-leader exception: coercing v. inducing

Fifthly, the scope of the ring-leader exception provided in the PLP is broader compared to the ECN+ Directive (and the MLP, paragraph 8 or 2006 Commission Leniency Notice, paragraph 13). Hence it needs adjusting. The PLP refers to an undertaking that was **inducing (convincing)** others to participate in an infringement (Article 113b(3) of the 2007 Competition Act).[62] To convince someone means to influence his decision by persuasive methods and not necessarily against someone's will[63] or to do something bad or illegal.[64] **Coercing** (standard used by the ECN+ Directive) involves use of force or threats,[65] obtaining a decision against someone's will and therefore is an action characterised by greater degree of malice. The Polish term is more difficult to apply[66] and forecloses a broader (in comparison to the ECN+ Directive) group of potential applicants from the possibility to apply for immunity[67] (critically: Turno, 2013, p. 511; Molski, 2014, p. 1418; Piszcz, 2015, p. 50; Korycińska-Rządca, 2018, p. 71). Amending this provision

[61] See Article 113b(2)(b) of the 2007 Competition Act and Article 17(c)(ii) of the ECN+ Directive.

[62] Polish: *nakłaniał*, in other words persuading or convincing.

[63] See PWN dictionary: https://sjp.pwn.pl/slowniki/nak%C5%82ania%C4%87.html (30.06.2019).

[64] Therefore the English term 'instigate' (https://www.lexico.com/en/definition/instigate (30.06.2019)) or 'incite' (https://www.lexico.com/en/definition/incite (30.06.2019)) would not be the best equivalent to Polish '*nakłaniać*'.

[65] See Oxford: https://www.oxfordlearnersdictionaries.com/definition/english/coerce#coerce_inflg_2 (30.06.2019) and Lexico dictionary https://www.lexico.com/en/definition/coerce (30.06.2019).

[66] It is not always clear when certain behaviour attains the level of a persuasion, e.g. will repeated invitation from a market leader combined with his participation in an infringement or just a passive behaviour qualify as such? The term was not clarified in the 2017 Polish Guidelines.

[67] Although it may just result from the fact that the Polish language version of the 2006 Leniency Notice in para. 13 uses the same term ('*nakłaniać*'). Interestingly, the English language version of the 2007 Competition Act available at the Polish NCA's web-site uses the English

is not required (because the ring-leader exception is provided in Article 17(3) and not in Article 17(2), see comments in Section 2.1. above)[68] but it may contribute to enhancing efficiency of the PLP.

2.2.5. Priority requirement: first to submit relevant evidence or first to fulfil all conditions

Sixthly, a fresh look concerning the 'priority' requirement is needed. According to the PLP, an applicant in order to qualify for immunity has to, as the **first,** meet **cumulatively** the following conditions:

(i) submit the required application covering detailed description of an infringement,
(ii) not disclose his intention to apply for immunity,
(iii) fully cooperate with the Polish NCA starting from the moment it applied for immunity,
(iv) cease participation in the reported infringement and
(v) provide the relevant evidence (or information, as defined above) (Article 113b(1)–(2) of the 2007 Competition Act).

The scope of duties (i)–(iv) is comparable to the general conditions for leniency set out in Article 19 of the ECN+ Directive. Contrary to the PLP, the ECN+ Directive does not extend the 'priority' requirement to those obligations. It is sufficient that the applicant is **first to submit the relevant evidence** (as discussed above, see Article 17(2)c).

This is a more reasonable method. Determining who was the first to satisfy requirements that relate in many cases to continuous actions extended over a long period of time is impossible. Therefore, in the interest of transparency and clarity, the PLP terms should be reformulated to reflect the approach taken in the ECN+ Directive.

2.2.6. Duty to confirm the granting of conditional immunity

Lastly, the ECN+ Directive provides that the NCA must inform the applicant of whether or not it has been granted conditional immunity from fines (on the applicant's request information is in writing, Article 17(4)). No time-limits have been specified in that regard.

According to the PLP, the Polish NCA confirms this information **immediately** (after it has reached the relevant conclusion) **in writing** and

term 'coerce' and the Polish language version of the ECN+ Directive in Article 17(3) uses incorrectly the word '*nakłaniać*'.

[68] There are arguments justifying view that the entire of Article 17, 18 and 19 are subject to maximum harmonisation. Król-Bogomilska, 2018, p. 20 pointed that such change is required in view of the earlier draft of the ECN+ Directive.

without the applicant's request.[69] Clearly, the PLP provides for better and broader information standards (confirmation relates also to the application for a **reduction of fines**). In this area, requirements for maximum harmonisation do not apply, hence the relevant provisions do not need amendments.

2.3. Specific conditions for a reduction of fines

2.3.1. Relevant evidence

The specific conditions for a reduction of fines in the ECN+ Directive are limited to the obligation to provide relevant evidence. In this case the evidence meets the threshold of relevance if it represents **significant added value for the purposes of proving an infringement** and is **relative** to the evidence that the NCA possessed at the time of the application (Article 18(2)c).

The PLP requirement in this respect is comparable. The applicant must provide an evidence that is of **substantial importance for the proceedings** and was not in the Polish NCA's **possession.**[70] It can be inferred from this wording that it concerns evidence that was new at the **time of the application**.[71] In practical terms, the meaning of this requirement is the same as the meaning of its equivalent in the ECN+ Directive.[72] Additionally, the Polish NCA clarified that this is an evidence that **strengthens by its nature and level of detail its ability to prove an infringement** (which mirrors the approach in the MLP) and 'proves certain facts and increase the level of detail of information already in the Polish NCA's possession'.[73]

Bearing the above in mind, and the non-binding nature of the 2017 Polish Guidelines, it would be in the interest of transparency and certainty to adjust the wording of the PLP's relevant provisions to the ECN+ Directive.

2.3.2. Lack of rules on fine reduction

The ECN+ Directive does not specify **the manner in which a fine should be reduced or relevant redaction criteria**. Nor does it determine the **impact**

[69] See para. 6(1) and 7 of the 2014 Procedural Regulation. Additionally, the Polish NCA confirms the date and the time of submitting a leniency application (Article 113a(4) of the 2007 Competition Act).

[70] See Article 113c(1)3 of the 2007 Competition Act. Contrary to the rules applicable in case of an application for immunity, only one threshold for relevant evidence was foreseen with respect to applications for a reduction of fines and it excludes the concept of the relevant information.

[71] This is not explicitly confirmed in the relevant para. 14, 17 and 18 of the 2017 Polish Guidelines as it refers to a general expression 'new and unknown earlier'.

[72] Infra and Turno, 2016, p. 1522–1523.

[73] See para. 18 and 14 of the 2017 Polish Guidelines and para. 10 of the MPL.

that the rejection of an application or disqualification from benefits at the end of the proceedings has **on the place in the queue** of others.[74]

The manner in which the reduction is calculated according to the PLP follows the system introduced in paragraph 26 of the 2006 Commission Leniency Notice.[75] The PLP also provides that rejected applications will be disregarded when determining the eventual order in a queue, but applications withdrawn or disqualified after a conditional leniency was granted will not impact the original order.[76] These provisions will not require amendments in the implementation process.

2.3.3. Partial immunity

The ECN+ Directive foresees **partial immunity**.[77] Accordingly, if an applicant submits compelling evidence that enables the NCA to prove additional facts allowing to increase the level of fines, this evidence should be disregarded when setting the fine imposed on that applicant. In other words, only the fines of other infringers can be enlarged based on this aggravating circumstance.

This rule will have to be introduced into the PLP, because the general rules on the setting of fines will not be sufficient to ensure such guarantee (Turno, 2016, p. 1525; Król-Bogomilska, 2018, p. 20; Materna, 2018, p. 44).

2.3.4. Simultaneous applications for immunity and a reduction of fine

There are two specific characteristics of the PLP concerning a reduction of fines that need considering from the perspective of the ECN+ Directive, namely the possibility to make simultaneous applications and the institution referred to as 'leniency plus'.

According to the PLP, an applicant may **simultaneously file an application for immunity and for a fine reduction** (the Polish NCA considers the latter, should the applicant fail to qualify for immunity).

The MLP (paragraph 20), which the ECN+ Directive is based on, provides that the undertaking may request the NCA to consider its application for

[74] This is one of harmonisation deficiencies, see comments in Section VI.

[75] See Molski, 2014, p. 1423; Skoczny, 2016, p. 171; Korycinska-Rządca, 2018, p. 72, who described in detail the PLP applicable rules, i.e. Article 113c (2) of the 2007 Competition Act. See also Kulesza, 2015, p. 86–87, 97 concerning historical versions of this provision.

[76] Para. 8 and 11 of the 2014 Procedural Regulation.

[77] See Article 18(3) of the ECN+ Directive that is comparable to the solution provided for in the 2006 Commission Leniency Notice (para. 26 in fine) and the MLP (para. 12 and para. 26 of the explanatory notes).

a reduction of fine after its application for immunity was rejected (unless from the outset it applies only for a reduction of fines, for example because it coerced others to participate in an infringement).

Article 17(4) of the ECN+ Directive contains a similar statement: the applicant may request a reduction of fines in case the NCA reject its application for immunity. The language is not conclusive as to whether the applicant may upfront request immunity and, alternatively (in case of rejection), a reduction of fines. Therefore, the PLP's current approach to alternative requests may remain unchanged.

2.3.5. Leniency Plus

The other particularity of the PLP is that since the 2014 Amendment it provides for a solution referred to as '**Leniency Plus**'. This provision allows the undertaking that applies for a reduction of fines in relation to one infringement ('first infringement') to receive an **additional 30% reduction of fines to be imposed for the first infringement, if it is the first to report another, unknown[78] infringement** ('second infringement'). The applicant must submit evidence enabling the Polish NCA to launch a full-fledged investigation with respect to this other (second) infringement (that is, relevant evidence fulfilling the regular 'threshold one' requirement that would be applicable if the applicant would merely request immunity in relation to the second infringement). The Leniency Plus option is foreign to the MLP and the EU systems (Piszcz, 2016, p. 215) although it is applied in several Member States (examples in Skoczny, 2015, p. 171 and Martyniszyn, 2015, p. 13).

Initially it was considered that in light of the ECN+ Directive' drafts, amendments to Polish Leniency Plus would not be necessary (Materna, 2018, p. 44). The final wording of the ECN+ Directive provides, however, strict requirements for fine reductions (Article 18(2)) which the Member States should not depart from (see considerations in Section V.2.1. above). In particular, the ECN+ Directive allows for reduction of fines if an applicant

[78] I.e., an infringement that is not subject of any (preliminary of full-fledged) Polish NCA proceedings. Apart from this additional fine reduction, the undertaking may benefit from leniency (presuming also reduction of fines) with respect of this other infringement, provided it complies with all applicable leniency conditions. See Article 113d of the 2007 Competition Act. The institution is subject of hefty criticism. Apart from many general legislative flaws, it has systemic deficiencies, e.g. because it is optional for the applicants and introduced a very high and rigid uplift (30% instead of a rage of reduction) applicable multiple times and regardless of the significance of the other revealed infringement (Martyniszyn, 2015, p. 13–14; Skoczny, 2015, p. 172). Additionally, the PLP provides no guidelines on how to differentiate the agreements or calculate fine reductions (Semeniuk and Syp, 2013, p. 33–41; Piszcz, 2015, p. 52; Piszcz, 2016, p. 216).

discloses its participation in a cartel and provides an evidence of the **alleged cartel** which represents significant added value for the purposes of proving an infringement covered by the leniency programme, **relative to the evidence already in the NCA's possession** (Article 18(2)(c)). It stems from the above wording that the reduction of fines is granted in exchange of evidence that **must relate to the initially reported cartel** (the cartel under investigation) and not to any infringement. Leniency Plus is an option for discount uplift by definition based on evidence **unrelated to the alleged cartel** (evidence concerning a 'second infringement'). Hence, if a maximum harmonisation approach is endorsed, the scope of Polish Leniency Plus will necessitate amendments. Normally it could not justify additional leniency-based reduction of fines imposed for participation in cartels (were the Member States should not modify the rules provided in the ECN+ Directive). It could, nonetheless, continue to apply in relation to other, non-cartel infringements (where by force of Article 18(1) of the ECN+ Directive, the Member States retained more flexibility in determining criteria for fine reductions).

The ECN+ Directive does not imply a modification of the rules on which leniency is granted with respect to the additionally reported infringement (the 'second infringement'), otherwise than discussed in the preceding sections.

2.4. General leniency conditions

Pursuant to the ECN+ Directive,[79] a leniency applicant in order to qualify for immunity or a reduction of fines must fulfil a set of general conditions. Those apply in addition to specific conditions, and cover the duty to:

(a) **disclose** to an NCA its involvement in a secret cartel and **end** participation in it, at the latest immediately following its leniency application, except in cases where (in view of the relevant NCA) continued involvement is reasonably necessary to preserve the integrity of the investigation,[80]

(b) **cooperate** genuinely, fully, on a continuous basis and expeditiously with the NCA during the entire enforcement proceedings,[81] including:

  (i) providing promptly **all relevant information and evidence** (in the applicant's possession or accessible to it), in particular: (i.1.) applicant's name and address, (i.2.) names of all past and current

[79] Articles 17(2)a–b, 18(2)a–b and 19.

[80] Meaning in particular that the delay in ending such participation is necessary to prevent the discovery of the cooperation by other cartelists.

[81] Duty of cooperation lasts until the closure of the NCA's enforcement proceedings against all parties under investigation (by adopting the decision or otherwise), see Article 19(b) of the ECN+ Directive. This means that it does not extend to the judicial review phase, if such is provided under applicable law, as it is the case in Poland.

cartel participants, (i.3) **detailed cartel description** (including the nature of the conduct, the duration and the affected products and the territories) and (i.4) information on any leniency applications (past or future) in relation to the same conduct;

(ii) remaining at the NCA's **disposal to answer any request** that may contribute to the establishment of facts;

(iii) making **staff available for interviews** (directors, managers and other members), including making reasonable efforts to ensure availability of former staff;

(iv) not **destroying, falsifying or concealing evidence** (including in the period when the applicant contemplates submitting the application);

(v) **not disclosing** the fact of cooperation with a NCA or any content of application (except to another competition authority)[82] starting from the time the applicant contemplates an application until the NCA issues the objections (unless otherwise agreed).

In principle, the PLP (Article 113a of the 2007 Competition Act) corresponds to the requirements of the ECN+ Directive. There are minor differences that should be addressed taking into account the pertinent standard of harmonisation.[83]

Following the 2014 Amendment, the applicant is required to cease its participation in an infringement **immediately after submitting the application** (previously it was the day when it submitted the application). This provision corresponds on substance to the ECN+ Directive, although the latter grants the NCA an option to set the exit date. The Polish NCA should be vested in similar powers.

In the PLP, **no end-date was set for the duty to cooperate** fully with the NCA (for example, it is not clear whether it covers a judicial review phase), continuous and genuine character of cooperation is assumed. Those issues should be addressed.[84]

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[82] An applicant may report its behaviour also to other public authorities as required by law, provided it does not disclose the fact that it contemplates filing for leniency, hand over the leniency statement and considers the importance of not adversely impacting the NCA's potential investigation (Recital 56 of the ECN+ Directive).

[83] Detailed discussion of each of the requirements in the light of the PLP's current standards exceeds the scope of this publication, therefore only main differences are addressed briefly in this Section.

[84] Unfortunately, the ECN+ Directive does not clarify how to assess situations when applicants file for leniency but attempt at the same time to paralyze the NCA's investigation by multiple recurse to judicial review relating to incidental issues (before final decision is issued), for instance by filing appeals concerning protection of business secrets or inspector's actions during the dawn raid.

Under the PLP, the applicant must provide **all relevant information and evidence as expected pursuant to the ECN+ Directive**, either because it is mandatory content of the application or it is a part of the duty to cooperate. The PLP's provides more details on what the description of the infringement normally includes (the objective and circumstances in which the agreement was concluded, each participant's and key individuals' role). Additionally, in Poland, the duty to provide evidence covers now only evidence of significant relevance for the matter (the ECN+ Directive requires all relevant evidence). In practical terms the latter difference is nil.

The scope of information currently required in Poland regarding other leniency applications should be extended. It should include also **future and non-EU applications**.

In relation to staff interviews, under the PLP, the applicant has a negative duty (not to obstruct). It should have a **positive duty to make staff available**, including former staff (reasonable efforts).

Duty not to destroy, falsify or conceal evidence should be changed to include the period when the applicant **contemplates** submitting an application. A clear-cut time frame applicable by default to the duty **not to disclose the fact that an application was submitted** (and implicitly the content of it) should be introduced. Nowadays, the consent of the Polish NCA is always required in that regard.[85]

There is no explicit duty under the PLP to remain at the Polish NCA's **disposal to answer any requests,** this can be however inferred from the remaining obligations. It should be added out of concern for clarity and transparency.

2.5. Duty to grant leniency

Pursuant to the relevant provisions of the PLP, the Polish NCA is under an obligation to grant immunity from or a reduction of fines if an applicant meets the relevant conditions. Nonetheless, the Polish NCA decides whether the conditions are fulfilled. Hence in practice, the Polish NCA enjoys quite a discretion when granting leniency benefit.[86]

This issue has not been addressed in the ECN+ Directive,[87] therefore the PLP does not require amendments in this respect.

[85] See Article 113a(5) item 4 of the 2007 Competition Act Piszcz, 2015, p. 50, following the 2014 Amendment suggested that an explicit waiver allowing disclosure to advisors and other competition authorities should be added.

[86] Turno, 2016, p. 1514. The situation is similar in case of a reduction of fines, it stems from the wording of Article 113b and 113c of the 2007 Competition Act.

[87] See Section VI for critical comments.

3. Form of leniency statements and confirmations

The ECN+ Directive in Article 20 and 21(4) lays down minimum requirements as to the application's form and language as well as obligatory confirmations. Pursuant to those provisions, leniency statements in full and summary applications may be submitted in writing, orally or in any other form not permitting the applicants to take control of such statements. The statements as well as markers can be submitted in the language of the given ECN or one of agreed Union languages. **No language that could be used universally was selected upfront**.[88]

The PLP meets the majority of these standards (paragraphs 2–3 of the 2014 Procedural Regulation). In Poland, the leniency statement along with relevant evidence may be submitted in writing or orally[89], in person, by post, fax or e-mail. In case of a faxed application, or a digital application not encrypted with a secured electronic signature, the statement and the attached evidence must be certified[90] (on the fifth working day following the e-submission at the latest) in order to preserve the timing of the original (digital or by fax) submission.

The form in which a summary application (or a marker) can be submitted is not expressly specified in the 2014 Procedural Regulation, it can be only inferred from its paragraph 3(4) that summary application can be submitted in writing or orally. This is an example of a situation, where it is assumed that some provisions of the 2014 Procedural Regulation referring to the general term 'application' (in this context general provisions regulating the form of the application, discussed above) apply to any application (full, summary or a marker). In fact, **the 2014 Procedural Regulation often relies on a general term 'application' without specifying what kind of application it is, nor defining that term**.[91] Only in some places it clearly differentiates between

[88] This is one of harmonisation deficiencies, see comments in Section VI.

[89] In this case, the Polish NCA retains sound recordings and records in a written protocol the exact timing when the submission started and ended ; the time when the applicant presents himself at the office (as evidenced in entry/exit records) is considered to be the submission time (para. 2 (5–6) of the 2014 Procedural Regulation). Paras. 62 to 65 of the 2017 Polish Guidelines provide additional clarifications. (i) The applicant may sign the written protocol (along with the Polish NCA's representative. (ii) Attached evidence should be in a carbon copy. (iii) Transcripts of oral statement are included in the case file and shared with the parties prior to the issuance of the decision (according to Article 70 of the 2007 Competition Act). (iv) Only the Polish NCA's representative sings the transcripts. The author submits that the parties should have access not only to the transcripts but also to the original recording.

[90] I.e. an applicant must submit a carbon copy with a signature (of an authorised employee or of a qualified lawyer, tax advisor, patent officer or government agent) certifying that it is a true and exact copy of an original (Article 51 of the 2014 Competition Act).

[91] Article 113a of the 2007 Competition Act sort of defines the term 'application' and Article 113e and 113f only refer to marker and summary applications, respectively. Those terms

an 'application' and a 'summary application'. In most instances the former provisions are of such nature that it is fully justifiable to conclude that they apply to any application. However, this is not always the case.[92]

This is a legislative flaw that should be corrected, including in the context of the form of an application. It should be clearly stated when specific provisions apply not only to a full application but also to a summary application and a marker. Additionally, those terms should be properly defined. This, in particular, concerns the provisions regulating the manner in which the application may be filed, its form, the way it is recorded etc (paragraph 2 of the 2014 Procedural Regulation) or to the duty to return rejected or withdrawn applications (Article 113g of the 2007 Competition Act).

Only summary application can be submitted in English, if its Polish language version is provided within thirty days following the original submission.[93] The implementation of the ECN+ Directive requires allowing **the Polish NCA to accept all leniency statements and markers (but not necessarily the accompanying evidence) in Polish or other, mutually agreed language version**. Accounting for this option necessitates an amendment of Article 51(2–3) of the 2007 Competition Act, according to which all evidence before the Polish NCA must be in or translated into Polish (certified translation), unless the leniency statement is considered as pleadings and not an evidence.

The Polish NCA *ex officio* (i) confirms (in an unspecified form) the date and time of the receipt of a full leniency statement (a summary application or marker are not expressly mentioned in this context, but see comments above), (ii) in case of a summary application, confirms in writing whether it was or not the first application and informs (in an unspecified form) other applicants (it is not specified if it includes summary applicants or applicants

should be properly defined in Article 4 of the 2007 Competition Act that contains systemic legal definitions.

[92] E.g. para. 6 or 5 of the 2014 Procedural Regulation (imperative requiring the Polish NCA to immediately request the applicant to mend incomplete applications) clearly should not apply to summary applications.

[93] The Polish language version of the statement may be submitted in an oral form. In that case, the Polish NCA proceeds as specified in footnote 90 above (para. 3(4) of the 2014 Procedural Regulation). Importantly, the 2017 Polish Guidelines (not binding document) refer to a translation of the statement (clarifying that it does not have to be a certified one) and not to a 'Polish language version' of the statement. It also states that the translation must be signed and that it is the governing version of the application (para. 67 of the 2017 Polish Guidelines). That tiny detail makes a considerable difference. The applicants are unwilling to sign the statements or the translations (due to concerns related to private enforcement). The Polish language version of the application should be treated as an application and not the translation of it. Therefore it can be submitted in an oral form (as specified above) without an obligation to sign it (the applicant may sign the minutes merely stating the beginning and the end of the submission time).

requesting marker, but see comments above) that a first summary application was already submitted, (iii) confirms in writing the leniency applicant's conditional place in a queue or (iv) informs immediately in writing that the applicant has not qualified for leniency and explains the reasons behind such conclusion. Additionally, the Polish NCA may give the applicant (including applicant requesting a marker) a reasoned warning in writing that it may fail to meet the leniency requirements to allow the applicant to mend the situation.[94] Article 20(2) of the ECN+ Directive specifically requires that receipt of a full or a summary application and the date and time of such receipt is confirmed **in writing (at least when requested).** Therefore, the implementation will require adjustments regarding the written form and express reference to a summary application in relation to confirmation listed in point (i) above.[95] However, specifying in all cases when the particular provision relates also to summary applications and markers and sorting the issue of legal definitions, is strongly recommended for the reasons set out earlier in this Section.

4. Marker

A marker must be differentiated from summary applications (discussed in Section V.5 below). In brief words, a marker is a preliminary application in a shortened form filed by the undertaking that for different reasons, usually time constraints, was unable to prepare at the outset a full application. If completed, a marker allows to reserve a place in a 'domestic' leniency queue. Summary applications (discussed in more details in the next section), can be filed before the NCAs only by undertakings applying for leniency with the Commission, in order to reserve a place in a 'domestic' leniency queue should the Commission refrain from pursuing the case. It is a 'provisional' application that releases the undertakings from a need of filing a full leniency application to a given NCA simultaneously with the application to the Commission.

The ECN+ Directive (Article 21) requires that the Member States accept leniency markers that enable the applicant to reserve a place in the queue for **immunity and (optionally) a reduction of fines** before the NCAs. It also sets out the **minimum content** of a marker, however the information listed in there should be provided **if it is available to the applicant**. Provisions relating to

[94] Such reasoned warning should be given only after the Polish NCA confirmed the applicant's conditional place in the queue, earlier warnings appear premature and overly burdensome for the authority. Article 113a(4) of the 2007 Competition Act and para. 3 (1–2), 6, 7 and 9 of the 2014 Procedural Regulation. See also comments in V.2.2.6. above.

[95] I.e. in relation to Article 113a(4) of the 2007 Competition Act or para 3(1) of the 2014 Procedural Regulation.

markers are considered to be based on a minimum harmonisation approach (Aresnidou, *Infra*).

The PLP (Article 113e of the 2007 Competition Act) provides for possibility to submit a marker to reserve a place in the queue for **immunity** and in the queue **for a reduction of fines** (this can be done simultaneously, that is, in one marker **at the outset** of the proceedings) and with respect to **all Article 101 infringements.** This is provided that the applicant perfects the application within time-limits[96] discretionally specified on a case-by-case basis and that complete information is not at the applicant's disposal[97] at the time of a marker submission. The PLP sets slightly different requirements concerning the minimum content than the ECN+ Directive. The description of infringement should include information on key individuals and their role. Conversely, information on other leniency submissions and the bases for the concern behind the request is not required. More importantly, **all of the minimum information must be provided** (not only if it is available) in order to successfully request a marker.[98] However, if this condition is met and the undertaking perfects its application, the place in the queue is **automatically reserved** (Turno, 2016, p. 1534; Korycinska-Rządca, 2018, p. 73–75).

This approach will have to be changed to satisfy the ECN+ Directive explicit requirement to **invest the NCAs with the discretion whether to grant a marker or not**.[99] Uncertainty in this regard incentivises the applicants to submit full applications in a first place and markers only as a last resort. Otherwise the marker benefit may be abused (Korycinska-Rządca, 2018, p. 74,

[96] The Polish NCA may extend those deadlines (Turno, 2016, p. 1535–1536; Modzelewska-Wąchal, 2014, p. 1433). Turno recommends setting at least tentative time limits; the recently published indications (14 to 35 days) in para. 22 of the 2017 Polish Guidelines seems to be sufficient in that regard. The Polish NCA determines the time limits and scope of missing information without delay. This approach is favourable for potential applicants, but burdensome for the authority (in particular that nowadays, in majority of cases the applicants request markers). The scope of evidence and information required for leniency has been defined elsewhere, therefore the Polish NCA should not be additionally obliged to list it for applicants requesting the marker.

[97] The 2017 Polish Guidelines refer to information that is not in the applicant's 'possession', it should be understood as information that is not at the undertakings immediate disposal, e.g. because the raw data it possesses (e-mail backup) needs processing.

[98] The applicant may 'submit an application in a shortened form containing the description of the infringement that **at least** convers […} (Article 113e of the 2007 Competition Act, emphasises added). Modzelewska-Wąchal, 2014, p. 1432.

[99] In this case, a rigid condition to provide all of the minimum content could be relaxed, as the authority would have the ability to reflect on whether the application is nonetheless well substantiated and the deficiencies are justified (note, there is no formal requirement to justify the request for a marker) and possibly balanced with other information. (Turno, 2016, p. 1535 emphasises that the applicant can always resubmit the marker or full application).

same approach is taken in the MLP and 2006 Commission Leniency Notice).[100] There is no requirement to remove from the PLP the possibility to make simultaneous marker requests for immunity and for a reduction of fines. Such change is nonetheless recommended as it would further motivate the infringers to come forward sooner (*infra).* Turno, 2016, p. 1534 suggest that the possibility to apply for a marker in relation to a reduction of fines should be removed altogether. Retaining the marker option with respect to non-cartel infringements does not run counter to the ECN+ Directive either. However, comments expressed in Section V.2.1. above apply accordingly. Additionally, in the implementation process, **the minimum content list should be expanded** to cover the two missing items mentioned above, without however a need to delete the requirement for information relating to key individuals.

Unfortunately, the ECN+ Directive does not provide any guidelines when, at the latest, the applicant submitting a marker should cease the infringement. **The NCA should have discretion to set relevant time limits** as in the case of full applications (Article 19(a) of the ECN+ Directive). A rigid requirement to end an infringement at the latest immediately following the submission of a marker (considered in the literature) may adversely impact the ability to perfect the marker or the integrity of the investigation (to some extent differently: Turno, 2016, p. 1537).

5. Summary application

The ECN+ Directive failed to introduce a one-stop-shop system and **continues to relay on summary applications**.[101] This measure allows an undertaking applying before the Commission for either immunity or a reduction of fines (in relation to cartel affecting at least three Member States) to take steps to reserve a place in a queue before the NCAs (in relation to the same infringement) by filing a simplified application. The latter is, in brief, a summary of the application submitted to the Commission. The applicant may be granted a place in a 'national' queue, should the Commission refrain from pursuing the case in whole or in part (and provided other conditions are met). The provisions relating to this subject (Article 22 of the ECN+ Directive) are more demanding and pursue maximum harmonisation approach. Hence, the Member States are left with little flexibility when implementing them.

The ECN+ Directive sets out the **minimum content of a summary application** (Article 22(2)). Those requirements are similar to those applicable with respect

[100] Król-Bogomilska, 2012, p. 10, points, however, that some commentators perceive such uncertainty as a negative (dissuasive) factor.

[101] This is one of harmonisation deficiencies, see comments in Section VI.

to markers and cover the description of the infringement (parties, nature, geographical and product scope, duration), other past and future applications and the list of Member States where the evidence is likely to be located.

In order to fully correspond to those conditions, Article 113f(3) of the 2007 Competition Act (that sets out the rules applicable to summary applications) will have to be amended to require (as a part of minimum content) information concerning past or future leniency applications made in non-EU countries. Secondly, the PLP will need to recognize expressly the possibility to **file a summary application when the undertaking applies before the Commission for a reduction of fines** (now this solution is available only to the immunity applicants, Modzelewska-Wąchal, 2014, p. 1435; Korycińska-Rządca, 2018, p. 75)[102] **or submitted to the Commission a marker** and is in the process of perfecting it. Previously the latter option was only assumed (Turno, 2016, p. 1539; Korycińska-Rządca, *infra)*. Currently, and in line with the ECN+ Directive (Article 22(2)), in the PLP all of the minimum content requirements must be met in order for the applicant to avail the benefits of a summary application.[103] The PLP allows summary applicants to reserve a place in a '**domestic**' queue for both: immunity and a reduction of fines (*Infra*) and only with respect to cartels, excluding applications from individuals because such broader applications before the Commission are not possible.[104] As a consequence, parties to non-cartel infringements or individuals may not apply for leniency before the Commission and must thus submit a full application or a marker before the Polish NCA, if they wish to benefit from leniency in Poland.

The current **practice** of the Polish NCA's **corresponds to the majority of the ECN+ Directive process provisions** relating to handling of summary applications.[105] The following rules will, however, have to be transposed into **binding law**:

a) the Commission shall be the main interlocutor of the applicant until it decides to refrain from pursuing the case (and informs accordingly the relevant NCAs)[106];

[102] Article 22(1) of the ECN+ Directive mentions leniency applicants, while Article 113f(1) of the 2007 Competition Act refers to immunity applications only.

[103] Article 113f(2) of the 2007 Competition Act uses imperative language regarding the content of summary applications: an application 'shall consist of', 'includes'; Modzelewska-Wąchal, 2014, p. 1435 expressed the concurrent opinion.

[104] The EU law does not provide grounds for imposing sanctions on individuals (not having a status of undertakings) for competition-related infringements with one exception only discussed by Król-Bogomilska, 2010, p. 5.

[105] See 24–32 of the 2017 Polish Guidelines.

[106] For instance, in such matters as deciding on when exactly the applicant should cease its participation in a cartel.

b) during this period the Polish NCA may request specific clarifications only in the areas covered by the minimum content and ask for a full application only exceptionally (when strictly necessary for case delineation or case allocation, Article 22(5) of the ECN+ Directive);
c) submitting the evidence or full application during this period is optional (currently it is required after the Polish NCA decides to open the investigation, but the earliest point in time when the latter can happen is not specified[107]);
d) the full application is considered to be submitted at the time of submitting the summary application (provided it is timely completed) only if the time, product and geographical scope of the original or updated summary application was in line with the application to the Commission (Article 22(6) of the ECN+ Directive); the latter condition is not reflected in Article 113f(5) of the 2007 Competition Act and paragraph 31 of the 2017 Polish Guidelines only mentions that the applicant may update the summary application;
e) the Polish NCA already has a duty to inform the applicant if he is the first participant to report the cartel before the Polish NCA in the form of a summary application (paragraph 3 of the 2014 Procedural Regulation); this obligation should be broadened to account also for undertakings that came clear in a form of a full application.[108]

To the satisfaction of the ECN+ Directive's standards (Article 22(5)), the Polish NCA has the discretion to set the time limits for completing a full application (Article 113f(4) of the 2007 Competition Act). Providing tentative time-limits in this regard in the 2017 Polish Guidelines would be helpful.

6. Individual sanctions

The ECN+ Directive (Article 23(1) requires that the staff of an infringer, including the directors and the managers, is protected from individual sanctions (such as fines or disqualification). The requirement concerns sanctions that can be imposed in **administrative and non-criminal** judicial

[107] See Article 113f(4) of the 2007 Competition Act. There is no express obligation of the Polish NCA to open a formal proceeding following the receipt of a leniency application (Turno, 2016, p. 1499) and even more so following the receipt of a summary application or a marker (Modzelewska-Wąchal, 2014, p. 1431, 1435).

[108] See Article 22(4) of the ECN+ Directive. Informing a summary applicant about the markers from other parties is not required, however it can be assumed that in such case the NCAs may wait until the time for perfecting the marker lapses and then eventually inform about full applications.

proceedings[109] in relation to those individuals personally involvement in a cartel (covered by the application for immunity). Immunity from individual sanctions should be granted provided that (i) the infringer (an undertaking) reported the cartel and was the first to provide relevant evidence meeting the thresholds for immunity (that is, fulfils conditions set out in Article 17(2)(b)–(c)), (ii) the concerned individual cooperated actively with the NCA pursuing the case and (iii) the application for corporate immunity (i.e. the undertaking's application) was made before this individual was made aware by the NCA about the proceedings against him or her (that is, the proceedings that could lead to the imposition of individual sanctions).

Under the same conditions, **immunity from criminal liability** (sanctions imposed in criminal proceedings such as imprisonment) should be ensured if the individual concerned also cooperates with the prosecuting authority. **Alternatively, immunity or a mitigation of such sanctions** should be ensured if, in addition to the conditions specified above, the contribution of such individual to detecting and investigating the cartel outweighs the interest in prosecuting and/or sanctioning of such individual (Article 23(2)–(3), see critical comments in Section VI below).

The NCA pursuing the investigation and a foreign prosecuting authority should communicate via the NCA where the proceedings that may lead to the imposition of individual sanctions take place. These rules do not impact the right to claim damages foreseen in the Damages Directive (Article 23(4)–(5) of the ECN+ Directive).

In Poland, following the 2014 Amendment, **staff having managerial functions**[110] may be held accountable by the Polish NCA for knowingly allowing an infringement of Article 101 and its national equivalents (except for bid-rigging) to take place (this is conditioned upon establishing the undertaking's liability).[111] Leniency options have been introduced at the

[109] For violations of national law that pursue predominantly the same objective as Article 101 TFEU, e.g. prohibition of bid-rigging (see Recital 64 of the ECN+ Directive).

[110] Defined in Article 4 (3a) of the 2007 Competition Act as: individuals managing the undertaking, including members of managing bodies or staff with managerial functions. For an extensive analysis of the term see Piszcz, 2013, p. 25–26 (who suggested that this includes any person managing the company's business (as a whole)) and Król-Bogomilska, 2015, p. 8–9 (who for instance pointed out that it cannot be entirely excluded that even a person *de facto* managing the company's affairs is subject to such liability).The broad spectrum of possible interpretation only demonstrates that this provision is far from being perfect. This is inadmissible situation in view of the fact that this is law setting grounds for quasi-criminal liability and the Polish NCA's growing appetite to apply it.

[111] Article 6a, 113h–113j of the 2007 Competition Act. Bernatt and Turno, 2015, p. 88–92 severely criticised this aspect of the 2014 Amendment, because it introduced in fact quasi-criminal liability of individuals without ensuring proper procedural guarantees that meet the standards

same time (that is, the possibility of submitting a leniency application by the individual, or alternatively automatically extending to such individuals the benefits of corporate applications, in cases when the company submits leniency application before such individual).[112] The latter decision was a welcome development although still requiring some improvements.[113]

Protection of individuals availed by the PLP is broader comparing to the ECN+ Directive because it also covers staff of an infringer that applies for a reduction of fines (therefore not only the staff of an immunity applicant) and additionally applies in relation to non-cartel matters. In this area the minimum harmonisation approach was taken in the ECN+ Directive. Hence there is no need to narrow down the scope of the protection stemming from the PLP, with one exception. Namely, immunity from individual, cartel-related sanctions should not be available where the immunity application (corporate or individual) was submitted after the Polish NCA instituted a full-fledged proceedings against the given undertaking and the individual concerned and informed (made aware) the later about that fact (a reservation originating from condition (iii) listed above). A requirement to this end must be implemented in Poland.

The Polish legal system criminalises **bid-rigging of public tenders** (Article 305 of the Polish Penal Code)[114] without, however, any system of leniency-related immunity or fine reductions.[115] In this respect Poland will have to implement **new solutions** (Materna, 2018, p. 44). That is, the law should provide at least for the possibility to take the immunity application and cooperation of the accused individual into account as a factor alleviating the final penalty or circumstance excluding liability altogether (institution comparable to Article 229 paragraph 6 of Polish Penal Code providing for active repentance in corruption matters).

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of criminal procedure. Król-Bogomilska, 2015, p. 8–10, also pointed to significant legislative flaws in this respect, mainly related to penal nature of this liability.

[112] Option discussed in detail by Król-Bogomilska, 2015, p. 11.

[113] For instance, it is unclear if there is only one leniency queue (for undertakings and individuals), critically Piszcz, 2015, p. 50; in favour Turno, 2016, p. 1545; what should be the status of an individual after the company withdraws its application altogether (should he consider filing his own application?), etc.

[114] Rumak, Sitarek, 2009, p. 101 point in addition to Article 286 of the Polish Penal Code (fraud) that might be relied upon to impose criminal sanctions for rigging private tenders. This option runs, however, the risk of violating the principle *nullum crimen sine lege stricta.* Discussing this problem in detail exceeds the subject of this publication. Compare also Molski, 2014, p. 1408, referring in addition to Article 296 of Polish Penal Code (abuse of trust).

[115] This is perceived as one of the reasons behind the low effectiveness of the PLP (Rumak, Sitarek, 2009, p. 101).

7. Protection of leniency information

The ECN+ Directive (Article 31 and recital 72) limits access to corporate statements and the use of leniency information (these rules apply to cartel-related leniency only). It provides that **exclusively the parties to the proceedings may be granted access to corporate leniency statements** (and settlement submissions) with the sole purpose of exercising their **right of defence**. In judicial proceedings, **the parties** may use information from leniency statements obtained through access to the NCA's file **only** (i) before the court reviewing the NCA's infringement decision issued in this case (including concerning abuse of dominant position) or (ii) allocating fines imposed on infringers jointly and severally and (iii) if it is necessary for this party's defence. The ECN+ Directive extends the application of those rules to **purely domestic cases** (the only such instance in the entirety of its text).

Additionally, **the party** may not use **in courts** information obtained during the NCA's enforcement proceedings, which was prepared (i) **by other persons specifically for the purposes of this proceedings** or (ii) **by the NCA and sent to the parties** in the course of such proceedings.[116] In this case, the restriction is temporal and lasts until the NCA terminates the enforcement proceeding with respect to all of the parties (by an infringement or commitment decision or otherwise).

Any of the above is without prejudice to the possibility of a NCA to publish the infringement decision that includes some leniency information[117] and applies independently of the form in which corporate leniency statements was submitted.

In Poland[118], only the parties to the proceedings may access leniency information (corporate statements and those submitted by individuals and other leniency-related material) in the file of the Polish NCA.[119] The information may be accessed after the Polish NCA issues a statement of objections; until this point of time, the parties should not even be aware that a leniency

[116] As well as withdrawn settlement submissions. This provision extends the protection availed in Article 6(5–6) of the Damages Directive.

[117] Article 31(7) and Recital 72 of the ECN+ Directive and recital 26 if the Damages Directive. Szot, 2018, p. 99–103, discusses in the context of Evonik judgment the rules governing the use of leniency information in the public version of the infringement decisions.

[118] See Article 70, 73 and of the 2007 Competition Act. Piszcz, 2016, p. 217, perceived protection availed by those provisions as overly broad and pointed out that it disregards interests of claimants in private enforcement actions and the related EU case law (comments were made prior to the implementation of the Damages Directive).

[119] According to Article 70(6) of the 2007 Competition Act, those documents and information cannot be made available based on public transparency rules (Act of 6 September 2001 on access to public information (Journal of Laws 2019, item 1429).

application was submitted (Krueger, 2016, p. 913).[120] The parties may not copy any leniency statements but may take notes, provided they stipulate not to use them otherwise than for the purposes of exercising their right of defence[121] in this enforcement proceeding or in follow-on judicial review proceedings.[122] The applicant may consent to a disclosure or to the making of copies. Breach in that regard (copying without consent or improper use, except in penal proceedings) by anyone, not only the parties to the proceedings, is sanctioned with a penalty of up to approx. EUR 5000. The low amount of this fine renders this protection rather illusionary (Article 108(5) of the 2007 Competition Act; see Stawicki and Komorowska, 2016, p. 1437). However, evidence obtained in this manner, or information obtained owning to access to leniency statements, may not be used as evidence in other court proceedings.[123]

Those provisions ensure (i) access restrictions – only the parties to the relevant proceedings (before the NCA or reviewing court) have access to the leniency statements, however the applicant's consent may remove this restriction. (ii) Use restrictions: normally, the parties may not use information obtained in this manner otherwise than for the purposes of their defence, but the limitation is not absolute (it applies to notes and unauthorised copies but not to the information as such and authorised copies). There are no temporal restrictions on the use in courts by the parties of other information (Polish NCA's official letters and information prepared by others for the proceedings before the Polish NCA). The ECN+ Directive provides for firm and general access and use restrictions. Hence, **the implementation of it requires removing the consent option and prohibiting the use of information derived from leniency statements (at least in cartel cases) otherwise than for the exercise of the right of defence as well as introducing temporal use limitations of other material**, for example, by amending the provisions discussed above.

[120] The parties may, however, learn that a leniency application was submitted in the proceedings indirectly, i.e. by way of confirmations that they should receive if they decide to submit their own leniency applications, see comments in Section V.3 above).

[121] This purpose is not directly specified in the relevant provision but is self-evident.

[122] Same applies to statements in the review court's files. Additionally, making leniency statements available for the purposes of other judicial proceedings is subject to the consent of the given leniency applicant (Article 479^{33} para. 2a, 2b and 6 of the Civil Procedure Code).

[123] Article 479^{33} para. 2b of the Civil Procedure Code. The wording of this provision is unclear: it justifies either (i) a broad reading: never an unauthorised copy of a leniency statement or information derived from leniency statements can be used in civil courts other than a reviewing court or (ii) narrower: it prohibits the use of unauthorised copies of leniency statements and information derived from **such copies** and solely if such copies where obtained from the court files (excluding other files). Stefańska, 2015, Article 479^{33}, indirectly endorsed a reading suggesting that the provision concerns only the documents placed in the court files. Other commentaries were inconclusive (Telenga, 2019; Ereciński, 2016).

Broader protection of leniency statements in Poland (namely those covering other than cartel infringements and leniency statements from individuals) **do not conflict with the ECN+ Directive**. However, the implementation will require important amendments in another aspect. **Polish law allows to use the information from the Polish NCA's file** for the purposes of other proceedings before the Polish NCA, in penal proceedings (instituted by public prosecutors, including in tax matters), private enforcement proceedings (with limitations steaming from the Damages Directive), or by the competent authorities in any other enforcement proceedings[124] as well as to exchange them with the Commission and other NCAs pursuant to Regulation 1/2003/EC (Article 12(2) and 22(1)) and Regulation 2006/2004/EC[125] (Article 6 and 7). **Those very broad exceptions provided for in Article 73(1)–(2) of the 2007 Competition Act undermine the access restrictions to (cartel) leniency statements** that the ECN+ Directive purports to impose.[126]

Currently, the Damages Act ensures that leniency statements are not disclosed or used in the context of private enforcement and imposes temporal use limits on other material.[127] However, the exemption allowing the use of information steaming form leniency statements in penal and other enforcement proceedings should be removed at least with respect to corporate statements in cartel cases.[128] Unfortunately, it does not seem that the ECN+ Directive disqualifies the use of those materials for the purposes of NCA's other proceedings (or addresses the exchange based on the Regulation 2006/2004, see critical comments in Section VI below). Hence, the former exception may remain intact. The exchange of corporate leniency statements pursuant to Article 12 of Regulation 1/2003 should be allowed only if the applicant

[124] Article 73 (2) of the 2007 Competition Act. Prior to the implementation of the Damages Act, it was unclear if civil courts could use this provision to access the files of the Polish NCA, in particular Article 73 (2) para. 5 referring to 'the competent authorities in any other enforcement proceedings' (in favour Jurkowska-Gomułka, 2013, p. 222; against: Bernatt, 2015). Błachucki, 2015, p. 19 points out that in practice the Polish NCA did not allow the requests of the civil court based on the latter provision (those requests were, however, unrelated to private enforcement).

[125] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), (OJ L 364, p. 1–11), hereinafter: **Regulation 2006/2004**. For comments relating to the Regulation 2006/2004 and 2007 Competition Act see Król-Bogomilska, 2009, p. 5.

[126] See comments in the Impact Assessment Report, p. 64–65.

[127] Articles 18 and 29 of the Damages Act, discussed by Szot, 2017, p. 93–95 and Jurkowska-Gomułka, 2018, comments to Article 18 and 29.

[128] This would in fact require introducing protection comparable to Article 89a(12) and corresponding amendments of Article 108(5) of the 2007 Competition Act.

consents to such exchange or it submitted a leniency application also to the receiving authority and may not withdraw it at the time when such exchange is affected (as expressly specified in Article 31(6) of the ECN+ Directive). Extending the consent requirement also to cooperation in consumer cases baes on Regulation 2006/2004 appears to be a logical addition.

VI. Missed opportunities

There is a number of important problematic issues relating to leniency that the ECN+ Directive failed to address. Due to space constraints, only the main problems are briefly discussed below.

Firstly, the most severe criticism of the ECN+ Directive in the context of leniency (and perhaps in general) is that it **failed to introduce a one-stop-shop system**. Instead it continues to relay on summary applications. The latter is only a partial solution to problems that applicants in multijurisdictional cases face when considering leniency applications[129] (although extending summary application options to applicants requesting the Commission to reduce their fines is a positive change). A system based on summary application will not provide automatic protection across the EU, in particular that the applicant must ensure that the scope of the application before the Commission and before the NCAs are convergent at all times. Importantly, it does not provide any relief to applicants who submit applications in more than one jurisdiction but not before the Commission (for example, because they apply for leniency with respect to non-cartel infringements). Such applicants will still have to apply simultaneously to all relevant NCAs, because an application filed with one NCA is not recognised elsewhere. Multiple applications will be required irrespectively of the fact which NCA at the end of the day will decide to pursue the matter.[130] The possibility to request a marker will be of some help in this event. However, it does not mend the problem entirely, since the NCAs will enjoy now the discretion to accept or reject marker requests.

Secondly, the situation was not made any easier be the fact that **no language that could be used universally was selected upfront** in the ECN+ Directive. Such option could be at least ensured with respect to corporate statements

[129] See Król-Bogomilska, 2012, p. 9; Król-Bogomilska, 2018, p. 22; Wagner-von Papp, 2019, p. 7.

[130] More than one NCA may have formally jurisdiction over the case but out of efficiency concerns only some may decide to pursue the investigation (Blake and Schnichels, 2004, p. 11).

(Wagner-von Papp, 2019, p. 8). An applicant will have instead only a possibility to agree with the NCA on the specific language version, which may lead to undesired delays and uncertainty.

Thirdly, **the failure to harmonise the approach towards leniency applications relating to non-cartel infringements is an important drawback** (that is, in terms of leniency conditions or rules on access to non-cartel leniency materials). Król-Bogomilska, 2018, p. 20, emphasised that inconsistences in that regard may produce equally deterrent effects on potential applicants and so undermine the enforcement of competition law.

Fourthly, the ECN+ Directive does not specify **the manner in which the fine should be reduced or relevant redaction criteria**. It does not even provide for a maximum reduction threshold that would ensure that there is a clear difference between immunity and a fine reduction, and hence incentivise the infringers to report as early as possible. The MLP sets 50% threshold in this respect in paragraph 11 (see also paragraph 24 of the MLP explanatory notes). Nor does the ECN+ Directive determine the **impact that the rejection of an application or disqualification** from the benefits at the end of the proceedings **has on the place in the queue** of others. The lack of clarity concerning the level of potential fine discounts, and shifts in the queue, are important drawbacks. These are undoubtedly important decision-making factors. Uncertainties concerning the scope and nature of potential advantages in different jurisdictions may have deterrent effects that the ECN+ Directive purports to remove.

Fifthly, the ECN+ Directive does not prohibit the **use of information steaming form leniency statements for the purposes of a NCA's proceedings other than the one relating to the reported infringement**. This considerably undermines the use restrictions already envisaged (see Section V.7 above).

Sixthly, the ECN+ Directive does **not specify if the NCA has the duty to grant the leniency benefits** if the applicant fulfils all of the specific and general conditions.[131] This is yet another drawback. It does not make sense to lay down detailed requirements regarding conditions for granting leniency advantages without deciding whether the applicant's right in this regard is something more than a legitimate expectation. After all, uncertainty in this respect is an important factor that undermines an applicant's confidence. Recourse to an obligation to effectively enforce the application of Article 101 TFEU may

[131] The Member States are under an obligation to have LPs in place that **enable** them to grant immunity from or reduction of fines (Article 17(1) and 18(1)). It does not mean that such benefits **shall be granted**.

help to overcome this problem,[132] however lack of clarity and certainty is undesirable.

Lastly, the ECN+ Directive **failed to introduce an unequivocal requirement to provide for automatically applicable immunity from sanctions** that can be imposed on individuals in criminal proceedings. Instead, the ECN+ Directive leaves the option open for Members States to provide for a system that allows lifting the sanctions or mitigating them *ex-post* (Article 23(3)). That is, it is for the authority in charge of criminal proceeding to decide whether at the end a given individual's contribution to discover the cartel outweighed the interest in imposing criminal sanctions upon him or her. As Wagner-von Papp, 2019, p. 8 emphasised, the existence of such systems will undermine the incentives to come clean in multijurisdictional matters entailing possible criminal liability, most notable in cases of bid rigging. The applicants will continue to be unsure whether penal sanctions will be eventually imposed or not.

VII. Conclusions

The PLP, owing to earlier informal harmonisation with the MLP and EU notices, corresponds in broad terms to the requirements of the ECN+ Directive. A number of adjustments is nonetheless needed, in particular if a maximum harmonisation approach is endorsed. The implementation will, in the majority of cases, require amending the 2007 Competition Act or the 2014 Procedural Regulation. Some principles are already reflected in the Polish NCA's practice. They will have to be transposed into bind law, as the practice may always change.

The main examples of the required modifications concern (i) specific conditions for immunity (in particular motion of relevant evidence or ring-leaders and deleting the concept of relevant information), (ii) providing for partial immunity, (iii) narrowing down the scope of Leniency Plus, (iv) adjustments concerning admissibility of leniency statements in languages other than Polish, (v) making granting of a marker subject to the Polish NCA's discretion, (vi) extending availability of summary applications to undertakings applying for a reduction of fines or submitting markers. Most notable amendments concern, however, (vii) linking corporate immunity with an immunity for natural persons from penal sanctions (or at least alleviating such liability) and (viii) broadening the protection of leniency statements. As explained, the latter cover permanent access restrictions as well as internal (by the parties) and external (by other enforcers) use restrictions of leniency

[132] In the sense that inconsistent approach to applications may weaken the efficiency of the whole programme and adversely impact the enforcement of Article 101 TFEU.

statements and temporal use restrictions applicable to materials specifically related to the leniency.

The two last issues (broader protection of leniency materials and mitigating penal sanctions) seem to have the greatest capacity to enhance antitrust enforcement, especially if immunity for bid-riggers is endorsed. Additionally, if the threshold 1 relevant evidence clearly refers to the evidence enabling the targeted inspection (instead of evidence enabling lunch of full-fledged investigation) the applicants could be finally motivated to come clear earlier. Nowadays, the prevailing practice is to request leniency only after the Polish NCA commenced the dawn raid. Apart from them, the changes will not revolutionise the functioning of the PLP or visibly boost its efficiency, in particular regarding combating cartels. The reason behind this conclusion is two-fold. Firstly, effectiveness of cartel detection in Poland is generally low. The authorities invest scarce resources on investigating vertical restraints or pursuing competition unrelated and ever-growing obligations imposed by law. Improvements in this regard are indispensable, including shifting the enforcement priorities in real terms. Secondly, perhaps other, non-leniency related solutions in the ECN+ Directive will help to strengthen antitrust enforcement to certain extent (for instance those obliging Member States to ensure the NCAs with sufficient resources and autonomy). In terms of the leniency area, the critics argue that Union legislators missed an opportunity to mend some very compelling problems. These are such issues as (i) making multijurisdictional leniency applications easier by introducing an EU-wide one-stop-shop, (ii) agreeing on an uniformly acceptable language version or (iii) unequivocally regulating the interplay between leniency protection and individual sanctions imposed on natural persons. In the latter case, providing for a clear cut duty to secure immunity from criminal sanctions would be a welcome development. Other harmonisation flaws include (iv) lack of determining the impact on the queue order of rejections, withdrawals and disqualifications, (v) a complete absence of rules (or guidelines) concerning fine reductions, (vi) failure to determine whether the NCAs enjoy discretion to grant leniency and (vii) completely excluding from harmonisation non-cartel infringements. These and other deficiencies undermine the ECN+ Directive's ability to advance current enforcement standards in real terms.

Implementation will be also a good occasion to overhaul the PLP in other areas, for example, properly defining 'coercers', scaling-down the scope of leniency benefits to cartels, hub and spoke, bid-rigging and vertical pricing infringements or sorting legal definitions (of leniency application or cartels) and providing in a clear manner which provisions of the 2014 Procedural Regulations apply also to markers and summary applications.

ANNEX 1

Table 1. Comparison of requirements relating to relevant evidence and relevant information pursuant to the PLP and ECN+ Directive

PLP	ECN+ Directive
I. IMMUNITY	
a) Threshold 1 relevant evidence:	
Article 113b(2)a: Evidence that enables the Polish NCA to **launch a full-fledged investigation** or	Article 17.2(c)(i): **Evidence** that enables the NCA to carry out a **targeted inspection** (in connection with a secret cartel), or
b) Threshold 1 relevant information:	
Article 113b(2)a: **information** that enabled the Polish NCA to collect such evidence, provided the Polish NCA was not, at that time, in possession of this information or evidence (**Polish:** ***dowód wystarczający do wszczęcia postępowania antymonopolowego*** *lub informacje umożliwiające Prezesowi Urzędu uzyskanie takiego dowodu, o ile Prezes Urzędu nie posiadał w tym czasie tych informacji lub dowodów albo*)	
a) Threshold 2 relevant evidence:	
Article 113b(2)b: **Evidence that significantly contributes to finding of an infringement** (if such investigation was already launched) or	Article 17.2(c)(ii): If the NCA already had in its possession evidence sufficient in that regard or had already carried out a targeted inspection, **evidence sufficient to find an infringement** (in the NCA's view), provided that the NCA did not yet have in its possession evidence sufficient in that regard and that no other undertaking previously qualified for immunity (in relation to the secret cartel) pursuant to threshold 1 (i.e. by providing evidence enabling a targeted inspection to take place).
b) Threshold 2 relevant information:	
Article 113b(2)b: on the Polish NCA's request submitted **information** that enabled the Polish NCA to collect such evidence, provided the Polish NCA was not, at that time, in possession of this information or evidence (Polish: *jeżeli wniosek został złożony po wszczęciu postępowania antymonopolowego – dowód, który* ***w istotny sposób przyczyni się do wydania decyzji****, o której mowa w art. 10, lub na* ***żądanie*** *Prezesa Urzędu przedstawił* ***informacje*** *umożliwiające uzyskanie takiego dowodu, o ile Prezes Urzędu nie posiadał w tym czasie tych informacji lub dowodów*)	
II. REDUCTION OF FINES	
Article 113c(3): **Evidence of substantial importance for the proceedings** that was not in the Polish NCA's **possession.** (Polish: *przedstawił dowód mający* ***istotne znaczenie dla rozpatrywanej sprawy****, którego Prezes Urzędu nie posiadał*)	Article 18.2(c): **Evidence** of a secret cartel which **represents significant added value for the purpose of proving an infringement** covered by the leniency programme, **relative** to the evidence already in the NCA's possession at the time of the application.

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The Implementation of the ECN+ Directive in Hungary and Lessons Beyond

by

Katalin J. Cseres*

CONTENTS

Abstract

In order to facilitate national competition authorities (NCAs) in their application of EU competition rules, the EU legislator adopted Directive 2019/1/EU. The Directive's aim is to empower the competition authorities of the Member States

* Associate Professor of Law, Amsterdam Centre for European Law and Governance, Amsterdam Center of Law & Economics, University of Amsterdam; email: k.j.cseres@uva.nl.
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to be more effective enforcers of competition law and to ensure the proper functioning of the internal market. The so-called ECN+ Directive introduces minimum harmonisation rules allowing competition authorities to have common investigative, decision-making (notably fining decisions) and enforcement powers. The Directive, furthermore, sets minimum safeguards for the NCAs' independence, accountability and resources as well as harmonizes leniency programmes including the coordination of national leniency programmes with each other and with that of the European Commission.
This paper critically analyzes the legal and policy developments that paved the way for the adoption of this Directive. Moreover, it examines the changes the implementation of the Directive is likely to generate in current Hungarian law and policy of competition protection. The focus of the paper's assessment is on the institutional aspects of the Directive and the enforcement of Articles 101 and 102 TFEU, in particular the mechanisms for ensuring independence and accountability of the NCAs. Through the assessment of the Hungarian implementation, the paper aims to shed light on a broader context of the Directive and the enforcement of EU competition law in EU Member States. The paper shows that the implementation of the Directive may fail to translate into (more) effective enforcement without an effective institutional capacity on the side of the NCAs, and in the broader legal and constitutional context of competition law and its multilevel enforcement.

Résumé

Pour faciliter l'application des règles de concurrence de l'UE par les autorités nationales de concurrence, le législateur européen a adopté la directive 2019/1/UE. L'objectif de la directive est de permettre aux autorités de concurrence des États membres d'être plus efficaces dans l'application du droit de la concurrence et d'assurer le bon fonctionnement du marché intérieur. La directive dite «ECN+» définit des règles minimales d'harmonisation permettant aux autorités de concurrence de disposer de pouvoirs communs d'enquête, de décision (notamment en matière d'amendes) et d'exécution. En outre, la directive fixe des garanties minimales pour l'indépendance, la responsabilité et les ressources des ANC, harmonise les programmes de clémence, y compris la coordination des programmes nationaux de clémence entre eux et entre ces programmes et ceux de la Commission européenne.
Le présent article analyse de manière critique les développements juridiques et politiques qui ont ouvert la voie à l'adoption de la directive. En outre, il examine les changements que la mise en œuvre de la directive est susceptible de générer dans la législation et la politique hongroises actuelles en matière de protection de la concurrence. Au centre de l'évaluation du présent document figurent les aspects institutionnels de la directive et l'application des articles 101 et 102 du TFUE, en particulier les mécanismes garantissant l'indépendance et la responsabilité des ANC. Grâce à l'évaluation de la transposition hongroise, le présent article vise à clarifier le contexte plus large de la directive et de l'application du droit

communautaire de la concurrence dans les États membres de l'UE. L'article montre que la mise en œuvre de la directive pourrait ne pas se traduire par une application (plus) efficace sans une capacité institutionnelle effective de la part des ANC et dans le contexte juridique et constitutionnel plus large du droit de la concurrence et son application à plusieurs niveaux.

Key words: EU Competition law, Institutional design, Competition Law procedures, Hungary, Decentralization.

JEL: K10, K21, D02

I. Introduction

In order to facilitate national competition authorities (hereinafter: NCAs) in their application of EU competition rules, the EU legislator adopted Directive 2019/1/EU. The Directive's aim is to empower the competition authorities of the Member States to be more effective enforcers of competition law and to ensure the proper functioning of the internal market.[1] The so-called ECN+ Directive introduces minimum harmonisation rules allowing competition authorities to have common investigative, decision-making (notably fining decisions) and enforcement powers. The Directive, furthermore, sets minimum safeguards for NCAs' independence, accountability and resources, harmonizes leniency programmes including the coordination of national leniency programmes with each other and with that of the European Commission. The Directive also addresses mutual assistance among NCAs and the role of NCAs before national courts. The Directive seeks to strengthen the cooperation between national competition authorities and the Commission within the framework of the European Competition Network (hereinafter: ECN). The Directive envisages giving NCAs enforcement powers similar to those enjoyed by the Commission.

This paper will, first, critically analyze the legal and policy developments that paved the way for the adoption of this Directive. Second, it will examine the changes the implementation of the Directive is likely to generate in current Hungarian law and policy of competition protection. The focus of the paper's assessment is on the institutional aspects of the Directive and the enforcement of Articles 101 and 102 TFEU, in particular the mechanisms for

[1] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019, p. 3–33.

ensuring independence and accountability of NCAs. Through the assessment of the Hungarian implementation, the paper aims to shed light on a broader context of the Directive and the enforcement of EU competition law in the EU Member States. The paper shows that the implementation of the Directive may fail to translate into (more) effective enforcement without effective institutional capacity on the side of the NCAs and in the broader legal and constitutional context of competition law and its multilevel enforcement.

The paper is structured into five sections. The first section analyzes the way enforcement of EU competition law has been shaped by Regulation 1/2003, and which challenges the multi-level system posed to enforcement, and how the system developed and eventually led to the adoption of the Directive. The second section critically analyzes the way convergence of procedural and institutional issues among the Member States has taken place before the adoption of the Directive, and it shows that the Commission played a dominant role in this process. Section three turns to the developments of procedures and enforcement of competition law in Hungary and the possible challenges and necessary changes to implement the Directive in Hungary. Section four analyzes the way provisions on independence and accountability of the Directive may fall short of achieving a really effective enforcement of competition law in the Member States. Hungary's example shows that effective *de facto* independence of NCAs is key to enforcement, and that active mechanisms of political and judicial accountability need to be present in a legal and political system in order to guarantee effective (competition) law enforcement. The paper closes with conclusions.

II. From Regulation 1/2003 to Directive 2019/1

The fundamental procedural rules for the application of Articles 101 and 102 TFEU have been laid down in Regulation 17/62. After remaining unchanged for forty years, in 2004 Regulation 1/2003 introduced vital changes to the enforcement of Articles 101 and 102 TFEU[2] with the aim to ensure effective enforcement on the one hand, and to simplify their administration to the greatest possible extent on the other. Regulation 1/2003 delegated enforcement powers to NCAs and national courts to relieve the Commission of its increasing administrative burden and make the enforcement of EU rules more effective. Regulation 1/2003 created a system of parallel competences between the Commission and NCAs and national courts and obliged the

[2] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laud down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

national enforcers to apply EU and national competition laws simultaneously. This transformation of EU competition law enforcement (see: Cseres, 2015) resulted in a multilevel governance system, where a mix of substantive EU provisions and national procedural laws and institutional designs are applied and enforcement is shared by the Commission and 28 national competition authorities. Accordingly, decentralized enforcement of EU competition law became subject to problems of multilevel governance similar to other fields of EU law.

When NCAs apply Articles 101 and 102 TFEU, they make use of their national procedural rules and impose remedies and sanctions that are available in their respective legal systems. Thus, the enforcement of EU competition rules has come to rely on the effective administrative enforcement of EU competition rules through national administrative procedures. This system created an enforcement gap between substantive and procedural rules and raised the problem of accountability for acts which are the result of this mixed enforcement system (Cengiz, 2009; Cseres, Outhuisje, 2017, pp. 82–114).

1. Multi-level governance under Regulation 1/2003

This multilevel enforcement system challenged the uniform and consistent application of EU competition law and created uncertainty for national enforcers how to apply and not to apply Treaty provisions. In order to remedy this problem, various legal provisions were laid down in Regulation 1/2003 and cooperation mechanisms between the Commission and the NCAs were introduced in the framework of the European Competition Network.[3] While these mechanisms accelerated a remarkable Europeanization[4] of competition rules,[5] much of the effectiveness of the decentralized enforcement now depends on the success of the coordination mechanisms between centrifugal pulls from the Member States towards their national legal systems and centripetal pushes from the Commission to safeguard uniform and consistent application.[6]

[3] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

[4] Europeanisation is understood as 'the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance' (Bache, Jordan, 2006; Cseres, 2014, 31–66).

[5] For example, when candidate countries join the EU and its competition law regime, external incentives and conditionality end their function as governance modes and the mechanisms within the ECN became crucial.

[6] While the legitimacy of shared enforcement depends on its compliance with the Rule of Law values.The main factors of effective competition law enforcement lie in effective administrative organisation, clearly worded national law provisions and the extent to which

In the first place, Regulation 1/2003 modernized and implemented the procedural rules that apply to the enforcement of the Commission in cases of Articles 101 and 102 TFEU. It is the legal basis of the Commission's investigation powers. However, it did not formally intervene with the procedures of NCAs over and above Article 5 and 35 of Regulation 1/2003 and the rules applicable to cooperation mechanisms. Regulation 1/2003 contains some basic rules on the powers of the NCAs, but left national procedures and institutional designs unaddressed. Article 5 lists the powers of NCAs when they apply Articles 101 and 102 TFEU and what type of decisions the NCAs can take in such cases. But Article 5 is a very basic provision and did not formally regulate or harmonize the procedural rules to be followed by the NCAs or the ECN.[7] This means that the NCAs apply the same substantive EU rules, but they do so in different procedural frameworks and may impose different sanctions. These procedural differences had been addressed to some extent in Articles 11 and 12 of Regulation 1/2003 through the cooperation of the NCAs within the ECN. The procedures and sanctions for the application of EU competition rules in the Member States were thus not harmonized by Regulation 1/2003, and they are only subject to general principles of EU law, in particular, the principles of effectiveness and equivalence, as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable.

With regard to the institutional setup of NCAs, under Article 35 of Regulation 1/2003, each Member State had a clear obligation to designate a competition authority responsible for the application of Articles 101 and 102 TFEU before 1 May 2004[8]. The chosen authorities could be administrative or judicial in nature. The only requirement was that they had to be designated in order to guarantee that the provisions of Regulation 1/2003 are effectively complied with.[9] Beyond Article 35 of Regulation 1/2003, neither

European rules are successfully transposed into the existing institutional and regulatory traditions of the Member States (Treib, 2006; Knill, Lenschow, 1998).

[7] European Commission, *Commission Staff Working Paper accompanying the Report on Regulation 1/2003*, SEC (2009) 574 final, para 200; *Commission Staff Working Paper*, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, COM (2014)453, para 43.

[8] Article 35(1) of Regulation 1/2003: 'The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.'

[9] Point 2 of the Notice on cooperation within the NCA provides that 'Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law.' See also judgment of the Court of Justice of the European Union of 13 September

further requirements nor additional formal rules have been formulated on the powers and procedures to be followed by the NCAs.[10] The diversity of the NCAs' institutional design is largely determined by country-specific traditions (The Reports of the ECN's Working Group on cooperation issues and due process provide an overview of the different systems and procedures for antitrust investigations within the ECN. See: ECN Working Group Cooperation Issues and Due Process, 2012, p. 6–7; Cseres, 2013).

Given this diverse procedural and institutional landscape, it has been questioned whether the decentralized enforcement system where NCAs operate under different national procedural rules and impose a variety of sanctions and remedies, could jeopardize effective EU law enforcement (Cseres, 2017 B, pp. 182–199).

Cases such as, *VEBIC*,[11] *Tele2 Polska*[12] *Orange*[13] and *Schenker*[14] clearly signaled that there are fundamental legal puzzles that arise when NCAs apply Articles 101 and 102 TFEU under domestic procedural rules.[15]

As Advocate General Kokott argued in *T-Mobile Netherlands and Others*: '[i]n those circumstances, it is of fundamental importance that the uniform

2005, Case C-176/03, *Commission of the European Communities v Council of the European Union*, ECR I-7879, paras 46–55.

[10] Albeit their competences were very roughly set out in Articles 5 and 6 of Regulation 1/2003. Although national procedural rules had to provide for the admission of the Commission as *amicus curiae* in national procedures, NCAs will have to be empowered to conduct examinations in accordance with Regulation 1/2003, and Member States will have to report to the Commission. The Commission retains broad supervisory powers that allows it to intervene in proceedings before national authorities and which in fact enables it to act as 'primus inter pares'. See Article 11(6).

[11] See Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, para 56: Article 35(1) requests that the NCAs are designated in such a way that the provisions of Regulation 1/2003 are effectively complied with. Agencies must ensure that the Treaty competition provisions are 'applied effectively in the general interest' See Van Cleynenbreugel, 2012, p. 285–312).

[12] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA w Warszawie*. CJEU, C-360/09, Pfleiderer AG v Bundeskartellamt; CJEU, C-681/11, Schenker & co; Case C-557/12, Kone AG, Otis GmbH, Schindler Aufzüge und Fahrteppen GmbH et al v. OBB- Infrastruktur AG [June 5th, 2014, not yet published], para. 32.

[13] T-402/13 *Orange v Commission* [2014]. In this case the General Court confirmed and further clarified the powers of the Commission to investigate practices that had been investigated earlier by a NCA. The General Court confirmed that the Commission's unannounced inspection on Orange's premises in relation to an alleged infringement of Article 102 TFEU in the market for internet connectivity services did not violate the principle of *ne bis in idem* paras 30–31.

[14] See also Case C-681/11, *Schenker&co*, para 46.

[15] Opinion of Advocate General Kokott delivered on 19 February 2009 in Case C-8/08 (2009) ECR I-4529, p. 85. See judgment of the Court of Justice of 4 June 2009, Case C-8/08, *T-Mobile Netherlands*, ECR I-4529, paras 85 and 86; Petit, 2014.

application of competition rules in the [European Union] be maintained. Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire [European Union] would be undermined if in the enforcement of the competition rules of Articles [101 and 102 TFEU] significant disparities occurred between the [NCAs] and courts of the Member States. For that reason, the objective of a uniform application of Articles [101 and 102 TFEU] is a central theme which runs throughout Regulation No 1/2003.'

Accordingly, it has been argued that consistent policy enforcement requires a certain degree of harmonization of procedures, resources and independence of the NCAs (Cengiz, 2009; Gauer, 2001, pp. 187–201; 2000, pp. 208–210).

The decentralized enforcement system of Articles 101 and 102 TFEU introduced by Regulation 1/2003 has often been characterized as a success and an effective way to enforce EU law. The decentralized enforcement system has been praised for effectively easing the Commission's workload by delegating enforcement powers to NCAs, national courts, and introducing a fundamental role for networked governance. Decentralized enforcement appears to work smoothly, and it has increased the Europeanization of competition rules across the Member States, while also developing a shared sense of competition policy and culture among the Member States.

However, there has also been serious criticism questioning the success of this enforcement model (Monti, 2014 A; Monti, 2014 B; Cseres, 2015, pp. 319–339). In fact, the Commission has also acknowledged that NCAs encounter difficulties in carrying out their work. Accordingly, late in 2015 the Commission started a public consultation on how to empower NCAs to be more effective enforcers.[16]

The next section will analyse how the Commission and the NCAs tried to deal with these difficulties and the way convergence among national procedural and institutional frameworks has developed until the legislative process of the Directive started.

2. 'Guided' convergence

Regulation 1/2003 reconciled the requirements of substantive coherence with the existing procedural diversity amongst NCAs.[17] Article 3(2) of Regu-

[16] European Commission, 'Empowering the national competition authorities to be more effective enforcers' http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

[17] Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final, 29 April 2009, para 200.

lation 1/2003 introduced a strict supremacy standard and has reinforced the process of convergence of substantive competition rules among Member States that started in the late 1980s.[18] Most Member States also began to harmonize certain rules of their procedures towards Regulation 1/2003 and the accompanying soft-law instruments, most notably the Leniency Notice (Cseres, 2015, p. 319–339). Hungary has been one of the most active Member States in this respect as will be shown below. This convergence took place through implementing similar procedural rules as those of the Commission's. The underlying reason for these legal transplants[19] could have been that once these rules and enforcement methods work effectively and efficiently in the hands of the Commission, they will prove successful in the hands of the NCAs as well.

Convergence has taken various forms from voluntary convergence by Member States to procedural convergence in the context of agreements on financial support from the EU with the Programme Countries, bilateral contacts and multilateral work within the ECN as well as reforms that have been stimulated by recommendations in the framework of the European Semester.[20]

Convergence has mostly been stimulated by the Commission. Consequently, it was the Commission who examined existing procedural divergences across the Member States and announced its intention to further harmonize national rules on procedures already in 2009. [21] It was first after the five year

[18] Competition law and policy gained importance and the ineffective abuse systems, which in certain jurisdictions included criminal law enforcement, was abandoned. Waarden and Drahos found that this convergence was due to a subtle top-down pressure from the Commission and the European courts combined with the emergence of strong epistemic community of competition lawyer (see: van Waarden, Drahos, 2002, p. 928). The new competition laws followed a prohibition system and enforcement was trusted to an administrative body with judicial like decision-making. Enforcement became primarily administrative law based, with administrative law sanctions. These new competition regimes worked more effectively than their predecessors and indeed their main achievement was to gain social and political support for the enforcement of competition law. See: Gerber, 1998, p. 402–403.

[19] Convergence between different legal rules towards an efficient model may take place as a result of a legal transplant or as an outcome of a competitive process between different legal formants. In the first case, legal transplants are implemented because they proved to be efficient in other legal systems. In the second case, convergence towards efficiency is the result of the interaction between different legal formants. So, while legal transplants are governed by hierarchy, the second scenario is governed by competition among legal formants. See: Mattei, Antoniolli, Rossato, 2000, p. 508–511.

[20] Commission Staff Working Paper, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, COM (2014)453 paras 48–50.

[21] Commission Staff Working Paper, para 207. See also ECN Investigative Powers Report and Decision Making Powers Report (2012) available at http://ec.europa.eu/competition/ecn/documents.html.

evaluation of Regulation 1/2003 in 2009 that the Commission put forward the consideration of soft harmonization or the adoption of certain minimum standards through legislative rules.[22] Then in 2012, the ECN published its Report on decision-making powers of the NCAs showing a high level of convergence among the NCAs. The Commission considered this convergence a basis for further harmonization of the NCAs' procedures for competition law enforcement.[23] In 2013, this convergence of national competition law procedures was summarized in the ECN's Recommendations on key investigative and decision-making powers.[24]

In the meantime the ECN's Working Group on cooperation issues and due process was set up that monitored convergence among the Member States and provided an overview of the different systems and procedures for competition law investigations within the ECN.[25]

Despite these developments, national rules still differed on fundamental aspects of the procedures, such as setting priorities, inspecting non-business premises, powers to inspect, to request information or to take commitment decisions, imposing behavioural or structural remedies, procedural rights of parties under investigation, for example, different scope of the privilege against self-incrimination for undertakings, and the enforcement measures and sanctions related to non-compliance with decisions, for instance, some NCAs did not have the power to impose fines directly in case of non-compliance with a commitment decision.[26]

These differences were seen to significantly affect the scope of investigative and decision-making powers of the NCAs (see also: Ost, 2014, pp. 125–136). Moreover, in the area of sanctions, such as fines and the nature of sanctions,

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[22] European Commission, 'Commission Staff Working Paper of 29 April 2009 accompanying the Report on the functioning of Regulation 1/2003', SEC(2009) 574 final para 207. See also European Competition Network, 'Investigative Powers: Report' and 'Decision Making Powers: Report' of 31 October 2012, available at ec.europa.eu/competition/ecn/documents.html.

[23] European Competition Network, 'Investigative Powers: Report' and 'Decision Making Powers: Report' of 31 October 2012, available at ec.europa.eu/competition/ecn/documents.html.

[24] ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information, available at http://ec.europa.eu/competition/ecn/recommendation_powers_to_investigate_enforcement_measures_sanctions_09122013_en.pdf; European Commission, 'Commission Staff Working Document SWD(2014) 231 – Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues', SWD(2014) 230, available at ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf.

[25] European Commission, 'Commission Staff Working Document SWD(2014) 231 – Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues', SWD(2014) 230, available at ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf.

[26] *Ibidem*, paras 45–46.

there are also differences across the national laws.[27] Most importantly, it was the ECN that served as a major catalyst in encouraging Member States and/or NCAs to ensure greater convergence, and the Commission had a dominant role in this so-called 'voluntary' harmonization process. Convergence clearly steered national procedural rules towards the Commission's procedural model.[28] Best example for this is the ECN Model Leniency Programme,[29] which closely resembled the Commission's leniency programme[30], but illustrative examples are also the review process of Article 102 TFEU and sector specific regulations.[31]

However, the effectiveness of these converged and transplanted rules was not always successful in the different institutional frameworks of the Member States. That was visible, for example, in Central and Eastern European (hereinafter: CEE) Member States, where agencies often had to divide resources between several legislative competences and, crucially, depended on institutional capacity.[32] The ECN Model Leniency Programme,[33] which has often been praised as a success story of the ECN's cooperation mechanism illustrates this in the CEE countries. The first adopted programmes proved to be unproductive due to insufficient transparency or uncertainty about eligibility. Many programmes had to be revised and are still seen as ineffective in practice.[34]

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[27] *Ibidem*, paras 62–77.

[28] The 'voluntary' convergence takes place within the ECN's Working Group on cooperation issues and due process, which monitors convergence among the Member States and provides an overview of the different systems and procedures for competition law investigations within the ECN. ECN's Working Group on cooperation issues and due process. Documents available at http://ec.europa.eu/competition/ecn/documents.html.

[29] ECN, *ECN Model Leniency Programme* (2006) available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf, accessed 28 April 2014 and the 2012 revision, available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf, accessed 28 April 2014.

[30] Communication from the Commission — Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 256/1 (2015).

[31] European Commission, 'Commission Staff Working Paper of 29 April 2009 accompanying the Report on the functioning of Regulation 1/2003', SEC(2009) 574 final, paras 248–249.

[32] This has been confirmed by the most recent example of Croatia (see: Kapural, 2014, p. 218). NCAs did not enforce the transplanted rules due to constraints in administrative capacity and the enforcement tools have not always delivered the expected results. This is, for example, the case with regard to the power to investigate private premises. There are no actual experiences of the use of this investigative tool in the Czech Republic, Estonia, Hungary, Romania, Slovenia and the Slovak Republic; in Bulgaria it does not exist at all (see: European Commission, *Commission Staff Working Paper accompanying the Report on Regulation 1/2003*, SEC(2009) 574 final, para 202).

[33] ECN, *ECN Model Leniency Programme*, 2006, available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf, accessed at 28 April 2014 and the 2012 revision, available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

[34] The Czech NCA has applied its leniency programme for the first time in 2004 with regard to a cartel agreement in the energy drinks market. Poland had its first leniency case in a 2006

While there has been a certain degree of 'voluntary' harmonization towards the Commission's procedural model, the above findings confirm the presence of top-down, rather than bottom-up, processes with hierarchical governance mechanisms. Accordingly, the public consultation initiated by the Commission in 2015 on how to empower NCAs to be more effective enforcers[35] was a natural consequence of these ongoing hierarchical governance mechanisms pushing towards more convergence among the national enforcement systems.

Ultimately the process resulted in the adoption of the ECN+ Directive in 2019.

III. Implementation of the ECN+ Directive in Hungary

The paper will analyze more in detail the conceivable changes the Directive generates in the Hungarian legal system and specifically the rules applicable in competition law proceedings.

First a short overview of the recent development of competition law proceedings will be provided.

1. Development of administrative procedures in competition law cases in Hungary

Specific investigative and decision-making powers of the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter: GVH) are defined and laid down in the Hungarian Competition Act (hereinafter: HCA) but as a background statute, the Act on the General Rules of Public Administrative Procedures and Services also contains procedural rules.[36]

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cartel agreement but had largely revised its 2004 leniency programme in 2009 due to several shortcomings of the previous model. In the Czech Republic, Hungary and Slovakia a marker system exists as well. However, in the Czech Republic the decision to grant a 'marker' lied fully at the discretion of the NCA. In Hungary, leniency was applied for in a few cartel cases yet only one of them has already been closed by the NCA in 2007 (Vj-81/2006). Nagy shows that in Hungary the annual number of leniency applications is fairly low (see: Nagy, 2016 A, p. 107).

[35] European Commission, 'Empowering the national competition authorities to be more effective enforcers' http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

[36] Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services. The provisions of this Act need to be applied to the procedures of the GVH only when the Competition Act, which contains specific procedural rules applicable to the GVH, does

Throughout the past decade various amendments of the HCA have brought competition law procedures in close compliance with the new provisions of the Directive. Therefore, it has now been argued that only certain rules need to be introduced in order to achieve full conformity with the Directive (Szilágyi, 2019, pp. 51–57). This means that the GVH already possesses many of the vital instruments and powers that are necessary to effectively enforce competition law. Key amendments have taken place in 2014[37] and 2017[38].

At the same time, it has been argued that in the past 5 years 10 amendments have been passed to the HCA, which has resulted in a fragmented piece of legislation (for example Article 88 has sections from A–V on civil law claims). The question arose whether a new modern competition act should be considered that is fit for the challenges of the 21 Century.[39]

The current procedural framework is in general quite similar to the investigative and decision-making powers of the Commission. However, the investigation and decision making powers are separated within the GVH. The decision-making body of the GVH is the Competition Council (hereinafter: CC) – under the management of one of the Vice Presidents of the GVH, who is at the same time the Chair of the CC. The CC is a quasi-judicial body and it decides each case by a three-member (exceptionally five-member) panel designated by the Chair of the CC and its members act with full autonomy. They cannot be instructed and they are subordinated exclusively to the law.[40] Criminal punishments can be applied in Hungary in competition law cases

not contain any rules different to the provisions of the Act on the General Rules of Public Administrative Procedures and Services.

[37] Act CCI of 2013 among others affected the types of procedures (upon application or on own initiative), stages of proceedings and the procedural position of the persons entitled to access documents, as well as establish a coherent system of access to documents that is sufficiently differentiated to accommodate various types of data. In the context of the protection of business secrets, the amended Competition Act allows the GVH to grant access to business secrets or certain other privileged information of the other party, with due consideration to the rights of the data owner and to the protection of other privileged information and the statutory rights of the party requesting access, in particular the conflicting rights to defence and to a legal remedy, with appropriate practical restrictions and secrecy obligations where required and following consultation with the parties concerned. See more Annual Report GVH 2014.

[38] The most significant of these changes relates to the re-regulation of the procedures affecting the control of concentration of undertakings. Another major area of amendment was the transposition of Directive 2014/104/EU of the European Parliament and of the Council on actions for damages for infringements of the competition law provisions. Act CXXIX.of 2017.

[39] http://competition.hu/versenyjog/a-versenytorveny-menetrendszeru-valtozasai/.

[40] OECD, *Roundtable on changes in institutional design of competition authorities, note by Hungary* (2014) DAF/COMP/WD(2014)123. The members of the CC are lawyers or economists (or have both qualifications). There must be at least one economist among the members of the decision panel for every case.

regarding public procurement and concessional cartels (Nagy, 2016 A, 139 ff.). In these procedures, it is not the GVH who conducts the investigations but the Public Prosecutor's Office in cooperation with the police, and the criminal court is the decision-making judicial entity (Nagy, 2016 A, 145). Natural persons involved in these cartels may face imprisonment of up to five years (Nagy, 2016 A, 140).

Concerning priority setting, NCAs have in general broad discretion to decide whether to investigate a certain case and to impose a fine. The GVH may set priorities and is not obliged to investigate all alleged violations of competition law. As the GVH used to receive a significant number of irrelevant complaints, in 2005 the complaint system was substantially reformed. Since 2005, complaints can be submitted to the GVH via a form requesting a relatively broad range of information. According to the reformed system, it is no longer necessary for the complainant to be concerned by the suspected violation of competition law. In this system complainants have special rights (for example, to challenge a decision of the GVH rejecting a complaint).[41]

According to Article 70 (1) HCA, the GVH only has the obligation to start an investigations in case the protection of the public interest warrants this, but has a margin of appreciation to decide when this requirement is fulfilled. The decision not to investigate a case can be appealed in court if the case was started on the basis of a formal complaint of a third party.[42]

The GVH has set up beyond its Cartel Unit a separate unit, the Cartel Detection Unit, which is responsible for the detection of cartels and also gathers, analyses, and processes all the information that is necessary for the initiation of competition supervision procedures; furthermore, it carries out unannounced inspections ('dawn raids').[43]

Once an investigation starts, the GVH has the following investigative measures when it acts during competition proceedings: request for information, hearing of witnesses, access to documents, on-site inspection without a prior notification based on a judicial authorisation, at the headquarters of the undertaking or at private premises, seizure, sealing or the making of forensic images of the computer database.[44] The undertaking also has the duty to

[41] The possibility to submit indications ('informal complaints') to the GVH, that do not have to comply with the requirements for complaints, still exists. However, 'informal complainants' do not have the same rights as complainants. OECD, *Roundtable on changes in institutional design of competition authorities, note by Hungary* (2014) DAF/COMP/WD(2014)123.

[42] Article 43/H and 82 HCA.

[43] OECD, INVESTIGATIVE POWER IN PRACTICE – Breakout session 1 – Unannounced Inspections in the Digital Age – Contribution from Hungary, DAF/COMP/GF/WD(2018)65.

[44] Sections 55, 55/A, 65, 65/A(1) HCA.

cooperate (Section 64B (I) GVH. See also: Nagy, 2016 B, pp. 192–204). In most EU Member States, the NCA has the possibility to impose a fine after the investigations phase, which is also the case in Hungary (this is different in Austria, Ireland, Denmark, Finland and Sweden).

2. Changes necessary for the implementation of the Directive

Articles 6–12 of the ECN+ Directive concern common investigative and decision-making powers and Hungarian legislation already complies with the Articles 6–9 on inspection of business premises and other premises, request for information and taking interviews. These provisions are laid down in Articles 64 (A–F) and 65 (A–D) GVH and provide wide investigative powers for the GVH in its investigations (Nagy, 2016 A, p. 94).

The Hungarian legislator will need to address, however, the finding and termination of infringement under Article 10, which HCA concerning decisions of the GVH does not preclude the possibility to impose behavioural or structural remedies. However, the HCA could specifically implement this possibility of taking decisions for behavioral and structural remedies in cases concerning agreements and abuse (Szilágyi, 2019, p. 53–54). Article 11 of the Directive addresses interim measures. The Hungarian Competition Act also regulates interim measures in its Article 72/A HCA, however, the conditions for taking these measures differs from the Directive; Hungarian legislation needs adjustment concerning the Directive's provisions that state that decisions on interim measures shall be proportionate and apply for a specified time period, which can be renewed when it is necessary and appropriate, or until the final decision is taken.

2.1. Commitments

Article 12 of the Directive addresses commitments. Commitments are regulated in Article 75 HCA. In fact, the Directive has implemented provisions (monitoring and reassessing commitments) that had already been part of Hungarian law (Szilágyi, 2019, p. 54). The GVH is entitled to conduct a so-called follow-up assessment to establish whether the commitments have indeed been complied with. Commitments were introduced in the HCA in 2005 and have been frequently adopted by the CC of the GVH. It has, in fact been criticized to be a substitute for private enforcement (Nagy, 2016 A, p. 117; Bassola, Kékuti, Marosi, 2011). A recent example can be found in commitments offered by Wizz Air Hungary Zrt. where, as a result of the

commitments, customers affected by the operation of the Wizz Flex service of Wizz Air since 2010 receive compensation and the company also undertook to change its information practices.[45]

2.2. Fines

The powers of the NCAs concerning fines are laid down in Articles 13–16 of the Directive. The Directive now harmonizes the fundamental principles of national fining policies, in order to eliminate divergences in fining policies that may prevent the effective enforcement of EU competition law. The Directive addresses an enforcement gap that relates to the cross-border enforcement of decisions imposing fines. This gap was at the heart of a Hungarian case, where the GVH fined Siemens Austria AG in the Hungarian gas insulated switchgear cartel.[46] Due to the lack of availability of an appropriate cooperation mechanism under Regulation 1/2003, the GVH brought an action for the recovery of the interest that was due to be paid by Siemens, on the ground of undue enrichment in Hungary.[47]

Many Member States' fining policies and several national fining rules already comply with the provisions of the Directive. Láncos shows that most Member States' policies even go beyond the Directive, closely aligning the details of their fining rules to the Commission's guideline on fines (Láncos, 2019). The Hungarian fining rules, as laid down in the HCA and the GVH's 2017 communication on fines to be imposed in cartel and abuse of dominant position cases in late 2017[48], have already been well aligned to the Commission's guideline on setting fines, adopting both the substantive thresholds and consideration of gravity and duration enshrined therein (Láncos, 2019).

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[45] Decision VJ/17/2017. http://www.gvh.hu/en/press_room/press_releases/press_releases_2019/commitment_decision_taken_by_the_gvh_in_the_wizz_a.html; See other cases in the area of unfair commercial practices: https://www.schoenherr.eu/publications/publication-detail/hungary-hcas-recent-practice-cooperation-and-commitments/.

[46] C-102/15 *Gazdasági Versenyhivatal v Siemens AG*. ECLI:EU:C:2016:607.

[47] Para 20.

[48] A Gazdasági Versenyhivatal elnökének és a Gazdasági Versenyhivatal Versenytanácsa elnökének 11/2017. közleménye a versenykorlátozó megállapodásokra és összehangolt magatartásokra, a gazdasági erőfölénnyel való visszaélésre, valamint a jelentős piaci erővel való visszaélésre vonatkozó tilalmakba ütköző magatartások esetén a bírság összegének megállapításáról (Communication No. 11/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the setting of the amount of fines in case of anti-competitive agreements and concerted practices, the abuse of dominant position and the abuse of significant market power).

Hungarian law will need adjustment only concerning the rules of Article 14(4) on defining liability for fines. Accordingly, to prevent undertakings escaping liability for fines for infringements of Articles 101 and 102 TFEU through legal or organizational changes, NCAs should be able to find legal or economic successors of the undertaking liable, and to impose fines on them, for infringements of Articles 101 and 102 TFEU.

2.3. Leniency

Concerning leniency the Directive sets a number of fundamental rules in Articles 17–23. These provisions require Member States to adopt leniency programmes that follow the Commission's Leniency Notice (Articles 17–20), and to establish a system of markers and summary applications (Articles 21, 22). The HCA, and the GVH's leniency policy laid down in soft law instruments, have converged in great detail with the Commission leniency policy and the ECN Leniency Model throughout the past 16 years.

Leniency policy in Hungary was introduced in 2003 and its main provisions were stipulated in the HCA. The detailed leniency policy was implemented in the form of a Notice of the GVH (Notice No 3/2003 on Leniency), which was not legally binding, but defined the guiding principles and the extent to which the active cooperation of a company suspected of engaging in a cartel activity should be taken into account.[49]

The relevant provisions of the HCA were amended in 2006 and more substantially in 2009, with the latter amendment taking into account the ECN's Model Leniency Programme. The leniency policy was then incorporated into hard law, into the provisions of the HCA. The HCA stipulates the basic rules, while the Notice on Leniency Policy contains the detailed rules on leniency. The marker system was introduced in Hungary by this amendment also. The next amendment of 2013 was to align the leniency rules with other provisions of the HCA and to harmonize the Hungarian leniency policy with the new ECN Model Leniency Programme revised in 2012. With the amendment of 2016, which entered into force in January 2017, the scope of the leniency policy was extended to hard core vertical agreements and concerted practices aimed at directly or indirectly fixing purchase or sale prices.[50]

Even though the Hungarian leniency programme is fully harmonized with the ECN Model Leniency Programme, and the new developments of the European Commission's practice are already incorporated, the number of

[49] OECD, Roundtable on challenges and co-ordination of leniency programmes – Note by Hungary, 5 June 2018, DAF/COMP/WP3/WD(2018)4, p. 1–2.

[50] OECD, Roundtable on challenges and co-ordination of leniency programmes – Note by Hungary, 5 June 2018, DAF/COMP/WP3/WD(2018)4, p. 2.

leniency applications was very low and the leniency policy has been criticized as being ineffective in Hungary.[51]

The next section will analyze the institutional aspects of the Directive and its implementation in Hungary

IV. Institutional issues: independence and accountability

Regulation 1/2003 has not specified any sort of requirements on the formal independence of NCAs.[52] As a consequence of the principle of institutional autonomy, the Member States are free to design their own enforcement system (See Scholten, Ottow, 2014). The designated NCAs could, therefore, be administrative or judicial in nature. The Member States were obliged to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EU law.[53]

Political independence of the NCAs is now implemented as one of the cornerstone provisions of the Directive in Article 4. The Article formulates minimum requirements of independence; it requires that an express provision is made in national law to ensure that when applying Articles 101 and 102 TFEU, NCAs are protected against external intervention or political pressure liable to jeopardize their independent assessment of matters coming before them.[54] Article 4 of the Directive lays down specific rules concerning independence, most importantly that NCAs should be performing their tasks independently from political and other external influences. The proposal for the Directive was in fact justified among others, by the need to ensure that

[51] As regards the reasons for the relatively low number of leniency applications, the cultural aspect is deemed to be one of the most relevant: i/ cultural background, as an effect of the formerly 'planned' economy system of Hungary (not to be seen as a traitor) and ii/ low level of competition law awareness (especially in the case of SMEs). In order to improve this situation, the GVH launched a communications campaign to raise awareness, educate, and incentivize. OECD, Roundtable on challenges and co-ordination of leniency programmes – Note by Hungary, 5 June 2018, DAF/COMP/WP3/WD(2018)4, p. 3.

[52] Case C-53/03 *Syfait* [2005] ECR I-04609, paras 31–36. In 2010, a Hungarian Court refused to examine whether the legal basis on which immunity had been granted to one of the undertakings was appropriate, as the fine imposed on the appellant resulted from its own infringement of competition rules, not from the other undertaking receiving immunity, Hungarian Metropolitan Court of Appeal (*Fővárosi Ítélőtábla*), *Kortex Mérnöki Iroda Kft. v Competition Authority*, Case n°2.Kf.27.408/2010/5, 17 November 2010.

[53] Point 2 Network Notice. See also Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005] ECR I-7879, paras 46–55.

[54] Recitals 14–16 Directive.

NCAs have the necessary guarantees of independence.[55] The preamble now says that national law can prevent NCAs from being sufficiently independent and having effective tools to detect infringements and impose effective fines on companies for infringements of EU competition rules. The independence of NCAs is to be strengthened by the Directive in order to ensure the effective and uniform application of Articles 101 and 102 TFEU.

The basic idea that institutions matter for economic development is founded on the assumption that institutional frameworks create incentives for behaviour, leading to different outcomes. North defines institutions as the rules that determine the behaviour of individuals and organizations.[56]

1. Relevance of institutions

It is well recognized in competition law that institutions are a critical driver of public policy and law enforcement that interact, in many indirect ways, with substantive rules (Crane, 2011). The interaction of the institutional design of competition law enforcement with substantive rules and policy-making has by now been extensively discussed in competition law (see: International Competition Network, Report on the Agency Effectiveness Project Second Phase – Effectiveness of Decisions Prepared by The Competition Policy Implementation Working Group, Presented at the 8th Annual Conference of the ICN Zurich, June 2009; Fox, 2010; Fox, 2012; Hyman, Kovacic, 2012).

It has been argued that the institutional embededness of legal rules involves important procedural and institutional complexities and irregularities that influence effective law enforcement. Substantive rules and policies are mediated through the institutions that investigate, enforce and adjudicate legal issues and the decision-making processes that these institutions employ. Institutional and procedural differences are likely to generate widely different substantive outcomes, even with a similar legislative mandate. The respective institutional contexts will each shape decisions in their own ways and may lead to differing functions of the legal rules and thus potentially very different outcomes (Gerber, 2008).

[55] Proposal for Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels, 22.03.2017 COM(2017) 142 final p. 3.

[56] North distinguishes between formal rules such as laws and regulations and informal rules such as constraints on behaviour derived from culture, tradition, custom and attitudes. Formal rules and informal constraints are interdependent and in constant interaction (see: North, 1990).

2. Independence in EU law

The independence of regulatory agencies has been traditionally justified by the technical complexity of the regulated markets, and thus the need for expert decision-making. An agency should be insulated from short-term political pressures in order to adopt public policies based on expertise – that is, to bring expertise-driven independent decision-making to the administrative state. It was believed to yield better public policy over the long term (Barkow, 2010). Consequently, the concept of independence builds on the regulator's legal and functional separation from market parties and its independence from the legislative and executive powers.

The basic design of democratic institutions, and thus the design of competition authorities, should be based on independence, neutrality, transparency, political and judicial accountability, and respect for the separation of powers. The independence of competition authorities is a critically important aspect of certainty and transparency, and ultimately affects the legitimacy of a country's competition law in the eyes of both business and its citizens.[57]

While in the US the concept of independence traditionally implied the US President's limited interference in the operation of independent agencies and the need for expert decision- making (Landis, 1938), in the EU the concept has been less clear-cut and developed mostly at national level independently from EU law requirements (Hanretty, Larouche, Reindl, 2012).

EU law has, in other fields of economic regulation, focused on the independence of national regulatory agencies from market players.[58] However, while EU law is considerably detailed concerning the concept of independence, and EU Courts emphasized the importance of independence in the context of regulated markets,[59] the Courts have, so far, not formulated any general

[57] Independence from the government can have a considerable impact on market stability and the facilitation of investment. Independence is essential in order to avoid competition law being used to achieve political or industrial goals that have little to do with the broader goals of efficiency, referenced above. These outcomes are significant features of a properly functioning democracy, governed by the rule of law. Independence from government politics 'de-politicizes enforcement decisions, reduces the risk of perceived bias, and provides consistency from one political term to the next.' Competition and Democracy, Contribution by BIAC, DAF/COMP/GF/WD(2017)1, p. 6 (see also: Ottow, 2015).

[58] It was in 1988, in Directive 88/301 on competition in the markets in telecommunications terminal equipment that the Commission introduced in Article 6 an obligation on the Member States to entrust the regulation of terminal equipment to a body independent from market parties active in the provision of telecoms services or equipment. This requirement of independence has also been implemented in the second liberalization package in the energy and telecoms sector.

[59] See Case C-202/88 *France v Commission* [1991] ECR I-1223, paras 51-52; Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5973, paras 25–26; Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2009] ECR I-1265.

principles on the independence of regulatory authorities.[60] Accordingly, while EU law requires regulators to be independent from political institutions, it has not laid down the criteria of independence that regulatory authorities must meet (Hanretty, Larouche, Reindl, 2012).

Regulation 1/2003 did not specify any kind of requirements on the formal independence of NCAs.[61] Still, political independence from central government may not be guaranteed in all countries, a fact that can be problematic as competition authorities have to use their expertise independently from political and market actors.

The most comprehensive study on the issue of the formal independence of NCAs is likely in the work of Guidi, who shows extensive variations in independence among the NCAs. However, Guidi's study raises the question of how does a NCA's *de iure* independence reflect its *de facto* independence (Guidi, 2011; Guidi, 2014). The difference between *de iure* and *de facto* independence is crucial as Member States' implementation may raise questions with regard to the Directive's provisions on independence. The next sections will analyze how the GVH complies with the Directive's provisions on independence and the accountability mechanisms.

3. Independence of the GVH

The Hungarian GVH is a budgetary institution and is independent from the Government: it cannot be given instructions by any governmental institution but is only bound by law. The operation and financial management of the GVH

[60] The 2009 package of liberalization mentions a general principle of independence towards the legislative and executive organs. Article 35 of Directive 2009/72 on electricity compels Member States to make the regulatory authority 'functionally independent from any other public or private entity' and give it the autonomy to decide 'independently of any public body'. The new Directive on the internal market for eletricity requires regulatory authorities to be independent. Article 57 of Directive 944/2019. Regulatory authorities need to be able to take decisions in relation to all relevant regulatory issues if the internal market for electricity is to function properly, and need to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, the approval of the budget of the regulatory authority by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be implemented in the framework defined by national budgetary law and rules. While contributing to the regulatory authorities' independence from any political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board.

[61] Case C-53/03 *Syfait*, judgment of 31 May 2005, paras 31–36.

is completely autonomous and constitutes a separate chapter in the central budget.[62]

The President of the GVH is nominated by the Prime Minister, heard by the Hungarian Parliament and is appointed by the President of Hungary. The Vice-Presidents are appointed by the President of Hungary, who, at the same time, entrusts one of the two Vice-Presidents with the responsibilities of the Chair of the Competition Council. The President and Vice-Presidents are appointed for a term of six years. After the expiry of the six-year period such appointments may be renewed, with the proviso that the Chair of the Competition Council may be reappointed only once. The President of the GVH cannot be dismissed except in specific and very serious circumstances.[63] In 2010, an amendment to the HCA specified that the appointment of the Vice-presidents will coincide with that of the President. The term of the then GVH President was to expire in 2010. The Vice-presidents term would have run until 2015. The amendment of the HCA was subject to a constitutional complaint to the Hungarian Constitutional Court.[64] The autonomy of the GVH is to protect it from direct influence from the government and market parties and is, among others, clearly safeguarded by the term of office of its president and vice-presidents (Iancu, Tănăsescu, 2019). Even though the Constitutional Court argued that the GVH's autonomy is constitutionally protected and anchored in the fixed term of office of its President and Vice-Presidents and the amendment to the HCA was not justified, the Vice-Presidents resigned voluntarily. This was certainly a relevant setback to the GVH's autonomy.

The GVH is held accountable to the Hungarian Parliament. As mentioned above, its President is heard by the Parliament before his or her appointment. Moreover, the GVH submits its annual reports to the Parliament and, on request, to the competent parliamentary committee on the activities of the GVH. In addition, according to Article 35 HCA, the GVH has to publish the non-confidential versions of all of its decisions and all of its final orders adopted at the conclusion of proceedings (the opening of which were also made public). Finally, the National Audit Office controls how the GVH uses its financial resources.[65]

Accordingly, *de iure* the GVH is independent and complies with the new provisions of the Directive. However, when examining its independence in

[62] Article 33/A HCA.

[63] Article 35 GVH, Article 35/A, Article 38 GVH.

[64] Decision of the Constitutional Court 183/2010. (X.28) AB.

[65] Act No. CXCV. of 2011 on Public Finances, Government Decree 368/2011. (XII. 31.) on the rules of operation of public finances and Government Decree 4/2013. (I. 11.) on public accounting.

the current broader constitutional and political context of Hungary, questions arise as to its *de facto* independence.

In general, the perceived quality and effectiveness of legal and political institutions in Hungary has been weak.[66] In 2018, Hungary ranked 60th among 137 countries in the institutional component of the Global Competitiveness Index, however, its institutions scores much lower at 101th.[67] Besides administrative burdens, predictability and transparency in policy-making and the efficiency of the legal framework in enabling firms to challenge government regulations are seen as particularly problematic.[68]

In 2019, the European Semester Country Report testified that Hungary's institutional capacity needs to be improved as there are fast and unpredictable changes in regulations and the transparency of policy-making is limited. There are significant regulatory barriers and state involvement including new monopolies and *ad hoc* exemptions from competition scrutiny.[69] Public authorities continue to entrust certain services to state-owned or private firms specifically created for these purposes (for example, textbook publishing, waste collection, mobile payments, tobacco wholesale and retail).

Specifically, a number of cases in the past seven years raised serious concerns about the GVH's independence from direct political influence of the government. Two landmark cases will be analyzed here: the exemption of mergers of national strategic importance and the so-called Watermelon cartel case.

In 2013 a new provision was introduced in the Hungarian Competition Act. Article 24/A of the Competition Act states that the Hungarian Government 'may, in the public interest, in particular to preserve jobs and to assure the security of supply, declare a concentration of undertakings to be of strategic importance at the national level.' For these types of concentrations, no authorization of the GVH is required. Moreover, the decision can be taken via a government regulation which is not subject to judicial review. Until 2018, 21 merger cases, in the area of energy, finance, telecommunications, IT and transport, were approved by the government without having the GVH authorize them on the basis of their impact on competition.[70] In November 2018, the government has declared the creation of a media conglomerate

[66] A stable and efficient legal framework, grounded on the principles of separation of powers and judicial independence, is widely seen as improving economic growth (see: North, 1990; Rodrik, Subramanian, Trebbi, 2004, pp. 131–165).

[67] World Economic Forum, 2017–2018. https://www.weforum.org/reports/the-global-competitiveness-report-2017-2018.

[68] OECD, Economic Surveys: Hungary, 2014, p. 29.

[69] European Semester, Country report, 2019, Hungary p. 37–39.

[70] European Commission, Country report, Hungary, 2015.

with Government Decree 229/2018[71] of 'national strategic importance in the public interest,' and with a decree it called for exempting the merger affecting hundreds of broadcast, online and print publications from competition rules. In its B/961/2018 Decision, the GVH declared that it has no competence to conduct a merger control review.[72] The merger conglomerate was thus not scrutinized by the GVH due to Article 24/A. The merger comprised a foundation to which 10 companies donated media outlets. Through the concentration, the foundation controls nearly 480 publications and their operations are run by a publisher known for his loyalty to the Hungarian prime minister. The foundation resembles a massive advertising and readership centre, which was not allowed to be formed until now under market rules. The merger of the media companies into the foundation and its exemption from competition rules reflects a large scale concentration of governmental power.

Even though the debate about the conflict between achieving efficiency considerations and public interest policy objectives through competition has intensified in recent years, as governments more frequently intervene in markets of significant national importance through a variety of tools, including arranged mergers and foreign investment rules,[73] the present Hungarian rules on exempting mergers is unprecedented.

The exemptions are issued through government decrees and thus cannot be challenged in court and thus be submitted to a legal review. A 2016 OECD Report shows that merger exemptions on public interest ground are common in other OECD countries too, but they are implemented only after full merger reviews by competition authorities and they are based on clear and explicit public interest grounds.[74] These exemptions are also quite rare. For comparison, Germany has exempted less than 10 mergers over the past 30 years. Hungary had put at least 21 exemptions in place between 2013 and 2018 as mentioned above. Most of these mergers in Hungary were relatively small and would probably have been cleared by the competition authority if subjected to a merger review.

The second case to be discussed here is the so-called Watermelon case. This case is_the most criticized example of exempting allegedly anti-competitive practices by legislation from the enforcement of competition rules.[75] This case

[71] 229/2018 (XII. 5.) Korm. Rendelet.

[72] http://www.gvh.hu//data/cms1039707/Osszefoglalo_B961_2018.pdf

[73] OECD, Public interest considerations in merger control, DAF/COMP/WP3(2016)3.

[74] In many jurisdictions (FR, GER, IT, NL, UK) the government (usually the minister of the economy) has the power to intervene in merger control. Such intervention is often *ex post* as it follows the competition authority's own assessment and is based on public interest clauses which allow the competition authorities' decision to be overruled. See: OECD, Public interest considerations in merger control, DAF/COMP/WP3(2016)3.

[75] Case Vj-62/2012.

also questions how effectively the ECN safeguards the enforcement of EU competition rules and whether the EU Commission could have played a more forceful monitoring role.

In 2012, the GVH initiated a competition supervision procedure against a number of Hungarian melon producers, the Hungarian Melon Association and the Inter-branch organization for fruits and vegetables (Hungarian Interprofessional Organisation for Fruit and Vegetables) concerning an alleged infringement of the prohibition on restrictive agreements. The parties had allegedly agreed on a 'fair" minimum price that would be charged from July 2012 for watermelons produced in Hungary and that they would restrict the distribution of imported watermelons. The alleged agreement was initiated by the Ministry for Rural Development, who wanted to secure a fair standard of income for farmers through this action.[76]

After the GVH started its investigation, the Hungarian Parliament adopted an amendment to the Act on Inter-branch Organisations.[77] This amendment stated that subject to the approval of the Minister for Agriculture and Rural Development, an otherwise restrictive agreement in the agricultural sector could be exempted from the prohibition of anti-competitive agreements under Hungarian competition law. The Minister must ensure that the restrictive agreement guarantees a fair income for the producers and that all market actors are equally allowed to join it.[78] In addition, the amendment stated that the GVH must (a) suspend imposing a fine for anti-competitive practices in violation of Article 11 of the Competition Act or Article 101 TFEU conducted with respect of agricultural products and (b) call the involved parties to act in compliance with the applicable laws. If such parties fail to comply within the deadline set by the GVH, the GVH is entitled to impose a fine on them.

The amendment had substantial consequences. The GVH terminated its proceedings in the Watermelon case after the Minister had found that the conditions for the exception were met.[79] The GVH also closed its investigation in the Sugar *cartel* case, in which it suspected that sugar producers had

[76] http://www.gvh.hu/en/press_room/press_releases/press_releases_2013/8198_en_termination_order_was_issued__the_end_of_the_watermelon_saga.html

[77] Act No. CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets adopted on November 19, which amended Act CXXVIII of 2012.

[78] Agricultural Organizations Act, Article 18/A(1) provided that:'The infringement of Section 11 of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Section 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied.'

[79] Vj-62/2012 paras 13–15, 42–46 and 56–57.

regularly coordinated their market behaviour with respect to prices, divided their industrial and retail purchasers, and shared information related to the quantities sold.[80] The GVH has been vigorously enforcing competition rules and, most notably, the cartel provision in the agricultural sector before 2012. In fact, price-fixing and market-sharing decisions of agricultural associations were among the most frequent types of GVH cartel cases.[81] The ECN's 2012 study of the food sector shows that in the period 2004-2011 the GVH had investigated and closed 11 cases, which is a relatively high number and places Hungary as the 8th most active enforcer among the Member States.[82] According to a 2018 study by the Commission on the application of EU competition rules to the agricultural sector, Hungary investigated only one single case in the agricultural sector in the period of 2012 and 2017.[83]

Despite heavy criticism of the exemption by both academia (Csépai, 2015, pp. 404–405; Toth, 2013, pp. 364–366) and international organizations (Pina, 2014, p. 16) as well as by the GVH itself,[84] the European Commission had not questioned the exemption itself. It only focused on the provisions that did not allow the GVH to impose fines where the agreement affected trade between Member States. The European Commission issued a reasoned opinion requesting Hungary to ensure effective enforcement of competition law regarding agricultural products and to comply with its competition law obligations under EU law. [85]

In this opinion the Commission emphasized that since 2004, the Commission and the NCAs share parallel competences for the enforcement of EU competition law. They cooperate in the ECN to exchange information and inform each other of proposed decisions to ensure an effective and consistent application of EU competition rules.[86] Threatened by possible initiation of an infringement procedure against Hungary, the Hungarian Competition Act was changed in 2015. Its new Article 93/A clarified that the GVH may impose

[80] Vj-50/2009 (sugar cartel), paragraph 132.

[81] Vj-199/2005 Egg cartel (2006), Vj-69/2008 wheat mill products I (2010); Vj-89-2003/58 hunting cartel (2004).

[82] ECN Subgroup Food. ECN Activities in the Food Sector. Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012; https://ec.europa.eu/competition/ecn/food_report_en.pdf

[83] Commission Staff Working Document. Accompanying the document Report from the Commission to the European Parliament and the Council The application of the Union competition rules to the agricultural sector {COM(2018) 706 final}, Brussels, 26.10.2018 SWD(2018) 450 final, p. 33.

[84] Vj-62/2012 watermelon (2013), para 70-72, GVH – The GVH suggests enforceable ethical rules to the agricultural sector, 29.9.2009.

[85] http://europa.eu/rapid/press-release_MEMO-14-293_en.htm.

[86] http://europa.eu/rapid/press-release_MEMO-14-293_en.htm.

sanctions, including fines, when the agreement infringes EU competition law. The 2015 amendment of the Competition Act introduced Article 93/A that explicitly stipulates that the provisions which regulate the specificities of agriculture, and which were originally part of Act CXXVIII of 2012 on agricultural associations and on the regulation of certain issues concerning the agricultural markets (Act on inter-branch organizations), are only applicable if the primacy of the competition rules of the EU does not prevail.[87] The Commission has accordingly closed the case in 2015 without further actions from the Commission. Even though questions arise with regard to the Commission's own case, the point here is the concern how the government can use the mechanism of legislation to bind the hands of the GVH in cases where competition law should be enforced. Moreover, an additional concern is that the decision of the minister is not open to a judicial challenge.

In this generally weak institutional governance framework competition has been often explicitly limited by legislation.[88] In this poorly performing institutional environment and where the low intensity of competition has been criticized for many years (Tőth, Hajdu, 2017), one has to conclude that the GVH has *de facto* become dependent on a legally constrained enforcement framework that limits its autonomy as an enforcer of competition rules. Additionally, independence has to be investigated in relation to political and judicial accountability. This will be the subject of the next section.

4. Accountability of the GVH

The NCAs can be held accountable by their national parliaments for their EU competition law enforcement. The scope of the accountability and its procedures are largely determined by country-specific legislation and the respective legal traditions. Article 4 of the Directive does not add a substantive provision in this regard. It simply states that Member States should subject their NCAs to proportionate accountability requirements, without defining further details of what these requirements are. The accompanying text does, however, indicate that proportionate accountability requirements include the publication by NCAs of periodic reports on their activities to a governmental

[87] Article 93/A. (5) para (1)–(4) shall only apply to a case if the necessity of the application of Article 101 TFEU does not arise. The necessity of the application of Article 101 TFEU shall be established by the Hungarian Competition Authority in its competition supervision proceeding pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, before making the final resolution. GVH, Annual Report, 2015. http://www.gvh.hu/en//data/cms1035410/gvh_ogy_pb_2015_a.pdf.

[88] European Semester, Country report, 2019, Hungary p. 39–40.

or parliamentary body. NCAs may also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.

In general, accountability mechanisms weakened in the past years in Hungary. The deterioration is particularly notable in Hungary concerning voice and accountability, control of corruption and regulatory quality. Corruption risks and weak accountability distort the allocation of resources as these are not necessarily channelled to the most productive firms.[89]

The GVH has been publishing and submitting its annual reports ever since its creation in 1991 to the Hungarian Parliament[90], where various Committees such as the Economic and Consumer protection Committees have pre-discussed and commented on the reports and the Parliament has held general debates with the participation of the representative of various parties. The GVH's work used to be praised and appreciated by the Members of the Hungarian Parliament (both government and opposition parties) and they voiced their satisfaction with the transparency and accuracy with which the GVH worked and communicated its work to the outside world.[91]

However, since 2010 accountability mechanisms significantly weakened. When the new chairman of the GVH was appointed by the government in 2010, he was not heard by the Parliament before his appointment.[92]

A discursive analysis of the Hungarian parliamentary debates on the GVH's annual reports in the period 2004–2018 revealed a serious 'backsliding' of the accountability mechanisms in Hungary.

The discursive analysis of general parliamentary debate reveals that the general debates no longer provide the forum to hold the GVH accountable for its enforcement work. The GVH's annual reports have not, since 2012, been subject to a general debate in the Parliament but were merely discussed within one single Parliamentary Committee, the Economic Affairs Committee.[93]

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[89] European Semester, Country report, 2019, Hungary p. 41.

[90] See annual reports in English: http://www.gvh.hu/gvh/orszaggyulesi_beszamolok, accessed 8 December 2016.

[91] See Parliamentary debates on the GVH's Annual reports, J/15947 A Gazdasági Versenyhivatal 2004. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/5632 A Gazdasági Versenyhivatal 2007. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról; J/2541 A Gazdasági Versenyhivatal 2006. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról; J/227 A Gazdasági Versenyhivatal 2005. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról,

[92] Az Országgyűlés hiteles jegyzőkönyve 2010. évi őszi ülésszak október 11–12-ei ülésének második ülésnapja, 34.szám, point 5166.

[93] Jegyzőkönyv az Országgyűlés Gazdasági bizottságának 2016. március 22-én, kedden 9 óra 34 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, pp. 5–12.

This has serious implications for the rule of law institutions and values in Hungary, but it may equally impact the enforcement of EU competition law.

Unlike its network members, the ECN itself cannot be held accountable either to the European Parliament or the national parliaments. It is only its members that are accountable to their respective parliaments, but even in that case not for acts or decisions taken within the ECN, such as case allocation and information exchange. Unlike other EU networks, for example for telecommunications, the ECN is under no obligation to publish annual reports and submit them to the Commission or the European Parliament. Information on and about the work of the ECN is provided through the Commission's annual report and through its website where the ECN publishes a newsletter.[94]

5. Judicial accountability

Judicial accountability is not part of the Directive, however, judicial review forms an indispensable part of the enforcement system in order to enhance the quality of administrative actions and to ensure good governance. It is fundamental for economic exchanges, since trade and investment depends on public decision-making bodies being subject to effective means of oversight and legal redress. It is important to address judicial accountability with regard to the Hungarian system and the possible result of the implementation of the Directive. The developments in Hungarian economic policy since 2010 not only comprised of increasing state involvement decision-making mechanisms and often increasing administrative discretion but also restriction or elimination of judicial control of such discretion. In fact, regulatory changes restructuring markets often went hand in hand with limiting the opportunities of individuals for legal redress (The Lendület-HPOPs Research Group, 2017, p. 50). The 2010 suspension of the review powers of the Constitutional Court on matters of fiscal policy certainly represents one of the major examples of this development.[95] Another example is the exclusion of judicial review against the regulations of the energy regulator following an unfavourable,

Jegyzőkönyv az Országgyűlés Gazdasági bizottságának 2016. szeptember 20-án, szerdán 9 óra 04 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, pp. 6–23; Jegyzőkönyv az Országgyűlés Gazdasági bizottságának 2018. október 15-én, 11 óra 10 perckor az Országház Tisza Kálmán termében (főemelet 37.) megtartott üléséről.

[94] See https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial, accessed 8 December 2016.

[95] It enabled the government to introduce new, controversial fiscal measures and to engage in an equally controversial restructuring of certain economic sectors without being subject to constitutional scrutiny.

for the government, ruling in judicial review by the Budapest Metropolitan Court.[96]

Decisions of the GVH are subject to judicial review at three different levels of the court system. At the two first instances of court review, courts examine the legality of the administrative decisions based on points of law and facts. On third instance, the Supreme Court reviews only on points of law. After those three court instances, the parties may file a constitutional complaint with the Hungarian Constitutional Court.[97] The standard of review in administrative procedural law is that of 'legality'.[98] In Hungarian law, judicial review of the legality of administrative decisions covers breaches of both procedural and substantive law, while on the basis of Article 339 it excludes the review of the merits of the administrative decision taken under direct statutory or discretionary powers. The division between the review of legality and the review of merits is, however, not always clear in Hungarian law.[99]

The role of Article 6 of the European Convention on Human Rights (hereinafter: ECHR) on the right to a fair trial in a reasonable time, and the European Court of Human Rights' *Menarini* judgment[100], had an important influence in Hungary concerning the standard of judicial review courts should engage in when assessing the GVH's decisions.[101]

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[96] Varjú showed that it is likely that the new act (Act 2013:XXII) was drafted, in part, as a reaction to the judgment of the Budapest Metropolitan Court allowing the action for judicial review launched by energy companies against regulation of the energy authority amending the network code concerning long-term capacity allocation, therefore, contradicting this particular aspect of the declared government policy on lowering utility prices.

The reduction of legal protection was introduced as part of the general regulatory overhaul of the powers and responsibilities of the regulator and the setting up of the new Hungarian Energy and Public Utilities Regulatory Authority. Under the new rules, the Constitutional Court has jurisdiction to review the regulations issued by the new regulator, but this Court lacks expertise and has often in recent years exercised near complete deference to government discretion in regulating the economy. Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group, The Legal and Regulatory Environment for Economic Activity in Hungary: Market Access And Level Playing-field in the Single Market A legal expert review reportp.2017, Budapest, 50.

[97] This procedure exists since the Fundamental Law of Hungary was implemented in 2012.

[98] Laid down in Hungarian law by Section 109(1) Administrative Procedure Act, Section 339 of the Code of Civil Procedure.

[99] See: Kovács, Varjú, 2014, pp. 195–226. The Hungarian Code on Civil Procedure recognizes two types of questions of fact: simple facts and facts the determination of which requires expert knowledge. Their separation is often controversial, especially in competition law, in which economics-based evidence is used. Often it is unclear whether the public authority has to assess a question of expert evidence or a question of law.

[100] ECtHR judgment of 27 September 2011 *Menarini Diagnostics SRL v Italy* (43509/08).

[101] See: Kovács, Varjú, 2014, p. 166. GVH decision Vj-130/2006/239, point 8; Judgment 2Kf.27.360/2006/29; Judgment Kfv.IV.39.399/2007/28.

Both the Hungarian Constitutional Court and the Hungarian Supreme Court have acknowledged that cartel proceedings are quasi-criminal proceedings which require special guarantees.[102] In the *Railways construction* case[103], the Hungarian Supreme Court concluded that Hungarian courts should be able to fully review the GVH's administrative decisions. In other words, they have the authority to review questions of facts and law; they can modify the GVH's decision with their own, for example, to reduce the fines imposed by the GVH.[104] In the Supreme Court's view, the courts should consider the GVH's decision as an *indictment* in penal law and during judicial review the plaintiffs can prove that a more reasonable assessment of the evidence exists (Papp, 2017, p. 265; Tóth, 2018). Moreover, according to the Supreme Court, full judicial review can lead to setting aside the rule that precludes courts from reconsidering decisions of administrative authorities taken in the course of their discretionary powers.[105]

While more recent judgments of the Supreme Court have somewhat limited this full review approach based on the ECHR, in the *Early repayment home loan* case, the Supreme Court was clear that administrative procedures, thus the GVH's procedures, must meet the requirements laid down in Article 6 ECHR and, as such, they need to take account of the fact to what extent the administrative procedure lives up to the standard of fair and judicial procedure.[106] The Supreme Court has extensively analyzed how the GVH's procedures comply with the principles of equality of arms and the principle of adversarial procedure.[107]

In this respect, the Supreme Court has assessed how the GVH's structure, and especially the position of the Competition Council as its decision-making body, and procedures comply with these principles. It came to the conclusion that the procedures of the GVH and the way investigation is conducted by case-handlers and reported to the decision-making body, the Competition Council, do not comply with the principle of adversarial procedure.[108]

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[102] Constitutional Court decision no. 30/2014 and Supreme Court judgment no. Kfv. III.37.690/2013/29.

[103] Judgment Kfv.III.37.690/2013/29.

[104] Kfv.III.37.690/2013/29, 30–31.

[105] This rule is laid down in Article 339 of the Hungarian Civil Procedural Code. Article 339/B of the Procedural Code sets a limit on the competence of the courts to review administrative decisions based on discretion; in practice, in reviewing the fines, the courts have the competence to overrule de facto the discretion exercised by the GVH with the reasoning that the facts established by the court are in contradiction with the records.

[106] Kfv.III.37.582/2016/16. Para 121–122.

[107] Kfv.III.37.582/2016/16. Para 121–122.

[108] The CC does not act like a judicial forum, listening to the arguments of both parties and then deciding their legal dispute based upon the facts and legal arguments presented. The CC

Therefore, the GVH procedure does not meet all the requirements of Article 6 ECHR and, as such, the Supreme Court stated that the judicial review process should ensure that the legal protection envisaged under the ECHR exists. Consequently, administrative courts must be able to consider the full range of relevant facts and legal issues and review the decision of the GVH in a sufficiently rigorous manner considering the legality and the rationality of the decision as well as whether procedural rules were complied with.[109] This approach has been confirmed by the Constitutional Court in another case[110] where it stated that the standard of proof in administrative cases should effectively be the same as under criminal law.

It has been argued that in practice, courts first seemed to be passive in their review judgments, perhaps because of the specific rule limiting their review of GVH's decisions in its discretionary powers (Tőth (2018) p. 53). However, today they are more actively assessing and turning over GVH's decisions, which may be a consequence of the Supreme and Constitutional Court's interpretation of the standard of review.[111]

Despite the more rigorous judicial review by Hungarian courts, the effectiveness of the justice system increasingly raises concerns, in particular as regards judicial independence. Over the last year, perceived judicial independence among businesses decreased in Hungary[112] and checks and balances within the ordinary courts system further weaken. In December 2018, the Hungarian Parliament proposed two legislative acts establishing an administrative courts system. The new law would create a self-standing branch of administrative courts, technically within the Hungarian judiciary, yet, placed under the direction of a separate, newly established Supreme Administrative Court, alongside the existing Supreme Court (Uitz, 2019). Even though the Hungarian government has postponed the creation of these special administrative courts, independence of the judiciary remains a concern in Hungary as shown by recent preliminary questions asked by Hungarian judges (Kochenov, Bárd, 2019; Bárd, 2019).

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is part of the GVH, and is involved to some extent in the case handlers' investigation, as far as it can give advice about the directions of the investigation. See: Tőth, 2018, p. 50.

[109] Kfv.III.37.582/2016/16. Paras 126-128.

[110] Decision of the Constitutional Court No. 30/2014 (IX. 30.). The Constitutional Court acted upon the complaint of an undertaking who challenged the Curia's final judgment (Kfv. II.37.076/2012/28.)

[111] Nagy argued that it may also be a consequence of more demanding effects analysis centering around actual effects [Vj- 96/2010/394 (Contact lenses), Kfv.11.37.110/2017/13 (Supreme Court); Vj- 8/2012/1751 (Bank Data)]. See: Nagy, 2018.

[112] 2019 EU Justice Scoreboard, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf.

V. Conclusions

This paper voices three main points of criticism concerning the Directive that has the aim to make national competition authorities more effective enforcers of competition law. First, the paper analyzed how the multi-level enforcement system that was created by decentralization and Regulation 1/2003 posed challenges to the uniform and consistent application of Articles 101 and 102 TFEU. Five years into the implementation of Regulation 1/2003, the Commission has already started to drive for more harmonization. While Member States voluntarily also converged their procedural framework to that of the Commission's procedures, it has been the work within the ECN, and with the dominant guiding role of the Commission, that convergence has been encouraged. While convergence has so far been documented and encouraged through soft law documents within the framework of the ECN, the Directive is now hard law that necessitates convergence. This, however, does not mean that such guided convergence will in fact result in more effective enforcement. Second, and related to the previous issue, as the case of Hungary shows there may be a limited number of changes necessary in national law to implement the Directive. However, there is a real risk that the Directive, and the particular provisions on institutional capacity (independence and accountability), will be implemented and fully complied with in national law without producing any significant impact on more effective enforcement. Hungary's example shows that institutions interact and influence law enforcement in a very subtle ways. In a country where the overall institutional capacity of administrative authorities has been deteriorating for the past years, where the competition authority has been several times constrained directly by the government in its enforcement work or by legislation to conduct proper competition law investigations and where political accountability is disappearing, a future implementation in black letter law will be meaningless and just function as a cover up for the underlying institutional shortcomings. Even though the Directive does not elaborate on the role of national courts, their review is vital both to guarantee judicial accountability of the NCAs and to truly make NCAs more effective enforcers of competition law.

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Competition Law Enforcement in Italy after the ECN+ Directive: the Difficult Balance between Effectiveness and Over-enforcement

by

Giacomo Dalla Valentina*

CONTENTS

Abstract

Almost fifteen years after its adoption, the system of decentralized enforcement laid down in Regulation 1/2003 has shaped competition law in a way that could hardly be predicted, in terms of both magnitude and quality of the activities of National Competition Authorities. More recently, the so-called 'ECN+ Directive' was adopted to address the shortcoming of such system, namely a perceived lack of independence and accountability of several NCAs and a certain degree of divergence within the European Competition Network. In this scenario, the Italian Competition Authority has frequently been depicted as a well-equipped,

* Ph.D. candidate in EU Competition Law at University of Milan – Faculty of Law; e-mail: giacomo.dallavalentina@unimi.it. Article received: 16 July 2019; accepted: 5 September 2019.

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independent and effective enforcer and – with a few notable exceptions – the international debate concerning such reform has mostly overlooked its possible impact within the Italian legal system. This paper aims to assess whether, and to what an extent, the ECN+ Directive should affect the enforcement of competition law in Italy and, in particular, those fundamental guarantees of independence and effectiveness that form the core of the rule of law in the field of EU competition law.

Résumé

Presque quinze ans après son adoption, le système d'application décentralisée prévu par le règlement n° 1/2003 a influencé le droit de la concurrence d'une manière difficilement prévisible, tant en termes d'ampleur que de qualité des activités des autorités nationales de concurrence. Plus récemment, la directive dite «ECN+» a été adoptée pour remédier aux lacunes de ce système, à savoir le défaut d'indépendance et de responsabilité de plusieurs autorités nationales de concurrence et un certain degré de divergence au sein du réseau européen de la concurrence. Dans ce scénario, l'autorité italienne de la concurrence a souvent été présentée comme une autorité bien équipée, indépendante et efficace, et – à moins de quelques exceptions – le débat international concernant cette réforme a pour la plupart négligé son impact possible dans le système juridique italien. Le présent article vise à établir si, et dans quelle mesure, la directive ECN+ doit affecter l'application du droit de la concurrence en Italie et, en particulier, les garanties fondamentales d'indépendance et d'efficacité qui constituent le fondement de l'État de droit dans le domaine du droit communautaire de la concurrence.

Key words: Competition Law, Public Antitrust Enforcement, Italian Competition Authority, ECN+ Directive

JEL: K21

I. Introduction

'*Fate che le leggi sian chiare, semplici, e che tutta la forza della nazione sia condensata a difenderle*'[1].

With these words, written in 1765, the Italian philosopher and scholar Cesare Beccaria, while advocating the ending of torture and death penalty, stressed the importance of clear and straightforward laws, accompanied by a united and coherent effort from public institutions.

[1] 'Let the laws be clear and simple; let the entire force of the nation be united in their defence' (Beccaria, 1764).

In the words of the European Commission (hereinafter: Commission), 'better results through better application'[2]. That is, in essence, the *trait d'union* behind the highly anticipated, if not hyped, adoption of Directive (EU) 2019/1 (hereinafter: Directive), aimed at empowering the national competition authorities (hereinafter: NCAs) of the Member States to be better enforcers, strengthening competition across the EU and, ultimately, giving consumers a better choice of goods and services at lower prices and of better quality[3].

Indeed, the main areas of intervention to unleash the 'untapped potential' of the NCAs were already identified in the Commission's 2014 Communication marking the 10th anniversary of Regulation 1/2003[4]. They have been subsequently subject to wide scrutiny, which became much more intensive when, on March 2007, the Commission presented a proposal to entrust the NCAs with more effective powers (hereinafter: Proposal)[5].

The background is well-known: Regulation 1/2003[6] put in place a system of parallel competences, in which the NCAs of the Member States were entrusted with the task of applying EU competition rules, namely Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) alongside the Commission. Since then, the Commission and the NCAs have enforced the EU competition rules in close cooperation within the European Competition Network (hereinafter: ECN), created in 2004 expressly for this purpose[7].

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[2] Communication from the Commission, *EU law: Better result through better application*, C/2016/8600, (OJ C 18, 19.01.2017, p. 10).

[3] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, PE/42/2018/REV/1 (OJ L 11, 14.1.2019, p. 3–33).

[4] Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM/2014/0453 final.

[5] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. COM/2017/0142 final – 2017/063 (COD). For some earlier comments on the Proposal see, *e.g.*, Sinclair, 2017; Wils, 2017, pp. 60–80; Ghezzi, Marchetti, 2017, pp. 1015–1075.

[6] Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p. 1–25).

[7] See the Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27/04/2004 p. 43–53), the Joint Statement of the Council and the Commission on the functioning of the network (document No 15435/02 ADD 1), as well as Recital no. 15 of Regulation 1/2003, which provided that 'the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements

While the scale of the enforcement activity increased at an impressive rate[8], and the NCAs quickly became a fundamental pillar of the application of EU competition rules, few institutional and procedural issues were brought to the attention of the ECN. In particular, the main worries regarded the existence of divergences in national procedures, the institutional position of the NCAs and the adequacy of their decision-making and investigation powers – all topics that were left open by Regulation 1/2003, which left a large degree of flexibility for the design of competition regimes within the Member States.

Since the first years of its existence, the ECN concentrated its activity in making the NCAs fit to fully cooperate and 'enhance their ability to jointly address competition problems and ensure convergence'[9]. Convergence and harmonization are, indeed, at the core of the thorough activity of the ECN, which culminated in the adoption of several recommendations and the publication, between 2012 and 2013, of two reports related to decision-making and investigative powers of the NCAs. The ECN reports showed that, notwithstanding the lack of specific EU law provisions, there had been a significant degree of voluntary convergence of Member States' laws regulating public enforcement of EU competition law, with homogenous basic elements of decision-making and investigative powers, as well as crucial procedural tools, present in all, or in a large number of, jurisdictions. Nonetheless, according to the ECN, the efforts that brought to this result did not led to uniformity and several divergences relating to fundamental topics were still in place. Both reports ended by pointing out that it was time for a further and informed debate concerning 'to which extent a further harmonization [was] desirable or needed, taking account of the cost involved'.

These recommendations and reports were crucial in delivering a wide analysis of the state of the art of public enforcement of EU competition law and are, in fact, at the heart of the Proposal, which can be seen as the output of a process of horizontal cooperation (Ghezzi, 2017).

The aim of this paper is to assess whether, and to what an extent, the entry into force of the Directive and its future implementation in the Italian legal system – which is often said to provide one of the most effective and 'lenient'

for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States'.

[8] According to the Explanatory Memorandum attached to the Proposal, since 2004 the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85% of them.

[9] European Competition Network, Resolution of the Meeting of Heads of the European competition authorities of 16.11.2010, Competition authorities in the European Union – the continued need for effective institutions, p. 2.

legal frameworks for competition law enforcement[10] – will improve the public enforcement of EU (and, possibly, domestic) competition law in Italy.

II. A dual transposition of the ECN+ Directive? Possible risks for the Italian legal system

In line with the experience of Directive 2014/104/EU, governing the actions for damages for infringements of the competition law provisions (hereinafter: Damages Directive)[11], Articles 103 and 114 TFEU represents the legal basis of the Directive.

The provision of such joint legal basis does not raise a merely theoretical point. In fact, the reference to Article 103 TFEU[12] and to the 'establishment and functioning of the internal market' included in Article 114 TFEU implies that the scope of application of the Directive will be limited to 'the application of Articles 101 and 102 TFEU and the parallel application of national competition law to the same case', hence excluding, with few exceptions[13], all anti-competitive behaviors that do not trigger intra-community trade and that the NCA would decide exclusively under national competition law[14].

The possibility of a dual implementation of the Directive raises some concerns, with specific regard to the possibility that this limited scope might

[10] See, e.g., Assonime, *European Commission consultation "Empowering the National Competition Authorities to be more effective enforcers" – Some comments*, 4/2016: 'in Italy, the enforcement toolbox at disposal of the AGCM seems quite comprehensive and well-functioning' (p. 4).

[11] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 05.12.2014, pp. 1–19).

[12] Article 103 allows the Council, following a proposal of the Commission and having received a non-binding opinion of the EU Parliament, to adopt 'appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102'.

[13] See Articles 29(2) and 4 of the Directive, concerning, respectively, the suspension/interruption of the limitation period for the imposition of fines as long as the NCA's decision is subject of proceedings pending before a review court, and the independence requirements of NCAs.

[14] Pursuant to Article 2 of the Directive, 'national competition law' means 'provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, as well as provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied on a stand-alone basis as regards Article 31(3) and (4) of this Directive, excluding provisions of national law which impose criminal penalties on natural persons'.

favor the implementation of a differentiated set of procedural and institutional rules from Member States that are not willing, or do not deem it necessary, to grant more powers to their NCAs. In this scenario, the provisions of the Directive would apply only to NCAs' decisions and proceedings under Articles 101 and 102 TFEU, while all proceedings initiated under national competition law would be regulated by the pre-existing (and, most certainly, less incisive) set of rules. This discrepancy would entail a number of complexities (both for the NCAs and the undertakings subject to investigations) and, in the end, the risk of jeopardizing the overall goals of the Directive (Botta, 2017)[15].

As far as Italy is concerned, at the present time there is still no indication on whether the legislator will extend the provisions of the Directive to national competition law or maintain, alongside the rules of the Directive, the pre-existing legal framework, namely Law 10 October 1990, no. 287 (hereinafter: Italian Competition Act).

Despite the above, the risk of dual transposition and uneven application of the rules provided in the Directive appears remote for a number of reasons. Firstly, it might be useful to look at the recent experience of the implementation of the Damages Directive that, as anticipated, was adopted on the same legal basis. The Italian legislator implemented the Damages Directive with Decree 3/2017[16], which extended the substantial and procedural rules concerning private antitrust litigation also to national law as a single regime.

Furthermore, the Italian NCA (the AGCM) has traditionally applied EU competition law consistently and widely. According to the 2009 Commission's Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, from 2004 to 2009 'roughly one half of the enforcement decisions adopted by the Italian competition authority during the reporting period were based on Community law'[17]. This was partly due to a peculiarity of the Italian legal system that, until 2017, was characterized by the so-called 'single legal barrier', meaning that in cases where a breach of Articles 101 and/or 102 TFEU was established, the Italian NCA did not apply in parallel national

[15] According to Botta, this problem could have been avoided by adopting the Directive under a different legal basis than Articles 103 and 114 TFEU, namely under Art. 352(1) TFEU, which provides that 'if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures'. The Author, however, acknowledges the difficulty to gain the political support of all Member States.

[16] Legislative Decree 19.01.2017, no. 3 (OJ no.15 of 19.01.2017)

[17] European Commission, Staff working paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Reg. 1/2003, COM(2009)206 final, p. 148.

law[18]. This rule was later abrogated with Decree 3/2017, which amended the Italian Competition Act allowing for the parallel application of national and EU competition law provisions.

Notwithstanding the overcoming of the single legal barrier system, the Italian NCA's approach was always aimed at applying both substantial and procedural cases regulated by either EU or national law in a consistent manner. This, in addition to the other above-mentioned circumstances, and in the absence of any contrary evidence, leads to the conclusion that the implementation of the Directive will be carried out with a scope so as to include the enforcement of national competition law.

III. The impact of the ECN+ Directive on the enforcement by the Italian Competition Authority

A. Fining powers

The formal recognition of the principle of 'single economic unity'

Currently, the system of administrative fines that the Italian NCA may impose is modeled on the provisions of Regulation 1/2003.

In fact, the first paragraph of Article 15 of the Italian Competition Act reflects Article 23 of Regulation 1/2003 by providing that the Italian NCA may decide, depending on the gravity and the duration of the infringement, to 'impose a fine up to ten per cent of the turnover of each undertaking or entity during the prior financial year'. The second paragraph deals with the additional fine that the Italian NCA may impose in case of non-compliance with the fine imposed in accordance with the first paragraph. A third paragraph (no. 2-*bis*) was finally introduced in 2001[19] and provides that the Italian NCA, 'in accordance with EU law, will use a general provision of its own to define the cases in which, based on assistance by companies under investigation in ascertaining infringements of competition rules, the fine may either not be levied or may be reduced in cases foreseen by EU law'.

Similarly, the 2014 Guidelines adopted by the Italian NCA on the application of the criteria for the quantifications of fines[20] present strong analogies with

[18] According to the ECN Report on Decision-Making Powers, this Italian system was the only one within the ECN that did not allow for the application of national competition rules in parallel with Articles 101 and 102 TFEU.

[19] See Law of 05.03.2001, no. 57 (O.J. no. 66 of 20.03.2001).

[20] Italian NCA Resolution no. 25152 of 22.10.2014 – Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, par. 1, of Law no. 287/90.

the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Cazzato, 2018).

Although, based on the above, the general features of the Italian NCA sanctioning system appear to be line with EU law, the Directive sets forth certain provisions that could have a substantial impact on the firepower of the Italian regulator.

I refer, in particular, to the principle introduced under Recital no. 46 of the Directive, which provides that the notion of 'undertaking' should be applied by the NCAs in accordance with the case law of the Court of Justice of the European Union (CJEU) and, specifically, in a sense that it 'designates an economic unit, even if it consists of several legal or natural persons'. This is formally laid down in Article 13(5) of the Directive, which prescribes that 'for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies' – in the meaning of any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

The long-standing legal concept of single economic unit[21] mainly serves the purpose of expanding the scope of the competition authorities' enforcement powers vis-à-vis parent companies, as the latter can be found liable and, thus, be fined for the conduct of one of their subsidiaries, insofar as they form, indeed, a single economic unit.

The formalization of this principle through the Directive's implementing legislation will arguably have crucial consequences in the enforcement activities carried out by the Italian NCA, which – despite an established case law of the CJEU – has been shy in evaluating the liability of a company on the basis of the single economic unity.

Indeed, the notion of 'single economic unit' started to appear in the recent decisional practice of the Italian NCA, however without main practical implications for the quantification of the fines.

For example, in the 2017 *Reinforcing Steel Bars* case, the Italian NCA, while claiming on the one hand that 'the concept of undertaking covers, for the purposes of competition law enforcement, any entity which is engaged in an economic activity, regardless of its legal status and the way in which it is financed [and] such concept must be construed as it designates an economic

[21] See, for a first reference, the Judgment of the Court of 14.07.1972, case 48–69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, ECLI:EU:C:1972:70, where the CJEU stated that 'where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit' (para. 134) and, therefore, 'In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company' (para. 135).

unit, albeit from a legal point of view, the economic unit is made up of several natural or legal persons'[22], did not use the turnover of the entire group for the calculation of the fines for several companies.

Similarly, in the 2012 *Road Barriers* cartel[23], as well as in a 2017 bid rigging case related to financed technical assistance services to the Public Administration in EU-financed programmes[24], the Italian NCA used the single economic unit construct to hold the controlling entities liable, but at the same time it clarified that such companies were individually involved in the competition law infringements, thus depriving the use of the single economic unit concept of any practical implications (Ghezzi, 2017).

More recently, in deciding the 2018 *Car financing* cartel case[25], the Italian NCA used the single economic unity principle in a fashion closer to the case-law of EU courts, as it assessed that the parties to the proceedings and their parent companies (either controlling the entire corporate capital of their subsidiaries or not) were part of single economic units and therefore took into account the group turnovers in order to determine the maximum legal thresholds of the fines. However, it is worth mentioning that the Italian NCA decided to waive the application of such principle *vis-à-vis* two of the parties 'because of the novelty of the approach adopted by the Authority to attribute the responsibility for the infringement also to parent companies that, albeit not owning all or almost all of the undertakings with them constitute a single economic entity for antitrust purposes'.

In conclusion, the full implementation of the Directive and, by this, the formal recognition of the notion of 'undertaking' shaped by the CJEU will presumably resonate in the quantification of the fines by the Italian NCA, especially considering that the latter has recently shown some signs of convergence towards the approach of the CJEU and the Commission. The amount of those fines, also in order to ensure legal certainty for companies operating across the EU, will have to reflect the overall strength of the corporate group and not only that of the subsidiary, making it more meaningful and deterrent[26].

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[22] Italian NCA, case no. I742 – *Tondini per cemento armato*, 19.07.2017, par. 331.

[23] Italian NCA, case no. I723 – *Intesa nel mercato delle barriere stradali*, 28.09.2012.

[24] Italian NCA, case no. I796 – *Servizi di supporto e assistenza tecnica alla PA nei programmi cofinanziati dall'UE*, 18.10.2017.

[25] Italian NCA, case no. I811 – *Finanziamenti auto*, 20.12.2018.

[26] See European Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of The Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 22.03.2017 SWD(2017) 114 final, 1/2.

Finally, it is worth mentioning that the Directive also intervenes on the maximum amount of the fines imposed by the NCAs. While Regulation 1/2003 – as well as the majority of the NCAs – provided that the fines shall not exceed 10% of the infringer's total turnover, the Directive now foresees that 'the maximum amount of the fine that national competition authorities may impose on each undertaking or association of undertakings participating in an infringement of Article 101 or 102 TFEU is not less than 10 %', theoretically allowing Member States to increase the ceiling for competition law fines in their systems.

Heavier sanctions against trade organizations

Another relevant development brought by the Directive in relation to the Italian NCA's sanctioning powers concerns trade organizations, which often play a pivotal role in the implementation of collusive conducts[27].

The clear aim underlying the Directive (according to Recital no. 48, 'NCAs should […] be able to fine such associations effectively') is achieved by looking at two areas that were traditionally problematic for the NCAs, including the Italian authority.

On the one hand, the Directive addresses the methods for calculating the turnover of trade organizations for the purposes of the quantification of the fine. The notion of 'turnover', in particular, has been construed in a conservative way by the Italian NCA with regard to association of undertakings, namely as the sum of the annual quotas paid by the members of the association.

Therefore, it is fair to say that – especially in the presence of wide-reaching cartels – the fines levied against trade associations were hardly sufficient to have any deterrence effects[28]. Now, the Directive provides that, in order to determine the amount of the fine in proceedings brought against associations of undertakings, where the infringement relates to the activities of its members, the NCAs should consider the 'sum of the sales of goods and services to which the infringement directly or indirectly relates by the undertakings that are members of the association'[29].

[27] Between 2010 and 2017, the Italian NCA ascertained the direct involvement of trade associations in roughly 60% of its infringement decisions (Ghezzi, Marchetti, 2017).

[28] This was also held by the CJEU back in the Judgment of the Court of 16.11.2000, case C-298/98 P, *Metsä-Serla Sales Oy v Commission*, European Court reports 2000, p. I-10157: 'when a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with deterrent effect can be determined'.

[29] See Recital no. 48 of the Directive, which also specifies that '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'.

Article 14(3) of the Directive provides that, where a fine is imposed on an association of undertakings and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

On the other hand, if these contributions have not been made in full to the association of undertakings within the time limit fixed by the NCA, 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, after this request, also 'by any of the members of the association which were active on the market on which the infringement occurred'. To avoid aberrant consequences, the Directive still allows the members of a trade organization to avoid such payment obligation by proving 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.

In conclusion, the Directive lays the ground for an empowerment of the Italian NCA's firepower against associations of undertakings. The guaranteed increase of the sanctions to trade organizations, along with the possibility to retrieve the fines from their members, will certainly add a new tool to the Italian NCA's arsenal to challenge the frequently active role of associations of undertakings in the implementation of cartels.

Such tools should, however, be used parsimoniously: the Italian NCA's habit of using legitimate activities of trade associations as control tools and evidence of the existence of cartels has had the effect of paralyzing licit activities of the associations (Siragusa, 2017), which will probably be even more difficult in the wake of the implementation of the Directive.

B. Behavioral and structural remedies

Article 10 of the Directive replicates the content of Article 7 of Regulation 1/2003 in prescribing that, where NCAs find an infringement of Article 101 or 102 TFEU, they may 'impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'. The Directive further specifies that, in choosing between two equally effective remedies, NCAs shall choose the least burdensome remedy for the undertaking, in line with the principle of proportionality.

The divergence within the EU concerning the power to impose structural remedies when applying EU competition rules, red-flagged by the ECN in

an *ad hoc* 2013 Recommendation[30], also affects the Italian legal system, where structural and behavioral remedies were never formally recognized in the Italian Competition Act nor in any procedural rule adopted by the Italian NCA[31].

It is worth noting that, despite lacking a clear legal basis, the Italian NCA has tried in the past to put in place such remedies, which did not find wide consensus and were eventually annulled on appeal by administrative courts due to the lack of a legal basis. For example, in the *Airport supplies* case[32], the Council of State held that 'the sanctioning measures for anti-competitive conduct […] provided for in Article 15 may be translated only into warnings for the elimination of infringements, within a certain period, and into the imposition of pecuniary fines, but not into the imposition of structural behavioral measures affecting private autonomy and economic initiative'. On another occasion, however, the same Court upheld the Italian NCA's remedies considering that 'in the presence of historical events already put in place and of illicit behaviors which have their effects still in act, the ICA can adopt remedies […] aimed at eliminating the effects of the infringements in the immediate future', provided that they respect the principles of suitability, necessity (that is, the absence of other suitable remedies) and adequacy'[33].

These few national cases involving structural measures show that the lack of a clear legal basis has *de facto* prevented the Italian enforcer from benefitting from a tool, which has proved to be particularly effective especially in those cases where, due to various factors, the mere imposition of fines is not sufficient to tackle the anticompetitive conducts. An accurate implementation of Article 10 of the Directive will arguably encourage the Italian NCA to test structural and behavioral remedies with more confidence and will pave the way for a more open approach of administrative courts in deciding upon the legitimacy of these remedies.

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[30] See European Competition Network, Recommendation on the Power to Impose Structural Remedies, 2013, where it was highlighted that, albeit some national legislative frameworks are aligned with Article 7(1) of Regulation 1/2003, others differ, as some Member States' laws 'provide for an explicit legal basis which enables the Authorities to impose structural remedies', other Member States 'recognise such powers on a general legal basis which covers all types of remedies without being specific' and, finally, some NCAs 'are not equipped with this power at all'.

[31] Indeed, with Law of 06.08.2006, no. 248, the Italian legislator put in place a series of amendments to the Italian Competition Act, in order to align its provisions with the standards and tools laid down in Regulation 1/2003. This intervention, however, did not acknowledge the provision of Article 7 of Regulation 1/2003 concerning structural and behavioral measures.

[32] Judgement of the Italian Council of State of 08.02.2008, cases no. 421 and 423, *Rifornimenti aeroportuali*.

[33] Council of State, 08.04.2014, no. 1673, *Coop Estense*.

C. Investigative powers

The Directive is not only about decision-making and fining powers. As anticipated above, the ECN recommendations and the reports from the Commission shed light on a patchwork of different rules concerning, *inter alia*, the investigation powers of the NCAs.

In this regard, it is often said that the Italian NCA is well-equipped when it comes to its powers of investigation[34]. While this assumption is correct, especially when comparing the Italian authority's toolbox with other NCAs, the implementation of the Directive will arguably enhance further the effectiveness of the Italian NCA's powers in the investigation phase.

The main novelty for the Italian legal framework is included in Article 7 of the Directive, which provides that the power for the NCAs to inspect premises for the enforcement of Articles 101 and 102 TFEU should extends to non-business premises, such as 'the homes of directors, managers, and other members of staff of undertakings or associations of undertakings'.

The Italian NCA was one of the few authorities part of the ECN that was not granted specific powers to gather information located on these premises when investigating infringements of competition law. Therefore, Article 14 of the Italian Competition Act, which currently regulates the inspection powers of the Italian NCA, will have to be amended to include such new and rather pervasive power.

In any case, the Directive specifies that inspections in non-business premises shall not be carried out without the prior authorization of a judge, who has to ascertain whether there is 'a reasonable suspicion' that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove an infringement of Article 101 or Article 102 TFEU, are being kept in non-business premises.

The emphasis of the Directive on the effectiveness of the NCAs' investigative powers is also reflected in other provisions, which will likely determine the amendments of the Italian Competition Act.

Firstly, Recital no. 30 addresses the need for NCAs to have at their disposal powers that are adequate to meet the enforcement challenges of the digital environment and, in particular, to obtain all useful information related to the investigation, including data obtained forensically, 'irrespective of the medium on which the information is stored, such as on laptops, mobile phones, other mobile devices or cloud storage'. While the Italian NCA is already used to acquiring digital evidence, this power was based on the more general power to carry out inspections. Hence, the transposition of the Directive will bring

[34] See, *inter alia*, Assonime, *European Commission consultation*, cit., p. 4.

a more detailed and appropriate legal basis for the Italian NCA's inspection activities.

Furthermore, the domestic legislation is going to be impacted by the provision – to be balanced with the constitutional right of defense and the privilege against self-incrimination – that where an undertaking or association of undertakings opposes an inspection, the Italian NCA will be able to 'obtain the necessary assistance of the police or of an equivalent enforcement authority so as to enable them to conduct the inspection'[35].

At the present time, it is rather difficult to assess how, and to what an extent, the Italian legislator will transpose such provisions, also considering the need for the implementing legislation to comply with domestic rules concerning investigations and the right of defense. Surely, the main novelty will be the power for the Italian NCA to inspect non-business premises, a possibility that is not foreseen by the current legal framework. Moreover, with the formalization of a legal basis for inspections in the digital environment, the Italian NCA will have the chance to achieve the objective recently laid down in the *Big Data guidelines and recommendations of policies*, where it expressed the need, in order to allow a full understanding of the new phenomena taking place in the digital economy, to strengthen its own powers as to 'acquire information outside the investigation procedures (investigations, pre-instruction activities), including the possibility of imposing administrative sanctions in the event of refusal or delay in providing the information requested or in the presence of misleading or omissive information'[36].

In conclusion, it is very much likely that the Italian NCA will find itself with a wider and undoubtedly more effective set of tools to lead the investigation phase.

D. Leniency applications

The Commission notably deems leniency programmes crucial in the enforcement of competition law, as they are a key tool whose potential in the discovery of highly secretive cartels, and their mere existence, can destabilize existing cartels.

The impact assessment accompanying the Proposal showed that there are, yet, several divergences and weaknesses in both the national leniency

[35] See Article 6(2) of the Directive.

[36] Italian NCA, AGCom and Italian Data Protection Authority, IC53 – *Big data: the guidelines and recommendations of policies shared by the three Authorities*, 10.07.2019, p. 10.

procedures and the cooperation among the NCAs and the Commission, which the Directive tries to address by providing a detailed set of rules.

In particular, the most relevant provision of the Directive is the one concerning summary applications. According to Article 22, where the Commission receives a full leniency application and the NCAs receive summary applications, the Commission will be the 'main interlocutor of the applicant, in the period before clarity has been gained as to whether the Commission intends to pursue the case in whole or in part'. During this period, the Commission will inform the NCAs about the state of play only at their request.

Also, NCAs will be prevented from requiring clarifications from the applicants in addition to the essential information of the summary application pursuant to Article 22(2) of the Directive[37]. Save for 'exceptional circumstances', NCAs will be able to require those clarifications in the event the Commission has informed them that 'it does not intend to pursue the case in whole or in part'.

The system envisaged by the Directive poses several problems and, in fact, has already been criticized by both those who believe it might endanger the principle of autonomy of the NCAs laid down by Regulation 1/2003 and stressed by the CJEU in *DHL Express*[38] (Ghezzi, 2017), and those who disapproved of the Commission's failure to establish a leniency one-stop shop system (Wagner-von Papp, 2019).

In spite of the academic discussions on this extremely sensitive topic, it is without any doubt that the new rules on the coordination between leniency applications will have a profound impact on the Italian experience, which is currently regulated by Article 15(2-*bis*) of the Italian Competition Act[39] and by the Italian NCA's Leniency Guidelines[40].

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[37] Namely, the name and address of the applicant, the names of other parties to the alleged secret cartel, the affected products and territories, the duration and the nature of the alleged secret cartel conduct, the Member State(s) where the evidence of the alleged secret cartel is likely to be located and information on any past or possible future leniency applications made to any other competition authorities or competition authorities of third countries in relation to the alleged secret cartel.

[38] Judgement of the Court of 20.01.2016, case C-428/14, *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato*, ECLI:EU:C:2016:27.

[39] Article 15(2-bis) of the Italian Competition Act provides that 'the Authority, in conformity with EU law, will use a general provision of its own to define the cases in which, based on assistance by companies under investigation in ascertaining infringements of competition rules, the fine may either not be levied or may be reduced in cases foreseen by EU law'.

[40] Italian NCA, *Communication on the non-imposition and reduction of fines in accordance with Article 15 of Law 10 October 1990, no. 287*, as amended by Resolution no. 24219 of 31.01.2013 (Bulletin no. 11 of 25.03.2013) and Resolution no. 24506 of 31.07.2013 (Bulletin no. 35 of 09.09.2013).

On the one hand, the expansion of the powers of the Commission (which will benefit from an exclusive, even if just temporary, jurisdiction) and the symmetrical stand-still obligation placed upon the NCAs might entail longer proceedings and a more burdensome gathering of evidence, especially in those cases where the Commission will take a long time to assess whether to pursue the case.

On the other hand, the Directive might have a positive effect in the interplay between the leniency applicant's immunity and the position of staff and managers of said applicant, which – as of now – are exposed in some cases to criminal liability for the same conducts. For this purpose, Article 23(2) of the Directive provides that, under certain conditions, current and former directors, managers and other members of staff of immunity applicants 'are protected from sanctions imposed in criminal proceedings, in relation to their involvement in the secret cartel covered by the application for immunity from fines, for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU'.

In Italy, this provision will involve the rules on bid rigging in the context of public procurement, which may also constitute a crime under Articles 353, 354-*bis* and 354 of the Italian Criminal Code[41]. The same goes for Article 501-*bis* of the Italian Criminal Code in relation to speculative conduct aimed at limiting the output or increasing the prices of raw material, food products or first need products. Hence, the Italian criminal law framework might be amended in the context of the implementation of the Directive.

IV. The issue of independence

Finally, few words must be said on the efforts made by the Directive to ensure the independence of NCAs. The Commission, acknowledging that some national laws prevents the NCAs from having 'the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively', tried to solve this issue by: (*i*) ensuring that staffers and management of NCAs perform their duties and exercise their powers independently from political and other external influence; (*ii*) explicitly excluding instructions from any government or other public or private entity; (*iii*) ensuring that they refrain from any action which is incompatible with the performance of their duties and exercise of their powers; (*iv*) prohibiting the dismissal of their management for reasons related

[41] Royal Decree of 19.10.1930, no. 1398.

to decision-making in specific cases; (*v*) ensuring that they have the power to set their priorities in individual cases including the power to reject complaints for priority reasons[42].

The Italian NCA – which is currently funded on the basis of a mandatory fee (equal to EUR 0,06 per thousand) charged to all companies whose turnover exceeds EUR 50 million – appears to be granted with adequate human and economic resources to perform its institutional duties[43]. Nonetheless, there are two provisions that will have a concrete impact, namely the reference to a cooling-off period and the matter of prioritization.

In particular, Recital no. 18 provides that, in order to prevent their assessment from being jeopardized, heads, staff and those who take decisions 'should refrain from any incompatible actions, whether gainful or not, both during their employment or term of office and for a reasonable period thereafter'. This is not currently foreseen by the Italian Competition Act, nor by other domestic laws. Indeed, the issue of revolving doors exists, and the Italian legislator has recently dealt with it in regard to other regulators by introducing a two-year cooling-off period[44].

The implementation of the Directive will certainly constitute a valuable opportunity for the legislator to decide if, and how, to deal with this sensitive topic.

Article 4(5) introduces the possibility, for NCAs, to set negative priorities, that is, to reject complaints on the grounds that they do not consider such complaints to be an enforcement priority. It is worth noting that this type of tool is different from positive priorities, consisting of the power to initiate investigations and proceedings *ex officio*, without having received any formal notification or complaint (Wils, 2011).

The introduction of the possibility for the Italian NCA to prioritize on the grounds foreseen by Article 4(5) of the Directive is more a matter of

[42] See Proposal, Chapter III, p. 15. The lack of independence of some NCAs has been discussed by scholars for a long time and has also been subject to judicial scrutiny in the Judgment of the Court of 31.05.2005, Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, ECLI:EU:C:2005:333, § 31, where the CJEU found that the Greek system of public enforcement did 'not appear to constitute an effective safeguard against undue intervention or pressure from the executive on the members of the [NCA]', due to the existence of 'no particular safeguards in respect of their dismissal or the termination of their appointment'

[43] See, e.g., Assonime, *European Commission consultation*, cit., p. 4, where the importance of maintaining an impartial and effective competition law enforcement is however stressed even 'if the NCA is given additional labour-intensive institutional competences', such as consumer protection, legality ratings and so on.

[44] In particular, a two-year period of cooling-off was introduced with Law 24.06.2014, no. 90 with regard to the Bank of Italy, CONSOB (the public authority responsible for regulating the Italian financial markets) and IVASS (the Italian Insurance regulator).

effectiveness than independence (Bruzzone, 2017), as it would help the Italian NCA to focus its resources on the basis of a cost-benefit analysis and in light of the principles established by the case-law of the CJEU[45].

V. Conclusions

In conclusion, the implementation of the Directive in the Italian legal system will entail several amendments to the current legal framework: even for the Italian NCA – which is granted with sufficient powers and resources and has proven to be one of the most compliant system within the ECN – the Directive brings several innovations, which will hopefully increase the quality and volume of competition law enforcement in Italy.

The choice to adopt a Directive, rather than a Regulation, has lead us to wait (and hope) for a prompt and precise action by the Italian legislator, which is asked to implement and adapt the provisions of the Directive to the peculiarities of the Italian system, avoiding a dual implementation for EU and domestic national law that would be of detriment to legal certainty and effectiveness.

One thing is now certain: the Directive will strengthen both investigative and decision-making powers of the Italian NCA, which will arguably find itself much better equipped for tackling anticompetitive conducts in the cooperation with other NCAs and the Commission.

Whilst these additional tools appear to be proportionate to ensure the effectiveness of the enforcement activity of the Italian NCA, they will have to be used and implemented with caution, in order to avoid the risk of over-deterrence and prejudice to fundamental rights.

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[45] See, *inter alia*, Judgment of the Court of First Instance of 18.09.1992, Case T-24/90, *Automec Srl v Commission of the European Communities*, ECLI:EU:T:1992:97, § 77. For a more recent reference, see Judgment of the General Court of 11.01.2017, T-699/14 – *Topps Europe v Commission*, ECLI:EU:T:2017:2.

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New Scenarios of the Right of Defence Following Directive 1/2019

by

Marialaura Rea*

CONTENTS

Abstact

The purpose of this paper is to analyze the effects of Article 3 of Directive 1/2019 when transposing it by Member States. The incompleteness and vagueness of Article 3 of Directive 2019/1 could cause non-harmonization in the various EU Member States, especially those in Eastern Europe, of the right of defence for the defendant party in the antitrust procedure. More specifically, to avoid this effect, Member States must adapt to European standards. In doing so, the paper intends to shed some light on how the right of defence is protected by the European Commission during competition proceedings.

* Ph.D. in Law and Economics, University of Study Naples 'Parthenope'; Stager at the Office of Commissioner Gabriella Muscolo, Italian Competition Authority. Article received: 2 July 2019; accepted: 15 August 2019.

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Résumé

Le présent article a pour objectif d'analyser les effets de l'article 3 de la directive 1/2019 lors de sa transposition par les États membres. Le caractère incomplet et imprécis de l'article 3 de la directive 1/2019 pourrait provoquer une non-harmonisation dans les différents États membres de l'UE, notamment en Europe orientale, des droits de la défense dans la procédure en matière de concurrence. Plus précisément, pour éviter cet effet, les États membres doivent s'adapter aux normes européennes. Le présent article entend apporter un éclairage sur la manière dont les droits de la défense sont protégés par la Commission européenne dans le cadre des procédures en matière de concurrence.

Key words: right of defence, due process, ECN+ Directive, National Competition Authorities, European Commission.

JEL: K21, K38

I. Introduction

This study focuses its attention exclusively on Article 3 of Directive 2019/1 which protects the right of defence in the context of competition proceedings.[1] Directive 2019/1 pursues the aim of harmonizing the powers and functions of National Competition Authorities in all Member States. However, as it will be shown, the content of Article 3 of Directive 2019/1 is vague and meager, only requiring Member States to ensure respect for fundamental human rights, without being explicit about what rights. As a result, the rule may not be implemented equally in all Member States, as some commentators have suggested. This could cause the failure in achieving the goal of uniformity that the European legislator set with the adoption of Directive 2019/1. It is believed that, in order to avoid this negative outcome, Member States should transpose the Directive by expanding its content. Member States should keep in mind how the right of defence is protected by European rules, how it is applied by the European Commission and how the Court of Justice interprets it.

In this work, we show how it is possible to achieve this objective. For the sake of clarity, this work intends, first of all, to reconstruct the reasons that stimulated the adoption of the Directive (section 2); analyze the problems

[1] European Commission, *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the Competition Authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, Brussels, January 2019.

and challenges of Article 3 of Directive 2019/1 (section 3); to then reconstruct how the right of defence is protected on the basis of European norms and the jurisprudence of the Court of Justice of the European Union (section 4).

This reconstruction is important, as it highlights which indications the Member States should keep in mind when each of them adopts Directive 2019/1 to avoid creating fragmentation in terms of rights (section 5).

II. Background about the adoption of Directive 2019/1

Last 11 December 2018, the European Parliament and the Council have adopted Directive (EU) 2019/1 to empower the Competition Authorities of Member States, so that they can be more effective enforcers and can ensure the proper functioning of the internal market.[2]

The principal aim of Directive 2019/1 is to ensure effective enforcement of Articles 101 and 102 TFEU, in order to guarantee fairer and more open competitive markets in the Union. Ensuring a better efficacy of market competition, it allows companies to compete more on their own merits, avoiding barriers to market entry (Wils 2017). From the consumer's point of view, it protects against artificially high prices of goods and services.

The objective of Directive 2019/1 is to ensure that National Competition Authorities (hereinafter: NCAs) have the guarantees of independence, adequate resources, and fining powers necessary to apply Articles 101 and 102 TFEU. In particular, these guarantees are essential in cases of parallel application of national competition law and EU law (for general overview of the directive, Papp 2019, Assonime 2019, Ghezzi, Marchetti 2017, p. 1015).

Gaps and limitations in the tools and guarantees of NCAs undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, which are designed to work as a cohesive whole based on close cooperation within the European Competition Network. This system doesn't work well when there are still NCAs that do not have adequate fact-finding tools (Pace 2004, p. 147; Pera, Pace 2003, p. 433; Torchia 2006; Brammer 2005, p. 1383;

[2] On 30th May 2018, the European Commission published a press release where it indicated that the representatives of the Council and the European Parliament had achieved a political agreement concerning a shared text of the Directive. The legal basis of the Directive is, in fact, Art. 103 and 114 TFEU. Art. 114 TFEU refers to the 'ordinary' decision-making procedure, which requires the positive vote of the Council and the Parliament. European Commission, *Commission welcomes political agreement reached by the European Parliament and the Council on new rules making to make national competition authorities even more effective enforcers*. The text of the press release is available at: http://europa.eu/rapid/press-release_STATEMENT-18-3996_en.htm.

Ortiz Blanco 2006; Türk 2006, p. 215; Wils 2008; Völcker 2004, p. 1027; Gerber 2005; Cengiz 2010, p. 35; D'Alberti; Wilks 2005, p. 431; Guerri 2005).

The last Directive (EU) 2019/1, that changes Regulation (EC) 1/2003, shares with Directive (EU) 2014/104 the goal of ensuring more effective competition through the relationship between public and private enforcement. The European legislator is aware that only empowering the effectiveness of public and private tools can be able to increase economy in the whole European market.[3]

Regarding the purposes which have stimulated the adoption of Directive 2019/1, they are embedded in two documents: one of this is 'Ten years of antitrust enforcement under Regulation 1/2003: achievements and future perspectives'; the other one is 'Co-operation Issues and Due Process'.[4]

In the first of these documents, it was verified that 'Regulation 1/2003 has given the Commission greater scope to set its priorities, enabling it to devote more resources to investigating cases and conducting inquiries in key sectors of the economy suffering from market distortions, as well as less conventional forms of anticompetitive'.[5] The second one concerns the rules on mutual assistance and cooperation between National Competition Authorities.

III. Problems and challenges of Article 3 of Directive 2019/1

Article 3 of Directive 2019/1 concerns the issue of guarantees and, in particular, of the right of defence during the proceedings concerning infringements of Articles 101 and 102 of the TFEU.[6]

The standard has a vague and incomplete content. Because of this, it has been the focus of a debate among academics. In fact, Article 3 of Directive 2019/1

[3] European Commission, *Directive 2014/104/Eu of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.*

[4] European Commission, *Communication from the Commission to the European Parliament and the Council – Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM (2014) 453. The test is available at: http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf; European Competition Network, *ECN Working Group Cooperation Issues and Due Process Investigative Powers Report*, 31 ottobre 2012. The test is available at: http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf.

[5] Council Regulation (EC) No 1/2003 of 16.12.2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*.

[6] Judgment of the European Court of Human Rights (hereinafter: ECtHR) of 10.10.2012, case no. 58331/09 *Gregačević v. Croatia*, par. 49.

establishes only in the first paragraph that NCAs must respect the general principles of the European Union and the Charter of Fundamental Rights of the European Union (hereinafter: ECHR). The second paragraph of Article 3 of Directive 2019/1 only adds that the exercise of powers by the Guarantors Authorities is subject to appropriate guarantees, such as the right of defence and the right to an effective remedy before a tribunal (Monti 2018; Botta 2018; Parcu 2018; Denkers 2018; Caragiale 2018).

From what we have just seen, it is clear that the rule is excessively generic, especially taking into account the different institutional formation of the Competition Authorities of the various Member States.

During the preparatory phase of the Directive, many commentators had called for greater attention to the Directive in the part concerning fundamental rights. On this latter point, the Report accompanying the Directive proposal is more specific on the subject of fundamental rights. Indeed, it considers that the companies subject to competition proceedings are granted the right to conduct a business, the right to property, good administration, the right to an effective remedy before a court, and last but not least, the right of defence.

However, the vagueness of Article 3 of Directive 2019/1 puts the objectives of Directive 2019/1 at risk. In fact, the main goal of Directive 2019/1 is a more effective application of competition rules in the Member States. This goal is pursued by Directive 2019/1, giving the same powers and the same rules in all EU Member States (Botta, Svetlicinii 2015, p. 276).

But the lack of Article 3 of Directive 2019/1 could lead to a paradox: NCAs will have equal investigative and sanctioning powers, but the companies during the proceedings concerning infringements of Article 101 e 102 TFEU will not have the same defence rights.

About this issue, a 2018 study investigated how the right of defence is protected in seven different states: Bulgaria, Croatia, Czech Republic, Hungary, Poland, Slovakia and Romania. It emerged from this study that the right of defence in the proceedings before NCAs is not protected equally in the various selected jurisdictions (Bernatt, Botta, Svetlicinii 2018, p. 303).

In all the analyzed jurisdictions, for example, the Statement of Objections sent to the defendant, indicating the contested violations, and the right to be informed is equally protected.

A certain degree of convergence on the right to be informed and access to the file is guaranteed in all Member States; by contrast, the privilege against self-incrimination and the legal professional privilege are applied in a divergent way in the selected jurisdictions.[7]

[7] European Commission, *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*. Para. 109–112.

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In particular, the privilege against self-incrimination is not guaranteed in five of the six analyzed countries: Bulgaria, Croatia, Hungary, Poland, Slovakia and Romania. Only the Czech Republic recognizes the privilege against self-incrimination. Furthermore, the selected jurisdictions do not directly extend such privilege in the relevant statutes to legal persons involved in administrative proceedings for a violation of competition law.

In accordance with the above, this research study demonstrates the state of disparity between the various Member States regarding the right of defence. For this reason, Article 3 of Directive 2019/1 must be interpreted in the light of the jurisprudence of the Court of Justice European Union and the rules applicable by the European Commission in relation to the right of defence.

IV. Right of defence by the European Commission in the context of competition proceedings

The right to defence is one of the most important fundamental rights and components of justice. In fact, some authors argue that the right to defence in not a simple bundle of procedural guarantees (Michałek 2015). This right can be divided into four sub-rights: i) right to be informed; ii) right to access the file; iii) privilege against self-incrimination; iv) legal professional privilege.

1. Right to be informed

The Commission must comply with general principles of EU law, which include *inter alia* respecting the rights of defence during administrative proceedings. The right to be informed is instrumental to the exercise of the right to be heard.[8]

[8] According to Italian legislation, the right to be informed during the administrative procedure is protected by Articles 7 and 10bis of the Lex no. 241/1990. Article no. 7 states '1. Ove non sussistano ragioni di impedimento derivanti da particolari esigenze di celerità del procedimento, l'avvio del procedimento stesso è comunicato, con le modalità previste dall'articolo 8, ai soggetti nei confronti dei quali il provvedimento finale è destinato a produrre effetti diretti ed a quelli che per legge debbono intervenirvi. Ove parimenti non sussistano le ragioni di impedimento predette, qualora da un provvedimento possa derivare un pregiudizio a soggetti individuati o facilmente individuabili, diversi dai suoi diretti destinatari, l'amministrazione è tenuta a fornire loro, con le stesse modalità, notizia dell'inizio del procedimento. 2. Nelle ipotesi di cui al comma 1 resta salva la facoltà dell'amministrazione di adottare, anche prima della effettuazione delle comunicazioni di cui al medesimo comma 1, provvedimenti cautelari.'; Article 10bis states '1. Nei procedimenti ad istanza di parte il responsabile del procedimento o l'autorità competente,

More specifically, the European courts have consistently held that the right to be heard, as an essential component of the rights of defence, arises in all proceedings initiated against a person which are liable to culminate in an adverse measure against that person (Durande, Williams 2005).[9] In particular, Article 41 of the Charter of Fundamental Rights states that 'every person has the right to be heard before any individual measure which would affect him or her adversely is taken'.

The right to be heard consists of:

i) an obligation on the Commission to make its case known to the defendants;
ii) an obligation to grant the defendants an opportunity to submit their comments on the Commission's objections.

The first dimension implies that the defendant must have access to the Commission's file in order to respect the principle of equality of arms.[10] Meanwhile, the second dimension of the right to be heard is the possibility for the defendant to make known his own views on the Commission's objections, whereby it does not matter, in principle, whether such submission is oral or written.[11]

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prima della formale adozione di un provvedimento negativo, comunica tempestivamente agli istanti i motivi che ostano all'accoglimento della domanda. Entro il termine di dieci giorni dal ricevimento della comunicazione, gli istanti hanno il diritto di presentare per iscritto le loro osservazioni, eventualmente corredate da documenti. La comunicazione di cui al primo periodo interrompe i termini per concludere il procedimento che iniziano nuovamente a decorrere dalla data di presentazione delle osservazioni o, in mancanza, dalla scadenza del termine di cui al secondo periodo. Dell'eventuale mancato accoglimento di tali osservazioni è data ragione nella motivazione del provvedimento finale. Le disposizioni di cui al presente articolo non si applicano alle procedure concorsuali e ai procedimenti in materia previdenziale e assistenziale sorti a seguito di istanza di parte e gestiti dagli enti previdenziali. Non possono essere addotti tra i motivi che ostano all'accoglimento della domanda inadempienze o ritardi attribuibili all'amministrazione.'

[9] See: judgment of the Court of First Instance of 30.09.2003, Joined Cases T-191/98 and T-212 to 214/98 *Atlantic/Container Line v. Commission*, ECLI:EU:T:2003:245.

[10] ECtHR, *Guide on Article 6 of the European convention on Human Rights*, April 2019, p. 29, available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf. It defines: 'Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. Equality of arms requires that a fair balance be struck between the parties, and applies to criminal and civil cases.'; European Commission, *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, par. 2.5.

[11] Judgments of the European Court of Human Rights: of 11.06.1027, case no. 19867/12, Moreira Ferreira v. Portugal (no. 2), par. 67; of 24.03.2017, case no. 24221/13, Carmel Saliba v. Malta, par. 67.

2. Right to access the file

Access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the right of defence.

The right of access to all files is provided for by different standards: Article 27 of Council Regulation (EC) No 1/2003; Article 15 of Commission Regulation (EC) No 773/2004; Article 18 of Council Regulation (EC) No 139/2004 and Article 17 of Commission Regulation (EC) No 802/2004.[12] In particular, access to the file pursuant to the provisions mentioned above is intended to enable the effective exercise of the right of defence against the objections brought forward by the Commission.[13]

In fact, only persons, undertakings or associations of undertakings, to whom the Commission has addressed its objections, can request access to the documents. To be able to defend yourself adequately, these parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in its objections (Chiappanini 2012).[14]

Parties are allowed to access all documents of which the Commission case files are composed However, file access is not permitted under any circumstances to internal documents. These documents can be neither incriminating nor exculpatory, because they do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Access to business secrets and other confidential information may be partially or totally restricted. The aim is to prohibit disclosure of information on the business activity, when information constitutes trade secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price

[12] Important in this context: *Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of EC Treaty, Articles 53, 54 and 57 of EEA Agreement and Council regulation (EC) No 139/2004*, (2005/C 325/07).

[13] In Italy, the right of access to public administration documents is protected by Articles 22–24 of Law no. 241/1990.

[14] Judgment of the Court of 08.06.1999, Case C-51/92P *Hercules Chemicals NV/Commission*, ECLI:EU:C:1999:357; judgment of the Court of 17.12.1999, Case C-185/95P *Baustahlgewebe GmbH/Commission*, ECLI:EU:C:1998:608; judgment of the Court of First Instance of 18.12.1992, Case T-10/92 *Cimenteries CBR SA and others v Commission of the European Communities*, ECLI:EU:T:1992:123; order of the President of the Court of First Instance of 05.12.2001, Case T-216/01 R, *Reisenbank AG / Commission*, ECLI:EU:T:2001:277, par. 46-51; Judgment of the Court of First Instance of 18.12.1992, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92.R, *Cimenteries CBR and Others/Commission*, ECLI:EU:T:1992:123.

structure and sales strategy. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as their disclosure would significantly harm a person or undertaking.

When business secrets are contained in the file, two opposite rights are to be protect: on the one hand, it must guarantee the right of access to the documents of the Commission for the parties to prepare their defence; on the other hand, the position of the company that could be damaged by access to company documents must be protected. In order to reconcile these two opposing rights, DG Competition has progressively introduced sophisticated access rules. First of all, the parties can submit a non-confidential version of the documents to the Commission, explaining the reasons for confidentiality. Alternatively, the party providing the data might either accept a negotiated disclosure or the data room procedure. In particular, data rooms are an exceptional tool which can safeguard the right of defence while respecting the legitimate interests of confidentiality of the undertakings or persons from which the Commission has obtained the information. By means of a data room, documents in the Commission's file are made accessible to an addressee of a Statement of Objections in a restricted manner, that is, by limiting the number and/or category of persons having access and the use of the information being accessed to the extent strictly necessary for the exercise of the rights of defence.

3. Privilege against self-incrimination

The privilege against self incrimination - *nemo tenetur se detergere* – is surely an indispensable bulwark of the right of an accused in any modern system of criminal justice.[15] The issue concerning statements obtained by defying the will of an accused not to testify against himself, especially when they are subsequently deployed in criminal proceedings in support of the prosecution case, may be examined by the European Court of Human Rights under the second paragraph of Article 6 regarding the presumption of innocence or, which is more often the case, under the first paragraph of Article 6 (Michałek 2015, p. 275; Gardner, Ward 2003, p. 388).[16]

However, this privilege, which prevents the prosecution from obtaining evidence by defying the will of the accused not to testify against himself, plays

[15] Judgment of the ECtHR of 17.10.2016, Case of *international bank for commerce and development ad and others v. Bulgaria*, par. 129.

[16] The legal professional privilege is not expressly guaranteed in the Italian legal system, but it is included in Article 620 of the penal procedure code entitled 'Professional secret'.

a significant role within competition law proceedings.[17] It namely constitutes important grounds upon which the production and disclosure of documents as well as production of oral explications required under Article 20 of Regulation 1/2003 during the inspections may be resisted. But, as clarified in *Tokai Carbon*[18], the privilege against self-incrimination is only applicable in relation to documents which are directly self-incriminatory, while it cannot be claimed *vis-a-vis* other internal documents which might raise the culpability of the firm only indirectly.[19]

It is noteworthy that the right to silence may often overlap with the presumption of innocence (right to remain silent) protected under Article 6 paragraph 2 of the European Court of Human Rights.[20]

Regarding the procedure, the Communication of Commission *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* in paragraph 2.5.2 establishes: 'Where the addressee of a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination […] it may refer the matter in due time following the receipt of the request to the hearing officer, after having raised the matter with the Directorate-General for Competition before the expiry of the original time limit set.' (European Commission, *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, par. 2.5.2; Michałek 2015, p. 246; Kim, Levitt 2010, p. 1; McBride 2009, p. 4).

[17] See e.g.: judgment of the Court of 29.06.2006, Case C-301/04 P *Commission of the European Communities v SGL Carbon AG* ECLI:EU:C:2006:432, which specifies that addressees of an Article 18 decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them.

[18] Judgment of the Court of 29.06.2006, Case C-301/04 P *Commission of the European Communities v SGL Carbon AG* ECLI:EU:C:2006:432, para. 41–42.

[19] See judgments of the ECtHR of 08.02.1996 in case John Murray vs UK, Application No. 18731/91 and of 05.11.2002 in case Allan vs UK, Application No. 48539/99 in which the ECtHR stated that 'The right not to incriminate oneself is primarily concerned with respecting the will of the person to remain silent'.

[20] About the right to remain silent and not to incriminate oneself, ECtHR, Guide on Article 6 of European Convention on Human Rights, supports that 'Anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself. Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.'

4. Legal professional privilege

Legal professional privilege (also referred to as 'LPP') constitutes another important component of the right to defence deriving from Article 6 European Court of Human Rights.[21]

In particular, certain communications between lawyer and client may, subject to strict conditions, be protected by legal professional privilege and thus be confidential as regards the Commission, as an exception to the latter's powers of investigation and examination of documents. The unfettered ability to communicate with a lawyer on a confidential basis is a fundamental right which exists in many legal systems around the world. It is undoubtedly crucial for a client to not be discouraged from telling her/his lawyer the whole truth concerning the case.

This privilege has to be respected from the preliminary inquiry stage. Indeed, LPP relates mostly to the investigative phase of the Competition Authorities' enforcement proceedings. First of all, the legal privilege prevents the Commission from examining and sizing such documents by the inspectors; it also ensures that the premises belonging to the lawyer are not searched by the Commission.

Regarding the proceeding, the company that invokes the legal privilege must provide adequate explanations to the Commission.[22] After that, the Commission assesses whether the company has the benefit of confidentiality.

Going into details, the legal professional privilege is applicable in EU competition law to safeguard the confidentiality of written communications between the defendant and its lawyers. However, two cumulative conditions have to be satisfied: i) the communication should be 'made for the purposes and

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[21] The exclusion of certain communications between lawyers and clients from the Commission's powers of enquiry derives from the general principles of law common to the laws of the Member States as clarified by the Court of Justice of the European Union: judgment of the Court of 18.05.1982, Case 155/79 *AM&S Europe Limited/Commission*, ECLI:EU:C:1982:157; order of the Court of First Instance of 04.04.1990, Case T-30/89 *Hilti/Commission*, ECLI:EU:T:1990:27; judgment of the Court of 17.09.2007, Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals/Commission*, ECLI:EU:T:2007:287, as confirmed by the Court in its judgment of 14.09.2010, Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:C:2010:512.

The Court of Justice of the European Union has considered that the protection of the confidentiality of communications between a lawyer and a client is an essential corollary to the full exercise of the rights of defence. In any event, the principle of legal professional privilege does not prevent a lawyer's client from disclosing the written communications between them if the client considers that it is in his interest to do so.

[22] European Commission, *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, par. 2.7.

in the interest of the client's right of defence'; ii) the communication was made by 'independent lawyers' (Gippini-Fournier E. 2005), not linked to the client by any employment relationship. In this case, the documents and conversations between the client and the lawyer will be confidential. Otherwise, Commission officials may immediately read the contents of the document and take a copy of it, when it considers that the undertaking has: i) not substantiated its claim that the document concerned is covered by legal professional privilege; ii) has only invoked reasons that, according to the case law, cannot justify such protection; or iii) bases itself on factual assertions that are manifestly wrong.

Finally, if the undertaking has been unable to resolve the matter with the Directorate-General for Competition, based on paragraph 2.7 of 'Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU': 'the hearing officer may be asked by undertakings or associations of undertakings to examine claims that a document required by the Commission in the exercise of Articles 18, 20 or 21 of Regulation (EC) No 1/2003 and which was withheld from the Commission is covered by legal professional privilege, within the meaning of the case law […]'.

V. Some perspectives for the transposition of the Directive – the Italian case

The study showed that before the transposition of Directive 2019/1 the right of defence was not uniformly protected in all analyzed EU Member States. In particular, the right to be informed at the start of the procedure and access to the files of the proceedings are almost uniformly protected in the various European countries. Otherwise, Bulgaria, Croatia, Hungary, Poland, Slovakia and Romania do not protect in any way the right of defence as far as the privilege against self-incrimination and legal professional privilege.

This picture of non-uniformity regarding the protection of the right of defence risks remaining unchanged in light of the current content of Article 3 of Directive 2019/1.

In order to avoid this paradox, namely that NCAs enjoy the same powers and functions to protect competition law, but that the right of defence is not fully recognized toward the companies which are parties of the proceeding before the National Competition Authority, it is appropriate for Member States transposing Directive 2019/1 within two years, to comply with the standards of the European Commission's right of defence.

In conclusion, only in this way can the achievement of the objectives that have stimulated the adoption of Directive 2019/1 be ensured, otherwise there

is a risk that nothing will change about the right of defence and that a vacuum of protection will remain in the countries of Eastern Europe. However, each Member State is free to ensure the right of defence in a greater way than that provided for by the Directive.

In Italian legislation, the right of defence is ensured by Article 24 of the Constitutional Charter, by the Law no. 241 of August 7th, 1990 (New rules on the administrative procedure), by the Law no. 287 of October 10th, 1990 (Competition and Fair Trading Act) and by the penal and procedural code.

But over the years a major role in the application of the right of defence has been played by the courts and scholars.

In particular, national legislation ensures the right of defence both during the antitrust procedure and in the following appeal proceedings.

Regarding the application of the right of defence (Art. 6, paragraph 1 ECHR), in the Italian legal system, it is important to mention the ruling of the European Court of Human Rights in the *Menarini* case.[23]

The facts are as follows.

In 2001, the AGCM, the independent regulatory authority in charge of competition, investigated an Italian applicant company for unfair competition. In a decision of April 2003 it fined the company six million euros for unfair competition on the market for diabetes diagnostic tests. All the company's appeals against that decision to the administrative court and to the Consiglio di Stato were rejected. The impugned penalty was not imposed by a court in adversarial proceedings but by the AGCM, an independent administrative authority. The applicant company had been able to challenge the penalty before the administrative court and to appeal against that court's decision to the Consiglio di Stato. According to the Court's case-law, these bodies met the standards of independence and impartiality required of a court. The administrative courts had examined the applicant company's various allegations, in fact and in law.[24]

The administrative courts had thus examined the evidence produced by the AGCM. The Consiglio di Stato has also pointed out that where the administrative authorities had discretionary powers, even if the administrative court did not have the power to substitute itself for an independent administrative authority, it was able to verify whether the administration had made proper use of its powers. As a result, the role of the administrative courts had not been limited simply to verifying lawfulness. They had been able to verify whether, in the particular circumstances of the case, the AGCM had made proper use of it powers.

[23] Judgment of the ECtHR of 27.09.2011, case 43509/08 – *A. Menarini Diagnostics Srl c. Italia*.

[24] See https://www.echr.coe.int/Documents/CLIN_2011_09_144_ENG_894208.pdf.

The administrative courts were able to examine whether the decisions of the AGCM had been substantiated and proportionate, and even to check its technical findings. Moreover, the review was carried out by courts having full jurisdiction, in so far as the administrative court and the 'Consiglio di Stato' were able to verify that the penalty did fit the offence, and they could have changed it if necessary. In particular, the Consiglio di Stato, had gone beyond a 'formal' review of the logical coherency of the AGCM's reasoning and made a detailed analysis of the appropriateness of the penalty, having regard to the relevant parameters, including its proportionality. The decision of the AGCM had thus been reviewed by judicial bodies having full jurisdiction.

In conclusion, regarding the Italian legislation, the adoption of Directive 1/2019 is a good opportunity to translate the principles made by Italian and European courts about the right of defence into national rules. In this context, ensuring the right of defence during competition proceedings is all the more important after the Directive, because NCAs of Member States will have more sanctioning powers. In fact, Article 10 of Directive 1/1029 states that Member States shall ensure that where NCAs find an infringement of Article 101 or 102 TFEU, they may by decision require the undertakings and associations of undertakings concerned to bring that infringement to an end. For that purpose, they may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. When choosing between two equally effective remedies, NCAs shall choose the remedy that is least burdensome for the undertaking, in line with the principle of proportionality.

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Independence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic*

by

Mária T. Patakyová**

CONTENTS

Abstract

This paper analyses the independence of National Competition Authorities under legislation before Directive 2019/1 and after Directive 2019/1. The aim of the paper is to find out whether Directive 2019/1 addresses the problem of independence

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** Assistant professor at Institute of European Law, Faculty of Law, Comenius University in Bratislava, Slovakia. Maria.patakyova2@flaw.uniba.sk. Article received: 10 June 2019; accepted: 1 July 2019.

properly or not. In order to answer the question, it discusses what does the term 'independence' actually mean, especially in the view of scholars. Several aspects of independence are identified. Subsequently, this paper zooms in on what are current imperfections when it comes to the independence of National Competition Authorities. The Antimonopoly Office of the Slovak Republic (AMO) is discussed in particular. The paper then finds out what are the requirements set out by Directive 2019/1 and whether these requirements address the imperfection identified above. The paper confirms that these imperfections are covered only partially.

Resumé

Cette article analyse l'indépendance des autorités nationales de concurrence selon la législation avant Directive 1/2019 et après Directive 1/2019. Le but de cet article est de trouver la réponse de la question si Directive 1/2019 dénoue le problème de l'indépendance. Pour répondre à cette question, l'article analyse la notion de l'indépendance, surtout d'après des académiciens. Plusieurs aspects de l'indépendance sont identifiés. Puis, l'article s'oriente vers des imperfections de l'indépendance des autorités nationales de concurrence. L'autorité anti-monopolistique de la République Slovaque est analysée particulièrement. Le document examine ensuite quelles sont les conditions fixées par la Directive 2019/1 et si ces conditions répondent aux imperfections identifiées ci-dessus. L'article confirme que ces imperfections ne sont que partiellement couvertes.

Key words: Independence, National Competition Authorities, Antimonopoly Office of the Slovak Republic, institutional design, Directive 2019/1.

JEL: K21, K23

I. Introduction

Since Regulation 1/2003[1] came into effect, National Competition Authorities (hereinafter: NCAs) have played a vital role in the enforcement of European competition law. The decentralised application of Articles 101 and 102 TFEU put the burden on the shoulders of the Members States of the EU (hereinafter: Member States), as they should secure effective enforcement. Regulation 1/2003 itself gives strong powers to NCAs, as they may require that an infringement be brought to an end, order interim measures, accept commitments and impose fines, periodic penalty payments or any other penalty provided for in their national law.[2]

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003").

[2] Article 5 of Regulation 1/2003.

Although regulatory bodies, such as NCAs, have strong powers at their disposal, they would be of no good if the NCAs cannot use them when appropriate and in a manner that is appropriate. Therefore, the independence of such bodies is essential.

It is perfectly acknowledgeable that the notion of independence is not understood in unison. There are many ways how to assess the meaning of independence and what does it require. However, we have chosen to analyse the views of scholars who analysed regulatory bodies,[3] such as NCAs, the Commission or sector regulators.[4] As long as the assessment of the notion of independence is only a *means* how to get to the core analysis of this paper, and not an *end* in itself, we dare to consider such assessment to be sufficient.

In order to reach a more accurate analysis, we have chosen one particular NCA on which the assessment of independence is performed.[5] The Slovak NCA – the Antimonopoly Office of the Slovak Republic (hereinafter: AMO) is the institution which is tasked to enforce competition law in the Slovak Republic. The paper focuses primarily on *de iure* independence in light of Act No. 136/2001 Coll. on protection of competition in its current[6] version (hereinafter: ***Act on Competition***) and in light of Regulation 1/2003. When appropriate, it tries to zoom in on *de facto* independence of this NCA as well.

In December 2018, the European Parliament and the Council adopted Directive 2019/1.[7] One of the objectives of Directive 2019/1 is to ensure that NCAs have guarantees of independence.[8] Therefore, this paper examines whether Directive 2019/1 fulfils this objective. In order to ascertain whether this is the case, this paper examines what might be the imperfections of securing the independence of the AMO under law *de lege lata*, and whether these imperfections are solved by Directive 2019/1.

Thus, the paper is organised as follows. First, the term of 'independence' is addressed. The view of the scholars, supplemented by decisions of the CJEU, is discussed. Several aspects of independence are identified. Second, the situation

[3] For the purposes of this paper, terms institution, body, authority are used predominantly as synonyms.

[4] Other ways how to understand the meaning of independence would be to see requirements and suggestions of international organisations (such as OECD) or various NGOs; to exhaustively analyse the requirements deriving from judgements of national or European courts.

[5] The comparison with other jurisdictions is not conducted and it is deliberately out of scope of this paper, unless it is referred to a paper of scholars who conducted such comparison. The outcomes of such comparison are used and dully referred.

[6] Hence, Act on Competition which is in effect in June 2019 is discussed here.

[7] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("Directive 2019/1").

[8] Recital 3 of Directive 2019/1.

of the AMO under Regulation 1/2003 and under the Act on Competition is outlined, whereas several shortcomings of the current stage of independence are identified. Third, independence under Directive 2019/1 is presented, with particular focus on specific obligations which shall be fulfilled by Member States when designing NCAs. Subsequently, the shortcomings identified in relation to the AMO are matched with the specific obligations under Directive 2019/1. Last but not least, the conclusion answers the question on whether the problem of independence is solved by Directive 2019/1.

II. The notion of 'independence'

1. Concepts

'Independence' does not refer to one concept only. As a matter of fact, there are several understandings of independence. Various concepts were presented by scholars as well as relevant institutions, organisations or think-tanks. We will now briefly look into the concepts presented by scholars in order to establish what is understood under the notion of independence.

It shall be noted in the beginning that there are two basic distinctions in the approach. The first one is related to *de iure* and *de facto* independence. The former refers to independence as it flows from the legal norms. Therefore, an institution is independent if it has legal safeguards which separate the institution from influences. Some authors use the notion '*formal independence*' (Alves, Capiau and Sinclair, 2015, p. 16). *De facto* independence relates to the functioning of the institution in the real world. If we deal with *de facto* independence, we do not explore the legal norms only but also examine influences on the institutions which are not presumed by the wording of the legal norms. Arguably, the level of *de facto* independence might be more decisive (Winter, 2013, p. 166).

The second distinction relates to political and functional independence (Zemanovičvá, 2017, p. 49). The former is rather self-explanatory. It asks the question on how can politicians, the respective government in particular, influence the institution. The latter refers to the separation of the institution from businesses – market players (Cseres, 2013, p. 37). If an institution should control acts of businesses, in that case it is inevitable to safeguard the independence of the institution from these regulated subjects. Thus, functional and political independence prevents the authority from achieving political or business goals which are not related to competition policy (Alves, Capiau and Sinclair, 2015, p. 15). Nowadays, both elements are often required (Ottow, 2013, p. 140).

2. View of the scholars on independence of regulatory bodies

The question of independence has been a research subject of many scholars for decades (Cseres, 2013, p. 10). Several of them have focused particularly on competition authorities. Arguably, the approach is similar when it comes to other regulatory bodies, such as sector regulators. Consequently, we will now look into the studies of various authors who have zoomed in on independence of competition authorities and of other regulators.

2.1. Necessity of independence

It is accepted in general that competition authorities should be independent (Alves, Capiau and Sinclair, 2015, p. 14–15).[9] This flows from the fact that effective law enforcement is conditional upon a proper set of procedural and institutional rules (Cseres, 2013, p. 9). In other words, no matter how well-established substantive rules are, they are always brought to life by procedural rules employed by an institution (when we consider public enforcement).

Van de Gronden and de Vries looked into independence of competition authorities in the EU (2006). Before looking into elements which they considered to be important for the independence of an institution, it is of particular interest to discuss to what an extent these authors considered independence of competition authorities as a necessity. It flows from their discussion that due to the fact that competition policy is only one of the legitimate policies of a State (the EU in this case), reasons of coherence require that competition policy is created and enforced together with other policies. Furthermore, the umbrella of democratic control of a parliament cannot be omitted too. (Van de Gronden and de Vries, 2006, pp. 65–66).

Although these considerations were presented in relation to a possible creation of a separate EU Competition agency, they may be applied to existing competition authorities *mutatis mutandis*. There is always a need to find a balance between policy considerations and discretion for independent authorities (Ottow, 2013, p. 155). An idea of having a completely independent authority would inevitable mean that this authority would be free to act arbitrarily. This is definitely not welcome, especially regarding strong powers in the hands of competition authorities.[10]

[9] It shall be stressed that independence does not necessary mean dividing regulators to narrow-focused institutions. For example, it is not always beneficial to separate the protection of competition and protection of consumers (Cseres, 2013, pp. 12–13). This is particularly true nowadays, when internet giants create situations require complex regulatory approach.

[10] To mention but one example, the possibility to conduct dawn raids is a strong interference into the rights of undertakings. To this end, see Patakyová (2019).

Therefore, what might be derived from the considerations above is that independence should not refer to a total separation of other bodies and policies. It shall rather refer to a possibility of the respective institution to collect the necessary information, to act when there is a need to act and in a manner that is appropriate (Alves, Capiau and Sinclair, 2015, p. 15), (Winter, 2013, p. 160).

2.2. Elements of independence

The first element already suggested above is related to **accountability**. Each regulatory body, no matter how much it needs to be politically and functionally independent, must always be responsible to a democratic assembly. Due to the fact that the selection of persons to regulatory bodies by public election would not seem feasible, these types of institutions are usually accountable to the respective parliament. It shall be stressed at this point that parliaments and governments are interconnected in many States. In practice, the term accountability is usually connected to an annual report being presented to the parliament or the appearance of the head of the institution at stake for a hearing in the parliament or one of its committees (Alves, Capiau and Sinclair, 2015, p. 17).[11]

However, accountability may be increased also by visibility of the institution and the awareness of the public of the policy the institution pursues. This is related to the fact that there are many forms of accountability, such as accountability to politicians, to the market or to the judiciary (Cseres, 2013, pp. 40–41), (Black, 2012, p. 4).

Apart from democratic accountability, one cannot underestimate the impact of **judicial accountability** (Alves, Capiau and Sinclair, 2015, p. 17). This is related to the fact that each decision of a regulatory institution is, as a matter of rule, subject to possible judicial review.[12] This is inevitably

[11] This *prima facie* contradiction was already recognised (and solved) by the CJEU. It was held in the case C-518/07 *European Commission v Federal Republic of Germany* [2010] I-01885, paras 39–46 that principle of democracy is observed by the EU law and, therefore, it is not precluded to have parliamentary influence over regulatory bodies to certain extent, for example, by having the management of supervisory authorities to be appointed by the parliament or the government; or by reporting of activities to the parliament.

However, it flows from C-614/10 *European Commission v Republic of Austria* [2012], paras 62–63, that if the government has too broad right to information, this might be understood as indirect influence on the institution.

[12] Notwithstanding the role of national courts as appeal bodies to the decisions of national competition authorities, national courts can also enforce competition law on their own. This is done mainly based on an action for damages, which may either follow a decision of a national competition authority on infringement of competition law, or it may be an action on its own, so called stand-alone action (Ezarchi, 2016, p. 595).

related to fundamental rights of persons who are affected by the decision,[13] however, from a broader perspective, judicial review also guarantees that the institution will not pursue other interests than the ones which are supposed to be pursued.

In relation to German, UK and Dutch competition authorities, which were analysed by Van de Gronden and de Vries, their **internal design** was considered as particularly important (2006). It is claimed that a collective decision-making body reinforced independence of competition authorities, as the outcome of proceedings does not depend on one person only. Likewise, it is looked upon favourably when competition authorities have two bodies at the head of the institution, as it allows checks and balances to be implemented. (Van de Gronden and de Vries, 2006, pp. 62–63).

In general, *de iure* independence is strengthened by legal and structural **separation from government** and ministries, which is essential. (Alves, Capiau and Sinclair, 2015, p. 16). However, political independence cannot be absolute. Van de Gronden and de Vries conclude that none of the jurisdictions they analysed had safeguarded complete political independence. This is so due to the fact that, although interventions into ongoing investigations are seen as a questionable power of the government, incorporation of long-term political considerations into competition policy is rather acceptable.[14] Therefore, general instructions of the respective Minister are allowed pursuant to both German and Dutch law. The UK law even accepts interventions in individual cases albeit only in certain situations. (Van de Gronden and de Vries, 2006, pp. 63–65).

Authors Alves, Capiau and Sinclair pointed out that *de facto* independence depended to a great extent on the person who is the **head** of the particular authority (2015, p. 16). This is certainly dependent on the appointment procedure of the head of the authority and on the criteria for the position, which may be established by legal rules. Likewise, the independence of the authority is strengthened when explicit and strict grounds for dismissal are established (Alves, Capiau and Sinclair, 2015, p. 16, 21).[15] Were these requirements lacking, the government (or another body entitled to dismiss the head of the institution) would be in a position to easily remove the person if he/she would commence to take steps against the will of the government.

[13] To this end, see Patakyová (2019).

[14] The differentiation between general instructions and instructions addressing concrete situations has been highlighted by other authors too, for instance by Ottow (2013, p. 155).

[15] I tis quite appalling that in some Member States of the EU there are no criteria laid down for the appointment of head or board of NCAs, However, for large majority of NCAs, the tenure for head of NCAs and their board members is fixed and explicit rules on their dismissal are adopted (Alves, Capiau, Sinclair, 2015, p. 21).

Therefore, any dismissal outside of the strictly designated and objective reasons might threaten the independence of the institution.[16]

Each institution is, as a matter of fact, only a gathering of persons working for the institution, supported by its material resources. Therefore, if one would like to explore the functioning of an institution, it is necessary to see '*behind the veil'* of the institution. Therefore, *de facto* independence is largely related to the personal and material background of the respective institution (Alves, Capiau and Sinclair, 2015, p. 22). Although it cannot be assumed that the more **persons and funds** an institution has at its disposal, the more independent it is; there is undoubtedly a relationship between these two factors, though probably not linear. (Alves, Capiau and Sinclair, 2015, p. 16, 17, 22). The question of whether authorities have a separate budget as well as freedom in employment of their own staff is of utmost importance (Alves, Capiau and Sinclair, 2015, p. 22).[17]

It is interesting to note that many scholars point towards rules on the **conflict of interest**. However, they usually connect them with the head of the institution. (Alves, Capiau and Sinclair, 2015, p. 21). However, conflicts of interests of ordinary employees of an authority are likewise severe. (Winter, 2013, p. 160).

Nevertheless, due to the limitation of the scope of this paper, we will not deal with the issue of a conflict of interest in further detail. The questions of persons and funds would be addressed only partially. The following parts of this paper mainly focus on accountability, internal design, separation from government and the appointment and dismissal of head(s) and members of appeal bodies of the chosen NCA.

III. Independence of national competition authorities – the *status quo* regarding the AMO

Nowadays, procedural aspects of competition law enforcement, when it comes to Articles 101 and 102 TFEU, are governed by Regulation 1/2003. This act strengthened the position of NCAs, which can now be characterised as the backbone of EU competition law enforcement (Małobęcka-Szwast, 2018, p. 26; Kalesná, 2012, p. 5). They can apply Articles 101 and 102 TFEU to their full extent (Craig, de Búrca, 2015, p. 1049). Pursuant to Article 5 of Regulation 1/2003, NCAs are empowered to impose penalties, to accept commitments, to order interim measures, to require that a breach of

[16] To this end, see for instance C-288/12 European Commission v Hungary [2014], para 59.

[17] Large majority of NCAs have a separate budget allocation and they employ their own staff (Alves, Capiau, Sinclair, 2015, p. 22).

competition rules is brought to an end, or to declare that there are no grounds for action. The latter does not mean the same as to declare that competition law was not infringed by a particular practice of an undertaking, as established by the case-law[18] of the CJEU (Jones, Sufrin, 2016, p. 1013), (Whish, Bailey, 2012, p. 252).

Despite the broad powers and important position of NCAs, it is of utmost interest that independence as such is mentioned only once in Regulation 1/2003, in particular in Recital 31. Even this provision is not related to institutional independence of NCAs. The provision is related to an interruption of a limitation period by *'procedural steps taken independently by the competition authority of a Member State'*.[19] None the less, Article 35 para. 1 of Regulation 1/2003 expressly states that application of Articles 101 and 102 TFEU shall be safeguarded. Each NCA should be capable of fulfilling the tasks Regulation 1/2003 prescribes (Jones, Sufrin, 2016, p. 1014). As stated above, it may be assumed that the level of independence of a NCA influences the level of effective enforcement of competition rules. Hence, independence of NCAs is implicitly required by Regulation 1/2003.[20]

Yet, as observed by scholars mentioned above, independence of NCAs is not perfectly safeguarded in all Member States. Let us now discuss how the Slovak NCA, the AMO, stands when it comes to these issues.

Regarding **democratic accountability**, the AMO is part of the executive power. The AMO shall present a report to the government once per year and also always when asked so by the government. It is interesting that the report is not presented to the parliament. However, the government is accountable to the parliament. In relation to the influence of such reports on independence, it was presented above that an annual reporting obligation is accepted in general.

Taking **judicial accountability** under consideration, it shall be stressed that the Slovak judicial system is relatively open to review of administrative acts and decisions (Patakyova, 2019, p. 150). Protection of individual rights is guaranteed and, by the same token, courts oversee whether a decision or an act of the AMO was based on objective evidence or not. If the latter was the case, it might suggest that the AMO did not act independently, but perhaps

[18] In particular, it was established in the case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] I-0305.

[19] Regulation 1/2003, Recital 31.

[20] Pace argues that this provision requires NCAs to be allocated with staff and resources at a sufficient level (2015, p. 252). However, we may argue that this provision requires not only this part of independence to be observed, but it requires NCAs to be independent in its entirety. This is so due to the fact that, as stated already, the level of independence of an NCA influences the level of its performance.

on a political order. Yet, when it comes to AMO's inactivity, this cannot be effectively superintended by courts. The AMO, as well as the Commission, is not obliged to act – instead, it is entitled to act. Therefore, even if the AMO deliberately does not commence proceedings against an undertaking that infringes competition law, courts cannot punish the AMO for its omission to act.[21] Although it appears that the independence of AMO is diminished by this, it shall be highlighted that this is a common feature of competition law enforcement. If competition authorities were obliged to act under all circumstances, it would mean that they could not set enforcement priorities and that their capacity would be spread too thinly across too many cases without the possibility to conduct a sufficiently deep analysis.[22]

The **head** of the AMO is the president (*predseda*). He is appointed by the President of the Slovak Republic based on a nomination of the Slovak government. At this point we can observe that the government plays a vital role in the selection process of the president of the AMO, which may be seen negatively. Moreover, the Act on Competition[23] does not require a special procedure for the selection, such as a public hearing, nor does it contain a transparent selection procedure (Zemanovičová, 2017, p. 49). It is interesting that there is also no regulation of who can nominate the candidates to the government. Therefore, the nomination of the head of the AMO is in the hands of political parties which form the government.

Political influence cannot be excluded in relation to the current president of the AMO, Mr. Tibor Menyhart. There are voices suggesting his close relationship to a person behind one governing party, Most-Híd. Mr. Menyhart confirmed that he knew the person and that the person was his superior for five years in his previous position. Yet, Mr. Menyhart strongly denied any influence of that person on the AMO (Kováč, 2016a).

In any case, the government is not the alpha and omega of the whole process. It is positive that there is another subject involved in the appointment process. The President of the Slovak Republic is a person elected directly by citizens in a separate election. As the President of the Slovak Republic and

[21] On the other hand, it shall be stressed that other undertakings are not defenceless when they see that there is an inactivity of the AMO. Pursuant to Act No. 350/2016 Coll. on certain rules on application of rights to damages caused by infringement of competition law (which implemented Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union), private enforcement of competition law is well possible within the Member States of the EU. To this end, see, for instance, Kalesná (2018).

[22] In any case, it may be difficult to distinguish between legitimate refusal to investigate on the one hand, and politically motivated refusal to investigate on the other.

[23] The relevant provision of Act of Competition in this relation is Section 15.

the parliament (which forms the government) are elected separately, they may be from different sides of the political spectrum. This may increase the independence of the president of the AMO.

Since the Slovak Republic is a parliamentary democracy (Ottová, 2006, p. 143), the position of the President of the Slovak Republic is rather weak, even though he/she has his/her mandate directly from citizens. There has been quite an unclear decisional practice of the Constitutional Court of the Slovak Republic on the question whether the President of the Slovak Republic may refuse to nominate a person. It is not appropriate to analyse these issue here, suffice it to say that the President of the Slovak Republic has limited powers in this regard.

Zooming in on the requirements for the president of the AMO, one cannot overlook the missing criteria on expertise, experience or personal integrity in the Act on Competition. Certain further requirements for the president of the AMO's integrity are laid down in a separate piece of legislation. Pursuant to Section 15 para 5 of the Act on Competition, the function of the president of the AMO is incompatible with functions and activities pursuant to the Constitutional Act No. 357/2004 Coll. on Protection of Public Interest in Exercise of Function of Public Functionaries, as amended (hereinafter: Constitutional Act on Protection of Public Interest). These includes, inter alia, being part of a statutory, managing, control or supervisory body of a legal person established for business purposes or exercising of entrepreneurial activities.[24] Article 4 para. 1 of the Constitutional Act on Protection of Public Interest obliges public functionaries to protect public interest during their term. They shall refrain from all actions which might be against this Constitutional Act, for example to use their functions or information they obtain for the benefit of themselves or of other persons. This strengthens the functional independence of the head of AMO.[25] On the other hand, from the practical perspective, this Constitutional Act is not enforced very well, even though there are mechanisms and sanctions prescribed therein.[26]

Moving forward, it is surprising that there are no professional criteria for the position of the head of AMO. Anyone who is a citizen of the Slovak

[24] This is established in Art. 5 para 2 of Constitutional Act on Protection of Public Interest.

[25] For the sake of completeness, it shall be noted that the functional independence is strengthened also by the fact that the head of the AMO is partially limited in exercise of certain functions and employments after his term. For example, within one year after the end of his function, he cannot be employed by or otherwise engaged with persons to whom he gave state aid or other advantage within last two years before the end of his function. See Art. 5 para 2 of Constitutional Act on Protection of Public Interest.

[26] See Articles 9–11 of Constitutional Act on Protection of Public Interest.

Republic and who is electable to the parliament may be appointed to the office.[27] Nevertheless, the laconic legal wording does not necessary lead to weak management of the AMO. The current head of the AMO is an educated lawyer with more than ten years of practice before he was appointed to the office.[28] There have been questions about his experience with competition law, however, Mr. Menyhart claimed that he had been working for Transpetrol[29] as a person responsible for its legal department where he had dealt with competition questions as well (Kováč, 2016a).

Considering the great discretion of the government in the nomination process, it must be concluded that *de iure* independence is insufficient at this point. Similarly, both political and functional independence is not guaranteed as there are only a few rules precluding a possible conflict of interest.[30] This shall not be undermined by the fact that the current head of the AMO appears to be a competent person.

Regarding other criteria related to independence and to the head of the NCA, it is positive that the term of the presidency of the AMO is five years, a firmly set period of time that is longer than the term of the government, which is four years. Section 15 of the Act on Competition allows re-appointment of the same person for the position of the president of the AMO. There may be only one re-appointment, that is, the same person may be the president of the AMO only for two consecutive terms. The limited number of these consecutive re-appointments is a guarantee for independence (Blažo, 2012, p. 100). However, re-appointment as such decreases the level of independence of the AMO due to the fact that the government may require a person who is in charge of the AMO to follow its instructions, otherwise the person will not be re-elected.

Despite the possible influence of the government which may be done through re-election, during a particular term, the president of the AMO may fulfil his tasks independently from the government. The government does not have powers to threaten him with removal from office, since the president of the AMO is removed from office by the President of the Slovak Republic in very specific cases only. The reasons for removal are as follows:

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[27] This flows from Section 15 para 2 of Act on Competition.

[28] The curriculum vitae of the president of the AMO is available on the website of the AMO. AMO: Rada úradu. Retrieved from: https://www.antimon.gov.sk/rada-uradu/ (30.06.2019).

[29] Transpetrol, a.s. is a company operating crude oil pipeline network in Slovakia in full ownership of the Slovak Republic. TRANSPETROL: Predstavenie. Retrieved from: http://www.transpetrol.sk/predstavenie/ (30.06.2019).

[30] In relation to Constitutional Act on Protection of Public Interest, it shall be noted that this act is rather formalistic and, therefore, cannot prevent engagement with business activities. Due to the limited scope of this paper, we will not deal with conflict of interest in further detail.

(i) he was effectively convicted for an intentional crime or for a negligent crime which was in direct connection with the exercise of his function;
(ii) he was effectively deprived of his legal capacity to act;
(iii) he commenced a function which is incompatible with the function of president of the AMO.[31]

Another important element of independence is the **internal design** of the institution. The Act on Competition does not regulate this exhaustively. What is laid down in the legislation is that, apart from the president of the AMO, there are also two other bodies: vice-president of the AMO and the Council of the Authority. Looking beyond the Act on Competition itself, we may observe that the organisational structure of the AMO is quite complex.[32] The vice-president of the AMO is the chief of the Division of Computer Science and Forensic Activities; Division of Abuse of Dominant Position and of Vertical Agreements; Cartel Division; and Mergers Division. The president of the AMO is in charge of the Division of State Aid; Division for Legislative-Legal Affairs and of Foreign Affairs; Division for the Second-Instance Procedure; Division of Audit and other divisions related to internal affairs.[33]

It flows from the organisation of the AMO that the **vice-president of the AMO** has a very important position within the authority. He/she is the chief of the first-instance procedure, as he/she is the person who signs the first-instance decisions of the AMO.[34] Similarly, he/she is the person who executes authorisations to conduct an inspection, when the inspection is conducted during the first-instance procedure.[35] The vice-president of the AMO is nominated by the president of the AMO and appointed to this function by the government. Similar to the situation with the president of the AMO, there is a lack of requirements on professional skills or experience applicable to the vice-resident of the AMO. Therefore, political influence, or influence from regulated subjects, cannot be excluded.[36]

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[31] Apart from the reasons for removal mentioned here, the function of the president of the AMO ends (i) upon expiration of the term for which he was appointed to the function; (ii) in case he retires from the office; (iii) in case of his death. See Section 16 of Act on Competition.

[32] AMO: Organisational structure of the AMO after 1st February 2019. Retrieved from: https://www.antimon.gov.sk/data/att/2021.pdf (07.06.2019).

[33] Apart from these divisions, there is General Secretary of Personal Office, who is in charge of HR affairs and economic and administrative affairs.

[34] See Section 15 para 3 of Act on Competition.

[35] See Section 22a para 2 of Act on Competition.

[36] Pursuant to the wording of Art. 2 para 1 of Constitutional Act on Protection of Public Interest, which regulates the personal scope of this Constitutional Act, it covers the heads of central authorities of state administration, such as the AMO, however, it is not clear whether vice-heads are covered to. A strict grammatical interpretation would lead to a negative answer.

Zooming in on the current vice-president of the AMO, Mr. Boris Gregor, it is suggested that he was nominated to his previous position in Bratislavská vodárenská spoločnosť, a.s. (Bratislava Water Company)[37] by the political party Most-Híd mentioned above. To the function of the vice-president of the AMO, he was nominated for the last six months of Mr. Menyhar's first term in the office. Mr. Menyhart claimed that it was fairly difficult to find a suitable person for six months only, as Mr. Menyhart was not sure whether he would be re-appointed for the position.[38] Therefore, the lack of competition law experience was to be compensated by the fact that Mr. Gregor came from a regulated field[39] (Kováč, 2016a). Nevertheless, the fact remains that, after Mr. Gregor was appointed to the office, several employees resigned from their position, including the chief of the Cartel Division (Kováč, 2016). The real motivation behind their departures from the AMO remains, according to publicly available information, uncertain. There are rumours about different opinions on the necessity to conduct inspections between Mr. Gregor and the former chief of the Cartel Division. Nevertheless, the fact remains that inspections have been conducted after the personal change in the office of the vice-president of the AMO.[40]

When it comes to the second instance procedure, this is done by **the Council of the Authority** (hereinafter: Council). The Council consists of the president of the Council, who is also the president of the AMO, and six other members.[41] The other members of the Council cannot be employees of the AMO.[42] It is very positive that the appeal procedure is held by persons who are not involved in the first instance procedure. The division of the roles between the president of the AMO and the vice-president of the AMO must be appreciated. Furthermore, it is also apt that the Council acts as a collective body. The level of independence is always higher when decisions are not taken by one person only (Zemanovičová, 2017, p. 50).

However, there is still room for improvement when it comes to the independence of the Council. First, the other members of the Council are

[37] Bratislavská vodárenská spoločnosť, a. s., operates water mains and sewer networks in western part of Slovakia, including the capital city. Bratislavská vodárenská spoločnosť: Basic information. Retrieved from: http://www.bvsas.sk/en/about-us/basic-information/ (30.06.2019).

[38] Eventually, Mr. Menyhart was re-appointed to the office.

[39] Public water mains and sewer networks are regulated by the Regulatory Office for Network Industries. Úrad pre reguláciu sieťových odvetví: The Office. Retrieved from: http://www.urso.gov.sk/?q=node/199&language=en (30.06.2019).

[40] See, for example, the Annual Report of the AMO for the year 2018, pp. 26, 31. AMO: Výročné správy. Retrieved from: https://www.antimon.gov.sk/vyrocne-spravy/ (30.06.2019).

[41] See Section 18 para 1 of Act on Competition.

[42] See Section 18 para 2 of Act on Competition.

nominated by the president of the AMO and appointed by the government.[43] We may argue that more persons might have been recognised by the Act on Competition to have the right to nominate other members of the Council. Moreover, the appointment by the government only confirms the already strong position of the government. Political independence is, hence, not guaranteed (rather, it is the opposite). Second, although there are certain requirements for the other members of the Council, these may be characterised as insufficient. Pursuant to Section 19 para. 2 of the Act on Competition, these requirements are: citizenship of the Slovak Republic, university degree, legal capacity, and clean criminal record. Paragraph 3 of the same section specifies that at least two members of the Council must be lawyers and at least two members must be economists.[44] It may be claimed that all members of the Council should be either lawyers or economists (or other profession related to the application of competition rules), and, more importantly, that these persons should have some level of experience with competition law. Nowadays, all members of the Council have a university degree, but expertise in competition law is difficult to assess from their publicly available CVs.[45] Third, although there are positive features of the Council's structure, its decisions are prepared by the Division for the Second-Instance Procedure.[46] It is questionable to what an extent is the Division for the Second-Instance Procedure separate from divisions dealing with cases in the first-instance.[47]

Regarding **staff and funds** of the AMO, it is quite difficult to assess their sufficiency. It is positive that the AMO has its own chapter within the State budget, therefore, it can deal with its own resources. As suggested by Zemanovičová and Vašáková, the stability of the budget over a longer period of time suggests a higher level of independence (2016, p. 2501). As it flows from the table below, the revenues of the AMO have been stable. However, it remains questionable whether they have been set on a sufficient level, and whether they should not be increasing at least in relation to the inflation rate.

[43] See Section 18 para 3 of Act on Competition.

[44] It is quite amusing that the wording of Act on Competition does not require these to be different persons. Therefore, virtually, it is possible that there are only two persons who have both, Master degree from law and Master degree from economics; and the remaining five members including the president of the Council, may be for example, ethnologists.

[45] AMO: Rada úradu. Retrieved from: https://www.antimon.gov.sk/rada-uradu/ (30.06.2019).

[46] AMO: Organisational structure of the AMO after 1st February 2019. Retrieved from: https://www.antimon.gov.sk/data/att/2021.pdf (07.06.2019).

[47] Naturally, the fact that the Division for the Second-Instance Procedure is responsible to the president of the AMO, whereas "first-instance divisions" are responsible to the vice-president of the AMO, no firewall seems to be created.

Act on State Budget for the particular year	Revenues of the budgetary chapter of the AMO
Act No. 370/2018 on State Budget for the year 2019, Attachment No. 2	200 000 EUR
Act No. 333/2017 on State Budget for the year 2018, Attachment No. 2	200 000 EUR
Act No. 357/2016 on State Budget for the year 2017, Attachment No. 2	200 000 EUR
Act No. 411/2015 on State Budget for the year 2019, Attachment No. 2	200 000 EUR
Act No. 385/2014 on State Budget for the year 2019, Attachment No. 2	200 000 EUR

Source: author.

IV. Independence of National Competition Authorities in the light of Directive 2019/1

It may be derived from the previous two sections that, firstly, independence is important and it can be affected by various factors and, secondly, that there is still room for improvement when it comes to the independence of the AMO. The question now is: is this problem solved by Directive 2019/1?

1. The requirements pursuant to Directive 2019/1

A room for improvement of the independence of NCAs was identified before Directive 2019/1 was adopted (Sinclair, 2017, p. 626). We may start our analysis with the very beginning of Directive 219/1. Recital 3 of Directive 2019/1 reads as follows:

> *Article 3(1) of* [Regulation 1/2003] *obliges NCAs* […] *to apply Articles 101 and 102 TFEU* […]. *Therefore, this Directive, the objective of which is to ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively,* […]. [In] *cases of parallel application of national competition law and Union law, it is essential that the NCAs have the same guarantees of independence, resources, and enforcement and fining powers necessary to ensure that a different outcome is not reached*.

At this very point we may observe two different shifts in the regulation of NCAs. The first one is that Directive 2019/1, unlike Regulation 1/2003, does explicitly require NCAs to be independent. This requirement has, until the implementation of Directive 2019/1, been derived from EU procedural rules on competition law enforcement by NCAs only implicitly. It is interesting

to note that this implicit requirement for independence is confirmed by the wording of Recital 5 of Directive 2019/1:

> *National law prevents many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce Union competition rules effectively. This undermines their ability to effectively apply Articles 101 and 102 TFEU and to apply national competition law in parallel to Articles 101 and 102 TFEU* […].

Therefore, the requirement contained in Article 35 of Regulation 1/2003 to design NCAs so as to ensure that the provisions of Regulation 1/2003 are effectively complied with, indeed comprised the requirement for independence.[48]

Second, Directive 2019/1 diminishes the institutional autonomy of the Member States to a certain extent. The principle of institutional autonomy of the Member States is established in EU law (Ottow, 2013, p. 139). It is well known that institutional autonomy has its limits, especially when it comes to the enforcement of EU law. However, the abovementioned Recital 3 interferes with the application of national law, in particular when EU law and national law are applied in parallel. Recital 8 then states that

> *there is a need to put in place fundamental guarantees of independence, adequate financial, human, technical and technological resources and minimum enforcement and fining powers*.

Naturally, Directive 2019/1 puts into effect a minimal level of harmonisation; Member States are always entitled to have more extensive guarantees of independence.[49]

Although Articles 4 and 5 appear extensive, they do not contain many hard-core obligations for Member States. Therefore, omitting the provisions which might be considered too broad to be enforceable, we may mainly enumerate the following (more or less concrete) obligations which are imposed on Member States in relation to independence:

i. the Member States shall ensure that staff and decision-making persons are able to perform their duties independently from political and other external influence[50];
ii. the Member States shall ensure that staff and decision-making persons neither seek nor take any instructions, whether from a public body or

[48] Recital 5 of Directive 2019/1 also confirms that failure to provide "*necessary guarantees of independence, resources, and enforcement and fining powers*" leads either to no enforcement, or to enforcement in a poorly manner.

[49] See Recital 10 of Directive 2019/1.

[50] See Article 4 para. 2 lit. a) of Directive 2019/1. More details are not provided.

a private entity; when applying European competition law, however, general policy instructions may be permissible[51];

iii. the Member States shall ensure that staff and decision-making persons do not, basically, act in a conflict of interest during their term and in a reasonable period after leaving the NCA at hand[52];

iv. decision-making persons shall be dismissed only for reasons related to the proper performance of their duties, to the proper exercise of their powers, to not fulfilling the requirements for the performance of their duties, or to being found guilty for a serious misconduct[53];

v. the appointment procedure of the decision-making bodies shall be clear, transparent and laid down in advance in national law[54];

vi. NCAs shall have the right to have enforcement priorities[55];

vii. Member States shall secure sufficient number of qualified staff and sufficient financial, technical and technological resources[56];

viii. NCAs shall be granted independence in the spending of the allocated budget[57];

ix. NCAs shall submit periodic reports to a governmental or parliamentary body[58], including information about the appointments and dismissals of decision-making persons, and information about the resources[59].

Apart from obligations, Articles 4 and 5 of Directive 2019/1 provides for certain explicit rights of Member States. For example, it is explicitly stated that proportional accountability requirements for NCAs are to be accepted,[60] which are basically the aforementioned report requirements placed on NCAs[61].

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[51] See Article 4 para. 2 lit. b) of Directive 2019/1.

[52] See Article 4 para. 2 lit. c) of Directive 2019/1 and also Recital 18 of Directive 2019/1. Regarding the scope of this paper, we will not deal with this part in further detail.

[53] See Article 4 para. 3 of Directive 2019/1.

[54] See Article 4 para. 4 of Directive 2019/1.

[55] See Article 4 para. 5 of Directive 2019/1.

[56] See Article 5 para. 1 of Directive 2019/1.

[57] See Article 5 para. 3 of Directive 2019/1 and also Recital 25 of Directive 2019/1.

[58] It is interesting to point out that reporting obligation is towards a body of government/parliament of a Member State. Therefore, this wording suggests that annual reports of NCAS should not be handled by the government or the parliament itself, but by a *body* created by the government or the parliament.

[59] See Article 5 para. 4 of Directive 2019/1.

[60] See Article 4 para. 1 of Directive 2019/1. This provision is related to Recital 22 which explains that credibility and legitimacy is enhanced by accountability.

[61] See Recital 22 of Directive 2019/1.

2. What shall be amended in the Act on Competition?

After identification of what is actually required by Directive 2019/1, we may now analyse to what extend shall the Act on Competition be amended and, in that manner, to see whether the insufficiencies regarding independence of the AMO are dully addressed by Directive 2019/1.

Independence from political and other external influence is not presented in further detail. Prohibition to seek or receive instructions from third parties is, again, a little bit vague. From the *de iure* perspective, an explicit prohibition may be incorporated into the Act on Competition; however, to secure its *de facto* application will be onerous. Since the government does not have the right to impose instructions onto the AMO in individual cases, this requirement may be already satisfied. When it comes to the dismissal of decision-making persons, it is to be highlighted that they are not legally defined by Directive 2019/1. Therefore, if we consider only the president and the vice-president of the AMO (persons signing decisions of the AMO), this requirement appears to be already satisfied.[62] Considering the appointment procedure of decision-making persons, Directive 2019/1 does not seem satisfied.[63] The procedure of nomination and appointment does not seem clear and transparent, as this role is mainly played by the government, without the necessity of a public hearing or a justification of the government's choice. However, since Article 4 para. 4 of Directive 2019/1 does not provide for more details, not even in a demonstrative manner, it is questionable what is required by this provision in practice.[64]

Prioritisation of enforcement is very important in order to create the possibility for NCAs to focus on a particular competition law issues or on particular sectors. The AMO uses prioritisation already[65], although an explicit provision on the possibility to prioritise may be inserted into the Act on Competition.

Regarding the requirement for sufficient personal, financial and technical background of NCAs, this requirement is not very specific either. There is an attempt for further specification in para. 2 of Article 5, however, the wording therein is rather general and not detailed. For the sake of completeness,

[62] If we consider that the other members of Council are also decision-making persons, the dismissal requirements of Directive 2019/1 are also fulfilled pursuant to Section 21 para 3 of Act on Competition.

[63] In relation to the other members of Council, appointment procedure is more clear, however, still no public hearing or official justification takes place.

[64] No more details are provided by Recital 17 of Directive 2019/1 either.

[65] See: AMO: The plan of main tasks. Retrieved from: https://www.antimon.gov.sk/data/files/1047_plan-hlavnych-uloh-pmu-sr-2019.pdf (09.06.2019).

Recital 17 of Directive 2019/1 specifies that fines should not be directly used for the direct financing for NCAs. Therefore, it is well possible that the AMO fulfils the requirements even without an amendment of the Act on Competition. The AMO disposes of its own chapter within the State budget and, therefore, it is allowed to spend its allocated finances.

In relation to periodical reporting, the AMO shall submit a report about its activities to the government. Although Article 5 para. 4 of Directive 2019/1 requires reporting to a governmental or parliamentary body, it is assumed that no substantial amendment of the current procedure will be required. The government may easily create a committee to which the report will be submitted.

V. Conclusion

Independence of regulatory bodies is always a tricky issue. How is it possible to set the criteria in a way that would safeguard independence from both businesses and politicians? To set such criteria by way of a directive, when we need to safeguard the institutional autonomy of the Member States, is even trickier. However, it was not the purpose of this paper to present a perfect wording of an act of law or of a directive in relation to independence. The very purpose of this paper was to see whether there are some independence issues of a chosen NCA, what they might be and whether they are properly addressed by Directive 2019/1.

The answers to these questions are, first, that there are independence issues regarding the AMO indeed. *De iure* independence has room for improvement, let alone its *de facto* independence. Are these solved by Directive 2019/1? The answer is in the affirmative, but only partially. There are still issues which might stay unsolved, even after implementation of Directive 2019/1. First, thenomination and appointment process of the president of the AMO, vice-president of the AMO and of other members of the Council shall be *clear and transparent*, however, it is not very clear and transparent what does this require in practice. The problematic issue of re-election to the position of the president of the NCA is not addressed by Directive 2019/1 either. Second, as regards the internal design, no collective body for decision-making is required by Directive 2019/1. Third, the requirements in relation to staff and financial resources, there is a threat that the wording of Directive 2019/1 is not sufficient to trigger a real improvement of the financing of the AMO. Therefore, the paper shows that there are still issues related to the independence of NCAs which remain unresolved by Directive 2019/1.

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Directive (EU) 2019/1 as Another Brick into Empowerment of Slovak Market Regulator

by

Hana Kováčiková*

CONTENTS

Abstract

The paper analyses the legal challenges brought to the Slovak competition law by Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The author selected particular issues from Slovak competition law and compares the state-of-the-art national situation with corresponding parts of this harmonising act. In the paper, specific attention will be given to compliance with safeguards, to the regulation of conflict of interest, to the examination of the effectiveness of enforcement, and to the possibilities of undertakings to avoid their responsibility for the breach of competition law. As the Member States have time for the transposition until 4 February 2021, this paper may initiate the debate on what to improve in Slovak legislation to achieve the goals set in this Directive.

* Assistant professor at Faculty of Law, Comenius University in Bratislava; hana.kovacikova@flaw.uniba.sk, ORCID: 0000-0002-4158-0924. The paper was prepared within project VEGA No 2/0167/19 (2019–2022) 'The Real Convergence in the European Union: Empirical Evidence and Implications' . Article received: 13 June 2019; accepted: 23 July 2019.

Résumé

L'article analyse les défis juridiques qui ont été soumis au droit slovaque de la concurrence par la directive (UE) 1/2019 afin d'habiliter les autorités de concurrence des États membres à mieux faire respecter les règles et à assurer le bon fonctionnement du marché intérieur. L'auteur a choisi des questions particulières du droit slovaque de la concurrence et il compare la situation nationale actuelle avec les éléments correspondants de la présente loi d'harmonisation. Dans cet article, une attention particulière est accordée au respect des garanties, à la réglementation des conflits d'intérêts, à l'examen de l'efficacité de l'application et à la possibilité pour les entreprises d'éviter leur responsabilité en cas de violation du droit de la concurrence. Du fait que les États membres ont jusqu'au 4 février 2021 pour transposer la directive, le présent article peut lancer le débat sur les améliorations à apporter à la législation slovaque pour concrétiser les objectifs fixés dans cette directive.

Key words: competition law, Antimonopoly Office, safeguards, principle of good administration, right to the defence, right to be heard, right to access the file, conflict of interest, effectivity, enforcement, avoidance of responsibility.

JEL: K2, K21

I. Introduction

Functioning competition is one of the tools how to achieve an operational internal market within the European Union. Respecting competition rules by market players is therefore crucial. However, the presumption of full compliance of undertakings with competition rules is unrealistic. Just for example, the official cartel statistics[1] provided by the European Commission showed that in the period 2015 – (16 May) 2019, the Commission has adopted 25 cartel case decisions and imposed fines of a total amount of 8 254 783 753 €[2].

In the same period of time, the Antimonopoly Office of the Slovak Republic[3] (hereinafter: AMO) adopted 31 antitrust decisions[4]. One decision

[1] Available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (access 09.06.2019).

[2] This amount includes corrections following amendment decisions of the General Court and the Court of Justice.

[3] The AMO is the authority responsible in Slovakia for the protection and enforcement of national competition law as well as European competition law according the Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25)

[4] Available at: https://www.antimon.gov.sk/73-sk/prehlad-pripadov/?&art_typ[]=1&art_typ[]=2&art_typ[]=3&art_datum_rozhodnutie_od=1.1.2015&art_datum_rozhodnutie_do=16.05.2019&page=0 (access 09 June 2019).

was on an abuse on a dominant position according to Article 102 (a) of the Treaty on functioning of the European Union (hereinafter: TFEU) and Article 8 Section 2 (a) of the Act No. 136/2001 Coll. on the Protection of Competition, as amended (hereinafter: the Competition Act)[5] containing an imposed fine of 127 000 €.[6] Nine of the decisions were on the inapplicability of the cartel-forbidding Article 4 of the Competition Act[7]. In seven decisions the AMO accepted commitments submitted by competitors (MIKONA[8], OPEL[9], ŠKODA Auto[10], Mazda Motor[11], Honda Motor[12], Porsche Slovakia[13], Toyota Central Europe Slovakia[14]). In fourteen decisions, the AMO imposed fines of a total amount exceeding 12 200 000 €.[15] Seven of these decisions were related to cartel agreements concluded in public procurement; the AMO imposed here also, beside financial sanctions, bans on the participation in public procurement procedures lasting from one to three years from the final decision. The rest of the decisions contained settlements or leniency.

From these facts we can conclude that the responsibility for securing a fair business environment stays with the market regulators.[16] The AMO remains the most important national market regulator.

The objective of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter: Directive 2019/1), as specified in para. 3 of its Recital, is to ensure that national competition

[5] The Competition Act is a 'national competition law' within the meaning of the Directive 2019/1.

[6] Decision of the AMO of 18.01.2018, No. 2018/DOZ/POK/2/2 *Airport Bratislava (BTS).*

[7] Decisions of the AMO in cases No. 68/2017/OKT-2017/ZK/1/1/004 *EUCOS-Build Systems-Brick-Box Engineering* from 02.02.2017; No. 2016/ZK/1/1/014 *GMT-Molior-Jagespiš* from 31.03.2016; No. 2016/ZK/1/1/013 *BOSO – Krovbav* from 30.03.2016; No. 2016/ZK/1/1/010 *STM Power – Škoda Slovakia* from 8 March 2016; No. 2016/ZK/1/1/041 *Edmart – IMH-Capgemini Slovensko-MW Consulting – Ernst & Young – Bank Pro Soft* from 11.08.2016; No. 2016/ZK/1/1/054 *GRUND – Popaďák – JAGI* from 15.12.2016; No. 2016/ZK/1/1/006 *DSC-ELORA-UNIOS--MARINE-ALUSTEEL* from 26.02.2016 and No. 2016/ZK/1/1/051 *Slovenská banková asociácia* from 8.11.2016.

[8] Decision of the AMO of 02.06.2017, No. 188/2017/OZDPaVD-2017/KV/2/1/015.

[9] Decision of the AMO of 24.05.2017, No. 89/2017/OZDPaVD-2017/KV/2/1/014.

[10] Decision of the AMO of 27.05.2016, No. 2016/KV/2/1/021.

[11] Decision of the AMO of 07.06.2016, No. 2016/KV/2/1/027.

[12] Decision of the AMO of 07.06.2016, No. 2016/KV/2/1/026.

[13] Decision of the AMO of 27.05.2015, No. 2016/KV/2/1/020.

[14] Decision of the AMO of 30.05.2016, No. 2016/KV/2/1/023.

[15] As fines in decision of 12.04.2018 No. 2018/DOV/POK/R/8 were anonymised, we do not know the exact number of total amounts of all imposed fines.

[16] e.g. AMO, Public Procurement Office for public markets, National Bank of the Slovak Republic for the banking sector.

authorities have the guarantees of independence, resources, as well as enforcement and fining powers necessary to apply Articles 101 and 102 TFEU in the standards recognised in the (centralised) EU enforcement procedure and confirmed by the case law of the Court of Justice of the EU as well as European Court of Human Rights. Therefore, the first goal of this article is to analyse the state-of-the-art situation in Slovak competition law regarding the **safeguards of the procedure** in comparison with Directive 2019/1. The **conflict of interest** will be the second object of the author's research. This part includes the comparison with legislation of other administrative procedures and assessment whether current competition legislation needs to improve or is sufficient. Lastly, as Directive 2019/1 stressed the necessity to fight with the attempts of undertakings to avoid their responsibility for the breaches of competition law by realizing restructuralization operations, this and **the effectiveness of enforcement** are objects of author's research, too. When examining effectiveness, the author pays attention also to other aspects of the (in) effectiveness of enforcement, such as the incompatible interpretation of the term '*undertaking*' in Slovak law or useless ('toothless') criminal legislation.

The author has selected these aspects of Directive 2019/1 as she considered them to be the most important parts of the procedure of competition law enforcement and both legislation and the case law calls for their conformity. Failure of a competition authority to meet the safeguard requirements will likely lead to the annulment of its decision. An insufficient assessment of the conflict of interest is capable of breaching the principle of sound administration, and may lead not only to unfair decisions taken by a competition authority, but also to damages caused by maladministration. Besides that, enforcement of competition law in Slovakia might be weakened by non-complying terminology, or by the lack of deterrent (or any other) effect of criminal sanctions. On the other side, even if the competition enforcement procedure meets all legal requirements, the goal of competition protection might not be met, as the competitor sometimes is able to avoid negative consequences of its behaviour. This scenario has already appeared in Slovakia in the recent past and caused a huge public outrage. The author, therefore, tested compliance of Slovak law with these challenges.

In this article, the author does not analyse the independence of the competition authority from the point of its creation or financing, as these questions are the subject of analysis of another author in this publication (Patakyová 2019B). The author neither analyses other aspects of Directive 2019/1, as they do not appear to be problematic when applying competition law in the Slovak Republic and already comply with current European Competition Law.

During the research, the author used scientific methods such as analysis, comparison, deduction, and synthesis.

II. Safeguards: State-of-the-art situation in Slovakia

This part analyses the compatibility of Slovak law with the requirements set in Article 3 of Directive 2019/1, which stipulates:

(1) Proceedings concerning infringements of Article 101 or 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, ***shall comply with general principles*** *of Union law and the Charter of Fundamental Rights of the European Union.*

(2) Member States shall ensure that the exercise of the powers referred to in paragraph 1 is subject to appropriate ***safeguards*** *in respect of the undertakings'* ***rights of defence****, including the* ***right to be heard and the right to an effective remedy before a tribunal****.*

(3) Member States shall ensure that enforcement proceedings of national competition authorities are conducted within a ***reasonable timeframe****. Member States shall ensure that, prior to taking a decision pursuant to Article 10 of this Directive, national competition authorities adopt a* ***statement of objections****.'*

General principles of the European Union Competition Law can be found in various sources: the Treaty on European Union introduces the principle of the internal market (Article 3). The Treaty on Functioning of the European Union establishes the prohibition of cartel agreements, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (Article 101) and the prohibition of abuse of a dominant position within the internal market or its substantial part, if it may affect trade between Member States (Article 102). The principle of the protection of competition can be found in Protocol (No 27) on the Internal Market and Competition.

The Charter of Fundamental Rights of the European Union (hereinafter: Charter) introduces to the process of competition law enforcement limits for competition authorities and safeguards for competitors expressed in their right to privacy (Article 7), right to good administration[17] (Article 41), right to an effective remedy and to a fair trial (Article 47), right of defence (Article 48).

[17] Right to good administration includes also the right of every person to be heard, before any individual measure which would affect him/her adversely is taken, right to have access to his/her file (while respecting the legitimate interests of confidentiality and of professional and business secrecy) and the obligation of the administration to give reasons for its decisions.

The Charter's provisions are applicable not only to the proceedings carried out by the Commission but also to the proceedings carried out by national competition authorities under Articles 101–102 TFEU (Bernatt, 2012, p. 257). As these rights are recognised also in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), whose contractual parties are all EU Member States, these principles are applicable to the enforcement of national legislation, too.

In addition, the above mentioned written principles are supplemented by general principles developed and used by the Court of Justice of the EU. Among important general principles recognised by European case law are: proportionality, legal certainty, legitimate expectation, respect for institutional balance and acquired rights (Tosato, 2015, p. 3).

The Slovak Competition Act does not contain specific rules on administrative proceedings. Competition law administrative proceedings are therefore governed by the rules contained in administrative *lex generalis*, that is, the Administrative Code[18]. Pursuant to Article 3 of the Administrative Code, the AMO as an administrative authority shall **act in accordance with law** and other regulations. It is obliged to protect the interests of the state (which is the competition) and the society (further development of competition to the benefits of consumers), the rights and interests of natural persons and legal entities and to strictly require the fulfilment of their duties. The AMO shall proceed in close cooperation with the parties and other concerned persons and always give them the opportunity to an **effective defence** of their rights and interests, in particular to **comment on the basis of the decision** and to exercise the right to make suggestions. The AMO shall assist and advice the parties or concerned persons so that they do not suffer harm in the proceedings due to the lack of knowledge of the law. Further, the AMO shall conscientiously and responsibly deal with every issue that matters in the proceedings, act in time and **without undue delay** and to use the **most appropriate means** to solve the case. The AMO shall ensure that the proceedings are conducted in an effective way and without unnecessary burdens to the parties or other persons. The decision of the AMO must be based on a **reliably established basis**. There shall be no unjustified differences in decisions on identical or similar cases.

National administrative principles are supplemented by European competition ones. The application of EU principles of competition proceedings is regularly realised by the decisional practice of the AMO, and later confirmed by the case law of the Supreme Court of the Slovak republic (hereinafter: SCSR). Moreover, the SCSR decided in case ***ŽSR***[19] that even in a special administrative procedure, which explicitly excludes the applicability

[18] Act. No 71/1967 Coll on Administrative Proceedings (Administrative Code).

[19] Judgement of the SCSR of 24.05.2017, 3SžF/38/2015 *ŽSR*, ECLI:SK:NSSR:2017:1013200158.1.

of an Administrative Order (for example inspection under the Competition Act, public procurement), Article 41 of the Charter of Fundamental Rights of the European Union, as well as Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration, must be taken into consideration.[20] Thus, the SCSR by this extensive interpretation admitted the **applicability of EU administrative principles to all national areas of administrative law**. When regarding inspections, the SCRS in case *Capgemini*[21] then specified that the AMO, as the authority which, while exercising its competences, inevitably interferes with the rights and legally protected interests of the persons, shall take particular consideration to the compliance of its procedures with the principles of legality, legitimacy and proportionality. The AMO therefore is obliged to

- prepare the inspection soundly,
- define its subject matter properly,
- reason its mandates,
- request the court for the order for the inspection (if applicable),
- prepare, plan and exercise its procedures in compliance with the principle of legality and proportionality

in such a way, that it can obtain information legally and can use it with the legitimate aim within administrative proceedings realised within a reasonable time. **The AMO shall conform its procedures with the requirements of the Constitution of the Slovak Republic as well as the ECHR**.

When regarding **the right of defence**, it should be noted that the observance of the right of defence is a general principle of European Union law, which applies where the authorities are minded to adopt a measure which will adversely affect an individual.[22] As the Court of Justice of the European Union (hereinafter: CJEU) stated for instance in the ***Toshiba case***[23] 'rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.'

[20] It is based on respect to principles of lawfulness, equality, impartiality, proportionality, legal certainty, principle of taking action within a reasonable time, participation, respect of privacy and principle of transparency.

[21] Judgement of the SCSR of 28.04.2016, No 8Sžnz/2/2015-221 *Capgemini Slovensko*, ECLI:SK:NSSR:2016:9015898694.3.

[22] Judgement of the Court of 16.01.2019, Case C-265/17 P *UPS*, ECLI:EU:C:2019:23, point 28.

[23] Judgement of the Court of 06.07.2017, Case C-180/16 P *Toshiba*, ECLI:EU:C:2017:520, point 30.

The right of defence in Slovak competition law is guaranteed. Firstly, pursuant to Section 25 para. 6 of the Competition Act, the AMO shall **instruct the parties**, who are not legally represented by an attorney at law, **on their procedural rights and obligations** in order not to suffer harm during the procedure due to the lack of knowledge of the law. Therefore, the AMO through the guidance published on its website[24] informs the wider public on rights and duties of the undertaking during an inspection. Undertakings' rights in this guidance include the **right to call for legal assistance**[25], **legal professional privilege**[26], **right to exclude data of private character from the inquiry, right to be present at the verification of the privacy of such data, right to ask for interpretation or consult the execution of the order if its content is not clear**.

Except its website, the AMO instructs undertakings on their rights also individually, within the document '**Notification of administrative proceedings**[27]'. As there is no interpreting provision in Slovak law on the content of such notification, nor relevant case law of the Slovak courts on this topic, the author would like to point to the judgement of the Czech Administrative Supreme Court in *PHARMOS and o.*[28] where the court established:

> *It has to be clear from the Notification of administrative proceedings (i.e. from the very first act realised by the administrative authority in administrative sanctioning proceeding, which started ex officio) the content and scope of the "charges" within the meaning of the Article 6 ECHR and what behaviour/acts will be assessed within the proceedings.*

Defining the content of a proceeding together with the instruction on procedural rights of the party creates a solid basis for the party to exercise his right to defence properly.

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[24] AMO: *Usmernenie k právomoci Protimonopolného úradu Slovenskej republiky vykonávať inšpekcie.* Available at: https://www.antimon.gov.sk/data/files/489_usmernenie-k-pravomoci-protimonopolneho-uradu-slovenskej-republiky-vykonavat-inspekcie.pdf.

[25] Representative of the undertaking or its lawyer has the right to be present at all actions taken by the AMO related to the inspection both in the premises of the undertaking and the premises of AMO.

[26] If the person concerned claims that a copy of the data includes communication with a lawyer, inspector may request him to specify this communication (e.g. by indicating its location, addressees and recipients of the communication) and justify why it should be treated as confidential. The indication of the data as confidential does not preclude inspectors from verifying whether such information has really the proclaimed character.

[27] Pursuant to the Article 18(3) of the Administrative Code, the AMO shall inform all the known parties that the proceeding were opened.

[28] Supreme Administrative Court of the Czech Republic of 31.03.2010, No1 Afs/58/2009-514 *PHARMOS and o*., para 8.

By the way, there is currently no case law in Slovakia on the question of the right of defence or its aspects. Despite the fact that the question of legal professional privilege was raised in the case *ŠEVT*[29], the SCSR did not decide on its merit as it established the whole inspection of the AMO unlawful on other basis.

As administrative law did not expressively stipulate the **principle against self-incrimination or the presumption of innocence**, an undertaking concerned needs to seek general protection in the constitutional framework[30] and the case law of the CJEU and the ECtHR. As in the previous case, there is no relevant case law of Slovak courts in these matters.

The right to be heard, as other procedural safeguard, is explicitly stipulated in Section 33 of the Competition Act,[31] which obliges the AMO to call parties of the proceedings, before adopting a decision, for oral or written statement on its background and the way of its finding, or to propose its completion. An oral statement can be provided at an oral hearing. However, an oral hearing will be held only if the party requests it (the AMO is not obliged to hold an oral hearing without request of the party). Pursuant the Article 21(3) of the Administrative Code, such hearing shall not be public. The AMO is obliged to provide parties with information on the conclusions of the realised inquiry. Such a provision of information (hereinafter: statement) has the character equivalent to the Commission's **statement of objections**. The AMO shall describe all evidence that it has at its disposal and give its preliminary findings. The AMO shall thereafter follow these findings in its final decision. If the AMO intends to diverge from them (for example upon the evidence provided by the party) it shall send a new statement to the parties. As in previous cases, there is no relevant case law of Slovak courts in these matters.

Inquired parties and their representatives have also the **right to access the file**, make extracts, receive copies or electronic versions of all documents except for voting minutes. If documents in the file contain confidential information, classified information, bank secrets, tax secrets, business secrets, telecommunication secrets, postal secrets or confidentiality set upon the law, the AMO is obliged to adopt adequate measure for their protection.

[29] Judgement of the SCSR of 05.04.2011, No 3Sž/1/2011 *ŠEVT.*

[30] Pursuant to the Article 47 (1) of the Constitution of the Slovak Republic '*Everyone shall have the right to refuse to give testimony, which might cause a danger of criminal proceedings against that person or a person akin.*' Pursuant to the Article 50(2) '*Everyone, against whom a criminal proceeding is held, shall be deemed innocent until the court state his guilt with the final judgement'.*

[31] '*Before issuing a final decision, the AMO is required to invite the parties to the proceedings to express in oral or written form their views on the substance and method of the decision or propose an amendment thereto, as well as to inform them on the finding of the investigation, which the Office has reached on the basis of available information and documents.'*

The AMO has set out a detailed technique of accessing the file for the party, its representative or other persons in its 2018 Guidelines on access to the files.[32]

As the AMO serves as the 'prosecutor', 'plaintiff' and 'judge' in one, a guarantee of **the right to an effective remedy before a tribunal** is inevitable and crucial. Access to judicial protection in Slovak administrative law is, with regards to the access to the judicial protection of the CJEU, relatively easy, as reviewable are not only decisions, but also any administrative actions of the administrative bodies by which rights, legally protected interests or duties of the persons are, or might be directly affected (Patakyová, 2019A, p. 150). The right to an effective remedy before a tribunal is governed by the Act No 162/2015 Coll Administrative Judicial Code (hereinafter: AJC). According the AJC, a party or any person affected by a decision or action of the AMO is entitled to seek judicial review of such act thorough a (general) administrative action under section 177 of the AJC, or through an administrative action in the matters of administrative sanctions under section 194 of the AJC or through an action against other intervention of the AMO under Section 252 of the AJC as follows. The Regional Court of Bratislava is the court competent for the procedure on these actions at first instance, which covers the territory of the whole Slovak Republic. The decisions of this court are reviewable upon cassation complaints, on which the Supreme Court of the Slovak republic is competent to decide.

In administrative judicial review two types of jurisdictions occur. Administrative courts have **limited jurisdiction** when deciding on the existence of a breach of competition law. Only the AMO has exclusive power to state that an undertaking breaches Article 101 TFEU/Section 4 of the Competition Act or Article 102/ Section 8 of the Competition Act. Pursuant to Section 191 AJC, court by a judgement will annul the decision or administrative action of the AMO if:

- it was based on an incorrect legal assessment;
- it is not reviewable due to the absence of intelligibility or lack of reasoning;
- factual findings of the AMO were insufficient to a proper assessment of the case;
- factual findings, which the AMO took into consideration as the basis of the reviewed decision are inconsistent with administrative case files;
- during the procedure, there has been substantial breach of administrative procedural provisions, which may cause the issue of unlawful decision.

As the SCSR explained in its judgement in *Cargo*[33], the role of the court in administrative judiciary is not to replace the activity of administrative

[32] AMO: *Metodické usmernenie upravujúce administratívno-technické podmienky nazerania do spisov a vyhotovovanie výpisov, odpisov a kópií z nich pre účastníkov konania a ich zástupcov, prípadne iné oprávnené osoby*. Available at: https://www.antimon.gov.sk/data/files/915_mu-nazeranie-do-spisov-pre-ucastnikov-konania.pdf (access 10.06.2019).

[33] Judgement of the SCSR of 26.10.2010, No 1Sžhpu/2/2008 *Cargo*, p. 19.

authorities, but to review the legality of their decisions, that is, to assess whether administrative authorities complied with statutory obligations. The court merely examines whether the discretion of the AMO is outside the limits and the aspects laid down by law, whether it is in accordance with the rules of logical thinking, and whether the basis for such decision has been fully and properly established by the procedural procedure. If these assumptions are met, the court cannot assume from the same facts other or opposite conclusions.

When the court, after the assessment of the decision or administrative action of the AMO, concludes that the action for annulment is not justified, it rejects such motion by way of the judgement. If the action was justified, the court will cancel such decision of the AMO. Depending on circumstances, in the case of cancelling the decision of the AMO, the court may, upon the request of the claimant, cancel even the decision of the AMO of lower instance in this case and at the same time to decide, that the AMO is obliged to proceed and decide again in this case. The AMO is bound by the legal opinion of the administrative court expressed in the cancelling decision. To ensure the effectiveness of the procedure, if the AMO did not follow the legal opinion of the administrative court, and the administrative court (due to the same reasons) cancelled the decision of the AMO again, the administrative court is entitled to impose a fine onto the AMO.

What needs to be stressed is that the scope of above mentioned judicial review of the procedure before the AMO or its decisions is limited to the scope and reasons provided by the claimant in his action.

A different situation occurs in the area of sanctioning, where the court exercises **unlimited jurisdiction**. Pursuant to Section 195 AJC, in the field of administrative sanctions, an administrative court is not bound by the scope and reasons of the claimant's action, if

- factual findings of the AMO were insufficient to a proper assessment of the case, or factual findings, which AMO took into consideration as the basis of the reviewed decision are inconsistent with administrative case files,
- the question of the forfeiture of responsibility for an offense or the expiry of a preclusive period or period of limitation for the imposition of sanctions for an offense may be inferred;
- it is the case of application of fundamental principles of criminal procedure under the Code of Criminal Procedure, which need to be applied on administrative sanctioning;
- it is the case of application of the principles of punishment under the Criminal Code, which need to be applied while imposing administrative sanctions;
- there needs to be an assessment whether the imposed type of sanction and its amount did not depart from the scope of discretion of the AMO.

Administrative court, while reviewing an AMO decision, follows the factual basis ascertained by the AMO, but is entitled to supplement the evidence. Both parties, the AMO or an undertaking concerned, may request such evidence supplementation, but the court is not bound by such claim. Upon the basis of the assessed evidence and the motion of the claimant, the administrative court will decide by a judgement in two possibly ways. Firstly, it can decide on the change of type or amount of the sanction, even in case that the AMO did not excess the limit of its discretion. Such change can be made if imposed sanction is not proportionate to the committed offense or has liquidation character for the undertaking. The SCRS decided in this way in *eD'system Slovakia*[34], where it lowered the imposed fine of the AMO of the amount of 1 246 621 € to the amount of 124 622,10 €. The court pointed out in this case, that sanction should be imposed is such a way, that its reimbursement is not negligible to the entity, but entity is still able to pay it. In this context, the court also referred to the case law of the CJEU (joined cases C-189/02 P, C-202/08 P, C-205/02 P, C-208/02 P and C-213/02 Dansk Rorindustri A/S and Others against the European Commission) which justifies the need to impose sanctions that entities will be able to pay.

Secondly, an administrative court may decide on giving up on imposing a sanction in a given case, if the purpose of administrative sanctioning might be achieved just by the processing of the case. In competition law cases, an administrative court may decide within the scope of sanctions defined in the Competition Act. At the same time, if the claimant is an undertaking concerned by a decision of the AMO, an administrative court cannot decide to the disadvantage of the claimant. By the way, there is no relevant case law in this matter.

It may occur that such legislation will introduce to the Slovak administrative sanctioning an automatic application of the principles of criminal sanctioning, but this issue is subject to an academic discourse. Košičiarová (2016) claims, that the AJC has bound administrative courts and therefore also administrative authorities (the AMO included) in the matters of administrative sanctioning to apply principles under criminal law without regard to the categorisation of the administrative offenses. On the other side, Šabová (2019) opposes this opinion with the following reasoning: Firstly, the AJC as a part of civil procedural law is not capable to regulate the duties of administrative authorities in administrative procedure. Even if the AJC regulates procedure and duties of administrative authorities during the judicial review of their decisions, it is not empowered to introduce procedural regulations for administrative procedure, nor regulations for sanctioning. Even more, the AJC, in the above mentioned

[34] Judgement of the SCSR of 26.10.2016 No 8Sžhk/1/2016 *eD'system Slovakia*, ECLI:SK:NSSR:2017:1015200916.1.

Section 195, did not specify which particular principle(s) of criminal law should be taken into consideration when imposing sanctions. As (towards the usage of principles) it stipulates: '*which need to be applied*', it means, that the application of the particular principle(s) must be assessed individually in every case. To this question, the author agrees with the Šabová. Such approach conforms with the approach of the ECtHR, which assesses every case under the *Engel*[35] criteria (the nature of the offence and the degree of stigma attached to it, the severity of the possible penalty, and the classification of the offence under domestic law) to define, whether the autonomous concept of the term 'criminal charge' and the relating criminal principles will be applicable.

To sum up this part, we can conclude that the current Slovak legislation does not contradict the goals set up in Article 3 of Directive 2019/1 and the set goals are met before their transposition. However, these goals are met not thanks to precise and clear legislation, but mostly due to the EU-conforming attitude of the AMO and courts, who follow the case law of the CJEU and ECtHR. As the AMO instructs parties only in a general way on their rights and mostly by the citation of their rights explicitly stipulated in the legislation, 'advanced' defence of a party (referring to the right to fair trial and its principles emanating from the case-law of the CJEU and ECtHR) relies on the skills, knowledge and activity of that party's lawyer. As courts have, when reviewing the procedural aspects of the proceedings, only limited jurisdiction and can act only upon the action of the party and within the scope of its claim, precise formulation of the safeguards and applicable procedural principles in the Competition Act or its implementing regulation would therefore help legal certainty of the procedural parties.

III. Conflict of interest in Antitrust law

'Conflict of interest' is a negative phenomenon that is generally prohibited. But what does this term mean? Despite the fact, that we can find various definitions of conflict of interest in various EU legal sources,[36] competition

[35] Judgement of the ECtHR of 08.06.1976, No. 5100/71, 5101/71, 5102/71, 5354/72 *Engel and others v The Netherlands*, ECLI:CE:ECHR:1976:0608JUD000510071 or Judgement of ECtHR of 21.05.2003, No. 34619/97 *Janosevic v Sweden*, ECLI:CE:ECHR:2002:0723JUD003461997.

[36] For example, Regulation (EU) 2018/1046 on the financial rules applicable to the general budget of the Union stipulates, states that conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other persons including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, is compromised for reasons

law is not one of them. For the purposes of general public service, we can use the definition provided by the OECD:

> *A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*.[37]

Directive 2019/1 in its recital[38] recommends national administrative competition authority to publish a code of conduct that covers rules on a conflict of interest. In Article 4(2), it stipulates that Member States shall ensure that the staff and persons who take decisions exercising the powers to find and terminate infringements, impose interim measures, accept commitments and impose fines and penalties in national administrative competition authorities refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers for the application of Articles 101 and 102 TFEU and are subject to procedures that ensure that, for a reasonable period after leaving office, they refrain from dealing with enforcement proceedings that could give rise to conflicts of interest.

The Slovak Competition Act contains the prohibition of conflict of interest only in relation with the trustee established by the AMO with the purpose to supervise the fulfilment of the conditions and obligations attached to a decision allowing a concentration[39]. Therefore, the Administrative Code (Section 9) must be applied again in a subsidiary fashion. An employee of the AMO is excluded from hearing and deciding a case if, having relation to the case, the parties to the proceedings or their representatives, there exists

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involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest.

According to Article 24 of the Directive 2014/24/EU on public procurement the concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Judgement of the Court of 12.03.2015, Case C-538/13 *eVigilo*, ECLI:EU:C:2015:166, point 35: 'A conflict of interests entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer'.

[37] OECD: '*Managing Conflict of Interest in the Public Service. OECD Guidelines and Country experiences*'. OECD Publication Service, Paris, 2003. Available at: https://www.oecd.org/governance/ethics/48994419.pdf (access 11.06.2019), p. 24.

[38] para 21.

[39] Section 12 (8) of the Competition Act.

a doubt of his impartiality. Furthermore, any person who has taken part in the proceedings as an employee of the competition authority of a different instance is also excluded from such hearing and deciding (the AMO provides two instanced proceedings). A party to the proceedings shall inform the AMO of the reasons for exclusion the deciding employee as soon as the party finds out such reasons. When an employee gets to know of reasons capable of his exclusion, he immediately must inform his closest senior manager and provides only inevitable acts. If the AMO decided that its employee shall be excluded due to the existing conflict of interest, it must adopt an adequate measure for a fair course of the procedure.

Is this regulation sufficient? Not really, as it covers clearly only a few situations. As there is only a general clause, a lot of questions arise. How, for example, to assess the relation to the party? Must the party be a close relative or any relative? How far must the relative be removed from the party in order not to be seen as in relation with the decision maker? And what happens in a situation when a close relative or close person to the decision maker has a business connection with the party, or the statutory body of the party? Or are they friends? What happens if none of them (party and employee) tell the truth on their relationship?

To find a solution, we can look for inspiration to other legal areas. For example, Slovak Bankruptcy Act[40] provides an exhaustive definition of related persons. Inspired by the design of the Bankruptcy Act, decision maker could be deemed related to the party if he:

- is or was the employee, statutory body or a member of the statutory body, manager, procurator, or member of the supervisory board of the party, or
- holds a qualified interest in the party, which is equal to at least 5% of the registered capital of the legal entity or the voting rights in the party, or the possibility to exercise control over the management of the party, or indirect interest (which means an interest held indirectly through legal entities, in which he holds a qualified interest).
- is or was the employee, statutory body or a member of the statutory body, manager, procurator or member of the supervisory board of the legal entity, which holds a qualified interest in the party, or
- is a person, who is close (namely ascendant or descendant in a direct line, sibling, spouse or other persons, to who the harm suffered by the party would feel as his own) to the party, or above-mentioned subjects.

[40] Act No. 7/2005 Coll on bankruptcy and restructuralization and on change and amendment of other acts, see the Article 9.

Other inspiration could be found in the OLAF's **practical guide on identifying the conflict of interest** in public procurement[41], which explains the means how to identify, manage, prevent and sanction conflict of interest existing between a public procurer (its employees) and tendering competitors. According to the author, this scheme is applicable to the competition processes too. For the purpose of identifying a possible conflict of interest, the employees of the AMO shall provide the employer with the list of existing related persons. This list shall be updated annually, or earlier, when it is relevant. At the beginning of the procedure, every participating employee or cooperating person shall fill in a declaration of absence of conflict of interests. To follow the principle of transparency, the AMO shall issue a Conflict of interest policy guide or Code of Conduct on this matter.

Besides that, other effective tools to prevent a conflict of interest might include a sufficient salary and, at the same time, a deterrent consequence for the partiality process and decision making.

To sum up, current national competition regulation of the conflict of interest needs to be the subject of a legislative improvement to meet the intended goal of EU legislation. The legislative change shall cover a more precise definition of the conflict of interest. For example: the AMO or its employees in charge, including national authorities at any level, shall not take any action which may bring their own interests into conflict with those of protecting of competition. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests. A conflict of interest exists where the impartial and objective exercise of the functions of a market regulator is compromised for reasons involving family, emotional life, political or national affinity, previous working connection realised in last 5 years, economic interest or any other direct or indirect personal interest. Such definition shall be supplemented by a Code of conduct of the AMO containing the above mentioned declarations, procedural protocols and sanctions, which shall be reflected also in the employment contracts of the employees of the AMO.

Regarding the conflict of interest, there is no relevant case law of the Slovak courts in this matter.

[41] OLAF: Identifying conflicts of interests in public procurement procedures for structural actions. A practical guide for managers elaborated by a group of Member States' experts coordinated by OLAF's unit D2- Fraud Prevention. Available at: https://eufunds.gov.mt/en/EU%20Funds%20Programmes/Migration%20Funds/Documents/Presentations/2013_11_12%20Final%20guide%20on%20conflict%20of%20interests.pdf (access 11.06.2019).

IV. Effective enforcement?

One of the reasons for the adoption of Directive 2019/1 was weak or ineffective enforcement of competition law which has occurred in some Member States. The lack of guarantees of independence, resources, as well as enforcement and fining powers for national competition authorities to be able to apply Articles 101 and 102 TFEU effectively, means that undertakings engaging in anti-competitive practices might be subject to ineffective enforcement.

This may be the case of Slovakia. Slovak competition law enforcement is realised through administrative law sanctions. The Slovak legal system provides also both criminal sanctions and private enforcement, but these possibilities are quite ineffective, mostly due to the time of the proceedings of competition enforcement.

For example, the Slovak Criminal Code[42] in Article 250 recognises as a crime 'Abuse of the participation on competition' (*'To the imprisonment up to three years will be sentenced anyone who abuses the participation on competition by action conflicting with Competition law resulting in the qualified harm /at least 26 600 €/ caused to other competitor or jeopardize the running of other competitor's business'*). However, no one was ever sentenced for this crime. The reasons for that can be found in the preconditions of criminal responsibility: (1) final judgement on the abuse of participation on competition and (2) final judgement on damages of amount at least 26 600 €. In Slovakia this means a process spanning many years. Competition proceedings often last, from their beginning until the final judgement, for 5 years[43] and sometimes even 10 years[44] or more[45]. After establishing the responsibility of an undertaking for 'abusing the participation on competition', then another, at least 4-years proceedings (on damages) need to be successfully completed and, of course, such proceedings require the action of the victim. Only after having the relevant evidence (the final judgement on the breach of competition law and the final judgement on the damages), has the criminal proceeding against a particular natural person (not undertaking), whose responsibility for the breach of competition law and the suffered harm needs to be proven, the potential to finish with the declaration of someone's guilt. But this part also can last years until the final judgement. Without any deeper research, considering

[42] Act No. 300/2005 Coll Criminal Code.

[43] E.g. AKCENTA/VÚB case No. 2 Sžhpu/3/2011, Slovak Telecom case No 3Sžhpu/1/2012.

[44] E.g AKCENTA/ČSOB case No. 3Sžh/1/2016 of 23.11.2017, ECLI:SK:NSSR:2017:1014200849.1.

[45] E.g. Diaľničný kartel case No 5Sžh/2/2015 of 2.11.2016 *Diaľničný kartel*, ECLI:SK: NSSR:2016:9015898699.2.

that no one was ever sentenced for this crime, it can be said, that criminal enforcement of competition law in Slovakia is almost 'mission impossible'.

Administrative sanctions therefore remain the main way of effective enforcement of competition law. Although the Slovak rules for imposing fines follow those of the European Union[46], some **disparities and problems** still remain.

For example, the Slovak Competition Act provides a slightly **different definition of the term 'undertaking'**. Under the current Article 3(2) of the Competition Act, the term '*undertaking*' (*'podnik'* within the EU definition and *'podnikatel'* in Slovakia) signifies an entrepreneur within the meaning of Article 2 of the Act No 513/1991 Coll Commercial Code[47], as well as natural persons and legal persons, their associations and associations of these associations, with respect to their activities and conduct that are, or may be, related to competition, regardless of whether or not these activities and acts are aimed at making a profit. According to Slovak law, this term covers also undertakings when considering concentrations. Following the definition provided by the CJEU (any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed[48]), we can see the differences.

When considering these differences, the author agrees with Blažo (2016), that the divergence between the concepts of undertaking in European and Slovak law can lead to obstacles to effective application or to illogical 'fallback' solutions when the AMO tries to punish competition infringements, particularly cartels. These hurdles can appear not only during the parallel application of European and Slovak law, when the discrepancies are evident, but also within the application of Slovak competition law. A narrower delineation of the concept of an undertaking in Slovak competition law obliges the AMO to identify liability of every natural or legal person separately and impose sanctions on every natural or legal person separately, even in case where several persons belong to a single economic unit and, therefore, are considered one unit under EU Law. In particular, this issue is evident in the case of cartels that last for a longer period of time when the persons, representatives or legal subjectivity of the companies change during that time.[49]

[46] See the Methodical guideline of the AMO available at: https://www.antimon.gov.sk/data/files/963_metodicky-pokyn-o-postupe-pri-urcovani-pokut_1-9-2018.pdf (access 11.06.2019).

[47] I.e. entity registered in the Business register, person providing business activity under a trade license, person providing business activity under a license other than trade license, natural person providing agricultural production which is registered in a special register.

[48] Judgement of the Court of 14.03.2019, Case C-724/17 Skanska and others, ECLI:EU:C:2019:204, para. 36.

[49] E.g., in the GIS cartel, the AMO in decision of 14.08.2009, No. 2009/KH/R/2/035 imposed 16 separate sanctions.

Legal definition of the term 'undertaking' provided in Article 2(1).10 of Directive 2019/1[50] and its transposition to national law will be therefore a step forward in the right direction.

Other problematic issue of enforcement might be the **possibility for undertakings to escape liability** for fines by way of restructuring. In Slovakia, it is not rare for formerly rich and stable companies, after falling into troubles with state (mostly financial or tax) administration that impose huge fines on them, to became empty and insolvent during the administrative process (which together with judicial review may last 10 years). A typical scenario of such scheme is, that management during that time established in parallel a new company, often with a similar name, to which directly, or through secretly related subjects, transfer property and other valuables from the 'problematic' undertaking. The way how they provide these transfers are usually highly sophisticated, with the purpose not to fall to the competition concept of economic continuity, but be safe from any action from the potential bankruptcy trustee or any creditor contesting these transfers[51]. Such undertakings (or persons behind them) also ensure control for themselves over the bankruptcy procedure through the voting of 'friendly' creditors. According the Section 36 of the Bankruptcy Act, a bankruptcy trustee, who was established independently through a random choice of the electronic system provided by the court, can be revoked and altered by the majority of voting creditors on the first meeting of creditors to another (and 'right') one. This process might be connected even with bribery of the voting creditors. As this action is not considered to be a crime and the revoked bankruptcy trustee does not have the right to challenge such decision of the creditors to the judicial review, it represents an elegant way of escaping liability.

Another problem of enforcement relates to the **extreme length of the procedure**. Proceedings in *Diaľničný kartel*[52] lasted 12 years (from the inspection in 2004 until final judgement in 2016). The ineffectiveness of enforcement in this case is stressed by the fact, that this cartel had the form of bid rigging in public procurement. Despite the fact, that the former (2005) public procurement legislation and the current competition legislation recognise as a sanction for cartelists a ban on the participation in public tenders, public

[50] 'Undertaking' as referred to in Articles 101 and 102 TFEU, means any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

[51] According the Article 60 of the Bankruptcy Act, a bankruptcy trustee is entitled to contest any legal actions, by which the debtor stints its creditors, as long as the same are taken with the intention of the debtor to stint its creditors and such intentions was or must have been known to the other party. It shall only be possible to contest those penalizing actions by law, which were taken during five years prior to the passing of the bankruptcy order.

[52] Judgement of the SCSR of 02.11.2016 No 5Sžh/2/2015 *Diaľničný kartel*, ECLI:SK:NSSR: 2016:9015898699.2.

authorities were not able to apply the ban in this case. As previous legislation stipulated, that tenderer is banned from public procurement for the period of 5 years after concluding the cartel (which in this case expired in 2009), which has to be confirmed by a final judgement, the recent legislation requires the imposition of the ban to the decision of the AMO (which is not the case, as the decision of the AMO was adopted in 2006 and the court cannot change the sanction to the disadvantage of the party if he is a claimant). During the whole process and also after the process, members of the cartels have been continuing to participate in tenders. To that regard, the Commission is likely to start an inquiry on an abuse of European Structural Funds, as the Slovak Republic did not prevent the participation of members of this cartel in various public procurements for construction works financed by European Funds.[53]

As the Directive explains and requires the necessity of the adoption of adequate guarantees on the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings which infringe competition law, the above-mentioned issues shall be the subject of legislative changes.

Firstly, the application of compatible terminology is inevitable. An unification of the term 'undertaking' will have an impact not only to effective imposition of fines but also on effective private enforcement, especially when regarding the concept of economic unit in the light of the above mentioned SKANSKA.

Secondly, with the aim to prevent the possibility of an undertaking escaping easily through the bankruptcy and recovery system, it might be useful to establish personal responsibility of the owner or acting managers of the undertaking breaching competition law, if the imposed fines are not enforceable. Strengthening the position of bankruptcy trustees and reprobating the bribery of creditors in bankruptcy proceeding, can also help to better enforce competition law.

Thirdly, both the Administrative Code and Administrative Judicial Code require proceedings to conclude in reasonable time. Such legislation therefore follows the goals set up in Directive 2019/1. Effective enforcement therefore fails on human factors – overloading of the courts and obstructions of the parties. As administrative courts deal with the whole packet of administrative law (even social security law, construction law, tax law, environmental law, etc.), an effective way how to reduce the length of the judicial process might be found in the creation of specialised competition senates.

[53] https://www.aktuality.sk/clanok/691446/opat-sa-vynoril-davny-dialnicny-kartel-siahnu-nam-na-eurofondy/ (accessed on 22.06.2019).

V. Conclusions

This analysis is not an exhaustive comparison of all aspects of Slovak Competition Law with Directive 2019/1 as, generally, the Slovak system of competition procedure tends to be in line with the practice of the European Commission. The AMO and Slovak courts regularly rely on European case-law and the soft-law instruments of the European Commission even in purely national cases. We can therefore say that the practice at European level shapes the application of national level (Blažo, 2016).

However, this short analysis of particular issues proved that incompatible, problematic or at least weak parts of Slovak competition law still remain, which need legislative improvements to achieve the EU standard of enforcement.

Safeguards predicted in Article 3 of the Directive 2019/1 present the slightest problem. Right to defence, right to be heard, legal professional privilege, right to access the file, right to exclude private data from the file, right for an oral hearing, right to present evidence and make suggestions, principle against self-incrimination, presumption of innocence, right to good administration or right to an effective remedy before a tribunal – all of these principles can be found in Slovak legislation, relevant case law of the CJEU and ECtHR and recognised principles applicable in the Slovak legal system. Absence of relevant Slovak case law in this relation therefore might mean that the AMO properly applies these safeguards to its proceedings.

Regarding the requirement of Directive 2019/1 to effectively prevent conflict of interest, it has to be admitted that Slovakia's current legislation does not meet the set goal. Current provision on conflict of interest was formulated in 1976 and is easily avoidable. It neither provides any effective preventive measures for AMO employees (positive measures in the form of a sufficiently high salary and deterrent measures in the form of sanctions, such as an immediate termination of the employment contract). More precise regulation together with the AMO's guidance or code of conduct on identifying and processing the conflict of interests therefore might ensure transparency and (after all) the effectiveness of the enforcement process too.

As it can be deducted from the text above, the effective enforcement of competition law by the Slovak competition authorities might be considered to be the most problematic part of the analysed issues. Lack of compliance in terminology and the great length of proceedings are not the only, but simply the most serious issues to be solved. Obsolete provisions of the Criminal Code and a leaky system of bankruptcy rules also do not comply with the requirements of Directive 2019/1

Even if Directive 2019/1 shined a light on the (in)effectiveness of the enforcement of competition law by the national competition authorities and,

therefore, with regard to future legislation amendments, it certainly represents another brick in empowering the Slovak market regulator.

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Implementing the ECN+ Directive in Lithuania: Towards an Over-enforcement of Competition Law?

by

Gintarė Surblytė-Namavičienė*

CONTENTS

Abstract

In 2018, the ECN+ Directive was issued with a goal to grant stronger powers to national competition authorities while enforcing competition law. This article analyses how the legal provisions of the ECN+ Directive have already been implemented in the Lithuanian Law on Competition, and considers what further changes may need to be made in order to fully implement the ECN+ Directive in the national law. It elaborates on the legal challenges while implementing the aforementioned Directive and provides a critical view on some of the amendments that have already been made.

* Dr. Gintarė Surblytė-Namavičienė, LL.M. (München) is a Lecturer at the Faculty of Law, Vilnius University, Lithuania. Article received: 14 June 2019; accepted: 15 August 2019.

Résumé

En 2018, la directive ECN+ a été adoptée pour conférer des pouvoirs renforcés aux autorités nationales de concurrence dans le cadre de l'application du droit de la concurrence. Cet article analyse comment les dispositions juridiques de la directive ECN+ ont déjà été transposées dans la loi lituanienne sur la concurrence et examine les modifications supplémentaires qui pourraient être nécessaires pour transposer intégralement la directive ECN+ dans le droit national. Il présente en détail les difficultés juridiques rencontrées lors de la mise en œuvre de la directive susmentionnée et donne un avis critique sur certaines des modifications qui ont déjà été apportées.

Key words: ECN+ Directive, Lithuanian Law on Competition, commitment decision, structural remedies, association of undertakings, parental liability, leniency, interim measures.

JEL: K21

I. Introduction

On 11 December 2018, an EU Directive was issued to empower national competition authorities (hereinafter: NCAs) to be more effective enforcers and to ensure the proper functioning of the internal market (the so-called ECN+ Directive).[1] According to recital 3, the objective of the aforementioned Directive is 'to ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively'. It is stipulated that, in such a way, the Directive 'inevitably has an impact on national competition law when it is applied in parallel by NCAs'.

According to Article 34(1) of the ECN+ Directive, this Directive should be implemented in the national laws of the Member States by 4 February 2021. The implementation of the ECN+ Directive may, however, raise legal challenges. Although a full implementation of the ECN+ Directive in Lithuania is still to follow, it may be timely to consider both current and potential legal issues that may arise with regard to the implementation of the legal provisions of the ECN+ Directive. Some of them have been selected for

[1] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ [2019] L 11/3.

a deeper analysis in this article, namely, commitment decisions, fines for the associations of undertakings, parental liability, leniency and interim measures.

II. Implementing the ECN+ Directive: legal changes and legal challenges

On 14 March 2019, several amendments to the Law on Competition of the Republic of Lithuania[2] (hereinafter: Law on Competition) were made that entered into force on 1 July 2019.[3] These amendments are mostly relevant for commitment decisions and structural remedies. As regards the latter, it could be noted that the Competition Council, before the amendments, could impose structural remedies only in the case of concentrations (Article 35(1) point 2 of the Law on Competition). After the amendment of Article 35, the competition authority may apply such remedies (for example, ordering to sell (part of) the company or its assets or shares, to reorganize the company etc.) also in the case of a prohibited agreement or an abuse of a dominant position.

The amendments related to commitment decisions may raise several legal issues and thus beg for a deeper analysis, which is provided below.

1. Commitment decisions

The right of the European Commission to adopt commitment decisions is enshrined in Article 9 of Regulation 1/2003.[4] The ECN+ Directive provides a legal framework for the Member States to legislate with regard to the commitment decisions that may be adopted by national competition authorities. Article 12(1) of the ECN+ Directive reads:

[2] Law on Competition of the Republic of Lithuania, 23 March 1999, No. VIII-1099, as lastly amended on 13 June 2019 (No. XIII-2219).

[3] Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38[1], 14 March 2019, No. XIII-1989.

[4] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1. Article 9(1) of Regulation 1/2003 reads: 'Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission'.

> 'Member States shall ensure that, in enforcement proceedings initiated with a view to adopting a decision requiring that an infringement of Article 101 or Article 102 TFEU be brought to an end, national competition authorities may, after formally or informally seeking the views of market participants, by decision make commitments offered by undertakings or associations of undertakings binding, where those commitments meet the concerns expressed by the national competition authorities. Such a decision may be adopted for a specified period, and shall conclude that there are no longer grounds for action by the national competition authority concerned'.

Commitment decisions are not a new concept in Lithuanian competition law. Legal provisions on commitment decisions were included into the Law on Competition as of 1 May 2004, when Lithuania entered the European Union. The Law amending and supplementing the Law on Competition,[5] Article 19, stipulated that Article 30(2) of the Law on Competition, which listed the grounds for the Competition Council to terminate the investigation, shall be supplemented, among others, with the legal provision stating that 'the investigation shall be terminated if the actions did not cause any significant damage to the interests safeguarded by the laws, and the undertaking, suspected to have infringed the law, in good will terminated the actions and submitted to the Competition Council in writing a commitment not to engage in such actions' (Article 30(2) point 2 of the amended Law on Competition).[6] Accordingly, one of the requirements for adopting a commitment decision was that the actions did not cause any significant damage to the interests safeguarded by the law – to be more precise, the Law on Competition. However, such a requirement is neither found in Article 9 of Regulation 1/2003 nor in Article 12 of the ECN+ Directive. One of the main requirements under the

[5] Law of the Republic of Lithuania amending and supplementing the Law on Competition, declaring invalid the Law on the control of state aid to undertakings, and amending Article 1 of the Civil Procedure Code, 15 April 2004, No. IX-2126. Article 3(1) of Section 4 of the aforementioned law stipulated that this law, except for Article 4 of Section 4, shall enter into force on the day when the Republic of Lithuania enters the European Union. The law thus entered into force on 1 May 2004.

[6] Further amendments to this legal provision were made in 2009 (Law of the Republic of Lithuania amending and supplementing Articles 1, 3, 4, 10, 13, 14, 19, 20, 23, 24, 26, 28, 29, 30, 31, 40, 41, 42, 43, 44, 49 and the Annex of the Law on Competition, 9 April 2009, No. XI-216) and in the new edit of the Law on Competition issued in 2017 (Law of the Republic of Lithuania amending the Law on Competition No. VIII-1099, 12 January 2017, No. XIII-193). In the latter, Article 28(3) point 2 of the Law on Competition stated that 'the investigation shall be terminated if the actions did not cause any significant damage to the interests safeguarded by the Law on Competition, and the undertaking, which is suspected to have infringed the law, in good will terminated the actions and submitted to the Competition Council in writing a commitment not to engage in such actions or to perform actions, which annul the suspected infringement or which provide conditions to avoid it in the future'.

aforementioned legal provisions is that the commitment meets the concerns expressed by the competition authority. Furthermore, the formulation of the Lithuanian Law on Competition, namely, the fact that the investigation shall be terminated, to some extent limited the discretion of the Competition Council while deciding whether to accept the commitments offered by the undertakings. Following the wording of the legal provision, the Competition Council had to accept commitments as long as the undertakings concerned had submitted the commitments and no significant damage had been caused to the interests safeguarded by the Law on Competition. However, the ECN+ Directive, although it does not say this in Article 12, explains in recital 39 that '[i]t should be at the discretion of NCAs whether to accept commitments'.[7]

The law as of 14 March 2019, amending a number of the legal provisions of the Lithuanian Law on Competition, makes important changes with regard to the notion of commitment decisions, enshrined in Article 28 of the Law on Competition. First of all, it provides discretion to the Competition Council to accept the commitments and to make them binding on the undertakings that submitted them, secondly, it strikes out the requirement of the lack of significant damage from the requirements for a commitment decision. Thirdly, the requirement that the undertakings terminated their actions in good will and commit to perform actions, which provide conditions to avoid the suspected infringement in the future, is deleted.

The amended legal provision (Article 28(4) of the Law on Competition), which entered into force on 1 July 2019, reads as follows:

> 'The Competition Council, if it plans to set commitments on the undertaking to terminate a prohibited agreement or an abuse of a dominant position, has a right to adopt a decision to terminate the investigation if the undertaking, which is suspected to have infringed the Law on Competition, submits in writing their commitments to annul the suspected infringement and the Competition Council, by its decision, makes them binding on the undertaking. The time framework of such commitments is defined by the decision of the Competition Council.'

Although this legal provision, as explained above, will bring advantages in many regards as compared to the previous legal provision, it also raises a number of legal problems.

[7] Recital 39 also provides an exception when commitment decisions may be not appropriate ('[i]n principle, such commitment decisions are not appropriate in the case of secret cartels, in respect of which NCAs should impose fines'). The fact that commitment decisions may be not appropriate in the case of cartels is stipulated in the Explanatory Memorandum of the Law amending the Law on Competition as of 14 March 2019 (Explanatory Memorandum to the Project of the Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38[1], 4 December 2018, No. XIIIP-2991, p. 3).

Firstly, it says that the Competition Council 'sets' the commitments. However, a more precise legal language should have been that the Competition Council 'accepts' the commitments, since it does not set them on its own initiative, but rather upon the initiative of undertakings.

Secondly, and more importantly, the wording of the new legal provision is confusing, if not unfortunate. On the one hand, it speaks about a 'suspected' infringement and the possibility for undertakings, which are suspected to have infringed the Law on Competition, to offer commitments to the Competition Council. On the other hand, however, it says that a commitment set, or, to be more precise, accepted, by the Competition Council will be 'to terminate a prohibited agreement or an abuse of a dominant position'. Thereby, the word 'suspected' is missing. Under EU competition law, commitment decisions – the notion, which was introduced by Regulation 1/2003 – are meant to serve as a tool for a more efficient competition law procedure (Geradin/Mattioli, 2017; Wils, 2015), so that such a procedure may be terminated without a final decision by the competition authority on whether there was an infringement of competition law.[8] This idea is repeated in recital 39 of the ECN+ Directive, which states that '[c]ommitment decisions should find that there are no longer grounds for action by the NCAs, *without reaching a conclusion as to whether there has been an infringement of Article 101 or 102 TFEU*' (emphasis added). Also, Article 12(1) of the ECN+ Directive states that '[s]uch a decision [...] shall conclude that there are no longer grounds for action by the national competition authority concerned'. Hence, a commitment decision may be accepted without finding an infringement.[9]

The ambiguity of the formulation of the new legal provision of the Lithuanian Law on Competition related to commitment decisions may render such a legal provision subject to interpretation. On the one hand, it could be interpreted in compliance with EU competition law, saying that the Competition Council may accept commitments from undertakings, which are suspected to have infringed the Law on Competition, without making a final decision on whether

[8] See: CJEU, *European Commission v. Alrosa Company Ltd*, Case C-441/07 P, 29 June 2010, ECLI:EU:C:2010:377, para. 35: 'This is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns'.

[9] See also recital 39 of the ECN+ Directive, which stipulates that '[w]here, in the course of proceedings which *might lead* to an agreement or a practice being prohibited […]'. (emphasis added)

there was such an infringement. On the other hand, however, it could be argued in an opposite way saying that, since Article 28(4) of the Law on Competition says that such a commitment would be set with a goal to terminate a prohibited agreement or an abuse of a dominant position, the Competition Council, before accepting a commitment, should perform a full investigation in order to find out whether there was such an infringement in the first place. In such a way, the notion of a commitment decision, as it is known under EU competition law, would be compromised, since it would be possible to accept a commitment only when a full investigation were performed. The 'reasonable' interpretation of this legal provision will be left for the competition authority and the courts. However, from the point of view of legal certainty, it would have been better if such an ambiguity had been avoided.

Thirdly, Article 12(3) of the ECN+ Directive lists a number of cases when the enforcement proceedings could be reopened by the competition authority, that is firstly, any material changes of the facts based on which the commitment decision was adopted, secondly, the undertakings acting contrary to their commitments, and, thirdly, cases where a commitment decision was based on incomplete, incorrect or misleading information provided by the parties. The Lithuanian Law on Competition, instead, foresees one legal ground when the Competition Council may reopen the investigation, namely the appearance of new circumstances (Article 28(6)). On the one hand, it could be argued that such a legal ground is rather broad and may cover cases listed in the ECN+ Directive. On the other hand, however, a narrow interpretation of the aforementioned legal ground may also be possible saying that it covers only new circumstances that appear after the case has ended, thus, not including the situations when the undertakings, for example, provided misleading information or act contrary to the commitments. Such a narrow interpretation of the legal grounds would be supported, for example, by the legal grounds for reopening civil law procedures: pursuant to Article 366 of the Civil Procedure Code of the Republic of Lithuania,[10] the appearance of new circumstances is the legal ground for reopening the procedure that is separate from the legal ground that false information might have been provided by the parties, third persons, experts etc. Also, the Law on Administrative Proceedings[11] foresees them as separate legal grounds (Article 156). The Criminal Procedure Code of the Republic of Lithuania,[12] however, includes the

[10] Civil Procedure Code of the Republic of Lithuania, 28 February 2002, No. IX-743 (with later amendments).

[11] Law on Administrative Proceedings of the Republic of Lithuania, 14 January 1999, No. VIII-1029 (with later amendments).

[12] Criminal Procedure Code of the Republic of Lithuania, 14 March 2002, No. IX-785 (with later amendments).

provision of false information under the same legal ground of the appearance of new circumstances for reopening the procedures (Article 444). Bearing this in mind, it might be that the appearance of new circumstances may be interpreted as one of the legal grounds, which would be separate from the other grounds, such as the provision of false information and acting contrary to the commitments.

Yet, the importance of the reopening of the procedure in the case of commitments should not be underestimated. Bearing in mind that the enforcement procedure in such cases is ended without a final decision on the infringement, the reopening of such a procedure may be highly relevant. After all, the goal of a commitment is to eliminate competition law concerns that a competition authority may have. Should a commitment fail to fulfill this goal, it might be very important to reinvestigate the case in order to eliminate the aforementioned concern. In is noteworthy in this regard that the fines, including periodic fines, which are foreseen in the ECN+ Directive for cases of non--compliance with a commitment decision (Article 13(2)(f), Article 16(2)(b)),[13] can hardly serve this purpose. On the contrary, such penalty payments may raise a number of legal concerns. First of all, the question arises whether the undertaking could be punished for a non-compliance with a decision, which lacks a final finding of the infringement in the first place. After all, a collision may arise here as regards the presumption of innocence. The reopening of the procedure, with a perspective of a full investigation, might be a more optimal solution in this regard. Secondly, even if the undertaking had to pay a periodic penalty payment for non-compliance with a commitment decision,

[13] This legal provision of the ECN+ Directive has already been implemented in the Lithuanian Law on Competition. According to the amendments to the Law on Competition that entered into force on 1 July 2019, Article 36(1) states that, for a non-compliance with the commitments set under Article 28(4) of the Law on Competition, a fine shall be imposed of up to 10 percent of the total annual turnover received in the preceding economic year. Besides, a possibility exists, under the amended Article 36, to impose periodic fines for a non-compliance with the commitments: Article 36(4) of the Law on Competition stipulates that, for a non-compliance with the commitments set under Article 28(4) of the Law on Competition, a fine of up to 5 percent of an average daily total turnover in the preceding economic year can be imposed on the undertakings for each day of the implementation (or continuation) of the infringement. It is noteworthy, in this regard, that the Explanatory Memorandum of the Law amending the Law on Competition stresses the importance of having legal provisions on imposing fines for the 'procedural infringements' such as, among others, a non-compliance with commitment decisions. (Explanatory Memorandum to the Project of the Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38[1], 4 December 2018, No. XIIIP-2991, pp. 4–5). However, from a legal perspective, a non-compliance with commitment decisions should not be considered as a merely procedural infringement, since it rather relates to the merits of the case.

this would not necessarily guarantee that such compliance will take place at the end of the day. On the contrary, and thirdly, situations may arise when the undertakings, paying the fine, even if on a daily basis, may conveniently 'buy out' competition rather than engage into it. Such a situation, however, would not solve the competition law problem, which, after all, is one of the main concerns in the case of commitment decisions. Hence, it may be highly important to have a number of clear legal grounds when a competition authority may reopen the enforcement proceedings in the case of commitment decisions.

Furthermore, it could also be noted that Article 28(4) of the Law on Competition speaks about the commitments, which would annul the suspected infringement. Compared to the previous legal provision, the amended legal provision does not say that the undertaking should commit not only to end the suspected infringement, but also to perform actions that provide conditions to avoid it in the future. In fact, under the previous legal provision, the annulment of the suspected infringement was only one of the conditions for a commitment to be accepted. On the one hand, it could be argued that a commitment, which obliges the company to perform actions in order to avoid a potential infringement in the future, may be very wide. On the other hand, however, it could be asked whether cases may exist where such a commitment may be needed in order to eliminate the competition law concern. After all, as it was said earlier, one of the main requirements under EU competition law for accepting commitments is that they meet the concerns of the competition authority, hence, they solve the competition law problem. Yet the Lithuanian legal provision merely states that the undertaking submits in writing their commitments to annul the suspected infringement and the Competition Council, by its decision, makes them binding on the undertaking. However, it could be asked whether such a formulation is not too narrow. It could be argued that the focus while accepting commitments should be on the elimination of the competition law concern – the notion that would be broader than the term of ending the suspected infringement. In this regard, the previous legal provision may seem to have been more effective.

The analysis above illustrates that the amendment of the Law on Competition with regard to commitment decisions may create legal problems. Although it improves, in some aspects, the legal provision that existed before, the new legal norm has serious deficits, so it remains to be seen how it will be applied in practice and whether a need may arise to amend this legal provision again in the future.

2. Fines

The ECN+ Directive stresses the importance of 'effective, proportionate and dissuasive fines' (Article 13, recital 40).[14] The imposition of fines is one of the traditional sanctions for competition law infringements. However, it is important, in general, and from the competition policy point of view in particular, that the focus on the deterrent effect of fines would not compromise the application of sound legal principles and would not lead to over-enforcement.

a) Fines for the associations of undertakings

Recital 48 stipulates that '[e]xperience has shown that associations of undertakings regularly play a role in competition infringements and NCAs should therefore be able to fine such associations effectively'. It is true that the calculation of a fine when an association is involved may be challenging. However, the difficulties in calculating a fine in such cases should not result in an over-enforcement of competition law.

According to the ECN+ Directive, Article 13(1), 'Member States shall ensure that national administrative authorities may […] impose […] effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU'. One of the highest risks when imposing fines on associations is double punishment, which may occur when the fines are imposed on both the association and its members. Respecting the principle of *non bis in idem*, recital 48 of the ECN+ Directive stipulates that '[w]hen 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'.

It is nevertheless possible to take into account the turnover of the members when the fine is calculated for the association. The ECN+ Directive stipulates that, while determining the amount of the fine, national competition authorities should have regard both 'to gravity and to the duration of the infringement' (Article 14(1) of the ECN+ Directive). Recital 48 of the ECN+ Directive explains that, when assessing the gravity of the infringement, and in the case the fine is to be imposed on an association of undertakings,

[14] The ability of the NCAs to impose effective fines is also stressed in the Explanatory Memorandum of the ECN+ Directive (Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, pp. 3, 16–17).

the turnover of the members of the association may be taken into account when 'the infringement relates to the activities of its members'. It is further stipulated that 'it should be possible to consider the sum of the sales of goods and services to which the infringement *directly or indirectly* relates by the undertakings that are members of the association' (recital 48) (emphasis added).[15] This is a rather broad definition. Compared to Regulation 1/2003, it could be noted that Article 23(2) also speaks about the infringement of an association that 'relates to the activities of its members', however, it does not say that an infringement might be related directly or indirectly to such activities. The ECN+ Directive, however, includes not only a direct, but also an indirect relation of the infringement to the activities of the members of the association.[16] Thereby, the ECN+ Directive gives a rather wide discretion to national competition authorities to calculate fines for an association taking into account the turnover of its members. Although such an indirect relation of the activities of the members of the association with the infringement may result in higher fines for an association – thus, along the lines of recital 48, which speaks about an effective fining of associations, it raises the risk of beating the purpose in terms of calculating the turnover of the members that would be not so much related to the infringement.

If the fine for an association is calculated taking into account the turnover of its members, Article 14(3) of the ECN+ Directive provides rules for an effective recovery of a fine. It is stipulated that 'the association is obliged to call for contributions from its members to cover the amount of the fine' in the case 'the association is not solvent' (Article 14(3) of the ECN+ Directive). The goal of such a rule is 'to ensure effective recovery of fines' (recital 48 of the ECN+ Directive). However, the ECN+ Directive does not explain what insolvency means. In recital 48 it is merely explained that 'NCAs 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'. Thereby, the focus is on the size of the undertakings rather than on the concept of insolvency. The latter will have to be determined by the respective rules of national law. Such national rules may, however, differ – the circumstance, which will be important in the case when the reach of an association may go beyond the borders of one Member State and the applicable law would be

[15] It is noteworthy that, according to recital 48, '[w]hen 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'.

[16] This is also repeated in recital 47 of the ECN+ Directive, which says that, when assessing the gravity of an infringement, account may have to be taken of the factors such as 'the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates'.

determined upon the rules of international private law. More importantly though, the ECN+ Directive does not explain whether the notion of insolvency should be interpreted strictly on the basis of the requirements of national legal norms on bankruptcy or whether such a notion should be broader (for example, including the cases of a mere inability to pay). For the purposes of legal certainty, it could be argued that the former should be the case, that is, the notion of 'insolvency' should be interpreted in the framework of national regulations on bankruptcy. Yet, even then, unclarities may remain. For example, the Law on Enterprise Bankruptcy of the Republic of Lithuania[17] stipulates that bankruptcy is a state of enterprise insolvency, declared on the basis of an order set by legal acts, when the end of such a state is strived by satisfying the requirements of the creditors and by ensuring a balance between the interests of the creditors and those of the enterprise (Article 2(1) of the Law on Enterprise Bankruptcy). However, it also defines intentional bankruptcy, namely, causing the bankruptcy by a consciously bad management of an enterprise and (or) concluding agreements when it was known or it had to be known that entering into them infringed the interests of the creditors and (or) lawful interests (Article 2(12) of the Law on Enterprise Bankruptcy). Thereby, the question as regards the implementation of the relevant legal provision of the ECN+ Directive, namely, related to 'insolvency', may be whether such insolvency should cover an intentional bankruptcy. If this were the case, the members of the association would be obliged to ensure the recovery of the fine, which was imposed on the association. It is doubtful, however, that this should be the case. It could thus be helpful to write it down into the legal provisions, implementing the aforementioned legal provision of the ECN+ Directive, that an 'insolvency' of an association, in the case of which, the members of the association may be obliged to pay the fine, should not extend to the cases of an intentional bankruptcy, that is the situation when the insolvency of an association is caused deliberately.

Article 14(4) of the ECN+ Directive specifies how the payment of the fine may be requested from the members of the association if they had to contribute to the payment of the fine due to the insolvency of the association.[18] It is said that, where it is necessary to ensure a full payment

[17] Law on Enterprise Bankruptcy of the Republic of Lithuania, 20 March 2001, No. IX-216 (with later amendments).

[18] Article 14(4) reads: 'Member States shall ensure that, where contributions referred to in paragraph 3 have not been made in full to the association of undertakings within the time limit fixed by national competition authorities, national competition authorities 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. Where necessary to ensure full payment of the fine, after the national competition authorities have required payment from such undertakings, they may also require the payment of the outstanding amount of the fine by any of the members

of the fine and the competition authority has already requested the payment from the undertakings, the representatives of which were the members of the decision-making bodies of the association, the competition authority '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'. Limitations to this rule are set by saying that the payment of the fine will be not 'required from 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'. Thereby, the duty of the members to pay the fine of the association is related to their actions in implementing the infringement and their knowledge about the infringement or their effort to distance themselves from such an infringement. On the one hand, such requirements may be important in terms of setting the limits when the undertakings may be obliged to pay the fine of the association. On the other hand, however, the requirements foreseen in Article 14(4) of the ECN+ Directive raise questions. First of all, it is said that the payment of the association's fine, in the case when the latter is insolvent and the full amount of the fine is not paid by its members which were part of the decision-making, may be required from its members which were active on the market on which the infringement occurred. Such a requirement is rather broad – it refers to the undertaking's activity in the market rather than to its relation to the infringement. Bearing in mind that the undertaking may be obliged to pay the fine for the association's infringement of competition law merely due to the fact that it is a member of the association and is active on the market related to the infringement, may raise questions when it comes to the presumption of innocence. Secondly, although an exception to this rule is foreseen in terms of the possibility of the company to avoid such a payment if it can prove that it did not implement the infringement and was not aware of the infringement or it publicly distanced itself from the infringement, the burden of proof in this regard would be on the company. It is also in this regard that the issues related to the presumption of innocence may arise. Thirdly, the notions of awareness and public distancing from the infringement are highly relevant in the case of proving a concerted practice under Article 101 TFEU.[19] However,

of the association which were active on the market on which the infringement occurred. However, payment under this paragraph shall not be required from 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'.

[19] See, for example, the *E-Turas* case (Decision of the Competition Council on the compliance of the actions of the undertakings providing organized sales of trips and other related services with the requirements of Article 5 of the Law on Competition of the Republic

in such a case, these notions have to be analyzed at the stage of proving an infringement of competition law, not merely clarifying the sanctions. In fact, should it be proven that a company was aware of the infringement and did not publicly distance itself from it, not to speak about the fact that it implemented the infringing decision, such a company should possibly be held liable for the infringement. In other words, the question in such a case would be not merely whether the company should pay the fine, but whether the company should be held liable for the competition law infringement in the first place. These two issues are different and should be analyzed separately according to appropriate legal standards.

b) Maximum amount of fines

The ECN+ Directive elaborates on the maximum amount of the fine (Article 15). According to Article 15(1), the maximum amount of the fine shall be 'not less than 10% of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision referred to in Article 13(1)'. Article 15(2) elaborates on the maximum amount of the fine for an association of undertakings when an infringement relates to the activities of its members. Several remarks have to be made in this regard.

The purpose of including a legal provision on the maximum amount of the fine, according to the Explanatory Memorandum of the ECN+ Directive, is 'to ensure NCAs can set deterrent fines on the basis of a common set of core parameters: first, there should be a common legal maximum of no less than 10% of the worldwide turnover and second, when setting the fine, NCAs should have regard to the core factors of gravity and duration of the infringement'.[20] The Explanatory Memorandum notes that:

> '[…] there are differences in the methodologies for calculating fines that can have a significant impact on the level of fines imposed by NCAs. These differences mainly concern: (1) the maximum fine that can be set (the legal maximum) and (2) the parameters for calculating the fine. Such differences partly explain how fines today can vary by up to 25 times depending on which authority acts. Very low fines may be imposed for the same infringement, meaning that the deterrent effect of fines differs widely across Europe which was an issue flagged during the public

of Lithuania and Article 101 TFEU, 7 June 2012, No. 2S-9; Judgement of the Supreme Administrative Court of the Republic of Lithuania, 2 May 2016, Case No. A-97-858/2016; CJEU, Case C-74/14, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba*, 21 January 2016, ECLI:EU:C:2016:42).

[20] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, p. 17.

consultation. The fines imposed may not reflect the harm caused to competition by the anti-competitive behaviour.'[21]

Accordingly, one of the main concerns is that 'very low fines may be imposed for the same infringement' and that such fines may differ among the Member States, partly due to the 'legal maximum' of the fines enshrined in respective laws. However, it could be asked whether it is 'very low fines' that should be one of the main concerns in the case of competition law infringements or whether it should rather be solving the competition law problem. Furthermore, the legal maximum that is enshrined in the national laws and in Regulation 1/2003 applicable to the European Commission serves a (good) purpose in terms of setting the limits for an amount of the fine that may be imposed for competition law infringements. After all, although the fine may have to be deterrent, it should not be such that could result in an expropriation. The Lithuanian Law on Competition foresees the 10% cap for setting the fine (Article 36(1) of the Law on Competition). Similarly, such a cap is enshrined in Article 23 of Regulation 1/2003.

Since the ECN+ Directive enshrines the 'legal minimum' of 10% in the case when a maximum amount of the fine should be imposed for a competition law infringement, it is not entirely clear how such a legal minimum will relate to the legal provisions establishing the legal maximum of 10% when imposing the fine. The ECN+ Directive does not provide criteria when the maximum amount of the fine should be imposed. Although this may be applied to the most severe cases evaluated on the basis of the gravity and the duration of the infringement, the interpretation of these criteria may differ in the Member States, so that also the amount of the fines, which the ECN+ Directive strives to make more uniform, may differ. More importantly though, although the ECN+ Directive does not require the elimination of the legal provisions on the legal maximum, the question is how the rules on the legal minimum in the case of the maximum amount of the fine should be implemented in compliance with national legal provisions, which speak about the cap of the fine in terms of 10%. As it was explained before, it is important that such a maximum cap would not be deleted from the laws, first and foremost, due to the fact that it sets the limits of the fine that may be imposed by the competition authority. However, since it will also be the legal minimum of the fine that may need to be included in the national law when implementing the ECN+ Directive, one of the options could be to write it down into the law that such a 'legal minimum' may be applicable in the case of the most severe competition law infringements, which would deserve the maximum amount of the fine. In such a way, the fine, which would go beyond the 10% of the

[21] *Ibidem*, p. 17.

worldwide turnover of the companies would – and probably, should – be an exception rather than a rule.

It is noteworthy that recital 49 of the ECN+ Directive explains that the rules on the legal minimum in the case of the maximum amount of the fine 'should not prevent Members States from maintaining or introducing a higher maximum fine that can be imposed'. Thus, Member States are allowed to go way beyond the 10% minimum in their regulations on setting fines. However, also in this regard, a word of caution should be spoken stressing the fact that the focus on the deterrence of fines should not lead to an over-enforcement of competition law risking to distort the balance between sanctioning the companies for competition law infringements and overstepping the boundaries of such sanctions with a risk of expropriating the companies.

Finally, it should be recalled that the European Competition Network (ECN) consists of the European Commission and national competition authorities. The European Commission is bound by Regulation 1/2003, whereas the ECN+ Directive is meant to strengthen the powers of national competition authorities. Balanced as this goal may seem to be at first sight, it may be that the ECN+ Directive grants stronger powers to national competition authorities than the European Commission has when enforcing competition law. After all, the legal provisions on the maximum amount of fine are missing in Regulation 1/2003, which is applicable in the case of the fines imposed by the European Commission. Article 23(2) of Regulation 1/2003 stipulates that '[f]or each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year'. However, national competition authorities may be able to impose fines that are 'at least' 10% of the total worldwide turnover if they decide to impose a maximum amount of the fine for a competition law infringement. The discretion of national competition authorities of doing so is not limited in the ECN+ Directive. Thus, whereas the Explanatory Memorandum seeks to align the differences in the amounts of fines imposed by national competition authorities, the result of the ECN+ Directive may be that such differences will exist, not the least when it comes to the enforcement of competition law by the European Commission and by national competition authorities.

3. Parental liability

Article 13(5) of the ECN+ Directive stipulates that 'Member States shall ensure that for the purpose of imposing fines on parent companies […], the notion of undertaking applies'. Although this legal provision is relatively short

and is rather abstract, the ECN+ Directive thereby seems to require the Member States to enable the attribution of the liability for competition law infringements to the parent companies when such an infringement is committed by their subsidiaries. The purpose of including such a legal provision in the ECN+ Directive, according to the Explanatory Memorandum, is related to the payment of the fines.[22]

Article 13(5) of the ECN+ Directive does not provide any legal requirements for parental liability. It merely refers to the 'notion of undertaking'. Recital 46 of the ECN+ Directive explains that:

> 'To ensure the effective and uniform application of Articles 101 and 102 TFEU, the notion of 'undertaking', as contained in Articles 101 and 102 TFEU, which should be applied in accordance with the case law of the Court of Justice of the European Union, designates an economic unit, even if it consists of several legal or natural persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit.'

It is interesting to observe that the ECN+ Directive, even if this is done in a recital, refers to the case-law of the Court of Justice of the EU (hereinafter: CJEU) – after all, case-law may be subject to change. So, bearing in mind that the Member States have to implement the ECN+ Directive in their national laws, the question is what exactly may need to be transposed into the national law. As said, the ECN+ Directive, in Article 13(5), provides rather lose criteria for parental liability. One of the options could be to write it down in the national law that parent companies may be held liable for the competition law infringements of their subsidiaries, leaving it for the national

[22] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, pp. 16–17: '[…] there are a number of issues that affect the level of enforcement of Articles 101 and 102 TFEU and mean that companies can face very low or no fines at all depending on which authority acts, undermining deterrence and the level-playing field. […] The third aspect concerns limitations regarding who can be held liable for paying the fine. The concept of 'undertaking' in EU competition law is established by the case law of the European Court of Justice. It means that different legal entities belonging to one 'undertaking' can be held jointly and severally liable for any fines imposed on such 'undertaking'. […] This sends a clear signal to the entire corporate group that the absence of good corporate governance and compliance with competition law will not remain unpunished. It also allows the fine to reflect the overall strength of the corporate group and not only that of the subsidiary, making it more meaningful and deterrent. However, several NCAs cannot today hold parent companies liable for infringements committed by subsidiaries under their control. […] To address this, the proposal provides that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings.' (footnote omitted).

courts and the competition authority to interpret such a legal provision in practice. The interpretation of such a legal provision, however, would not be without a challenge. One of the most pressing questions would be the issue of fault in the case of parental liability.

According to Article 13(1) of the ECN+ Directive, competition authorities may impose fines where undertakings – intentionally or negligently – infringe Article 101 or 102 TFEU. This is repeated in recital 42, which stresses the fact that, 'in accordance with the Charter of Fundamental Rights of the European Union, in proceedings before national administrative competition authorities or, as the case may be, in non-criminal judicial proceedings, fines should be imposed where the infringement has been committed intentionally or negligently'. Thereby, establishing fault is required for the imposition of fines for competition law infringements.

One would expect that fault shall be interpreted on the basis of national legal provisions and case-law. However, recital 42 of the ECN+ Directive says that '[t]he notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union on the application of Articles 101 and 102 TFEU and not in line with the notions of intent and negligence in proceedings conducted by criminal authorities relating to criminal matters'. Although it may, in fact, be that the notions of intent and negligence do not need to live up to a strict standard of these notions under criminal law, it could nevertheless be argued that it is important to leave room for the national courts and competition authorities to interpret these notions in line with their national laws.

Having said this, it could be recalled that the CJEU has held that parent companies may be considered liable for the competition law infringements committed by their subsidiaries. In *European Commission v. Siemens*,[23] the CJEU held that when 'an economic entity infringes the competition rules, it is for that entity, in accordance with the principle of personal responsibility, to answer for that infringement'.[24] Hence, on the one hand, the CJEU speaks about personal liability in the case of competition law infringements. On the other hand, however, the CJEU said that '[…] in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 81 EC'.[25] Accordingly, the

[23] CJEU, Cases C-231/11 P to C-233/11 P, *European Commission v. Siemens AG Österreich and others*, 10 April 2014, ECLI:EU:C:2014:256.

[24] *Ibidem*, para. 44 (with further references).

[25] *Ibidem*, para. 45.

liability can be attributed to the parent company under the condition that those companies 'form part of the same economic entity'.

In the words of the CJEU:

> '[…] the conduct of a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. […] The Commission will thus be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary.'[26]

Thereby, the attribution of liability to the parent company hinges on the fact that a subsidiary 'does not decide independently', but rather follows the instructions of the parent company.

Furthermore, the CJEU, in the *AKZO* case, explained that '[…] the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement'.[27] Moreover, according to the CJEU, '[…] it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market'.[28]

Thus, according to the case-law of the CJEU, the parent company may be held liable for the competition law infringement of its subsidiary if such a parent company exercises a decisive influence on such a subsidiary, so that the latter does not decide on its behavior independently, but rather follows the instructions of the parent company. Personal liability is thereby substituted by the presumption of liability on the basis of exercising decisive influence by the parent company upon the subsidiary.

In Lithuania, the Supreme Administrative Court of Lithuania has confirmed competition law liability on the basis of the 'single economic entity'

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[26] *Ibidem*, paras 46, 48 (with further references).

[27] CJEU, Case C-97/08 P, *Akzo Nobel NV and others v. Commission of the European Communities*, 10 September 2009, ECLI:EU:C:2009:536, para. 59.

[28] *Ibidem*, para. 61.

doctrine.[29] The Court, in a case on the compliance of the actions of shipping agents with Article 5 of the Lithuanian Competition Law (the national equivalent to Article 101 TFEU), held that one of the main criteria of a single economic entity under competition law is the scope of independence of undertakings when adopting their decisions related to their behavior in the market. In this regard, referring to the 'AKZO presumption' that holding 100% of the shares implies that a parent company makes a decisive influence on its subsidiary,[30] the Court held that it was sufficient to show that a parent company possessed all the capital of a subsidiary in order to make a presumption that such a parent company exercised a decisive influence on a subsidiary. Thus, the company, which had 90% of the shares of its subsidiary and which could unilaterally adopt all the decisions, was held to constitute a single economic unit together with its subsidiary and thus to be jointly liable under competition law.

It is noteworthy, however, that in another case – a case, which was related to advertising laws,[31] the Supreme Administrative Court of Lithuania annulled the Competition Council's decision,[32] which was based on joint liability. The Court thereby referred to the ruling of the Constitutional Court of the Republic of Lithuania,[33] according to which, if the sanctions, which are foreseen in the law, in their severity amount to criminal law sanctions, no matter to which kind of liability they refer (criminal, administrative or other), such sanctions have to be followed by respective procedural guarantees, which derive from the Constitution of the Republic of Lithuania, *inter alia*, Article 31. It was stressed by the Constitutional Court that Article 31 of the Constitution of the Republic

[29] Judgement of the Supreme Administrative Court of Lithuania of 7 April 2014, Case No. A552-54/2014. In this regard, the Supreme Administrative Court of Lithuania agreed with the findings of the Competition Council, although the decision of the latter was partly changed by the Court mostly with regard to the amount of the imposed fines (Decision of the Competition Council of the Republic of Lithuania on the compliance of the actions of the undertakings providing shipping agency services and other services related to shipping and of their association with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 TFEU, 8 December 2011, No. 2S-25).

[30] CJEU, Case C-97/08 P, *Akzo Nobel NV and others v. Commission of the European Communities*, 10 September 2009, ECLI:EU:C:2009:536, para. 60.

[31] Judgement of the Supreme Administrative Court of Lithuania of 18 June 2015, Case No. A-903-624/2015.

[32] Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB 'Nacionalinis žalos ir skolų išieškojimo centras' and UAB 'Tikroji turto kaina' with the requirements of Article 5 of the Law on Advertising of the Republic of Lithuania and Article 15 of the Law on Competition of the Republic of Lithuania, 19 December 2013, No. 2S-15.

[33] Ruling of the Constitutional Court of the Republic of Lithuania of 3 November 2005, Case No. 02/03-03/03-04/03-05/03-39/03-05/04-16/04-02/05-04/05.

of Lithuania should not be interpreted as applicable only to persons who may be held liable under criminal law. Furthermore, according to the Constitutional Court, the latter imperative has to be taken into account also in the cases when the sanctions, even if they are titled in the law as 'economic sanctions', in their severity amount to criminal sanctions. In such a case, it was said, the procedural guarantees – that derive from the Constitution of the Republic of Lithuania – for persons who may be subject to administrative liability have to be foreseen in the respective laws.[34] The Supreme Administrative Court of Lithuania stressed that, according to Article 31(4) of the Constitution of the Republic of Lithuania, a penalty can be imposed only on the basis of the law. In this regard, the Court referred to another ruling of the Constitutional Court of the Republic of Lithuania,[35] according to which, the aforementioned legal norm of the Constitution of the Republic of Lithuania means that a penalty cannot be imposed on the basis of any kind of legal act, but, instead, it can be imposed only on the basis of the law.[36] The Supreme Administrative Court noted that the laws of Lithuania did not foresee joint liability for the infringements of advertising laws. It was stressed that, in contrast to civil liability, joint liability is not possible in the cases of criminal and administrative liability, since the application of a joint liability in such cases would eliminate the possibility to individualize the liability of separate subjects – a fact that contradicts the goals of criminal and administrative liability. Importantly though, with regard to the decision that was judicially reviewed, the Supreme Administrative Court of Lithuania noted that the deficiencies in terms of that the liability was not specified with regard to each undertaking, which, from a legal point of view, were separate, even if they were related, could not be corrected by the Supreme Administrative Court, since this, it was said, could raise the risk of infringing the principle of *non reformatio in peius*. As a result, the Supreme Administrative Court referred the case back to the Competition Council.

Thus, although the Supreme Administrative Court of Lithuania, on the one hand, has affirmed the 'single economic entity' doctrine, it, on the other hand, stresses the importance of the individualization of liability in administrative proceedings – a fact, which comes close to the requirement of fault. Furthermore, the individualization of liability would also imply that the decision or the judgement finding an infringement should clearly state which companies are liable for what and to what extent.

In contrast, the CJEU held in the *European Commission v. Siemens* case that the European Commission, while imposing fines on the basis of joint liability

[34] *Ibidem*, Part II of the legal findings of the judgement, para. 10.4.

[35] Ruling of the Constitutional Court of the Republic of Lithuania of 11 January 2001, Case No. 7/99-17/99.

[36] *Ibidem*, Part III of the legal findings of the judgement.

pursuant to Article 23(2) of Regulation 1/2003, does not have an obligation 'to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship'.[37] It was said that '[o]n the contrary, the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the Commission to strengthen the effectiveness of the action taken by it for the recovery of fines imposed for infringement of the competition rules, since that mechanism reduces for the Commission, as creditor of the debt represented by such fines, the risk of insolvency, which is part of the objective of deterrence pursued generally by competition law […]'.[38] The internal allocation of the payment of the fine of those held jointly liable was said to be an issue 'to be resolved at a later stage',[39] so that 'it is for the national courts to determine those shares, in a manner consistent with EU law, by applying the national law applicable to the dispute'.[40]

It could be questioned, however, whether the effective enforcement of competition law in terms of the recovery of fines should undermine the application of sound legal principles, including those on personal liability. Instead, it could be argued that parental liability could be established in exceptional circumstances showing that the parent company exercised a decisive influence on the subsidiary thereby depriving the latter of independent decision-making. In such a way, the attribution of liability would be based, if not on the intent, then at least on negligence, in terms of the deficits in the management of the company, for which a parent company may be held to be liable. In such cases, it should also be possible to individualize liability by saying to what extent companies are held liable for their contributions to the infringement, thus, without leaving the determination of the shares to be paid by those companies for 'a later stage' (as suggested by the CJEU in the case cited above).

[37] CJEU, Cases C-231/11 P to C-233/11 P, *European Commission v. Siemens AG Österreich and others*, 10 April 2014, ECLI:EU:C:2014:256, para. 58 ('While it follows from Article 23(2) of Regulation No 1/2003 that the Commission is entitled to hold a number of companies jointly and severally liable for payment of a fine, since they formed part of the same undertaking, it is not possible to conclude on the basis of either the wording of that provision or the objective of the joint and several liability mechanism that that power to impose penalties extends, beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship.').

[38] *Ibidem*, para. 59 with further references.

[39] *Ibidem*, para. 60: 'The determination, in the context of the internal relationship of those held jointly and severally liable for payment of a fine, of the shares each of them is required to pay does not pursue that dual objective. That is a contentious issue, to be resolved at a later stage, and, in principle, the Commission no longer has any interest in the matter, where the fine has been paid in full by one or more of those held liable.'

[40] *Ibidem*, para. 62.

Finally, it should be mentioned that the ECN+ Directive, in recital 42, gives a possibility to the Member States to foresee objective liability for competition law infringements. Recital 42 of the ECN+ Directive stipulates that the requirement of fault is 'without prejudice to national laws under which the finding of an infringement is based on the criterion of objective liability, provided that it is compatible with the case law of the Court of Justice of the European Union'. In Lithuania, however, such objective liability does not seem to exist. The Supreme Administrative Court of Lithuania held in the case *G4S*[41] that competition law liability is based on fault – the latter may be in a form of an intent or negligence, but, in any case, the applicability of liability without fault was said to be inappropriate.

Thus, the implementation of parental liability pursuant to Article 13(5) of the ECN+ Directive may prove to be challenging. This is not only due to the fact that the notion of parental liability under EU competition law may, by itself, be controversial (a critical analysis on parental liability under EU competition law in: Kalintiri, 2018). In Lithuania, the controversies also exist in the case-law of the Supreme Administrative Court of Lithuania, which, on the one hand, seems to confirm the 'single economic entity' doctrine, yet, on the other hand, and in line with the case-law of the Constitutional Court of the Republic of Lithuania, holds that joint liability is not possible in administrative proceedings, which rest on the principle of the individualization of liability. In fact, a word of caution should be expressed about using a too broad interpretation of the 'single economic unit doctrine', which may, at the end of the day, result in (parental) liability without fault. It remains to be seen how the ECN+ Directive will be implemented in Lithuania in this regard. One of the options, as stated above, would be to stipulate in the law that parent companies may be liable for the competition law infringements of their subsidiaries leaving it for the practice to interpret and further develop this legal provision.

4. Leniency

The ECN+ Directive elaborates in detail on the leniency programmes[42] for secret cartels (Articles 17–23). Recital 50 explains that such programmes

[41] Judgement of the Supreme Administrative Court of Lithuania of 8 April 2014, Case No. A502-253/2014, paras 95–105.

[42] Article 2(1) point 16 of the ECN+ Directive defines a leniency programme as 'a programme concerning the application of Article 101 TFEU or a corresponding provision under national competition law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and

are 'a key tool for the detection of secret cartels' and thus contribute to an effective competition law enforcement.

It is, first of all, noteworthy that, although the ECN+ Directive stresses the importance of reducing differences as regards leniency programmes in the EU Member States and thereto related legal certainty,[43] the relevant legal provisions of the ECN+ Directive address secret cartels – a concept that may be subject to interpretation in itself. According to the definition provided by the ECN+ Directive, a secret cartel 'means a cartel, the existence of which is partially or wholly concealed' (Article 2(1) point 12). Recital 53 explains that '[f]or a cartel to be considered a secret cartel, not all aspects of the conduct need to be secret. In particular, a cartel can be considered a secret cartel when elements of the cartel which make the full extent of the conduct more difficult to detect are not known to the public or the customers or suppliers'. Such an explanation does not provide much clarity, so that the implementation of the relevant legal provisions may be challenging when it is not entirely clear what the subject matter of the relevant rules is in the first place.

In any case, Article 17(1) of the ECN+ Directive stipulates that its legal provisions will be 'without prejudice to national competition authorities having in place leniency programmes for infringements other than secret cartels or leniency programmes that enable them to grant immunity from fines to natural persons'. In fact, the leniency programme that is available under the Lithuanian Law on Competition is broader than the legal provisions of the ECN+ Directive, which addresses secret cartels, that is agreements between competitors. According to Article 38(1) of the Law on Competition, an undertaking, which is a participant of an agreement between competitors or of an agreement between non-competitors on direct or indirect price fixing, foreseen in Article 5(1) point 1 of the Law on Competition, may apply for leniency. Thus, the Lithuanian leniency programme covers not only agreements between competitors, but also those of non-competitors in the case of price fixing. In fact, when the Lithuanian leniency programme was introduced back in 1999, it covered the participants of an agreement between competitors and dominant undertakings.[44] The applicability of the leniency programme to dominant undertakings was deleted from the law in 2009.[45] In 2012, a new edit

role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction of, fines for its involvement in the cartel'.

[43] See recitals 50–51 of the ECN+ Directive.

[44] See the Law on Competition of the Republic of Lithuania of 23 March 1999, No. VIII-1099, Article 43.

[45] Law of the Republic of Lithuania amending and supplementing Articles 1, 3, 4, 10, 13, 14, 19, 20, 23, 24, 26, 28, 29, 30, 31, 40, 41, 42, 43, 44, 49 and the Annex of the Law on Competition, 9 April 2009, No. XI-216, Article 19.

of the Law on Competition was issued,[46] where the legal provisions related to the leniency programme were also amended. Notably, they were broadened to include also the agreements between non-competitors on a direct or indirect price fixing (Article 38(1) of the amended Law on Competition).

Generally, the conditions for leniency are set in Article 38(1) of the Law on Competition, which stipulates that an undertaking, which is a participant of a prohibited agreement between competitors or a participant of a prohibited agreement between non-competitors on a direct or indirect price fixing, as foreseen in Article 5(1) point 1 of the Law on Competition, may be exempted from the fine, which is foreseen for such an infringement, if the undertaking, in the request for immunity, provided all the information about such an agreement to the Competition Council and if all of the following conditions are fulfilled:

1) the undertaking in the request for an exemption provided the information before the opening of the investigation on the agreement;
2) the undertaking is the first one of the participants of the prohibited agreement to provide such information in the aforementioned request;
3) the undertaking in the request submits all the information known to it about the prohibited agreement and together with it submits the evidence confirming the circumstances described therein;
4) the undertaking co-operates with the Competition Council during the investigation;
5) the undertaking was not the initiator of the prohibited agreement and did not induce other undertakings to participate in such an agreement.

More detailed criteria and the procedures for immunity from fines and for their reduction are provided in the Rules on Immunity from fines and reduction of fines for the parties to prohibited agreements (hereinafter: Leniency Rules), which were adopted by the Competition Council in 2008.[47] Leniency Rules elaborate on both the immunity from fines as well as fine reductions. However, Leniency Rules, since they were adopted in 2008 (thus, before a legal amendment of the Law on Competition broadening the scope of leniency in terms of non-horizontal agreements), apply to horizontal agreements only (point 2 of the Leniency Rules).

[46] Law of the Republic of Lithuania amending the Law on Competition, 22 March 2012, No. XI-1937. The law entered into force on 1 May 2012.

[47] Resolution No. 1S-27 of the Competition Council of the Republic of Lithuania, Rules on immunity from fines and reduction of fines for the parties to prohibited agreements, 28 February 2008 (available in English at: http://kt.gov.lt/en/rules-on-immunity-from-fines-and-reduction-of-fines-for-the-parties-to-prohibited-agreements).

As it may be seen from Article 38(1) of the Law on Competition, a big portion of the requirements for leniency will reflect those enshrined in the ECN+ Directive. However, there may be some important differences.

As regards the requirements for leniency, it could, first of all, be noted that the ECN+ Directive does not expressly say that the information by a leniency applicant has to be provided before the competition authority starts the investigation. Instead, it is said that the leniency applicant has to be the first one to submit evidence, which enables the competition authority to carry out a targeted inspection (Article 17(2) of the ECN+ Directive). Although these requirements are related, some amendments in the national law may be needed. Amendments may also be needed when it comes to the form of leniency statements. Leniency Rules, point 14, foresee that a leniency applicant has to submit the leniency application in writing. The ECN+ Directive, however, stipulates that such a request may also be submitted orally as well as in any official language of the EU where that is bilaterally agreed upon by the competition authority and the leniency applicant (Article 20 of the ECN+ Directive).

Importantly though, Article 17(3) of the ECN+ Directive stipulates that immunity from fines should not be granted to those undertakings, which coerced other undertakings 'to join a secret cartel or to remain in it'. The Lithuanian Law on Competition (Article 38) speaks about an initiator of a prohibited agreement. According to Article 38(1) of the Law on Competition, such initiators of the prohibited agreement or those, which induced other undertakings to participate in the prohibited agreement, cannot benefit from the exemption of a fine. However, neither the Law on Competition nor the Leniency Rules explain what the terms 'initiator' or 'the undertaking, which induced others to participate' mean. The ECN+ Directive uses the term 'to coerce'. Apart from the differences in wording, this may also have important legal consequences, since the terms 'an initiator', 'an inducer' and 'a coercer' are not identical. The latter is a stronger one and may provide more legal certainty when applying leniency rules. After all, a clarification about who may not benefit from immunity from fines may help potential leniency applicants to better evaluate their position before submitting an immunity request. It is also noteworthy that, although the initiators of a prohibited agreement cannot benefit from immunity from fines, they may, nevertheless, apply for a reduction of a fine, as it is foreseen in the Leniency Rules (point 9) and as this does not seem to contradict the relevant legal provisions of the ECN+ Directive (Article 18, Article 17(3) of the ECN+ Directive).

Furthermore, the ECN+ Directive makes a difference between the immunity from fines and their reduction. Whereas in the case of the former, it is required that the applicant should be the first one to inform the competition authority

about the competition law infringement and to provide evidence (Article 17(2) letter c) of the ECN+ Directive), such a requirement is not found among those for a reduction of the fine (Article 18 of the ECN+ Directive). The Lithuanian Leniency Rules, however, contain this requirement in both cases, namely, the application for the immunity from fines (point 3) as well as the request for a reduction of fines (point 8). Thereby, the Lithuanian rules set stricter requirements than the ECN+ Directive and will thus probably have to be amended.

When it comes to cases when the applicant for immunity or a reduction of the fine submits the application, but asks to be granted a place in the queue for leniency in order to gather the necessary information and evidence (the so-called marker for applications for immunity from fines (Article 21 of the ECN+ Directive)), the ECN+ Directive elaborates on the markers for such applications only in the cases of immunity requests. The Lithuanian Leniency Rules, however, foresee the possibility of such markers in the case of both applications for immunity and for a reduction of fines (point 17). This, however, does not seem to contradict the ECN+ Directive, which, in Article 21(5) and recital 58, explains that Member States may allow undertakings to request a place in the queue for leniency also in the cases of the application for a reduction of fines.

Finally, the ECN+ Directive requires Member States to ensure that 'current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are fully protected from sanctions imposed […] for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU […]' (Article 23(1) of the ECN+ Directive). The Lithuanian Law on Competition foresees sanctions for managers of undertakings if they contributed to the prohibited agreement between competitors or an abuse of a dominant position (Article 40). The latter legal norm was included in the Law on Competition in 2011.[48]

According to Article 40(3) of the Law on Competition, a sanction may be not imposed on a manager of an undertaking who has been exempted from the fine under Article 38 of the Law on Competition or on a manager of an undertaking who submitted the information to the Competition Council as required by Article 38(1) of the Law on Competition about the infringements committed by the undertaking, with which the employment relationship was terminated at the time when the information was submitted to the competition authority. The ECN+ Directive stresses the importance of the timing when

[48] Law of the Republic of Lithuania amending and supplementing Articles 3, 40, 42 of the Law on Competition and supplementing the Law on Competition with Articles 44^1 and 44^2, 21 April 2011, No. XI-1347.

the applications for immunity should be submitted by managers. Namely, Article 23(1) letter c) of the ECN+ Directive stipulates that the application for immunity from fines of the undertaking should predate 'the time when those current or former directors, managers and other members of staff concerned were made aware by the competent authorities of the Member States of the proceedings leading to the imposition of sanctions referred to in this paragraph'.[49] However, the ECN+ Directive, as it was said, does not impose the requirement on the leniency applicant to provide information before the competition authority starts the investigation. Should this requirement, which is currently enshrined in the Lithuanian Law on Competition, be deleted while implementing the provisions of the ECN+ Directive, a legal norm elaborating on the timing of the submission of leniency applications by managers may need to be included in the national legal norms.

Currently, the Lithuanian Law on Competition does not foresee a possibility to mitigate sanctions imposed on the managers; instead, the relevant legal provisions enable the competition authority not to apply sanctions. The ECN+ Directive, however, in recital 66, stipulates that 'Member States are not precluded from also protecting the current or former directors, managers and other members of staff of the applicants for reduction of fines from sanctions, or from mitigating such sanctions'. Thus, it may be considered to include in the national laws the possibility to mitigate sanctions to managers in the case of leniency.

5. Interim measures

Article 11 of the ECN+ Directive elaborates on the application of interim measures by the competition authorities.[50] Pursuant to the Lithuanian Law on Competition, the national competition authority has the possibility to apply

[49] See also recital 64 of the ECN+ Directive, which says: 'One of these conditions is that the application for immunity should predate the time when those individuals were made aware by the competent national authorities of the proceedings that could lead to the imposition of sanctions. Such proceedings include the moment those individuals become suspected of violating such national laws.'

[50] Article 11(1) of the ECN+ Directive reads: 'Member States shall ensure that national competition authorities are empowered to act on their own initiative to order by decision the imposition of interim measures on undertakings and associations of undertakings, at least in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU. Such a decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken. The national competition authorities shall inform the European Competition Network of the imposition of those interim measures.'

such measures. Importantly though, Article 26(1) of the Law on Competition stipulates that interim measures will apply until the final decision of the Competition Council in a particular case is adopted.[51] The ECN+ Directive, however, says that interim measures shall apply either 'for a specified time period' or 'until the final decision is taken' (Article 11(1) of the ECN+ Directive). Moreover, such a specified time period may be renewed, however, upon the condition that it is 'necessary and appropriate'. This may be important bearing in mind the effect that interim measures may have on the companies, which are the addressees of such measures. Following the legal provisions of the ECN+ Directive, the application of interim measures until the final decision of the competition authority is taken is but one of the options. In other cases, the application of such measures would have to be limited in time and, although the possibility exists for a renewal of such a specified time, the competition authority would be able to do this only upon showing that such a renewal is necessary and appropriate.

The fact that interim measures may be applied for a specific period of time, rather than until the final decision of the competition authority is taken, may be important in fast-moving markets. The ECN+ Directive stresses the role of the effective application of interim measures in fast-moving markets.[52] However, in fast-moving markets in particular, the application of a broad scope of interim measures may have to be considered with caution and weighed against the principle of proportionality. Bearing in mind the rapid developments of the markets, the application of such measures for the whole duration of the investigation (that is, until the final decision of the competition authority) may, under some circumstances, cause negative effects not only on the companies, but on the whole market as well. Hence, the beauty of the ECN+ Directive, when it comes to interim measures, might be that it foresees two types of such measures, namely, broad measures (applicable until the final decision of the competition authority) and narrow measures (applicable for a specific period of time).

It could also be noted that the ECN+ Directive requires that national competition authorities have the power to impose interim measures by their decision (Article 11(1) of the ECN+ Directive). According to Article 26(2)

[51] According to Article 26(1) of the Lithuanian Law on Competition, the Competition Council may, in urgent cases, when there is sufficient information about the infringement of the Law on Competition and in order to avoid significant damage or irreparable consequences for the interests of undertakings or the society, adopt the decision to apply interim measures, which are necessary for the enforcement of the Competition Council's final decision.

[52] Recital 38 of the ECN+ Directive explains that '[t]here is a particular need to enable all competition authorities to deal with developments in fast-moving markets and therefore to reflect within the European Competition Network on the use of interim measures and to take this experience into account in any relevant soft measure or future review of this Directive'.

of the Law on Competition, the Competition Council may apply two types of interim measures: firstly, it may oblige the undertakings to terminate an illegal activity, and, secondly, it may, yet only upon receiving an authorization from the Vilnius Regional Administrative Court, oblige the undertakings to perform certain actions if a failure to perform them may result in a serious damage to the interests of other undertakings or of the society, or may cause irreparable consequences.[53] The decision of the Competition Council on the application of interim measures (both types) may be appealed to the Vilnius Regional Administrative Court within one month from the adoption of such a decision; however, filing of a complaint does not suspend the application of interim measures (Article 24(4) of the Law on Competition). Bearing in mind that Article 11(2) of the ECN+ Directive stresses the importance of the 'expedited appeal procedures', it might be that some amendments of the aforementioned legal provision may be needed.

III. Conclusions

In Lithuania, some of the legal provisions of the ECN+ Directive have already been implemented in the national law. Yet, the amendments to the Law on Competition related to commitment decisions may create legal issues. Although the lack of significant damage caused to the interests safeguarded by the Law on Competition is deleted from the requirements for accepting commitments, thereby widening the discretion of the Competition Council to accept them, the ambiguity of the wording of the new legal provision on commitment decisions (that is, whether the competition authority may accept the commitments without conducting a full investigation and making a final decision on whether a competition law infringement occurred) may render this legal provision subject to interpretation and may thus have a negative effect not only as regards legal certainty, but also when it comes to an effective application of this important legal instrument, which was created under EU competition law with the purpose of making competition law procedures

[53] In the case when the Competition Council has to get an authorisation from the Vilnius Regional Administrative Court to apply interim measures, Article 27(4) of the Law on Competition foresees that the aforementioned court has to analyse such a request within 72 hours. If the request is rejected, the Competition Council may lodge a complaint with the Supreme Administrative Court of Lithuania within 7 days (Article 27(5) of the Law on Competition). The latter has to analyse the complaint within 7 days (Article 27(6) of the Law on Competition). The decision of the Supreme Administrative Court of Lithuania is final (Article 27(7) of the Law on Competition).

more efficient. Further, the Lithuanian Law on Competition lists one legal ground for the Competition Council to reopen the procedures, namely, the appearance of new circumstances. Should this legal ground be interpreted narrowly, the investigation could not be reopened in cases such as, for example, when the companies act contrary to the commitments. Such a situation would be unfortunate, since it would leave the competition law problem identified by the competition authority unsolved – a circumstance, which is of utmost importance while accepting the commitments in the first place.

Further amendments will have to be made in the national law in order to fully implement the ECN+ Directive. In this regard, a careful implementation of the legal provisions related to fines may be needed. While difficulties may arise when calculating fines for the associations of undertakings, it is important that the rules on calculating such fines, as well as the rules on an effective recovery of a fine, do not unjustifiably extend to cover the turnover of the members of the association. Furthermore, since the ECN+ Directive elaborates on the maximum amount of the fine and enshrines the 'legal minimum' in the case of such a fine, unclarities remain as regards the application of such a 'legal minimum' in relation to the legal provisions establishing the 'legal maximum' when imposing the fine. Also, since such rules are missing from Regulation 1/2003, applicable to the European Commission while enforcing EU competition law, it might be that national competition authorities will have stronger powers than the European Commission while imposing fines. In any case, it is important that the implementation of the legal provisions on the 'legal minimum' in the case of the maximum amount of the fine, the goal of which is to impose deterrent fines on undertakings, does not lead to the over-enforcement of competition law, raising the risk of expropriating the companies.

Among the legal provisions of the ECN+ Directive that will have to be implemented, the legal provisions on parental liability may turn out to be the most challenging. Apart from the fact that the ECN+ Directive provides rather lose criteria in this regard, the attribution of the liability of the subsidiaries to their parent companies on the basis of the notion of undertakings in terms of a single economic unit, first and foremost, raises the question of fault. The latter is an important aspect of personal liability. Although the Supreme Administrative Court of Lithuania, following the case-law of the CJEU, has confirmed joint liability of the companies forming a single economic unit, in another case (related to advertising laws), the same court held that joint liability was not possible in administrative proceedings due to the fact that such liability eliminates the possibility to individualize the liability of separate subjects. In light of this, and bearing in mind that the effective enforcement of competition law, particularly in terms of the recovery of fines, should

not undermine the application of sound legal principles, including those on personal liability, a cautious approach may be needed when implementing and further enforcing the legal norms on parental liability.

Whereas the implementation of the legal provisions on parental liability may be the most challenging, leniency may require a higher amount of legal provisions devoted to the implementation of the ECN+ Directive. Among others, important changes in the national law may have to be made with regard to the notion of 'coercer' as well as fine-tuning the differences between the legal requirements for granting immunity from fines and merely reducing them, including, but not limited to the cases when the leniency applications were submitted by managers of companies.

Finally, changes in the national law may also have to be made as regards the application by the Competition Council of interim measures. The rules limiting the duration of the application of such measures may be highly important for fast-moving markets and may thus have a positive effect.

For the most part, the ECN+ Directive still has to be implemented in Lithuania. However, the implementation of some of the legal provisions of the ECN+ Directive, such as those related to fines or parental liability, raise the risk of over-enforcement of competition law. Thus, a cautious approach may be needed while implementing these legal provisions in order not to beat their purpose and to provide a legal framework for a more efficient enforcement of competition law, yet not its over-enforcement.

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Heading Towards an Effective Mechanism for the Protection of Collective Interests of Consumers – Some Comments on the Proposal for a Directive on Representative Actions

by

Jagna Mucha*

CONTENTS

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Abstract

In April 2018, the European Commission introduced a long awaited Proposal for a Directive on represented actions, which aims to modernize the existing European collective redress system. The aim of this paper is to answer the question whether the solutions put forward in this Proposal will improve the landscape of collective redress in the EU. For this purpose, I analyse the existing model of collective consumer redress in the EU, as set forth by Directive 98/27/EC, Directive 2009/22/EC and Recommendation 2013/396/EU; I also evaluate it from the perspective of its functionality with special consideration of key problematic issues. Against this background, I present the legal provisions put forward in the Proposal for a Directive on representative actions. The comparison of both legal structures makes it possible to give an answer to the question whether the proposed legislation can remedy the existing problems of the collective redress system and, thus, to answer the question whether it will contribute to strengthening the mechanism for the protection of collective consumer interests in the EU.

Résumé

La Commission européenne a présenté en avril 2018 une proposition de directive tant attendue sur les actions représentées, qui vise à moderniser le système européen de recours collectif en vigueur. L'objectif du présent article est de déterminer si les solutions proposées dans la proposition amélioreront le cadre des recours collectifs dans l'UE. A cette fin, l'article analyse le modèle existant de recours collectif des consommateurs dans l'UE, tel qu'il est défini par la directive 98/27/CE, la directive 2009/22/CE et la recommandation 2013/396/UE; il l'évalue également du point de vue de sa fonctionnalité en accordant une attention particulière aux questions problématiques essentielles. Dans ce contexte, l'article décrit les dispositions juridiques avancées dans la proposition de directive relative aux actions représentatives. La comparaison des deux structures juridiques permet de répondre à la question si la législation proposée peut remédier aux problèmes existants du système de recours collectif et, partant, si elle contribuera à renforcer le mécanisme de protection des intérêts collectifs des consommateurs dans l'UE.

Key words: collective redress, collective interests of consumers, consumer law, law enforcement, class action, representative actions, directive 2009/22/EC, Proposal for a Directive on the representative actions, A New Deal for Consumers, action for an injunction.

JEL: K23, K33, K41

I. Introductory remarks

Collective redress is a an umbrella term which covers a wide range of procedural mechanisms tailored for collective enforcement of consumer law. Although these mechanisms are very diverse – collective redress models and types differ significantly worldwide – they serve the same purpose, namely to enable a great number of claimants to seek redress.[1] Micklitz and Durovic classifies four major forms of collective redress: i) the representative action, in which standing to bring an action on behalf of the group in order to get redress is granted to a representative entity, ii) the group action, in which the aforementioned legal standing is granted to a member of the group, iii) the model or test case, in which the action is initiated by one or more persons and in which the adopted judgment establishes the grounds for other cases brought against the same defendant and, iv) United States class action style, which is a form of group action led by professional lawyers who receive fees for their services and claim compensation for the clients (Durovic and Micklitz, 2017, p. 81).

However, in EU law and policy, the term collective redress is used in opposition to the U.S. style class action system, which is widely criticised by EU institutions. Over the years, within the debate on the desired shape of the EU model of collective redress, the European Commission kept arguing that although U.S. class action system is the best known example of collective redress, its functioning is highly controversial since it fosters a conflict of interests, which results in frivolous and abusive litigation.[2] It is said by the Commission that the biggest weaknesses of the U.S. style class action system is that it allows the cases to be based on poor merits on one hand, and claimants do not receive adequate compensation since the money is diverted to their lawyers on the other (Hodges, 2014, p. 71–75). Therefore, it shall not be applied in the EU.[3] In order to avoid the above mentioned problems, the Commission spoke in favour of basing the EU model of collective redress on

[1] European Parliament, Collective redress in the Member States of the European Union, 2018, p. 13–14.

[2] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a European Horizontal Framework for Collective Redress', 11.6.2013, COM (2013).

[3] European Commission in MEMO/08/741 to the Green Paper on Consumer Collective Redress – questions and answers, point nine stated '(…) US style class action is not envisaged. EU legal systems are very different from the US legal system which is the result of "toxic cocktail" – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures)'.

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different procedural mechanisms than the U.S. class action style, namely on representative and group actions.[4]

It is worth noting, however, that apart from the above mentioned major forms of collective redress in general, there are also many other procedural mechanisms at the national level, which make it possible to deliver collective redress in EU Member States. Just to mention, recently Hodges and Voet, apart from representative and group actions, identified regulatory redress, ordered or brought about by the intervention of public enforcers, civil claims piggy-backing on criminal prosecutions and consumer ombudsmen, being a specific form of alternative dispute resolution entirely separate from the courts (Hodges and Voet, 2018, p. 1–2). Although the comparative overview of existing legal tools in this field is not the subject of this paper, it needs to be underlined that collective redress mechanisms vary significantly not only worldwide, but also within EU Member States.

For the purpose of clarity of the discussion to follow, it needs to be mentioned also that there are two basic approaches, according to which affected individuals may join the group, namely systems referred to as *opt-in* and *opt-out*. In the first case, the group includes only those individuals who actively opt in to become a part of the group represented. Consequently, the judgement is binding only on those who opted in, while all the other individuals remain free to pursue their damage claims individually. By contrast, under an opt-out system the group is composed of all the individuals who belong to the specific group and claim to have been harmed by the same or similar infringement, unless they actively opt out of the group; in such a case, they are not bound by the judgement.[5]

Diversity of collective redress mechanisms in some Member States as regards their design, quality and operation, and lack of them in another, gave rise to different levels of consumer law enforcement in the EU. Being aware of that fact on one hand, and noting the advantages and weaknesses of collective redress on the other, the European Commission[6] started to work on a framework for collective redress at the EU level.

[4] European Commission, Communication (2013) 'Towards a European Horizontal Framework…', *op. cit.*

[5] The opt-in system is imposed by the legislation of most Member States, including Poland. The opt-out principle is applied by two Member States, namely the Netherlands and Portugal, while four Member States (Belgium, Bulgaria, Denmark and in competition cases also the UK) provide for a mixed system. See: European Parliament, Collective redress…, *op. cit.*, p. 22–27.

[6] To be more specific, two Directorate- General: DG SANCO and DG COMP.

II. Different routes to developing the legislative framework for collective consumer redress in the EU

The need to ensure the protection of collective consumer interests in the EU was noticed by the EU legislator in the 90s. This issue was mentioned for the first time in 1996, in the Commission's Action Plan on consumer access to justice and on the settlement of consumer disputes.[7] Simultaneously, along with the performance of the action plan, the Commission drafted Directive 98/27/WE on injunctions for the protection of consumer interests,[8] aimed at creating a mechanism which would make it possible to eliminate infringements of collective consumer interests. Directive 98/27/EC constituted a tool of procedural law, used in case of infringement of rights of substantive law, granted in consumer directives which were attached to the said act.

Due to the amendments introduced to Directive 98/27/EC in 2009, it was repealed by Directive 2009/22/EC on injunctions for the protection of consumer interests.[9] Contrary to what is claimed by the Commission,[10] the changes introduced in the new act were not significant and were more of a formal nature. To be more specific, the main and the only change introduced by Directive 2009/22/EC regards its scope and consists of updating Attachment No. 1 to the Directive, which provides the list of acts related to consumer rights. Any act which harms collective redress contrary to these provisions listed in the Attachment constitutes infringement within the meaning of Directive 2009/22/EC. Consequently, it confirmed only the *status quo* of the landscape of collective redress in the EU (Howells, 2017, electronic resource).

Lack of fundamental changes in the field of injunctions may be justified by the fact that the collective consumer redress model of that time introduced by Directive 298/27/EC was supposed to be complemented by another instrument, which would make it possible to claim damages for breach of competition law. In the White Paper on damages actions for breach of EC antitrust rules (2008)[11], the Commission suggested the introduction of two mechanisms of collective redress in the field of competition law, allowing consumers and

[7] Communication from the Commission 'Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market', 14.02.1996, COM (96)13 final.

[8] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJEC, L 166/51.

[9] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJEU, L 110/30.

[10] According to the Commission '(…) Directive 98/27/EC […] has been substantially amended several times', see: directive 2009/22/EC, *op. cit.*, rec. 1.

[11] European Commission, White Paper on Damages Actions for Breach of EC antitrust rules, 02.04.2008, COM(2008) 165 final.

small businesses to compensate damages: representative actions brought by qualified entities such as consumer associations or state bodies and second, opt-in collective actions. As a result, in 2009 the Commission prepared the legislative Proposal for the Directive on collective actions.[12] However, due to strong resistance from the business environment and heavy pressure imposed on the Commission by some Member States, the proposal was aborted (Hodges 2014, p. 72; Sorabji 2014, p. 74; Stadler 2013, p. 483). One of the arguments voiced against the proposed mechanisms was the inconsistent approach to collective redress in the field of competition and consumer law, which was caused by the fact that two Directorate General, DG COMP and DG SANCO, had different concepts as regards the future shape of the collective redress system. While the first one was in favour of the introduction of a binding mechanism in the field of compensatory redress, the second was far more vague in its suggestions in this respect.[13] In order to provide coherent policy in this field, the Commissioners for competition, consumer affairs and justice were requested to work together on further developments on the collective redress system (Hodges, 2014, p. 72; Stadler, 2013, p. 483–484).

However, over the years, the proposal for the introduction of a legal instrument which enables claiming competition law damages collectively was still very controversial (Sorabji, 2014, p. 74). To this end, in order to increase the chances of its adoption, the new Proposal for a Directive on competition damages of 2013 did not mention collective actions at all.[14] The political solution adopted by the Commission was to separate the proposal for collective actions in a soft law instrument. Thus, in 2013, the Commission issued its Recommendation on common principles for injunctive and compensatory collective redress mechanisms.[15] The Commission indicated therein that all Member States should have collective redress mechanisms at the national level for both injunctive and compensatory relief.[16] It needs to be noted, however, that the goal of this document is not to harmonise the national systems of collective redress, but to introduce non-binding, general rules which will be applicable both, in court and out-of-court proceedings (Voet, 2014, p. 97–128). Recommendation 2013/396/EU identifies specific safeguards relating to either

[12] Proposal for a Directive on collective actions (2009) was withdrawn and it is not available anymore.

[13] Compare: European Commission, White Paper on Damages… (2008) *op. cit.* and European Commission, Green Paper on Consumer Collective Redress, 27.11.2008, COM(2008) 794 final.

[14] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404.

[15] Recommendation 2013/396/EU, *op. cit.*

[16] *Ibidem*, Art. 2.

injunctive or compensatory collective redress,[17] as well as common principles for both types of redress. The last category includes, among other things, the principles regarding the legal standing to bring representative actions, the admissibility of collective actions, information on collective actions, the reimbursement of legal costs of the winning party, the funding of legal actions and some general principles with regard to cross border cases.[18] According to the Commission, the aim of the safeguards contained in Recommendation 2013/396/EU is to provide a barrier against abuse.[19] However, at the same time, this document allows Member States for many exemptions which hampers this goal (Hodges, 2014, p. 78). Although Recommendation 2013/396/EU was supposed to do its work, latest comparative studies show that most of the Member States did not follow the principles set out by the Commission and in spite of the existing guidelines the mechanisms of collective redress are still significantly varied.[20] Therefore, it may be said to justify the claim that the Recommendation itself did not contribute to establishing a common, pan-European model of collective consumer redress (Sorabji, 2014, p. 75; Hodges and Voet, 2018, p. 43).

The latest attempt to create a legislative framework for collective consumer redress was undertaken in April 2018. The European Commission issued 'A New Deal for Consumers'[21], which proposed a legislative package as an answer for the new challenges of consumer policy (Jabłonowska and Namysłowska, 2018, p. 11; Kowalczyk-Zagaj, 2018, p. 120). 'A New Deal for Consumers' aims at, among other things, providing better redress opportunities for consumers, supporting effective enforcement and enhanced cooperation of public authorities in a fair and safe single market.[22] In this respect, the Commission presented a Proposal for a Directive for representative actions.[23] In that Proposal, the Commission wants to modernise the existing model for the protection of collective interests of consumers in the European Union, which, in principle, should improve the efficiency of collective consumer redress. The main innovation provided by the Commission is the combination of the procedure for injunctive and compensatory redress. Currently, the

[17] With regard to compensatory collective redress see: Piszcz, 2017, p. 223–250.

[18] Recommendation 2013/396/EU, points 4–18.

[19] *Ibidem*, para. 10.

[20] European Parliament, Study on Collective redress in the Member States of the European Union, 2018.

[21] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 'A New Deal for Consumers', 11.04.2018, COM(2018) 183 final, (hereinafter: 'A New Deal for Consumers').

[22] 'A New Deal for Consumers', *op. cit.*, p. 4

[23] Proposal for a Directive on representative actions, *op. cit*.

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Proposal for a Directive on representative actions is being scrutinised by the European Parliament.

The enhancement of the protection system of collective consumer interests in the European Union, as planned in 'A New Deal for Consumers', is based mainly on the legal solutions provided in the existing Directive 2009/22/EC. Therefore, for the purpose of clarity of further discussion of the new legislative framework contained in the Proposal for a Directive on representative actions, it is indispensable to present briefly some legal grounds for the functioning of the currently binding act.

III. Model for the protection of collective consumer interests in the EU provided in Directive 2009/22/EC

The core of the EU model for the protection of collective consumer redress is provided in Directive 2009/22/EC. The existing mechanism constitutes an instrument of procedural law, which enables consumers to enforce their rights granted in substantive law, namely in consumer directives listed in the attachment to Directive 2009/22/EC. It needs to be noted that the existing procedural measures primarily serve the purpose of eliminating the infringements and not of enabling consumers to seek compensation.

The main tool serving the purpose of exercising consumer rights granted in EU law is the action for an injunction for the protection of consumer interests.[24] Directive 2009/22/EC does not regulate the type of procedure for conducting such proceedings. At the time when the Directive was introduced, Member States were entitled to decide whether the action for an injunction should be brought via judicial (civil or commercial judicial proceedings) or administrative proceedings.[25] In the literature on the subject one can also find, as supported by the practice of some Member States, that the interpretation of the provisions of Directive 2009/22/EC allows national legislators to

[24] Directive 2009/22/EC, *op. cit.*, Art. 1.

[25] According to European Commission '(…) two thirds of the Member States opted for a civil or commercial judicial procedure whilst only a few (Hungary, Malta, Poland and Romania, for instance) opted for mainly administrative approach. Certain Member States, even though they opted for a judicial procedure, designated administrative authorities to rule on certain infringements (Austria for television broadcasting activities and Finland for advertising for medicines for human use and for package travel, for instance).' See: Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, 18.11.2008, COM(2008) 756 final, p. 4, (hereinafter: 'Report on the application of Directive 98/27/EC (2008)').

combine both types of proceedings in a hybrid model[26] (Sieradzka 2008, LEX, Oleksiewicz 2012, LEX). Depending on the type of proceedings, the action for an injunction is brought to national courts or administrative authorities, competent in each Member State. The aim of the action is to identify and to eliminate the infringement which harms the collective interests of consumers. Therefore, the action for an injunction is said to be an instrument which belongs both to private and public law.[27]

Directive 2009/22/EC provides the procedural rule regulating the issue of legal standing to bring an action for an injunction. Under the Directive, it is only independent public bodies or organisations whose purpose is to protect consumer interests that are allowed to commence such proceedings (the so-called 'qualified entities', designated by the Member States).[28] Such entities may a) seek an order requiring the cessation or prohibition of any infringement, ii) seek measures such as publication of the decision or iii) 'in so far as the legal system of the Member States concerned permits' – seek an order against the losing defendant to pay a fixed amount into the public purse or any beneficiary, designated in or under national legislation.[29] The purpose of the action is, above all, to identify and eliminate the infringement. Measures which shall improve the enforcement of an injunction include the publication of the decision (preventive measure) and the possibility to impose a fine on the trader (repressive measure).

Directive 2009/22/EC does not specify how the individuals affected may join the group represented by the authorised entities (opt-in v. opt-out mechanisms). This is a particularly sensitive and difficult issue since it is determined by the constitutional tradition of the Member States. Within EU institutions, there is no consensus as to the choice of one principle regarding the composition of the group at the EU level. To this end, the European Commission recommends the opt-in model and justifies its standpoint, among others, by stating that it makes it possible to respect the right of a person to decide whether to participate or not and, thus, preserving the autonomy of the parties.[30] A different approach is articulated by the European Parliament which favours the opt-out or mixed system, leaving a margin of appreciation to national judges, since it is more effective and even 'more justified in

[26] Such model exists, among others, in Austria and Finland.

[27] On consumer redress in the field of competition law see: Sieradzka 2012.

[28] Directive 2009/22/EC, *op. cit.*, Art. 3.

[29] *Ibidem*, Art. 2.

[30] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violation of rights granted under Union Law, 2013/396/EU, OJEU L 201/60, (hereinafter: Recommendation 2013/396/EU), para. 21–24.

cases where exercise of "opt-in" would entail more damages, namely for the consumers, in terms of the cost of joining, and for the traders, in terms of the costs of notifying all parties involved.'[31] According to the European Parliament, the decision on the choice of the variants in question should not be left to the discretion of the Member States.[32]

IV. Weaknesses of the existing model

During the period of more than 20 year, starting from the introduction of the model of the protection of collective consumer interests, the application of the legal regulation has been evaluated many times. The most valuable source of knowledge regarding the use of the action for an injunction is provided by the European Commission in the following: i) the report from the application of Directive 98/27/EC (2008),[33] ii) the report from the application of Directive 2009/22/EC (2012)[34] and – more recently – iii) the report on the Fitness Check (2017)[35] and – finally – the report on the implementation of Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms (2018).[36] The analysis of the data provided by the Commission makes it possible to identify some key problems which concern the enforcement of consumer rights by way of the action for an injunction and the obstacles to the effectiveness of the existing mechanism.

[31] European Parliament, Collective redress…, *op. cit.*, p. 86.

[32] *Ibidem*.

[33] Report on the application of Directive 98/27/EC (2008).

[34] Report from the Commission to the European Parliament and the Council concerning the application of directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest, 6.11.2012, COM (2012) 635 final (hereinafter: "Report on the application of Directive 2009/22/EC (2012)').

[35] European Commission, Staff Working Document: Report of the Fitness Check on consumer and marketing law directives (REFIT), 23.05.2017, SWD 2017 (208) final and SWD 2017 (209) final (hereinafter: 'Fitness Check (2017)').

[36] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union law (2013/396/EU), 25.1.2018, COM (2018) 40 final (hereinafter: 'Report on the implementation of the Commission Recommendation 2013/396/EU (2018)').

1. Limited application of the cross-border actions for an injunction

One of the most important problems of the system for the protection of collective consumer interests is the very limited application of existing tools to counter cross-border infringements. Directive 2009/22/EC, following Directive 98/27/EC, permits the qualified entities of Member State A to bring an action in Member State B if the latter, by trading with consumers in Member State A, were in breach of consumer laws. Thus, the qualified entities are vested with legal standing before foreign courts. The court in Member State B would hear and decide the case without questioning the legal standing of the qualified entity of Member State A.

However, it was demonstrated by the Commission in the reports that the proposed concept of cross-border litigation is not used in practice. By the year 2008 only one qualified entity from the UK (the Office of Fair Trading) used this mechanism in two cases, bringing an action for an injunction to the courts of Belgium and the Netherlands.[37] The main reasons for the very limited use of such cross-border litigation are the costs of bringing an action, complexity and length of procedure as well as the limited scope of the injunction procedure (injunction is mandatory only with respect to the case and the parties in question and is limited in terms of the national scope).[38] In spite of the fact that between the years 2008-2012 the number of cross-border cases increased (only around 70 injunctions with cross-border dimension and 5632 actions in total), most of them were not based on the concept provided in Directive 2009/22/WE.[39] The traders, although established abroad, were sued in the country to which they directed their commercial activity, so in the country of origin of the consumer. The qualified entities brought actions for an injunction in their own language, own jurisdiction and in line with the applicable, national law. This allows them to avoid many practical problems, such as language barriers or difficulties of identifying and assessing the trader data abroad.

Latest data confirm that injunctions requiring the cessation or prohibition of an infringement are still not used in cross-border cases, and the qualified entities from different Member States do not cooperate enough with one another in order to exchange good practices or develop common strategies with the aim to counter widespread infringements.[40]

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[37] Report on the application of Directive 98/27/EC (2008), *op. cit.*, p. 6.

[38] *Ibidem*, p. 6–9.

[39] Report on the application of Directive 2009/22/EC (2012), *op. cit.*, p. 7.

[40] Fitness Check (2017), *op. cit.*, p. 102; Explanatory Memorandum of European Commission, Proposal for a directive of the European Parliament and of the Council on representative

2. Costs, length and complexity of the proceedings

Directive 2009/22/EC does not regulate the issue of costs linked to the injunction proceedings and leaves it to the discretion of Member States. In order to prevent abusive litigation and frivolous claims the European Commission recommends following the principle of reimbursement of legal costs to the winning party (the so called 'loser pays principle').[41] As it is shown by the latest report, Member States largely apply this principle in their civil procedural law.[42] As a result, in the light of the necessity to reimburse the costs of the opposing party, the claims are brought mostly in these cases in which the probability of winning by the qualified entity is high. What is more, in many Member States the situation of the qualified entities is difficult even if they win the case, since they may be obliged to pay costs of proceedings anyway if the losing defendant is unable to pay the costs.[43]

Latest data show that the financial risk linked to the proceedings for an injunction is the most crucial obstacle which limits the number of actions for an injunction brought by qualified entities, and therefore it considerably impairs the effectiveness of the collective redress mechanism in the whole EU.[44]

Another obstacle to the effectiveness of actions for an injunction is the length and complexity of the procedure.[45] The glaring example of the lengthiness of the proceedings can be demonstrated by one of the biggest group proceedings in Poland. In this case, the municipal consumer ombudsman (Pol. *miejski rzecznik konsumentów*) brought a claim against BRE Bank S.A. (currently mBank S.A.) on behalf of 1247 clients of the bank. The case concerned consumers who concluded mortgage loan agreements according to which the rate of the loan was subject to indexation in Swiss francs. The agreements contained a condition which allowed the bank to change the interest rate at its own discretion. In simple terms, the bank increased the interest rate due to economic changes, which was unfavourable to consumers and did not decrease the interest rates when the market situation changed to the benefit of consumers (Niedużak and Szwast, 2014, p. 9–11). The case was adjudicated

actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, 11.4.2018, COM(2018), 184 final, p. 8.

[41] Recommendation 2013/396/EU, *op. cit.*, para. 13.

[42] All Member States that have collective redress mechanisms, with the exception of Luxembourg, follow the 'loser pays' principle in their civil procedural laws. See: European Commission, Report on the implementation of the Commission Recommendation 2013/396/EU (2018), *op. cit.*, p. 8.

[43] Report on the application of Directive 2009/22/EC (2012) p. 11.

[44] Fitness Check (2017), *op. cit.*, p. 103.

[45] *Ibidem*, p. 104.

at the courts of all instances.[46] However, the bank successfully appealed to the Supreme Court of Poland[47] and consequently the case must be adjudicated again by the court of second instance in Łódź. The case is still pending. It has been ongoing for over 8 years.[48] The course of the proceedings and – in particular – the controversial judgment of the Supreme Court have been widely discussed and criticised in the doctrine (Czabański, 2016, p. 182–188, Czech, 2016, p. 56–65).

3. Limited effect of the ruling with respect of the case and the parties involved

Another significant problem related to the use of actions for an injunction is the limited effect of the ruling.[49] Studies conducted by the European Commission confirmed that in most of the Member States an injunction order is issued with respect of the case and the parties involved. This means that it binds only the qualified entity which brought an action for an injunction and the defendant trader (*inter partes* effect).[50] In practice, if one trader will infringe the rights of consumers and the infringement is identical to the infringement committed by another trader, confirmed by an earlier the judgment, the consumer cannot rely on the previous injunction order but must prove the infringement anew. This poses problems for the effectiveness of an injunction order and therefore, obviously, it increases the litigation risk and causes costs to the justice system.[51]

Only some of the Member States in their legal orders extend the effects of the decisions issued as a result of an action for an injunction to other parties (*erga omnes* effect), in particular with regard to the nullity of unfair contract terms.[52] Extending the effects of injunctions beyond the individual case has the advantage that it prevents the repeated use of that term.[53] However, some

[46] Judgement of the court of the first instance in Łódź dated 03.07.2013, case no. II C 1693/10; judgment of the court of the second instance in Łódź, dated 30.04.2014, case no. I ACa 1209/13 (in favour of consumers).

[47] Judgment of 14.05.2015, case no. II CSK 768/14.

[48] Currently the proceeding takes place before the Court of Appeal in Łódź (Sąd Apelacyjny w Łodzi), under sign. I ACa 1058/15.

[49] Report on the application of Directive 2009/22/EC (2012), *op. cit.*, p. 13–16.

[50] Report on the application of Directive 98/27/EC (2008), *op. cit.*, p. 9; Report on the application of Directive 2009/22/EC (2012), *op. cit.*, p. 14.

[51] Fitness Check (2017), *op. cit.*, p. 104.

[52] Report on the application of Directive 98/27/EC (2008), *op. cit.*, p. 9; Report on the application of Directive 2009/22/EC (2012), *op. cit.*, p. 14.

[53] Opinion of Advocate General delivered on 06.12.2011 in case C-427/10 *Invitel*, ECLI:EU:C:2011:806, para 69.

national courts had doubts as regards the compliance of such regulation of national law with EU law, especially with regard to Directive 93/13/EEC on unfair terms in consumer contracts.[54] Therefore, this issue was analysed by the Court of Justice of the European Union (hereinafter: the Court).

For the very first time this question was analysed by the Court in the case C-472/10 *Invitel*,[55] where the proceedings before the Court were commenced as a consequence of a reference for a preliminary ruling lodged by a Hungarian court. The reference has been made in the context of public interest proceedings brought by the Hungarian national consumer protection authority (hereinafter: NFH) against the company Invitel – a telephone network operator. NFH alleged that Invitel used unfair terms in contracts concluded with consumers, which made consumers pay fees that had not initially been agreed upon between the parties. The Hungarian national consumer protection authority declared the contested term to be null and void on the grounds of being unfair and automatic and imposed a retroactive reimbursement to the subscribers of the amounts wrongly invoiced. The national court was not sure whether it can declare the invalidity of an unfair term with regard to all the consumers who have concluded a contract with unfair contract terms or only with regard to those consumers who are a party to the proceedings.

When answering this prejudicial question, the Court recalled the idea that the consumer is in a weak position towards the trader as regards both his bargaining power and his level of knowledge.[56] As a consequence, consumers agree to the terms drawn up in advance by the trader without being able to influence the content of those terms. The Court referred to Article 6 of Directive 93/13/EEC, which provides that unfair terms shall, as provided for under the national law, not be binding for the consumer and stated that the aim of this provision is to replace the formal balance of the contracting parties and to re-establish equality between them.[57] At the same time, the Court said that the extension of the effects of an injunction to all consumers is justified due to the deterrent nature and dissuasive purpose of the action for an injunction.[58] Therefore, the Court adjudicated that the declaration of invalidity of an unfair contract term effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same

[54] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJEC no. L95/29.

[55] Judgement of the Court of Justice of the European Union dated 26 April 2012, C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*, ECLI:EU:C:2012:242.

[56] *Ibidem*, para. 33

[57] *Ibidem*, para. 34

[58] *Ibidem*, para. 37.

terms apply, including those consumers who were not party to the injunction proceedings.[59]

Moreover, Court stated that Directive 93/13/EEC does not preclude '(…) where the unfair nature of a term in the general business conditions has been acknowledged in such proceedings, national courts are required, of their own motion, and also with regard to the future, to take such action thereon as is provided for by national law in order to ensure that the consumers who have concluded a contract (…) will not be bound by that term.'[60] By virtue of the above, the Court approved of the extension of *res judicata* of the decision on the declaration of unfairness of a contract term to consumers who are not party to the proceedings. However, it is pointed out in literature on the subject that the Court imposed the obligation on national courts to recognise *pro futuro* the effect of the declaration of unfairness only to those Member States that recognise the *erga omnes* effect of an injunction (Keirsblick, 2013, p. 1473).

The question of the extension of the legal effects of an injunction order as regards other parties was also discussed by the Court in the case C-119/15 *Partner*.[61] The judgement was issued as a consequence of a reference for a preliminary ruling requested by a Polish court. The referring court asked whether a judicial decision, having the force of law, which declared the contract terms unlawful and, as a result, had them entered into the register of unlawful standard contract terms, can have the effect not only on the trader being a party to the proceedings, but also in relation to other traders who use identical unlawful standard contract terms. In the case in question, the Polish court adjudicated on the appeal of Biuro Partner against the decision of the President of the Office of Competition and Consumer Protection (hereinafter: UOKiK) issued in an administrative procedure (the original UOKiK decision was upheld by the court of first instance). In the administrative decision the President of UOKiK found that Biuro Partner in its standard conditions of business used terms which were considered equivalent to terms previously declared unlawful, and consequently entered into the public register of unfair terms. The President of UOKiK stated that those terms harmed collective interests of consumers and imposed a fine on the company. The Polish court had doubts as to such decision since Biuro Partner did not participate in the proceedings in which the standard terms were declared unlawful and consequently entered into the public register.

The Court, however, stated that the extended effect of the entry into the public register of unfair terms does not contradict EU law on the condition

[59] *Ibidem*, para. 44.

[60] *Ibidem*.

[61] Judgement of the Court of Justice of the European Union dated 21 December 2016, C-119/15 *Biuro podróży 'Partner' sp. z o.o. sp. k. v., Prezes UOKiK*, ECLI:EU:C:2016:987.

that the trader is vested with the relevant procedural guarantees.[62] The main requirement here is to ensure that the trader has an effective judicial remedy both against the decision declaring that the terms are equivalent to the terms entered into the said register (in terms of the question whether those terms are substantively identical and having regard in particular to their harmful effects for consumers) and against the decision stating the amount of the fine imposed.[63]

Applying the reasoning presented by the Court in the cases *Invitel* and *Partner*, it may be argued that the extension of the effects of an injunction order both on all consumers affected by the unfair contract terms and on the traders who use such terms in consumer contracts is welcome at the EU level. However, it should be noted that the decision regarding legal effects of the injunction is left at the discretion of Members States. In both cases, the Court does not impose the obligation on the Member States to recognise the *erga omnes* effect of an injunction order, but it states that such wording of the national law does not contradict EU law (Wyżykowski, 2018, p. 114–115).

4. Limited spectrum of legal remedies

The only legal consequence of the injunction procedure available under Directive 2009/22/EC is the prohibition to continue the infringement by the trader. The Directive does not provide any further remedies which would remove the consequences of the infringement of consumer rights. The European Commission emphasises that '(…) as a general rule, the injunction procedure introduced by the Directive does not enable consumers who have suffered harm because of an illicit practice to obtain compensation.'[64]

In my view, this limited effect of the injunction procedure designed by Directive 2009/22/EC on consumer redress possibilities constitutes the main problem which hampers the effectiveness of the mechanism in question. The fact that consumers cannot seek compensation together with seeking an injunction and, therefore, are forced to commence separate proceedings poses unnecessary litigation risks and increases costs not only for consumers but also for the whole justice system. It also discourages consumers from pursuing their claims collectively since even a successful action for an injunction may not result in positive financial implications.

It is reported that in most Member States consumers cannot rely on injunction orders and in order to claim compensation they have to bring

[62] *Ibidem*, para. 47
[63] *Ibidem*, para.
[64] Report on the application of Directive 2009/22/EC (2012), p. 9.

a separate claim for damages (either individually or collectively).[65] In many Member States, the courts which adjudicate compensation claims are not bound by a previous injunction order.[66] Consumers have to prove the infringement (anew), to prove the damage and – finally – the link between the infringement and the damage. Only in some Member States, consumers are able to rely on injunction orders in their follow-on action for compensation where they then have to prove only the amount of the damage suffered.[67]

V. Change for the better? Proposal for a Directive on representative actions

Outcomes revealed in the report on the implementation of the Commission Recommendation 2013/396/EU published in 2018 confirmed the concerns articulated by some scholars as regards abidance of the safeguards provided in Recommendation 2013/396/EU (Stadler, 2013, p. 488; Sorabji, 2014, p. 75; Hodges, 2014, p. 78; Howells, 2017; electronic resource, Money-Kyrle, 2016, p. 251). It leaves no doubt that the non-binding instrument is not a sufficient tool to provide procedural coherence and therefore to ensure a homogenous landscape of collective redress in the EU. Although the Commission recommended for all Member States to have collective redress mechanisms at the national level, for both injunctive and compensatory relief, nine Member States did not introduce mechanisms for compensatory collective claims.[68] On the other hand, it was also clear that the procedural mechanism provided in Directive 2009/22/EC – action for an injunction – is not by itself a sufficient instrument to enforce consumer rights. Keeping in mind the above mentioned lack of legislation in this field at the national level on the one hand, and being aware of the problems hampering the effectiveness of the injunction procedure as designed by Directive 2009/22/EC on the other, the European Commission commenced works on new legislation which allows to modernise and complement the existing system of the protection of collective interests of consumers in the EU.

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[65] Report on the implementation of the Commission Recommendation 2013/396/EU (2018), p. 18.

[66] *Ibidem.*

[67] The Commission Report (2018) revealed that 'In Denmark, Belgium and Italy it is possible to rely on an injunctions decision in a follow-on collective action in consumer law cases (…) In Netherlands follow-on actions are possible not as a matter of law but rather of practice.'

[68] Report on the implementation of the Commission Recommendation 2013/396/EU (2018), p. 3.

As a result, in the Proposal for a Directive on representative actions, the Commission tries to combine the procedural mechanisms existing in Directive 2009/22/EC (that is, the action for an injunction) and mechanisms which, due to a political consensus, were finally included in Recommendation 2013/396/EU, namely the action for compensation. In this sense, one may say that the Proposal for a Directive on representative actions constitutes a continuum of the concept which due to political resistance has so far never been included in a binding act.

As far as the form of collective redress is concerned, the works resulted in the Commission proposing an act which follows the same patterns as Directive 2009/22/EC. The proposed Directive on representative actions is based upon the old structure, namely the principle according to which Member States designate their qualified entities to represent the collective interests of consumers. Such procedural mechanism, which under Directive 2009/22/EC exists in relation to injunctions, was proposed by the Commission already in 2008 in relation to compensatory collective claims in the field of antitrust law,[69] unfortunately without success. Similarly, as it is regulated in existing legislation, in the proposed act representative entities may bring representative actions in the case of a violation of rights granted in EU consumer law, listed in the Attachment to the Proposal. It also keeps the freedom of choice given to Member States with regard to the decision on the procedure of bringing representative actions. Legal remedies can be claimed within judicial or administrative proceedings or both, depending on the field of law or business sector.

The main difference between both acts consists of the extension of the redress measures which may be claimed by the qualified entities on behalf of consumers. According to the Proposal, different remedies can be sought within one representative action, or many different actions. In addition to the existing possibility to seek an injunction order (but in the extended scope, also as an interim measure), the Proposal provides for the possibility to seek compensatory redress also. This is why the Proposal shall be also examined as a continuum of the provisions set forth in the non-binding Recommendation 2013/396/EU. Due to the extension of the scope of the proposed act – I believe – the terminology has been changed in the Proposal: the existing term 'action for an injunction for the protection of consumers' collective interests' designed by the directive 2009/22/EC is going to be replaced by the term 'representative action', which according to the definition of collective redress used in Recommendation 2013/396/EU refers to both injunctive and collective redress.[70] It is worth considering, whether the proposed act does answer the

[69] European Commission, White paper (2008), *op. cit.*, p. 4.
[70] Recommendation 2013/396/EU point II 3a.

problems which have hindered the effectiveness of Directive 2009/22/EC, as discussed above.

1. Cross-border representative actions

The proposed Directive for representative actions keeps the model of cross-border representative actions, which permits qualified entities from Member State A to apply to the courts or administrative authorities in Member State B if the traders from B are in breach of consumer law while trading with consumers from Member State A.[71] Exactly the same way as it is under Directive 2009/22/EC, Member States would have to present to the Commission a list of qualified entities, designated in advance.

Notably, no specific procedure for cross-border representative actions has been proposed. Lack of regulation in this respect implies for the qualified entities the necessity to get acquainted with the relevant legal regulations of another Member State (judicial or administrative, depending on the legal order of the Member States). Exactly the same way as it is practised under the current law, it will entail some financial consequences, namely the qualified entity must bear the costs of the preparation of the claim, court fees, remuneration of the lawyers from different jurisdictions, or costs of translation. Additionally, one may expect that bringing cross-border claims will be hindered by uncertainty as for the choice of applicable law governing the dispute in point. The Proposal of the Directive for representative actions does not provide or refer to any private international law rules regarding the competent courts, the recognition and enforcement of the judgements or choice of applicable law and it does not refer to any other act of EU law (Biard, 2018, p. 201). Leaving this area unregulated, the Proposal follows the old pattern set in Recommendation 2013/396/EU (Stadler, 2013, p. 484).

The legal situation of consumers can be even more complex in case of representative actions brought by the same qualified entity for the protection of collective interests of consumers from different Member States. The Proposal provides for the possibility to bring an action by a single qualified entity on behalf of the consumers from different Member States affected (or likely to be affected) by the same infringement, committed by a trader. Such cross-border action may also be brought to the competent court or administrative authority by several representative authorities acting jointly. Although the idea of the introduction of the possibility to commence such proceedings is – indeed – justified by the need of ensuring the effectiveness of the procedure, the lack

[71] Proposal for a Directive on representative actions, *op. cit.*, Art. 16.

of any guidance as to the course of such cross-border proceedings is very surprising, since it will certainly pose many legal difficulties.

2. Legal costs and financing the qualified entities

Another obstacle hampering the effectiveness of the injunction procedure in its current shape is caused by high costs of proceedings commenced by the action for an injunction. Under the current Proposal, this problem seems to be unsolved. On the one hand, the Proposal states that Member States shall ensure that that procedural costs related to representative actions shall not constitute financial obstacles to the qualified entities, and this shall be achieved by limiting the costs of judicial and administrative proceedings, granting access to legal aid and providing the entities with public funding.[72] On the other hand, however, the proposed Directive left it to the discretion of Member States to regulate the amount of costs of the injunction proceedings. According to the Proposal, this act should not affect the national rules concerning the allocation of procedural costs.[73]

It's worth noting that the legal framework proposed still applies the principle according to which the costs of the injunction procedure are to be borne by the qualified entity bringing representative action. At the same time, the Proposal states that the procedural costs of the proceedings shall not prevent the qualified entities from effectively exercising the right to seek redress. Although the Proposal does not regulate this question directly, it gives some guidance as regards the possibility of funding of the qualified entities.

An interesting innovation introduced in the Proposal for a Directive on representative actions is the possibility to finance the activity of the qualified entities from the private sector, among other things, from the business environment. Member States may decide whether the qualified entities financed by third parties will be allowed to seek all the redress measures available (including compensatory collective redress) or only some of them. As regards the entities seeking compensatory collective redress, the EU legislator provides for an additional obligation to declare the source of the funds used for its activity in general and the funds that it uses to support the action.[74] Additionally, the qualified entities have to demonstrate that they have sufficient financial resources to meet any adverse costs should the action fail. At the same time, the Proposal prohibits third party funding in case of

[72] *Ibidem*, Art. 15.
[73] *Ibidem*, rec. 4.
[74] *Ibidem*, Art. 7.

actions brought against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependent.

3. Duration of the proceedings

Following the need to ensure effectiveness of the proceedings, the EU legislator provides that representative actions shall be treated with due expediency.[75] By way of exception, a representative action for an injunction order in the form of interim measure shall be treated according to an accelerated procedure. The purpose of this procedure is to ensure that any further harm that may be caused by a trader's practice subject to representative action may be prevented as quickly as possible.[76] However, the legislator does not provide for any guidance as to the course of those proceedings and it does not provide any difference between both types. There being no precise regulations in this respect, it is doubtful whether it will constitute a turning point making it possible to shorten the time of the proceedings.

4. Extended scope of application

The proposed Directive extends the scope of the application of representative actions on two fields. Firstly, the projected mechanism shall cover a variety of areas, such as data protection, financial services, travel and tourism, energy, telecommunication and environment.[77] The *ratio legis* for such solution is to cover the infringements of EU law protecting the interests of consumers, regardless of whether they are referred to as travellers, users, customers, retail investors, retail clients or another in the relevant EU law.[78] Therefore, Attachment No. 1 to the Proposal of a Directive, listing EU legal acts relevant for the protection of collective interests of consumers, was updated and extended, compared to the one, attached to Directive 2009/22/EC.

Secondly, the Proposal extends the redress measures which may be sought by the qualified entities within one or many proceedings. Following the pattern of Directive 2009/22/EC, the Proposal provides that the qualified entities may seek an injunction order (interim or definite measure) in order to stop or

[75] *Ibidem*, Art. 12.

[76] Explanatory Memorandum to the Proposal for a directive on representative actions, *op. cit.*, point. 5.

[77] Proposal for a directive on representative actions, *op. cit.*, rec. 6.

[78] *Ibidem.*

prohibit the trader's practice.[79] The significant change, however, is caused by introducing a different measure, aiming at the elimination of the continuing effect of infringement. In this respect the Proposal provides for the possibility to seek compensatory redress, or – in line with the terminology used in the Proposal – representative actions for compensation. In the redress order, a trader may be obliged to provide for, among other things, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (compensatory redress mechanisms).[80] It goes without saying that the introduction of the possibility to seek compensation constitutes the most important legislative change which shall result in an increase of the number of actions brought on behalf of consumers.

The proposed act introduced the principle according to which proceedings initiated by collective actions for compensation, which were adjudicated in favour of consumers, shall be finalised with a redress order. Only under special circumstances – instead of a redress order – the court or administrative body may issue a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of EU law. This discretion is granted only in duly justified cases where, due to the characteristics of the individual harm to consumers concerned, the quantification of individual redress is complex and thus ineffective to be quantized within representative action.[81] Such declaratory decision may be directly relied upon in subsequent redress actions (both in individual and collective actions).[82]

The possibility to issue a declaratory decision is strictly excluded in two cases which regard mass harm situations.[83] The first relates to cases where the consumers concerned by the infringement are identifiable and they suffered harm which is comparable to the one caused by the same practice with regard to the period of time or a purchase.[84] The second one concerns cases where consumers suffered an insignificant loss and it would be disproportionate to distribute the redress to them.[85] In such cases, the redress shall be diverted to public purposes serving the collective interests of consumers, such as awareness campaigns, consumer legal aid funds or consumer movements.[86]

[79] Proposal for a directive on representative actions, *op. cit.*, Art. 5.

[80] Proposal for a directive on representative actions, *op. cit*., Art. 6.

[81] Proposal for a directive on representative actions, *op. cit.*, Art. 5.

[82] Explanatory Memorandum to the Proposal for a directive on representative actions, *op. cit.*, point 1.

[83] *Ibidem*.

[84] Proposal for a directive on representative actions, *op. cit.*, Art. 5.

[85] *Ibidem.*

[86] Proposal for a directive on representative actions, *op. cit.*, rec. 21.

V. Evaluation of the changes proposed

It seems to be indisputable that a modification of the existing system of collective redress for consumers is to be welcomed. It remains doubtful, however, whether the changes proposed by the Commission will really contribute to the modernisation of this system. The idea of including compensatory collective redress in the EU system is definitely one of the most vital and positive amendments proposed by the Commission. One may expect that the possibility to seek compensation collectively will motivate consumers to enforce their rights towards traders. However, as it is demonstrated in the paper, the idea to include compensatory collective redress in the binding legal instrument is not entirely new and over the years was highly controversial, mainly due to the strong resistance from the business sector and some Member States. Thus, reaching a consensus as regard the European framework for collective redress in the shape as proposed by the Commission seems to remain questionable.

It shall be also noted that bearing in mind that consumers are not willing to bear the costs of the proceedings, the qualified entities must be equipped with appropriate funds used for their activity. To this end, the possibility of third-party funding seems to be promising. One may say that, contrary to the Commission's claims, inflow of third-party capital will bring 'representative actions, European way'[87] somehow closer to the U.S. class action style in that sense that the proceedings might be financed by the business sector. Therefore, the question of the control of the source of the funds must be regulated in more detail in order to prevent third party traders from providing financing for collective actions against their competitors or dependant entities. Otherwise, third party funding can result in abusive or frivolous litigation, feared by the Commission.

Moreover, it is surprising that while being aware of many problems arising out of the application of Directive 2009/22/EC, and caused by its vagueness, these issues were not addressed by the Commission in the proposed legislation. Under the Proposal, the question of the length and costs of injunction proceedings seems to be unregulated. Similarly, the difficulties relating to cross-border proceedings remain unsolved.

Quite in the same spirit, it shall be criticised that the margin of appreciation left to Member States is so wide. This issue is not new and has been raised already in relation to the safeguards contained in Recommendation 2013/396/EU, which allows Member States for many exemptions (Hodges, 2014, p. 78). Perhaps the most vivid example here is leaving the choice to the

[87] European Commission, press release: http://europa.eu/rapid/press-release_IP-18-3041_en.htm, accessed: 08.06.2019.

Member States as regards the system of joining the group. The Proposal for a Directive on representative actions does not specify whether it should be the opt-in, opt-out or a mixed system. In my view, leaving this crucial point to the discretion of Member States excludes the possibility of the creation of a coherent system of collective redress at the EU level. This – in turn – may bring some doubts with regard to the enforcement of injunctive orders issued in the course of injunction proceedings at the EU level. It is a commonly known fact that better coherence implies better enforcement of the law. However, it may be argued that instead of specific solutions in this respect, the Commission should go further than issuing vague declarations.

Keeping in mind all of the above mentioned, it seems to be doubtful whether the current Proposal for a Directive on representative action will significantly improve the European landscape of collective redress and strengthen the mechanism for the protection of collective consumer interests.

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Cumulative Enforcement of European and National Competition Law and the *Ne Bis In Idem* Principle

Case Comment to the Judgement of EU Court of Justice of 3 April 2019 *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów* (Case C-617/17)

by

Mario Libertini*

CONTENTS

Abstract

The judgement of EU Court of Justice in response to the request for a preliminary ruling by the Polish Supreme Court confirms that the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national competition authority

* Mario Libertini is emeritus professor of Business Law in the Law Department of "Sapienza" University of Rome; mlibertini@liblex.it. Article received: 18 June 2019; accepted: 3 July 2019.

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from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC (now Article 102 TFEU). In that regard it can be concluded that the judgement does not have anything new and is just a confirmation of settled case-law. Unfortunately, this case represents a lost opportunity to review the 'double barrier' doctrine and to clarify if the relationship between European and national competition law is one of 'bilateral specialty' or not.

Résumé

L'arrêt de la Cour de justice de l'Union européenne en réponse à la demande de décision préjudicielle de la Cour suprême polonaise confirme que le principe *ne bis in idem*, consacré à l'article 50 de la Charte des droits fondamentaux de l'Union européenne, doit être interprété en ce sens qu'il ne s'oppose pas à ce qu'une autorité nationale de concurrence inflige une amende à une entreprise dans une décision unique pour infraction au droit national de la concurrence et pour infraction à l'article 82 CE (devenu article 102 TFUE). A cet égard, on peut conclure que l'arrêt ne comporte rien de nouveau et ne constitue qu'une confirmation d'une jurisprudence constante. Malheureusement, cette affaire représente une occasion manquée de revoir la doctrine de la «double barrière» et de clarifier si la relation entre le droit européen et national de la concurrence est une «spécialité bilatérale» ou pas.

Key words: *ne bis in idem* principle; objectives of EU competition law, objectives of national competition laws.

JEL: K21, K38

I. Introduction

In the decision at hand[1] the EU Court of Justice stated that the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national competition authority from fining an undertaking in a single decision for both an infringement of national competition law and an infringement of Article 82 EC (now Article 102 TFEU). In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement.

[1] EU Court of Justice, 4th Chamber, 3 April 2019, C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów.*

Apart from some problems of interpretation of this judgement in itself, it should be noted, above all, that it eluded the questions posed by the Polish Supreme Court. Specifically, the question of whether

> '*the rules of EU competition law and of national competition law which are applied in parallel by the competition authority of a Member State protect the same legal interest*'.

II. The application of EC competition rules before Regulation EC/1/2003

Just to frame the problem, we have to take as a basis the traditional principle of the 'double barrier' in antitrust matters, now established in all national laws of the Member States of the EU (see, for a comprehensive and updated examination of the issue, Filippelli, 2018, pp. 512 ff; see also Tome' Feteira, 2015, in particular § 2.04).[2] According to this principle, National Competition Authorities (hereinafter: NCAs) could apply in parallel, to the same facts, European and national competition rules.

In fact, the original reason of the 'double barrier principle' can now be questioned. At the beginning of European competition law, some Member States (first of all, Germany) could believe that their competition national laws were more detailed and more effective than the European ones. In particular, there was the concern that the European Community could implement competition rules only as a means of building a common internal market, focusing its intervention against agreements aimed to artificially reconstruct boundaries between national markets, but could neglect other important cases of anti-competitive practices and, in particular, the issue of the trade within Member States. In other terms, the original inspiration of the double-barrier principle was that of recognizing a true system of 'crossed vetoes', in order to achieve a more effective contrast to anti-competitive practices. Indeed, at the roots of the question there was also a residual spirit of 'sovereignism' (or at least national pride) of some Member States.

Anyway, the Court of Justice, with the *Wilhelm* decision of 1969,[3] downsized the original inspiration of the double barrier principle. In this famous decision, the Court stated, in the field of competition law, the principle of the primacy of EC law (since then generalized with the *Simmenthal* case in 1978). In

[2] Until a few years ago, two Member States (Italy and Luxembourg) applied the opposite principle of the "single barrier", avoiding a cumulative application of European and national competition laws. Nevertheless, for a "spirit of emulation", also these States (Italy for last, in 2017) complied their internal competition rules with the standard solution of the double barrier.

[3] EC Court of Justice, 13 February 1969, C-14/68, *Walt Wilhelm and others v. Bundeskartellamt.*

fact, the Court admitted the possibility of concurrent proceedings before the Commission and the NCA, respectively in application of European and national antitrust law, but

> '*subject to the condition that the application of the national law must not prejudice the full and uniform application of Community law or the effects of measures taken to implement it*'.

The *Wilhelm* decision did not consider the case of the cumulative application of European and national antitrust law by an authority of a Member State. In fact, at the time the direct application of European antitrust law by the national authorities was still not a general rule (as it became with the Regulation 1/2003), but a faculty left to the single Member States (according to the current interpretation of Article 9.3 Regulation CE/17/62).[4] Nevertheless, the *Wilhelm* decision contained an implicit statement, by which, in case of cumulative application of EC and national competition rules, an NCA would have to apply the national rules only to the extent they could supplement the EC law without prejudice to its '*full and uniform application*'.

The statement of the Court about the '*full and uniform application*' implied that the primacy of European antitrust law not only involved the compliance with European prohibitions, but also compliance with European exemptions, included block exemptions.[5]

In its decision, the Court emphasized the elimination of the obstacles to the trade between Member States as a central issue of EC competition law. Therefore,

> '*where it is established that an agreement is not covered by the prohibition laid down in Article 85 (1) because it is not likely appreciably to affect trade between Member States, a Member State, and consequently the courts and tribunals of that State, is free to apply its more severe legislation thereon*'.[6]

At that time, it was generally believed that the sole goal of EC competition law was that of protecting the freedom of trade, in order to create a single market, while any other goals of competition policy could be pursued separately by national laws. However, the evolution that occurred in European competition law in the last 50 years led to overcome such a conception (see, on this point, the essays collected in Ullrich 2006). The focus has rather been put, on the one hand, on the goals of antitrust law (more economic approach, consumer welfare, dynamic efficiency and so on), under the influence of

[4] In Italy, for example, this faculty was practiced by a specific statute in 1996.

[5] EC Court of Justice, 10 July 1980, in joined cases C-253/78, 1-3/79, *Guerlain and others*, § 17.

[6] S. the decision above quoted (fn. 5), point 8, let. *(a)*.

the international debate (see, Libertini, 2017), and, on the other hand, on the aim to achieve a uniform development of antitrust law all over the EU territory.

III. The application of EC competition rules under Regulation EC/1/2003

In particular, the Regulation EC/1/2003 provides the direct application of EC competition rules by national (administrative and judicial) authorities. Moreover, it (Article 1.2) provides the automatic exemption for '*the agreements which satisfy the conditions of Article 81(3)* [now 101.3] *of the Treaty*', with consequent 'full and uniform' application of this exemption by the national authorities. Further, Article 3.2 states that

> '*The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*'.

Therefore, Regulation 1/2003 provides a rule of full convergence in the enforcement of European law against cartels having European relevance (that is, '*which may affect trade between Member States*'). In other terms, the 'effect on trade between member States' constitutes a materiality threshold for the application of European antitrust rules, rather than as the main purpose of European competition policy or, even less, as an element marking the distinction between EU and national antitrust policy against cartels.

Instead, as to unilateral conducts, the Regulation does not preclude the application of more severe national rules. This raises an interpretative problem: can national rules be applied even when they contrast with the European ones (in other terms: in a frame of 'crossed vetoes') or should they apply only when they *integrate* the European provisions?

In my opinion, the right response is the last one (see also Filippelli, 2018, p. 527). In fact, EU competition law has evolved along a trajectory of a full consistency between European and national competition rules. This is quite evident if one considers – in addition to the soft law sources – the antitrust damages directive (EU/2014/14) and, above all, the ECN+ directive (EU/2019/1), expressly meant:

'*to ensure a truly common competition enforcement in the Union that provides a more even level playing field for undertakings operating in the internal market and reduces unequal conditions for consumers*'.[7]

The same trend may be inferred from some declarations of principle in TFEU.[8]

With this in mind, it should be reasonable to conclude that:

a) for bi- or multilateral conducts (Article 101 TFEU) there are no exceptions to the full and uniform application of Article 101 for all conducts '*which may affect trade between Member States*'; national rules can apply only for minor conducts which may not affect the trade between Member States;
b) for unilateral conducts, it is above all confirmed the full and uniform application of Article 102 for conducts '*which may affect trade between Member States*' (including the possibility that the conduct is justified on the ground of gains of efficiency in the relevant market, with similar criteria to those laid down in Article 101.3[9]). However, it is possible that the national law prohibits some unilateral conducts (also having European dimension) considered unfair, but not covered by the prohibition of abuse of dominant position (in particular, conducts consisting of abuse of contractual power).

Until 2017,[10] these were the rules provided by Italian law. A principle of 'single barrier' applied (that is, the alternative application of European or national antitrust law, depending on the fact whether the conduct may affect or not the trade between Member States). Nevertheless, for unilateral conducts, there were (and still are) some prohibitions regarding abuses of contractual power (abuse of economic dependence,[11] abuse in contractual relationships in the agri-food sector[12]).

After the introduction of the generally accepted principle of the 'double barrier', the Italian public enforcement practice indeed has not changed. Usually, there are no cases of double assessment of infractions or double fines by the NCA (see also: Filippelli, 2018).

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[7] Dir. EU/2019/1 of 11 Dec. 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, § (8). The Directive covers the application of European rules by NCA, the parallel application of European and national law and also the application of national competition law on a stand-alone basis (Art. 1.2).

[8] See Art. 119.1, Art. 120, Prot. 27 T.F.E.U.

[9] S. *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02, § 28 ff.

[10] S. Art. 17 Legislative Decree 19 Jan. 2017, n. 3, which modified Art. 1 of L. 287/1990.

[11] Art. 9, Law 18 June 1998, n. 192.

[12] Art. 62, Decree-Law 24 Jan. 2012, n. 1, converted in Law 24 March 2012, n. 27.

IV. The common objectives of European and National competition laws

In fact, the cumulative application of European and national competition laws is consistent with the idea that these pursue different purposes. This assumption was possible in the framework of the 'original' thesis of the double barrier, when it won over the thesis that the two different bodies of law pursued different purposes – respectively, free trade between Member States or within a Member State (see also Tome' Feteira, 2015). But this assumption could not be consistent with the actual aims of European competition law: today, it is generally recognized that both sets of rules (European and national) share the same basic objective of promoting consumer welfare and the efficiency of the markets (an efficient allocation of resources and dynamic efficiency). The pursuit by national competition laws of specific goals (as, for example, defence of 'national champions', allowance of crisis cartels or protection of pluralism in itself) would conflict with the principle of full and uniform application of European law.

In sum, there is no room and no true reason for a double assessment of infraction to European and national competition laws and more for a double fine.

It remains, surely, the possibility of autonomous national prohibitions of unilateral conducts consisting in the abuse of contractual power. However, this possibility does not lead to a double fine, but to an exclusive application of a national prohibition in a field not covered by European Law.

V. The essence of the request for a preliminary ruling by the Polish Supreme Court

In this context, the Polish Supreme Court, facing a case of double fine in antitrust matters, intelligently raised two questions that should have led the Court of Justice to an in-depth review of the whole 'double barrier' issue.

Really, the questions were about the meaning of the *ne bis in idem* principle in Article 50 of the Charter of EU Fundamental Rights and were so formulated:

(i) '*Can Article 50 of the [Charter] be interpreted as meaning that the application of the* ne bis in idem *principle presupposes not only that the offender and the facts are the same but also that the legal interest protected is the same?*'

(ii) 'Is Article 3 Regulation [N° 1/2003], read in conjunction with Article 50 of the [Charter], to be interpreted as meaning that the rules of EU competition law and national competition law which are applied by the competition authority of a Member State protect the same legal interest?'.

The question (i) is a quite rhetorical one. If the same conduct violates two different statutory provisions, protecting different legal interests, there is, according to the general principles of criminal law (see, for example, Palombino, 2016, 89 ff) (and the 'common legal heritage' of the EU), an *ideal* concurrence of offences and the author of the conduct must suffer two penalties, even though the criminal laws generally provide some criteria mitigating the mere accumulation of sanctions.[13] In other terms, there is no room for the application of the *ne bis in idem* principle. On the contrary, if the same conduct violates two different statutory provisions, protecting the same interest, there is an *apparent* concurrence of offences and the guilty will suffer only one sanction, according to the specialty principle. In other terms, the 'substantial' *ne bis in idem* principle will have full application.

Following this traditional approach, the Court should have given a positive response to the first question and should have made an in-depth analysis of the problem of the uniformity (or not) of the interests protected respectively by European and national competition laws. (In my opinion, the right response should be that both these laws pursue the same interest – namely efficiency of markets and consumer's welfare – so that the 'substantial' *ne bis in idem* principle should be applied. Therefore, the subsydiarity principle imposes the exclusive application of European rules, when the conducts influence the competitive process at a European, and not merely national, level. In this case it needs to have a full and uniform application of European competition law, without any exception grounded on national law).

VI. The *ne bis in idem* principle in the case-law of the ECHR, CJEU and national courts

Unfortunately, the actual application of the specialty principle is, notoriously, far from easy (Palombino, 2016. In Italian, see, above all, Zorzetto, 2010). In most cases, it leads to the recognition of a 'bilateral specialty', that is, an interference between two norms. Taking that into account, the most recent case-law of the ECHR follows a flexible approach to the issue, affirming the possibility of cumulative applications of rules protecting the same legal interest, but conceived as complementary by the national legislator (for example criminal and administrative sanctions in proceedings having '*a sufficiently close connection in substance and time*'). However, in those cases the total amount of penalties must comply with the proportionality principle.[14] In other words,

[13] For example, Art. 81 Italian Criminal Code provides that, in case of ideal concurrence of offences, the guilty will suffer the penalty provided for the more serious crime, increased of a third.

[14] European Court of Human Rights, Grand Chamber, 15 Nov. 2016, n. 34130/11, *A a. B v. Norway;* Sec. I, 8 Nov. 2018, n. 19120/15, *Seražin v. Croatia.* The same criteria are applied

the *ne bis in idem* is declined, basically, in a new 'substantial' version. The main issue becomes not the solution of a conflict between norms sanctioning the same conducts, but rather to avoid that different proceedings, founded on different but complementary norms regarding the same facts and the same interests, could lead to an outcome of overdeterrence, contrasting with the proportionality principle.

The case law of the Court of Justice is not very clear in affirming the same criteria and could appear as following a case-by-case approach, but in more recent case-law greater prominence is given to the idea that '*the new aim of the* ne bis in idem *principle is that of ensure overall a proportionate penalty*' (Felisatti, 2018, 121 ff., at p. 141, where a precise analysis of the most recent decisions of the CJEU on these topics can be found).

The national judges, at least in Italy, fully welcomed this approach to the *ne bis in idem* principle in the key of the proportionality principle[15] and follow regularly a 'double track' principle in case of 'complementary' criminal and administrative sanctions (for example in fiscal and in financial matter).The Italian Civil Supreme Court followed the same normative model (cumulative application tempered by the proportionality principle) in order to resolve a long standing problem in Italy: that of the court having jurisdiction over the liability of directors in state-owned companies, in particular providing in house companies (if the civil Tribunal or the Court of Accounting) (see Cass. civ., Sezioni Unite [Grand Chamber], 13 September 2018, n. 22406; for critical comment: Briguglio, 2019).

Nevertheless, the ECHR in the meantime has specified its approach. In the most recent cases (ECHR, sec. II, 16 April 2019, Bjarni Ármansson v. Iceland; ECHR, sec. V, 6 June 2019, Nodet v. France. About this case see the comment: Scoletta, 2019), the ECHR required a strict procedural link between the two proceedings and strengthened the requirement of 'complementarity'. This requirement involves that there is not a full identity between the interests protected by two different norms.

VII. The *ne bis in idem* principle and the proportionality principle

This trend in the interpretation of the *ne bis in idem* principle in connection with the proportionality principle is, in my opinion, quite reasonable.

by the Italian "Cassazione penale" (Italian Criminal Supreme Court), Sec. III, 14 Feb. 2018, n. 6993.

[15] See different judgements of the Italian Criminal Supreme Court, in *Foro italiano*, 2019, II, 279 ff., with a critical comment by G. De Marzo.

Considering the frequent occurrence of 'bilateral specialty' between norms, it is normally hard, in these cases, to choose the prevailing norm. The sole thinkable criterion could be a hierarchical one. Specifically, the statement of a hierarchy of values (or a hierarchy of legal interests). However, the application of a similar criterion would result in great uncertainty and could often lead to arbitrary outcomes. By contrast, the cumulative application of the two norms, tempered by the proportionality principle in order to weigh the penalties, leads, in practical terms, to acceptable results.

It should be noted, however, that this assumption sounds reasonable as long as there is a bilateral specialty between two interfering norms. Conversely, in case of full overlapping between two parallel norms (same facts and same protected interests) or in case of 'unilateral' specialty, the substantial *ne bis in idem* principle should be still applied. I think that the possible 'close connection' between two punitive proceedings cannot justify a double (although proportionate in outcome) sanction, unless the different proceedings are intended to protect complementary, but non identical, legal interests.

I don't know if this will be the final approach of the ECHR and of the CJEU on this evolving matter. In any case, I believe this should be the rational outcome of the discussion.

VIII. The essence of the CJEU ruling in Case C-617/17

In the decision at hand, the Court – according to the general consent towards the 'double barrier' doctrine – takes for granted the possibility of parallel application of European and national competition laws. In particular, the judgement repeats the commonplace whereby

> '*Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide*'.[16]

On this basis, it is easy to extend to competition law the reported judicial trend conducive to the cumulative application of interfering norms, tempered by the proportionality principle. Moreover, the fact that the same authority will apply both sets of rules makes it easy to acknowledge a 'close connection' between the two proceedings.

[16] The decision at hand quotes, such as most recent, EU Court of Justice, Grand Chamber, 14 February 2012, C-17/10, *Toshiba* (§ 81), where many other quotations.

On the other hand, this conclusion is not really new, in the field of European antitrust law. In fact, already in the leading case (*Wilhelm*[17]), the Court stated that

> '*If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice, such as that expressed at the end of the second paragraph of Article 90 of the ECSC Treaty, demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed*'.

Today, the (slightly *naïve*) reference to 'natural justice' and the (somewhat forced) reference to the former Article 90 of the ECSC Treaty, have been substituted by the strong reference to the positive 'proportionality principle' of Article 5, al. 4, TEU. However, the substance is practically the same.

IX. Conclusions

That being said, it can be concluded that the judgement at hand does not deliver anything new and is just a confirmation of settled case-law.

Nevertheless, I think that this case represents a lost opportunity to review the 'double barrier' doctrine and to clarify if the relationship between European and national competition law is one of 'bilateral specialty' or not. The question posed by the judge *a quo*, whether the two sets of rules protect the same legal interest or not, would indeed require a specific response in this sense.

The Court implicitly considers to have given a negative response to the second question of the Polish Supreme Court with the reference to the commonplace ('*Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide*'). Nevertheless, the issue of 'different area of application' should logically lead to the result of an alternative, rather than a cumulative, application of the two sets of rules. Instead, the issue of the 'different angle of view' of the same facts could actually lead to recognize a bilateral specialty; however, in reaching this conclusion, it should be acknowledged that the legal interests protected by the two sets of rules are partially identical and partially different. But the Court eluded this question.

Moreover, this conclusion cannot be reached if the only difference between the two sets of rules is that the European ones pose as a requirement of application that the relevant conducts '*may affect trade between Member*

[17] EC Court of Justice, 13 February 1969, C-14/68, *Walt Wilhelm and others v. Bundeskartellamt*, § 11.

States'. This requirement just involves the dimension of markets affected by the conduct, not legal interests protected. When this dimension affects trade between Member States, the current principle is that of 'full and uniform' application of EU antitrust law, so that national laws are prevented to lay down rules conflicting with the European ones. Below this threshold, national law has full application (without prejudice of general principles of EU law).

In other terms, the linear relationship of European and national competition law should be that of separate areas of application, depending on the markets affected by the conduct at issue, under a subsydiarity principle. This relationship is expressly stated for merger control, and should be extended, by way of proper interpretation, to cartels and abuses of dominant position too.

On the contrary, if the two sets of rules would actually protect different legal interests and could have parallel application, in order to ensure the concrete protection of these different interests, double application and double fine should be compulsory, rather than optional (such as it is deemed in the common opinion).

In conclusion, there is room for further discussion about the double barrier doctrine and the *ne bis in idem* principle in European competition law.

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Collective Proceedings for Damages in UK Competition Law
Case Comment to the Judgment *Merricks v Mastercard* [2019] EWCA Civ 674

by

Kathryn McMahon*

CONTENTS

Abstract

Merricks v Mastercard [2019] is the first action under the newly developed 'opt-out' collective proceedings regime for aggregate damages under UK competition law to be considered by the UK Court of Appeal. It is significant for both the level of damages (£14 billion (€16 billion)) and the clarification of the legal test at the certification stage for the suitability for an aggregate award: the method for calculation of the aggregate damages and the sufficiency of evidence. The Court's lowering of these thresholds importantly opens the door to future class actions and reasserts the importance of collective proceedings as a valuable means of redress for competition law infringements. The decision has now been

* Associate Professor, School of Law, University of Warwick, UK. Article received: 9 June 2019; accepted: 1 July 2019.

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appealed to the UK Supreme Court where these issues may be further clarified and resolved.

Résumé

Merricks v Mastercard [2019] est la première action examinée par la Cour d'appel du Royaume-Uni, dans le cadre du nouveau régime de procédure collective «opt-out» récemment mis au point en vertu du droit britannique de la concurrence. Cette action est importante tant pour le niveau des dommages (14 milliards de £; 16 milliards de €) que pour la clarification du test juridique au stade de la certification de l'aptitude à une indemnisation globale: la méthode de calcul du dommage et le caractère suffisant des preuves. L'abaissement de ces seuils par la Cour ouvre la voie à de futurs recours collectifs et réaffirme l'importance des procédures collectives en tant que moyen utile de réparation pour les infractions au droit de la concurrence. La décision a maintenant fait l'objet d'un appel devant la Cour suprême du Royaume-Uni, où ces questions peuvent être clarifiées et résolues.

Key words: UK Competition Law, EU Competition Law, class actions, collective proceedings, certification stage, damages.

JEL: K2, K3, L4, M2

I. Introduction

On the 16 April 2019, the UK Court of Appeal (Patten, Hamblen and Coulson LJJ) allowed an appeal by representative Walter Merricks against a judgment of the UK Competition Appeal Tribunal (hereinafter: CAT) refusing to grant a Collective Proceedings Order (hereinafter: CPO) against three companies in the Mastercard group.[1] Merricks' action seeks to represent an estimated class of 46.2 million people, in an aggregate award of damages worth £14.098 billion (€15.7 billion). Leave has been granted for an appeal of the decision to the UK Supreme Court.

This was the first action under the newly developed 'opt-out' collective proceedings regime for aggregate damages under UK competition law to be considered by the Court of Appeal. The judgment provides an important interpretation of the new legislative regime, in particular the standard of evidence required for a CPO application.[2]

[1] *Merricks v Mastercard* [2019] EWCA Civ 674 (UK Court of Appeal).

[2] In *Gibson v Pride Mobility Products* (2017) CAT 9, the CAT had certified a CPO in a collective action for damages for losses by consumers who bought a scooter from one of

II. The UK legislative regime for collective proceedings

The UK regime for damages permits 'stand-alone' (where the applicant bears the burden of proof for the infringement) or 'follow-on' (the applicant can rely on a previous public or private decision and is relieved of proof of liability)[3] actions to be brought before the CAT or High Court for damages arising under the Competition Act 1998 (CA) (UK) (s47A) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The Consumer Rights Act 2015 (UK) introduced amendments (ss 47B and 47C CA) to allow the bringing of collective proceedings for these damages in the CAT. Section 47B requires that collective proceedings must be commenced by a person who proposes to be the representative (s47B(2)) and may only continue if the Tribunal makes a collective proceedings order (CPO) (s47B(4)).

The Tribunal may make a CPO only if:

> S47B (5)(a) …the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings; and
> (5) (b) in respect of claims which are eligible for inclusion in collective proceedings.
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law...
> (7) A collective proceedings order must include the following matters—
> (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,
> (b) description of a class of persons whose claims are eligible for inclusion in the proceedings.

The eligibility rules for a CPO under s.47B(6) are further incorporated into Rule 77(1)(b) (Competition Appeal Tribunal Rules 2015 (2015 No. 1648) made under s 15 of the Enterprise Act 2002 ('the Rules')) which directs eligibility to be determined in accordance with Rule 79.

Rule 79(1) states:

> (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

eight retailers found to be fixing resale prices in breach of the *Competition Act* 1998 (UK). The case was ultimately withdrawn however due to an error in the economic expert calculation of damages arising from the 'follow-on' action.

[3] The decision is binding proof that the behavior took place and was illegal: Regulation 1/2003, Article 16; Competition Act 1998 (UK), s58A.

(a) are brought on behalf of an identifiable class of persons;
(b) raise common issues; and
(c) are suitable to be brought in collective proceedings.[4]

III. The private right to damages for breach of competition law

EU competition law places importance on the establishment of private rights to damages for loss caused by a breach of competition law.[5] The UK collective damages provisions were introduced to facilitate these actions. These collective proceedings may be brought on an opt-out or opt-in basis. Prior to reform there was no UK direct equivalent of the US 'opt-out' model of class action for competition claims in which one or more parties can bring an action on behalf of a large class matching a particular description which includes absent or unidentified parties, except for those who have expressly chosen not to participate (for a discussion of the purposes and background to the reforms: see: Mulheron and Edlin, 2018, p. 224–227).

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[4] Rule 79 (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
(b) the costs and the benefits of continuing the collective proceedings;
(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
(d) the size and the nature of the class;
(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
(f) whether the claims are suitable for an aggregate award of damages; and
(g) the availability of alternative dispute resolution and any other means of resolving the dispute…

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)— (a)the strength of the claims; and (b)whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

[5] Case C-453/99, *Courage Ltd. v. Crehan*, [2001] ECR I-6297 and Joined cases C-295/04, 297/04 and 298/04 *Manfredi et al.v. Lloyd Adriatico assicurazioni Spa e Assitalia Spa*, [2006] ECR I-6619; Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (EU Damages Directive).

The calculation of damages for breach of competition law is a complex task which is based on a principle of full compensation, including actual loss, loss of profit and interest.[6] Compensation means placing the injured party in the position it would have been in had there been no infringement (which requires consideration of the counterfactual). The calculation requires the estimation of complex economic and statistical data and the use of large datasets, which are both difficult and costly to obtain and analyse. Unlike competitors who may have the incentive and resources to undertake these calculations, consumers are faced with diminished (including rules regarding the disclosure of evidence) and costly access to this asymmetric information.[7]

The proportionality of the costs and burdens on the injured party for the quantification of damages may be relevant to the EU principle of effectiveness. National law must provide an effective remedy which must not render excessively difficult or practically impossible the exercise of rights conferred on individuals. The EU *Damages Directive* (2014) states:

> Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.[8]

The calculation of damages arising from a cartel, the subject of this infringement, includes the 'overcharge' (higher prices, loss of profits) paid by the direct purchaser of the goods or services which were the subject of the cartel and the 'volume effect' (loss of volume of sales).[9] The calculation of the 'overcharge' is based on the counterfactual, an estimate of the non-infringement price compared to the actual price paid by the customer. The calculation can be made on comparator (different product or geographic) markets.[10] The compensation available to the direct purchaser may be fully

[6] Damages do not include overcompensation by punitive, multiple or other damages: EU Damages Directive (2014), recitals 12, 13.

[7] EC, *Quantifying Harm in Actions for Damages Draft Guidance Paper* (June 2011); Communication from the Commission on quantifying harm in actions for damages (2013/C 167/07).

[8] EU Damages Directive, Article 17.

[9] For a 'buyer cartel' there could also be an 'undercharge' for the supplier of the cartel.

[10] European Commission, *Guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser* (2019) (Draft) [5.1] http://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf.

or partially (depending on level of competition and elasticity) passed on to customers, as indirect purchasers.[11]

The collective action in this infringement dealt with the amount of overcharge paid by consumers as indirect purchasers.

IV. The facts in issue in *Merricks v Mastercard*

The action for collective damages arose from a 'follow-on' action from a 19 December 2007 decision by the European Commission against Mastercard under Article 101 TFEU for the setting of a multilateral interchange fee (hereinafter: MIF) which resulted in higher fees being charged between acquiring banks.[12]

The background to the claim was set out by the CAT in its decision of 21 July 2017.

> Mastercard operates what is commonly known as a four party payment card scheme… (1) a cardholder; (2) the cardholder's bank (known as the "Issuing Bank"); (3) a merchant; and (4) the merchant's bank (known as the "Acquiring Bank"). Issuing and Acquiring Banks … must pay fees to Mastercard to participate in the scheme and comply with the Mastercard Scheme Rules.. The Issuing Bank transmits payment to the Acquiring Bank, less a transaction fee known as the interchange fee ("IF"). The Acquiring Bank in turn generally deducts the amount of the IF, along with a fee for its acquiring services, from the payment it makes to the merchant. The total deduction made by the Acquiring Bank from the amount paid to the merchant is called the merchant service charge ("MSC"). However, the IF accounts for the vast majority of the MSC. The Issuing Bank and the Acquiring Bank may have bilaterally agreed the level of IF that will apply to transactions between them, or in some cases they may be the same bank. But except for those situations, the level of the fee defaults to one set by Mastercard. This default fee is known as the multilateral interchange fee: the MIF… (i) where a card issued in one EEA Member State is used at a merchant based in a different EEA Member State, a cross-border MIF applies. This is the EEA MIF … which was the subject of the EC Decision.[13]

The European Commission found that the setting of the EEA MIF by Mastercard constituted a decision of an association of undertakings which had the object or effect of restricting competition in breach of Article 101 TFEU.

[11] EU Damages Directive, Article 12–14.

[12] COMP/34.579 *MasterCard* (2007); European Commission, Commission prohibits MasterCard's intra-EEA Multilateral Interchange Fees, Memo IP/07/1959.

[13] *Merricks v Mastercard* [2017] CAT 16 at [8]–[12] https://www.catribunal.org.uk/sites/default/files/2.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf.

It was considered that the entire cost of the MIF was passed by the Acquiring Banks to merchants as part of the merchant service charge (hereinafter: MSC). Merricks sought the CAT's approval to act as class representative on behalf of all UK residents who between 1992 and 2008 purchased goods or services from businesses in the UK which accepted Mastercard.[14]

V. The requirements for certification of a Collective Proceedings Order (CPO)

The CAT found Merricks was a suitable class representative but refused the CPO for two main reasons:

> …a perceived lack of data to operate the proposed methodology for determining the level of pass-on of the overcharges to consumers and the absence of any plausible means of calculating the loss of individual claimants so as to devise an appropriate method of distributing any aggregate award of damages.[15]

The absence of a method of distribution of the damages award was considered to not be compensatory because it would bear no relation to the actual losses sustained by any individual member of the class.[16]

Section 47B CA requires the CAT to determine the award of a CPO and its decision can only be challenged on judicial review 'if it could be shown that it had misapplied the relevant legal test or had made a decision on the facts before it which no reasonable tribunal, properly directed as to the law, could have reached.'[17]

On judicial review, the Court of Appeal found that the CAT had committed an error of law in applying the wrong test on two issues.

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[14] *Merricks* [2019] EWCA Civ 674 [4]. Merrick's claim also included an additional UK MIF fee deriving from intra-UK transactions between the issuing and acquiring banks.

[15] *Merricks* [2019] EWCA Civ 674 [29].

[16] In critiquing the 'top-down' aggregate methodology the CAT claimed that the aggregate method was defective because 'if, hypothetically, a million people opted out of the proceedings, there would be no proper way of reducing the quantum of damages accordingly (and, conversely, of increasing it if a large number of people now domiciled outside the UK sought to opt in): it would simply lead to everyone in the class getting more (or less) money out of the total pot.' *Merricks* [2017] CAT 16 [87]. This question should arguably not be determined however at the certification stage: see Mulheron and Edlin, above n. 7, 2018, p. 240–241.

[17] *Merricks* [2019] EWCA Civ 674 [12]. The Tribunal's decision to grant or refuse a CPO can also be appealed to the Court of Appeal: *Merricks v Mastercard* [2018] EWCA Civ 2527.

VI. The methodology for calculation of the 'Pass-on'

The first issue was the method and feasibility of calculation of the aggregate award of damages and in particular the level of MSC pass-on to consumers during the infringement period. The collective claim relied on an expert report prepared by Dr Cento Veljanovski and Mr David Dearman. The experts acknowledged that the assessment for quantifying the loss was preliminary and would require the complex analysis of further data to be disclosed by Mastercard and market studies. The experts proposed a 3-step method of calculation of the volume of all relevant UK Mastercard transactions, the extent of the overcharge in respect of the EEA MIF and the proportion of the overcharge passed on to the proposed classes.

While it was common ground that the MSC overcharge was fully passed onto merchants, it was more difficult to determine the level of pass-on to consumers. The difficulties arise from the different time periods and product and market sectors subject to the charge in the UK economy. The experts assumed a single weighted average for the different levels of MSC Pass-on. In considering the likely level of the 'pass-on' rate, the experts placed considerable importance on the position taken by Mastercard and their experts in previous litigation. In a claim brought by Sainsbury's, a UK supermarket, in relation to the MSC, Mastercard's expert evidence was to the effect that the level of pass-on by Sainsbury's to consumers was closer to 100% than to 50%.[18]

VII. The common issues of fact or law

The experts' assessment was based on a 'top-down' method on a 'global or class-wide basis in terms of the amount of the overcharge passed on to consumers generally without the need to calculate how each member of the represented class was affected.[19] To be eligible for inclusion in collective proceedings the claim must raise common issues of fact or law (s47B(6) CA). The CAT was concerned that the proposed methodology for calculating the level of pass-on of the MIFs from merchants to consumers as a whole, identifying a global loss suffered by consumers, may not constitute a common issue absent being able

[18] *Merricks* [2019] EWCA Civ 674 [9]; *Sainsbury's v Mastercard* [2016] CAT 11.
[19] *Merricks* [2019] EWCA Civ 674 [19].

to show that each member of the class was in some way adversely affected in their own purchases during the infringement period.[20]

The Court of Appeal pointed out however that the CAT had accepted that not all of the issues need to be common issues in order for the collective claim to be certified.[21] There was also no requirement under Section 47C(2) CA to approach the assessment of an aggregate award through the medium of a calculation of individual loss.[22] The Court stated that '[p]ass-on to consumers generally satisfies the test of commonality of issue necessary for certification.'[23]

VIII. The sufficiency of data for the grant of the CPO

While the CAT had accepted that a method of calculation of global loss through a weighted average pass-on was methodologically sound, they acknowledged that this required access to a wide range of data. Given the preliminary nature of the information available, the crucial question for the CAT was what amounts to 'sufficient data' for the methodology to be applied for the grant of the CPO? While the CAT did not expect a full analysis to be carried out 'a proper effort would have had to be made to determine whether it is practicable by ascertaining what data is reasonable available'.[24]

The CAT relied on the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57 (hereinafter: *Microsoft*), which considered overcharges paid to Microsoft for the purchase of software by indirect purchasers:

> Accordingly, applying the *Microsoft* test (para 58 above), we are unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis. It follows that we are not satisfied, and

[20] *Merricks* [2019] EWCA Civ 674 [45].

[21] *Merricks* [2019] EWCA Civ 674 [46].

[22] The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person: Section 47C9(2) CA.

[23] *Merricks* [2019] EWCA Civ 674 [47]. The Court of Appeal stated that the ability to treat the loss caused to consumers as a class as a common issue 'was dependent on the availability of an economic model and methodology that was capable of making that global (and therefore common) assessment', citing the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57 at [115]: *Merricks* [2019] EWCA Civ 674 [43]; Section 4(1)(c) of the Canadian *Competition Act* 1985 requires the claims of the class members to raise common issues which are defined as meaning 'common but not necessarily identical issues of fact'.

[24] *Merricks* [2017] CAT 16 [77].

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> indeed very much doubt, that the claims are suitable for an aggregate award of damages: see rule 79(2)(f).[25]

The CAT went on to cite Rothstein J from the *Microsoft* judgment:

> … the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.[26]

While the CAT and Court of Appeal were not bound to follow Canadian authorities, the Court of Appeal noted that they were useful, due to the similarities between the two class action provisions.[27] The Court found however that the CAT had committed an error of law by applying the wrong test in setting the standard of evidence as too high for the CPO stage. The Court of Appeal stated:

> It seems to us that at the certification stage the proposed representative must be able to demonstrate that the claim has a real prospect of success. To do so in this case he had to satisfy the CAT that the expert methodology was capable of assessing the level of pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology. But it was not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value.[28]

The Court of Appeal went on to state:

> The availability of data sufficient to allow the methodology to be operated on what the CAT described as a sufficiently sound basis ought at the certification stage to be looked at in terms of what information can be made available for use at the trial.[29]

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[25] *Merricks* [2017] CAT 16 [78].

[26] *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57 [118], cited by Merricks [2017] CAT 16 [58].

[27] The Court of Appeal stated: 'Our view is that the CAT was right to treat the Canadian jurisprudence on certification as informing the correct approach. Most of the provinces in Canada have enacted class proceedings legislation (not limited to competition cases)': *Merricks* [2019] EWCA Civ 674 [40]. For a thorough review of the Canadian and United States class action jurisprudence relating to this case: see Mulheron and Edlin, 2018.

[28] *Merricks* [2019] EWCA Civ 674 [44].

[29] *Merricks* [2019] EWCA Civ 674 [50].

It was sufficient at certification stage that the proposed methodology was credible, 'it was not appropriate at the certification stage to require the proposed representative and his experts to specify in detail what data would be available for each of the relevant retail sectors in respect of the infringement period.'[30]

The CAT had rather carried out a form of mini-trial and required the representative to establish more than a reasonably arguable case,[31] which therefore 'exposed the claim to a more vigorous process of examination than would have taken place at a strike-out application.'[32] This also ignored that certification is a continuing process under which a CPO may be varied or revoked at any time (s.47B(9)).[33] At the certification stage, the proposed representative should not 'be required to demonstrate more than that he has a real prospect of success. This is not the test which the CAT applied.'[34]

IX. The method of distribution of the aggregate award

The second issue for the refusal by the CAT of the CPO concerned the proposed method of distribution of the aggregate award which the CAT stated would bear no relation to the actual loss suffered by individual members of the class and therefore conflict with the principle of compensation of damages.

This issue was related to the methodology of seeking to calculate the loss on a top-down, aggregate basis and seeking to award the class on a per capita basis for each separate year of the infringement period and 'not on the basis of a common issue concerning loss suffered by each member (or most members) of the class'.[35]

The Court of Appeal however found that the CAT had committed an error of law by wrongly directing itself to refuse certification by reference to the proposed distribution method.[36] Section 47B and the Rules do not determine any particular form of distribution and the provisions are open-ended.[37] The CAT is merely required to determine whether the claims are suitable for

[30] *Merricks* [2019] EWCA Civ 674 [51].

[31] *Merricks* [2019] EWCA Civ 674 [52].

[32] *Merricks* [2019] EWCA Civ 674 [53]. Williams and Bates query whether this lower standard is in keeping with the 'strong safeguard' envisaged by the UK Government in devising the collective proceedings scheme: See Williams and Bates, 2019, p. 333.

[33] *Merricks* [2019] EWCA Civ 674 [53].

[34] *Merricks* [2019] EWCA Civ 674 [54].

[35] *Merricks* [2017] CAT 16 [87].

[36] *Merricks* [2019] EWCA Civ 674 [62].

[37] *Merricks* [2019] EWCA Civ 674 [60].

an aggregate award of damages and this does not include the assessment of individual loss (Rule 79(2)(f)). The actual mode of distribution need also not be considered at the certification stage, as it is a matter for determination at trial.[38]

The purpose of a collective action is to encourage suits not available individually, and so to require the calculation of individual loss for the authorisation of a distribution at the CPO stage would largely negate these large-scale opt-out proceedings.[39] The Court of Appeal stated: '[t]he vindication of the rights of individual claimants is achieved by the aggregate award itself.'[40]

The Court of Appeal set aside the order and remitted it to the CAT for re-hearing.

X. Conclusion

The Court of Appeal decision in *Merrricks* provides an important indicator of the likely success of future collective proceedings under the new UK regime. The standard set by the Court of Appeal that the claim at the CPO stage has a 'real prospect of success' whereby the expert methodology is capable of assessing the pass-on (credible) and there is (or likely to be) data available to operate that methodology, is a fairly low threshold that will encourage future cases.

The Court has also found that to make the aggregate award of damages subject to the assessment of the loss suffered and recoverable by each individual would annul the purpose of the power to make collective awards. Williams and Bates argue that this approach 'effectively dispenses with the requirement for each, or even any, of the individual claims comprised within a collective action to be made out. Instead, the requirement for loss to be shown (which is normally a necessary ingredient of a claim for breach of statutory duty) is replaced with a requirement that some (not necessarily identified or identifiable) members of the class suffered loss (Williams and Bates, 2019, p. 335). But as Mulheron and Edlin point out, the compensatory principle is not statutorily mandated under the new collective scheme (Mulheron and Edlin, 2018, p. 242) and the representative 'is not expected to produce a methodology that each and every class member suffered some loss.'[41] While s47B(1) CA provides that collective

[38] *Merricks* [2019] EWCA Civ 674 [62].
[39] *Merricks* [2019] EWCA Civ 674 [57].
[40] *Merricks* [2019] EWCA Civ 674 [61].
[41] *Ibidem*, 235.

proceedings may be brought 'combining two or more claims', it is clear that they are perceived to differ from a mere summation of individual claims.

The reliance by the Court of Appeal and the CAT on Canadian jurisprudence will provide an important source of interpretation for future certification decisions. The Canadian Supreme Court noted in the *Microsoft* case that the methodology 'cannot be purely theoretical or hypothetical but must be grounded in the facts.'[42] The Canadian court stressed the importance of certification as a 'meaningful screening device' and the 'standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.'[43]

In assessing these questions and ensuring that the CPO is a 'meaningful screening device' it may be difficult for future Tribunals to effectively draw the line between conducting a 'mini trial' and establishing a 'real prospect of success' that is grounded in fact. At the same time, given the complexities and costs faced by representatives to access and analyze data at the CPO stage, if the CAT applies the correct test in future cases it may be difficult to set aside cases on judicial review because these questions, in the absence of error of law, are for the CAT to decide. The judgment provides a strong statement of the legal test that the CAT should observe at the certification stage and reasserts the importance of the collective proceedings as a valuable means of redress for competition law damages. The decision has now been appealed to the UK Supreme Court where these issues may be further clarified. If upheld by the Supreme Court, it will be interesting to observe how the CAT deals with both this remitted and future decisions.

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[42] *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57 [118].

[43] *Microsoft*, *ibid* [103] referring to *Hollick v Toronto (City)* 2001 SC 68, cited in *Merricks* [2019] EWCA Civ 674 [41].

Extending the Principle of Economic Continuity to Private Enforcement of Competition Law. What Lies Ahead for Corporate Restructuring and Civil Damages Proceedings after *Skanska*?

Case Comment to the Judgement of the Court of Justice of 14 March 2019 *Skanska Industrial Solutions and others* (Case C-724/17)

by

Vasiliki Fasoula*

CONTENTS

Abstract

In the tradition of civil law Member States, civil liability issues are linked to the legal entity that caused a damage, with the exception of lifting the corporate veil. The Finnish competition authority imposed fines to Finnish companies that participated in an asphalt cartel. Following that decision, an action for damages was lodged for infringement of Article 101 TFEU that ultimately led to the *Skanska* ruling. The European judge completes and specifies some ambiguities of the Damages Directive. From a holistic point of view of the objective pursued by both public and private enforcement of European competition law rules, the economic entity of an 'undertaking', as it is defined by European law rather than the legal entity as it is defined by national law, must be a substantive criterion, and not a procedural one, in civil liability procedures before national courts awarding damages for European law infringements. Introducing the principle of economic continuity to national

* PhD candidate, Paris II Panthéon-Assas University, Paris, France; ATER in Private Law, Paris Nanterre University, Paris, France, e-mail: vicky_fasoula@hotmail.com. Article received: 8 June 2019; accepted: 16 September 2019.

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civil liability procedures is a creeping harmonisation of national civil law in order to serve the effectiveness of European competition law. The scope of *Skanska* could also extent to Article 102 TFEU infringements. Corporate restructuring must follow from now on a lengthy and complex due diligence as the acquirers could be liable for their predecessors' infringements in any Member State.

Résumé

Dans la tradition des États membres de droit civil, les questions de responsabilité civile sont liées à la personne morale qui a causé un dommage, à l'exception du voile corporatif. L'autorité finlandaise de la concurrence a infligé des amendes aux entreprises finlandaises qui ont participé à une entente sur l'asphalte. Depuis cette décision, une action en dommages-intérêts a été introduite pour violation de l'article 101 du TFUE, qui a finalement abouti à l'arrêt Skanska. Le juge européen complète et précise certaines ambiguïtés de la directive Dommages et intérêts. D'un point de vue global de l'objectif poursuivi par l'application publique et privée des règles du droit européen de la concurrence, l'entité économique de l' «entreprise» telle qu'elle est définie par le droit européen, et non l'entité juridique telle qu'elle est définie par le droit national, doit être un critère de fond, et non de procédure, dans les procédures en responsabilité civile devant les juridictions nationales qui accordent des indemnités pour violation du droit européen. L'introduction du principe de continuité économique dans les procédures nationales de responsabilité civile est une harmonisation progressive du droit civil national afin de servir l'efficacité du droit européen de la concurrence. Le champ d'application de Skanska pourrait également s'étendre aux infractions à l'article 102 du TFUE. La restructuration des entreprises doit dorénavant faire l'objet d'un contrôle préalable long et complexe, car les acquéreurs pourraient être fiables pour les infractions commises par leurs prédécesseurs dans tous les États membres.

Key words: actions for damages, determination of the entities liable to provide compensation, principle of economic continuity, autonomous concept of undertaking, effectiveness of EU competition law.

JEL: K21

I. Introduction

The Court of Justice of the European Union's (hereinafter: CJEU) preliminary ruling in *Skanska*[1] follows the line of its previous case law regarding

[1] Judgement of the Court of 14.03.2019, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, ECLI:EU:C:2019:204.

the private enforcement of competition law (Iannuccelli 2014, p. 223–240). However, it can be considered to be a landmark case, as it goes a step further in addressing some questions left unanswered by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter: Directive 2014/104/EU)[2], mainly the determination of the entities that are liable under civil law for compensation in actions for damages for breach of Article 101 of the Treaty of Functioning of the European Union (hereinafter: TFEU) before national civil courts. The CJEU adopts a holistic view of the EU competition law enforcement system in the internal market. Under the point of view of such a coherent system, both public enforcement of competition rules by national competition authorities (hereinafter: NCAs) of Member States and private enforcement of those same rules under national civil liability proceedings have a complementary role in preserving the effectiveness of European Union's (hereinafter: EU) competition law provisions, by punishing anticompetitive behaviour on the part of the undertakings as well as deterring them from engaging in such conduct. For that reason, it is a matter of European, and not national law, to determine the entities liable to pay damages for EU competition law infringements. By ruling so, the CJEU introduces the autonomous concept of 'undertaking' to civil liability actions before national courts of the Member States, and extents the application of the principle of economic continuity, previously used when imposing fines for EU competition law infringement, to private enforcement of EU competition law rules as well.

II. Facts of the case

The facts of the ruling are based on the asphalt cartel in Finland between 1994 and 2002. The companies involved in dividing up contracts, prices and tendering for contracts included, among others, Lemminkäinen Oyj, Sata-Asfaltti Oy, Interasfaltti Oy, Asfalttineliö Oy and Asfaltti-Tekra Oy. Since the beginning of their participation in the asphalt cartel, a lot of corporate restructuring took place involving the above mentioned undertakings: Asfaltti-Tekra changed its name to Skanska Asfaltti Oy and acquired all the shares in Sata-Asfaltti on 2000. The latter was wound up due to a voluntary

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

liquidation procedure in January 2002 and in August 2017 Sata-Asfaltti changed its name to Skanska Industrial Solutions (SIS). In October 2000, NCC Finland Oy acquired the shares in Oy Läntinen Teollisuuskatu, the parent company of Interasfaltti. On 2002, Interasfaltti and Läntinen merged and became Interasfaltti. One year later, NCC Finland Oy split into three new companies, including NCC Roads Oy which owned all the shares in Interasfaltti. Finally, in December 2003, Interasfaltti was wound up due to a voluntary liquidation procedure and its commercial activities were transferred to NCC Roads. In May 2006, that company changed its name to NCC Industry (NCC). In 2000, Siilin Sora Oy, changed its name to Rudus Asfaltti Oy and acquired all the shares in Asfalttineliö. The latter was wound up due to a voluntary liquidation insolvency procedure and its commercial activities were transferred to Rudus Asfaltti, which changed its name to Asfaltmix in 2014.

Following the Finnish Competition Authority's (Kilpailuvirasto) proposition of 31 March 2004 to impose fines onto the companies that participated in the cartel, the Finnish Supreme Administrative Court (Korkein hallinto-oikeus), in accordance with the economic continuity test recognised by the CJEU case law[3], imposed fines on the cartel participants, including on SIS for its own conduct and that of Sata-Asfaltti, on NCC for the conduct of Interasfaltti and on Asfaltmix for the conduct of Asfalttineliö. On the basis of the decision imposing fines, the City of Vantaa that had concluded contracts with those companies during the time period when they were participating in the asphalt cartel, lodged, subsequently, an action for damages against the cartelists, including SIS, NCC and Asfaltmix before the Finnish District Court (Käräjäoikeus). The District Court ordered the above mentioned companies to compensate the City of Vantaa for the harm it suffered because of their anti-competitive conduct and also of the conduct of the companies whose commercial activities they had acquired and continued. The District Court's reasoning was that 'in order to ensure the effectiveness of Article 101 TFEU, the economic continuity test must be applied to the determination of liability for damages in the same way as that for the imposition of fines[4].'

Contrary to the District Court's decision, the Finnish Court of Appeal (Hovioikeus) dismissed the City of Vantaa's claims against SIS, on account of Sata-Asfaltti's conduct and NCC and Asfaltmix. The Court of Appeal refused the application of the economic continuity test to actions for damages due to the absence of detailed rules or more specific provisions in the national legal order – according to which only the legal entity that caused the damage may be held liable – and it also held that the principle of effectiveness of EU

[3] Judgment of the Court of 18.12.2014, Case C-434/13 P *European Commission v Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp.*, ECLI:EU:C:2014:2456.

[4] Case C-724/17 *Vantaan kaupunki...*, para 12.

competition law cannot call into question the fundamental characteristics of the Finnish rules on civil liability[5]. After that, the City of Vantaa lodged an appeal before the Finnish Supreme Court (Korkein oikeus) that was faced with the following legal problem: on the one hand, the Finnish provisions on civil liability are founded on the principle that only the legal entity that caused the damage is liable. A derogation from this basic rule is possible, in Finland as in many other Member States, for legal entities belonging to a group of companies, by lifting the corporate veil if the entities concerned used the group structure in a reprehensible or artificial manner, in order to avoid legal liability issues (Cortese 2014, p. 73-93). On the other hand, CJEU case law allows any person to claim damages for the infringement of EU competition law if there is a causal link between the damage and the infringement. The national legal order of the Member States is responsible for the specific rules guarantying the exercise of that right. However, there is no clarification regarding the person that may be held liable to provide compensation for damages resulting from an infringement of Article 101 TFEU. If that determination is founded on the direct application of Article 101 TFEU, then the liability of the 'undertaking' may take place and according to the case law it may be attributed to the entity that has continued the business of the entity responsible for the infringement in question, if the latter has ceased to exist. If the person liable is not, however, determined by a direct application of Article 101 TFEU, then the Supreme Court must attribute liability for the damage caused by the asphalt cartel according to the rules of Finnish law and the principle of effectiveness of EU law. Confronted with this legal dilemma, the Supreme Court stayed the proceedings and referred those questionings to the CJEU for a preliminary ruling[6].

The CJEU held that the determination of the entities liable for compensation in an action for damages for an infringement of Article 101 TFEU is done in accordance with EU law. Therefore, the concept of 'undertaking' under Article 101 TFEU must 'designate the perpetrator of an infringement' of Article 101 TFEU that 'must answer for the damage caused by the infringement'. Furthermore, since in the view of the CJEU, actions for damages form an 'integral part of the system for enforcement of those rules' and pursue the same objective of punishing Article 101 TFEU infringements and of deterrence, the principle of economic continuity applied to public enforcement of EU competition law provisions imposing fines must also be extended to the private enforcement of those rules, despite any restructuring or organisational change of the undertakings in order to escape liability. Finally, the effect of the ruling cannot be limited in time since the applicant

[5] Case C-724/17, *Vantaan kaupunki...*, para 13.
[6] *Ibidem*, para 22.

did not provide sufficient evidence that the entities concerned acted in good faith.

III. Comments

As established by consistent CJEU case law[7], Article 101 and Article 102 TFEU produce direct legal effects in relations between individuals, creating directly rights for them which have to be protected by national courts, including the right for individuals to lodge claims for damages due to EU competition law infringements (Sauter 2016, p. 23). In *Kone*[8], the CJEU clarified further that among the conditions necessary for a legal or physical person to claim compensation is the causal link between the harm suffered by the person due to an agreement or practice prohibited under Article 101 TFEU. In the same judgement, the CJEU held that a national provision on a causal link preventing actions for damages for umbrella pricing was contrary to EU competition law and therefore prohibited under Article 101 TFEU.

According to the principle of procedural autonomy of the Member States, that was introduced in 1976 by the landmark case *Rewe*[9] and confirmed by consistent case law[10], in the absence of EU rules governing the matter at hand, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law. In the case of actions for damages, Member States lay down the rules on the exercise of the right to claim compensation for harm resulting from an agreement or a conduct prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are guaranteed. The principle of equivalence guarantees that the national rules are applied without distinction, whether the alleged

[7] Judgment of the Court of 13.06.2006, Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA*., ECLI:EU:C:2006:461; judgement of the Court of 20.09.2001, Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465.

[8] Judgment of the Court of 05.06.2014, Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317, para 22.

[9] Judgment of the Court of 16.12.1976, Case 33/76, *Rewe-Zentralfinanz eG and Rewe--Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188.

[10] Judgment of the Court of 15.03.2017, Case C-3/16, *Lucio Cesare Aquino v Belgische Staat*, ECLI:EU:C:2017:209; judgement of the Court of 19.10.2017, Case C-425/16, *Hansruedi Raimund v Michaela Aigner*, ECLI:EU:C:2017:776.

infringement is of EU law or national law, where the purpose and cause of action are similar[11]. Complementary to that, the principle of effectiveness safeguards that the conditions laid down by the domestic norms do not make it impossible in practice to exercise the rights which the national courts are obliged to protect (Wilman 2015, p. 24).

The question raised in *Skanska* is to examine whether the determination of the entities liable to pay compensation for an infringement of Article 101 TFEU constitutes a condition of the right to claim damages or a rule regarding the exercise of that same right as Advocate General Wahl (hereinafter: AG Wahl) analysed in his opinion[12]. The CJEU sided with AG Wahl and held that such a determination is a constitutive condition to the right to be compensated for EU competition law infringement and, due to the direct legal effect of Article 101 TFEU, it must be interpreted uniformly. Therefore, the determination of the entity liable to pay compensation is directly governed by EU law and any national law provisions contrary to EU interpretation cannot be applied[13].

The practical implication of the CJEU's ruling is that *Skanska* introduces the specific concept of 'undertaking' used in EU law[14], to civil liability proceedings before national courts of Member States for EU competition law infringements. In the CJEU's view, using the autonomous concept of undertaking to determine the entity liable to pay compensation for damages due to an infringement of Article 101 TFEU is also in accordance with Directive 2014/104/EU. Under its Article 11(1) Member States must ensure that undertakings which have infringed competition law through joint behaviour are held jointly and severally liable to compensate the parties that suffered a harm because of that infringement and it is for the national legal system of each Member State to determine the entity which is to compensate for that damage. However, the provision of Article 11(1) does not apply to the definition of entities but instead to the attribution of liability between those entities and, thus, the determination of those entities is not subject to

[11] Judgment of the Court of 01.12.1998, Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd*, ECLI:EU:C:1998:577; judgement of the COurt of 30.06.2016, Case C-200/14 *Silvia Georgiana Câmpean v Serviciul Fiscal Municipal Mediaş, formerly Administrația Finanțelor Publice a Municipiului Mediaş and Administrația Fondului pentru Mediu*, ECLI:EU:C:2016:494.

[12] Opinion of Advocate General Wahl of 06.02.2019, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, ECLI:EU:C:2019:100, paras 60–66.

[13] Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, *op. cit.*, para 28.

[14] Jones 2012, p. 301–331; judgment of the Court of 13.06.1962, Case 19/61 *Mannesmann AG v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1962:31; judgment of the Court of 23.04.1991, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161.

interpretation according to national law provisions of the Member States. Moreover, Article 1 of Directive 2014/104 confirms that those responsible for damage caused by an infringement of EU competition law are specifically the 'undertakings' which committed that infringement[15]. In EU competition law, the notion of undertaking covers any type of economic entity exercising an economic activity, irrespective of its legal status or the way in which it is financed (Hirsch 2008, p. 409–431). As an economic notion, it describes an economic unit irrespective if in law that same economic unit consists of several legal or natural persons (Pietrini 2017, p. 309–342).

Since an 'undertaking' is an autonomous concept of EU law, the CJEU held that it must be interpreted and applied in the same way both in public enforcement of EU competition law under Article 23(2) of Regulation 1/2003[16] as well as in private enforcement under the provisions of Directive 2014/104/EU. In the CJEU's holistic approach to EU competition law provisions, both public and private enforcement of EU competition law are an integral part of a system intending to punish undertakings' anticompetitive behaviour and to deter them from engaging in such conduct. The maintenance of the system of effective competition could be endangered if the undertakings responsible for compensation for harm caused by an infringement of Article 101 TFEU could escape penalties by changing their legal identity through corporate restructuring and other legal or organisational changes under national laws (Stuyck 2017, p. 177–191). It could also lead to an increase in *forum shopping* between Member States through the exercise of the freedom of establishment (Mercer, 2013, p. 329–336). For that reason, and in order to guarantee the effectiveness of competition law provisions (Pardolesi 2012, p. 289–310), the CJEU adopted AG Wahl's analysis on the idea that 'liability is attached to assets, rather to a particular legal personality[17]'. That means practically that the principle of economic continuity, applied to public enforcement of EU competition law in order to impose fines to undertakings, must also be extended in regards to private enforcement of the same legal provisions. The principle of economic continuity ensures that an economic entity which continues its economic activities through legal or organisational corporate changes remains liable for infringing EU competition law provisions, since the initial entity that committed the infringement and its successor can be considered identical from an economic point of view[18]. The CJEU held therefore that it is not contrary to the principle of individual liability under

[15] Case C-724/17, *Vantaan kaupunki...*, paras 33–35.

[16] Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

[17] Opinion of Advocate General Wahl of 06.02.2019, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, *op. cit.*, para 80.

[18] Case C-724/17, *Vantaan kaupunki...*, para 38.

classical civil law in general, and under Finnish national law provisions more specifically, to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist.

IV. Conclusion

The *Skanska* ruling can be seen as a creeping harmonisation of national law provisions of Member States regarding civil liability for EU competition law infringements. It addresses questions that where not answered under Directive 2014/104/EU. Using the autonomous concept of 'undertaking' as a criterion to determine the entity liable to compensate the harm caused because of EU competition law infringements, the CJEU reaffirms its economic approach in interpreting competition law provisions within the internal market as well as a holistic view of the objective pursued by both public and private enforcement of competition law provisions. Imposing fines and awarding damages, are part of the same system aiming at both punishment and deterrence of anticompetitive conduct of undertakings. According to this point of view, it is only fair to extent the principle of economic continuity applied when imposing fines to claims for damages. This case law development and the transposition of Directive 2014/104/EU by the Member States can be an opportunity for further harmonisation in matters regarding national civil liability, for example the evaluation and monetization of the harm suffered when awarding damages among the jurisdictions of Member States (Monti 2018, p. 42–61). Even if the facts leading up to the *Skanska* ruling concerned an infringement of Article 101 TFEU, the same analysis and legal solution should also apply to future cases regarding Article 102 TFEU infringements, as provisions of both articles produce direct legal effects and their effectiveness is also assured by Directive 2014/104/EU and Regulation 1/2003. The undertakings that proceed in good faith to corporate restructuring, especially through cross-border mergers or acquisitions, should also pay attention to possible competition law risks of their predecessors and procced to a firm and solid due diligence of the present and the past state of the target undertaking's conduct before the conclusion of any transaction that could expose them to civil actions for damages in one or even more Member States.

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The Principles of Article 102(c) TFEU in Cases of Non-exclusionary Secondary Line Discrimination on Grounds Other than Nationality

Case Comment to the Judgment of EU Court of Justice of 19 April 2018 *Meo-Serviços de Comunicações e Multimédia* (C-525/16)

by

Jan Szczodrowski*

CONTENTS

Abstract

Although the instances of application of Article 102(c) TFEU can hardly be described as rare, to date it has been applied to essentially two sets of diverging situations, namely to discrimination on grounds of nationality on the one hand, and other forms of discrimination on the other. While there is a relatively high number of instances of the former category of applications, and the criteria of the application of Article 102(c) TFEU to such situations seem straightforward, fewer cases exist in which Article 102(c) TFEU was applied to non-exclusionary secondary line discrimination on grounds other than nationality, and the criteria of application are arguably less clear. The judgment in case C-525/16 *MEO* represents a significant, yet not a revolutionary step in its interpretation. While in some respects, it may be seen as bringing some novelty (for example, the delineation of

* Jan Szczodrowski, Ph.D., LL.M. (College of Europe) is a Member of the Legal Service of the European Commission (Competition Team). The views expressed in the present case comment are personal and do not reflect those of the European Commission. Many thanks to Anthony Dawes for his comments on an earlier draft of the present case comment. Article received: 17 July 2019; accepted: 14 September 2019.

the respective scopes of application of Article 102(b) and Article 102(c) TFEU), in others (that is, the notion of competitive disadvantage), it rather confirms the principles which have been previously established. Arguably, the Court's teaching on the elements which the competition authorities and courts across the EU may have at their disposal to establish the existence of *competitive disadvantage*, within the meaning of Article 102(c) TFEU, is open to various interpretations. Yet it does to a certain extent shape the toolkit that these authorities and courts may have at their disposal and leaves some room for reasonable welfare related arguments.

Résumé

Bien que les cas d'application de l'article 102, point c), du TFUE puissent difficilement être considérés comme rares, ils ont été appliqués jusqu'à présent à deux ensembles de situations essentiellement différentes: la discrimination fondée sur la nationalité, d'une part, et les autres formes de discrimination, d'autre part. Si le nombre de cas de la première catégorie de demandes est relativement élevé et si les critères d'application de l'article 102, point c), du TFUE à de telles situations semblent simples, il existe moins de cas où l'article 102, point c), du TFUE a été appliqué à une discrimination secondaire non exclusive fondée sur des motifs autres que la nationalité, et les critères d'application sont sans doute moins clairs. La décision rendue dans l'affaire C-525/16 MEO représente une étape importante, mais non révolutionnaire. Elle peut être considérée, à certains égards, comme apportant une certaine nouveauté (par exemple, la délimitation des champs d'application respectifs de l'article 102, point b), et de l'article 102, point c), du TFUE), mais elle confirme plutôt les principes qui ont été établis antérieurement (i.e., la notion de désavantage concurrentiel). L'enseignement de la Cour sur les éléments dont les autorités de concurrence et les juridictions de l'UE peuvent disposer pour établir l'existence d'un désavantage concurrentiel, au sens de l'article 102, point c), du TFUE, peut sans doute être interprété de diverses manières. Pourtant, elle détermine dans une certaine mesure les instruments dont les autorités et les tribunaux peuvent disposer et laisse une certaine place à des arguments raisonnables liés au bien-être.

Key words: competition law; antitrust; discrimination; competitive disadvantage; discrimination on the grounds of nationality.

JEL: K21; K42

I. Facts of the case

The case at hand was brought by MEO, a Portuguese provider of telecommunication and TV-related services against the decision of the national competition authority (hereinafter: NCA) to reject its complaint against GDA, a collecting society in charge of managing the rights of artist and performers in Portugal. In 2014, MEO lodged a complaint with the Portuguese NCA in which it claimed that GDA infringed the provision of national law, the wording of which is identical to Article 102(c) TFEU. According to MEO, GDA (which is the sole body responsible for the collective management of the aforementioned category of rights in Portugal), applied three different tariffs simultaneously to its customers (that is, providers of pay TV services such as MEO). In particular, according to MEO, GDA charged a different (higher) tariff than the one it applied vis-à-vis MEO's direct competitor, NOS. In 2016, the Portuguese NCA rejected MEO's complaint on the ground that any potential difference in prices applied to MEO and its competitors (such as NOS) were not such as to put MEO at a competitive disadvantage in light of the small proportion of MEO's costs that the fees paid to GDA amounted to. According to the NCA, this fact was confirmed by the growth of MEO's market shares (on the market for pay TV services) in the relevant period in which GDA differentiated between the higher tariffs applied to MEO and lower tariffs applied to its competitors. The decision of the Portuguese NCA was then challenged before the Portuguese competition law tribunal, which referred to the CJEU a series of questions concerning the interpretation of Article 102(c) TFEU.

II. Legal context

Already before *MEO*, it was settled-case law that for Article 102(c) TFEU to apply, apart from the need to establish dominance, it was necessary that: (i) there was discrimination (that is the dominant undertaking applied dissimilar conditions to equivalent transactions) and, (ii) such discrimination tended to distort that competitive relationship, that is, it hindered the competitive position of some of the business partners of the dominant undertaking in relation to the others.[1] The Court of Justice also ruled that for a finding of an abuse it is sufficient that, having regard to the whole of the circumstances

[1] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, EU:C:2007:166, para. 144.

of the case, the dominant undertaking's behavior '*tends to a distortion of competition between those business partners'* and it made clear that there is no requirement of proof of an '*actual, quantifiable deterioration in the competitive position of the business partners taken individually*.'[2]

Depending on the circumstances of the case, the Court has been willing to accept a variety of factors relevant for the assessment of the conduct's ability to distort competition in breach of Article 102(c) TFEU. For instance, in *Hoffmann-La Roche*[3], the Court considered that fidelity rebates granted to some customers put other customers in a disadvantaged position. The Court of Justice rejected the argument according to which the rebates at hand were not of such kind as to place those customers who did not receive them at a competitive disadvantage since the ensuing differences in prices could not have an *appreciable effect* on competition. The Court considered that, in light of the importance attached by the dominant undertaking to the rebates in question, it could not be accepted that they were without importance to the dominant undertaking's customers. In *British Airways*[4], it was the fact that:

(i) the dominant undertaking's trading partners competed intensely with each other;
(ii) their ability to compete depended on their ability to offer products suited to their customers' wishes at a reasonable cost (which depended on the conditions under which they obtained inputs from the dominant undertaking) as well as their individual financial resources; and
(iii) the fidelity rebates granted by the dominant undertaking could lead to exponential changes in the revenue of these dominant undertaking's trading partners.

In *Kanal 5*[5], the Court considered that, in order to verify whether the price discrimination at hand would put one category of the dominant undertaking's trading partners in a disadvantaged position compared to the other category, it was necessary to verify whether they were each other's

[2] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 145; judgment of the Court of First Instance of 17.12.2003, Case T-219/99 *British Airways v Commission*, EU:T:2003:343, para. 238.

[3] Judgment of the Court of 13.02.1979, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para. 122–123.

[4] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 146–147; judgment of the Court of First Instance of 17.12.2003, Case T-219/99 *British Airways v Commission*, paras. 237-238 and 266.

[5] Judgment of the Court of 11.12.2008, Case C-52/07 *Kanal 5 and TV 4*, EU:C:2008:703, para. 46.

competitors on the same market. Finally, in *Clearstream*[6] the General Court found that

> '*the application to a trading partner of different prices for equivalent services continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market could not fail to cause that partner a competitive disadvantage*.'

In parallel, however, the Court developed another line of case-law in which it did not seem to be too concerned with the existence of a competitive disadvantage. Instead, as soon as discrimination was identified, the existence of a disadvantage (and the ensuing distortion of competition) could also be implicitly assumed to exist[7] or, even, it was not mentioned at all among the conditions for Article 102(c) TFEU to apply.[8] This approach was subsequently adopted by the Commission in a number of specific cases that were mostly concerned with some form of discrimination based on nationality[9], and most of which were addressed to Member States on the basis of Article 106(3) TFEU.[10]

III. The *Meo* judgment

Although the thrust of the case is on the notion of '*competitive disadvantage*', the Court of Justice did not hesitate to start its analysis by developing further the previous case-law on Article 102(c) TFEU concerning the notion of '*other trading partners*' and the relationship between the level of trade at which the dominant undertaking is present and the market on which the abuse takes

[6] Judgment of the Court of First Instance of 9.09.2009, Case T-301/04 *Clearstream v Commission*, EU:T:2009:317, para. 194.

[7] See Opinion of AG van Gerven in Case C-18/93 *Corsica Ferries*, EU:C:1994:195, p. 1809 referring to Case 27/76 *United Brands v Commission*, EU:C:1978:22, para. 233 and Case C-179/90 *Merci Convenzionali Porto di Genova*, EU:C:1991:464, para. 18–19.

[8] Judgment of the Court of 17.05.1994, Case C-18/93 *Corsica Ferries*, EU:C:1994:195, para. 43.

[9] Case 95/364/EC *Brussels National Airport*, Commission Decision of 28.06.1995, OJ L 216, 12/09/1995 p. 8, rec. 13; Case IV.35.703 *Portuguese Airports*, Commission Decision of 10.02.1999, OJ L 69/31 (upheld in the judgment of the Court of 29.03.2001, Case C-163/99 *Portuguese Republic v Commission*, EU:C:2001:189, para. 52), Case 2000/521/EC *Spanish Airports*, Commission Decision of 26.07.2000, OJ L 208/36; Case IV.35.767 *Finnish Airports*, Decision of 10.02.1999, OJ L 104/34, p. 24.

[10] The Commission Decision in Case IV.35.767 *Finnish Airports.* Although it was adopted on the same date as IV.35.703 *Portuguese Airports* and it contained almost the same interpretation of Article 102(c) TFEU as the latter, it was contrary to the latter based exclusively on Article 102 TFEU as a whole and addressed to an undertaking, and not a Member State.

place. In *British Airways*[11], the Court stated that dominant undertaking's behavior should not distort competition on the market downstream or upstream (from the market on which the dominant undertaking is present), that is the market on which the suppliers or customers of the dominant undertaking are present. In *MEO*, the Court further clarified[12] that it is not necessary for Article 102(c) TFEU to apply that

> '*the abusive conduct affects the competitive position of the dominant undertaking itself on the same market in which it operates*'.

As far as the notion of '*competitive disadvantage*' is concerned, the Court of Justice started its interpretation by recalling, by reference to *British Airways*[13], the basic two conditions of (i) the existence of discrimination and (ii) its ability to distort competition by hindering the competitive position of some of the business partners of the dominant undertaking in relation to the others (see above).[14] The Court then clarified that the mere existence of such immediate disadvantage does not mean that competition is distorted or capable of being distorted.[15] The Court then once again relied on *British Airways*[16] by recalling that the relevant legal test for the finding of competitive disadvantage remains whether the conduct tends, in light of all the circumstances of the case, to lead to a distortion of competition and that no additional proof of an actual, quantifiable deterioration in the position of the dominant undertaking's trading partners can be required.[17] In particular, the Court clearly rejected any *de minimis* rule in the assessment of the seriousness of the competitive disadvantage.[18]

In relation to the assessment of the conduct's capability of producing a competitive disadvantage, the Court, referring to the judgment in *Intel*,[19] pointed to the faculty (indicating that *it is open for the competition authorities or courts)* of taking into account various elements such as

> '*the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their*

[11] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 143.

[12] Judgment of the Court of 19.04.2018, Case C-525/16 *Meo – Serviços de Comunicações e Multimédia*, EU:C:2018:270, para. 24.

[13] Judgment of the Court of 15.03.2007, Case C-95/04 P *British Airways v Commission*, para. 144.

[14] Judgment of the Court, Case C-525/16 *Meo*, para. 25.

[15] Judgment of the Court, Case C-525/16 *Meo*, para. 26.

[16] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 145.

[17] Judgment of the Court, Case C-525/16 *Meo*, para. 26.

[18] Judgment of the Court, Case C-525/16 *Meo*, para. 29.

[19] Judgment of the Court of 6.09.2017, Case C-413/14 P *Intel v Commission*, EU:C:2017:632, para. 139.

amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.'[20]

In the circumstances of the case, the Court pointed in particular to:

(i) the existence of a certain negotiating power of MEO (and NOS) vis-à-vis GDA (as a factor relevant in the assessment of abuse and the negotiating power);[21]

(ii) the fact that parties may have had recourse to arbitration in setting the tariffs (and that *in casu* GDA may have simply applied tariffs set by the arbitrators);[22]

(iii) the price differences represented *a relatively low percentage* of MEO's total costs, so that this difference seemed to have had an only limited effect on its profits; and

(iv) the fact that GDA had no interest in excluding one of its trading partners from the downstream market.[23]

IV. Comment

First, in relation to the clarification concerning the notion of '*other trading partners*', while the case-law to date appeared relatively clear, it left the possibility open for some to argue that the discrimination under Article 102(c) TFEU (albeit happening at different levels of trade, that is, upstream or downstream) would only be abusive if the dominant undertaking itself was a vertically integrated entity also active on the upstream or downstream markets in question. Such approach would obfuscate the delineation between non-exclusionary secondary-line discrimination abuses under Article 102(c) TFEU and exclusionary abuses dealt with under Article 102(b) TFEU (Gonzalez Diaz, Snelders, 2013, p. 581). Against this background, the fact that the Court ruled in *MEO* that the abuse does not need to affect the competitive position of the dominant undertaking on the market in which it operates, could be interpreted as delineating the respective scope of the application of Article 102(b) and Article 102(c) TFEU.

Second, as far as the interpretation of the notion of '*competitive disadvantage*' is concerned, the judgment in *MEO* should be seen as a confirmation of earlier case-law (and the judgment of the Court of Justice in *British Airways* in particular) rather than as a revolutionary step. Indeed, the Court not only

[20] Judgment of the Court, Case C-525/16 *Meo*, para. 31.
[21] *Ibidem*, para. 32.
[22] *Ibidem*, para. 33.
[23] *Ibidem*, para. 35.

anchored its reasoning predominantly in *British Airways*, but also clarified the key concepts that the latter judgment contained. In particular, while reaffirming that the discrimination should only tend to distort the competitive relationship between the dominant undertaking's trading partners[24], and that there is no need for an actual, quantifiable deterioration in their competitive position, the Court specifically added that there is no *minimum threshold (de minimis)* below which such deterioration (that is the disadvantage) could be considered as not abusive.[25] The latter point appears to be a logical consequence of the former, that is if there is no need to measure the actual, quantifiable disadvantage, there is no need either (and in most cases, no possibility) of verifying whether such disadvantage falls short of or goes beyond certain threshold.[26] Moreover, the significance of the fact that, in *MEO*,[27] the Court referred to a number of facultative factors – which largely correspond to those enumerated in the *Intel* judgment[28] in relation to the conduct's capability of producing the alleged foreclosure effects – is to be verified in practice. The Court's own approach in the present case, and the fact that it relied only on some selected, *case specific* factors[29], suggests that the list is to be seen as an open-ended one, and that the relative importance of particular factors invoked by the Court should not be exaggerated (see for instance Ritter, 2013, p. 273, where the author points out that the transplantation of the As-Efficient-Competitor test from Intel in the context of Article 102(c) TFEU is ill-conceived).

The inclusion of a non-exhaustive list of factors, which competition authorities and courts across the EU may use in their assessment of the capability of the dominant undertaking's conduct of putting some of its trading partners at a disadvantage compared with others, also addresses to a certain extent the long-dated criticism according to which the enforcement

[24] Judgment of the Court, Case C-95/04 P *British Airways v Commission*, para. 145; judgment of the Court, Case C-525/16 *Meo*, para. 27.

[25] Judgment of the Court, Case C-525/16 *Meo*, para. 29.

[26] In that context, the fact that when enumerating various factors, which the competition authorities or courts may take into account (Judgment of the Court, Case C-525/16 *Meo*, para. 31), the Court indicated that they can be used in the assessment of whether the price discrimination at hand <u>produces</u> or is capable of producing a competitive disadvantage, does not put into question the starting premise according to which a proof of actual effects is not required. Indeed, it appears that just as with the facultative nature of the factors to which the Court referred (i.e. 'it is open to such an authority or court…'), the Court also considered it to be open to competition authorities and courts to rely on such actual effects (while this is certainly not a formal requirement).

[27] Judgment of the Court, Case C-525/16 *Meo*, para. 31.

[28] Judgment of the Court of 06.09.2017, Case C-413/14 P *Intel v Commission*, EU:C:2017:632, para. 139. For a detailed comparison of the language used by the Court in *MEO* with the approach taken in Intel, see: Ritter, 2019, p. 259–274.

[29] Judgment of the Court, Case C-525/16 *Meo*, para. 32–35.

of Article 102(c) TFEU to date has not taken sufficient account of the welfare effects of price discrimination (Gerard, 2005, p. 7-8). According to those critics, the only type of price discrimination, which the enforcement of Article 102(c) TFEU should aim to target, is the one which causes some disadvantage to the dominant undertaking's customers competing against one another (Gerard, 2005, p. 8), or that its application should be limited only to cases in which consumer harm is demonstrated (Temple Lang, 2008, p. 6). The need to demonstrate the conduct's capability of distorting competition (with the exception of cases concerning pure discrimination based on nationality and/or discrimination aimed at partitioning of the internal market – see below), is generally correct and the Court's judgment in *MEO* does reaffirm the existence of such a need. It is also hard to argue that the judgment at hand and the elements enumerated by the Court, which may be used to establish the existence of competitive disadvantage, totally ignore the aforementioned criticism concerning the Court's earlier agnosticism on the welfare effects of price discrimination.

Finally, some criticism has been expressed in the past towards the policy of applying Article 102(c) TFEU to discrimination based on nationality (Gerard, 2005, p. 26–27). At the same time, some argue that *MEO* would generally raise the enforcement threshold (O'Donoughue, 2018, pp. 443–445). However, it is submitted that *MEO* is unlikely to have an impact on cases based on the discrimination on the grounds of nationality. Indeed, the Court of Justice seems to have previously confirmed that the interpretation of Article 102(c) TFEU, when it comes this type of discrimination, is a realm in which other – market integrationist – values prevail.[30] The continued need for efficient enforcement tools to combat various forms of discrimination on the grounds of nationality, and measures aiming at partitioning the internal market along national borders, are all the more evident in the (renewed) wake of protectionism.[31] Indeed, the original purpose of prohibiting discrimination under Article 102(c) TFEU may well have been the willingness to prevent dominant undertakings[32] from discriminating in favoring companies in their

[30] Judgment of the Court of 29.03.2001, Case C-163/99 *Portuguese Republic v Commission*, para. 52; Judgment of the Court of 17.05.1994, Case C-18/93 *Corsica Ferries*, para. 43.

[31] See for instance: Case AT.40461 DE/DK Interconnector, Commission Decision C(2018) 8132 final of 07.12.2018; Case AT. 39351 Swedish Interconnectors, Commission Decision of 14.04.2010.

[32] This can be easily imagined in particular in relation to state-controlled undertakings or undertakings in which the state holds significant shares. In such cases, Article 102(c) TFEU has often been applied in combination with article 106 TFEU in the context of decisions addressed to Member States (there are however, exceptions to this rule: see Commission Decision in Case IV.35.767 *Finnish Airports* or Commission Decision in Case AT.40461 DE/DK Interconnector).

own Member States (Temple Lang, 2003, p. 250).[33] Paradoxically, case-law such as *MEO* (and the earlier *British Airways* judgment) make it clear that Article 102(c) TFEU may find application also to discrimination on grounds other than nationality. In such cases, however, the additional requirement of 'competitive advantage' could be seen as a logical additional criterion (which otherwise would not need to be fulfilled due to the market integrationist purpose of the Treaty) and *MEO* makes it clear that the application of this criterion in such cases is not a matter of pure formality.

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[33] This is further confirmed by the wording of Article 60 of the Treaty establishing the European Coal and Steel Community which specifically targeted discriminatory practices based 'in particular on the nationality of the buyer'.

B O O K R E V I E W S

Anna Piszcz and Adam Jasser (eds.), *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*, University of Warsaw, Faculty of Management Press 2019, 278 p.

Unfair trading practices (hereinafter: UTPs) in business-to-business relationships in the food supply chain are a traditional source of controversies and, at the same time, a very hot legal and political topic in view of the adoption of EU Directive 2019/633 in April 2019. After years of discussions, the EU has proceeded to a partial harmonization consisting of a ban, or a conditional ban, of selected practices whereby large buyers of agricultural and food products make life difficult for their smaller suppliers. These are abuses well-known from business interactions between different 'weight categories': late payments for deliveries, canceling orders for perishable goods at short notice, unilateral changes to terms of supply, requirements for payments not related to the sales of supplied agricultural and food products etc.

Although such practices are, at first glance, a matter of the law of unfair competition, or even protection of economic competition, the new EU Directive has no ambition to complement EU competition law or to further harmonize trade conditions of the EU Internal Market in general. Its legal basis is Article 43 (2) TFEU and this new piece of law, therefore, represents a sectorial harmonization measure under the common agricultural policy (CAP). Significant imbalances in bargaining power between buyers and suppliers within the agricultural and food supply chain are characterized in the preamble of the Directive as the core of the problem whose negative manifestations are the practices that 'grossly deviate from good commercial conduct', that are 'contrary to good faith and fair dealing' being 'unilaterally imposed by one trading partner on the other'. All the complexity of existing relationships in the food supply chain, as well as of the efforts to modify their content with legal tools, has thus been expressed already in the first recital of the preamble.

In the food supply chain, functionally related, but structurally very different, worlds collide, maybe more than anywhere else. A world of producers tied to the land and a specific place, whether they are independent farmers or large holdings, do face a world of globalized distribution, represented primarily by multinational retail chains with their international brands and purchasing strategies. Although we all somehow feel that agriculture and food production are the foundation we cannot do without, as without them there would be no healthy nutrition, no food security, no cultural landscape and countryside as part of society and its economy, the reality is

that distribution chains have won the game of these two worlds and we have profited from their victory. Food retail chains can get the production of scattered producers to customers on time, in the necessary quantities, in an attractive package and, which is not insignificant, at prices that would not be possible without optimized wholesale distribution. Thus, on the one hand, consumers sympathize with hard-working farmers and admire picturesque landscapes of a cultivated country; on the other hand, they would not give up large retail chains with their diverse offerings, endless opening hours, discount events etc.

Attempts to regulate this structurally unbalanced relationship thus have to cope with the limits given by their practical effects. It is possible to tie retail chains with stringent regulation – but often to the detriment of consumers and also to at least one part of their smaller suppliers who, due to the burdening legal requirements, will be avoided by large buyers in favor of equally large suppliers. And one cannot forget also the conceptual-doctrinal pitfalls of such a regulation. The prohibition of certain content of concluded contracts is undoubtedly a restriction of the freedom of contract, a kind of 'social engineering' that may be difficult to keep within the limits of the minimum necessary regulation, and which, by consequence, can lead to more bureaucracy and corruption, with all conceivable impacts on the freedom, prosperity and stability of societies.

With all this in mind, it is no wonder that a pressure has existed for decades (from the moment when there were enough goods produced and the question arose how to sell them effectively) to regulate the imbalance between sellers and buyers of agricultural and food products, and in parallel, a restraint or even a resistance to respond to this pressure by means of public law regulation. Therefore, until now, at national level, solutions have been sought to find a way out of a maze of conflicting interests and negating each other benefits, by combining private and public law instruments, measures of varying aim and scope, promoted by both private actions and administrative decisions.

The reviewed book is a kind of interim report on looking for, and finding, these national solutions. It emerged at the moment when the EU adopted the harmonization measure, that has set a common minimal standard for everyone in the field. Thus, the book provides information on the starting point for implementing the 2019/633 EU Directive in selected EU Member States, on their current national experience with UTPs regulation and its application in practice. On 278 pages of the text, it provides detailed country reports from Poland, the Czech Republic, Slovakia, Hungary, Croatia, Bulgaria, Estonia and Lithuania (written by authors from these countries). Beyond these country reports, it contains summary studies presenting both UTPs in food supply chain in general (authors A. Piszcz, D. Wolski) and their current regulation in France, Germany, UK, Italy, the Netherlands and Portugal, as well as the draft EU directive (D. Wolski). The final summary (A. Jasser, A. Piszcz) offers a thorough comparison of national approaches towards UTPs regulation in the countries of Central and Eastern Europe.

The main part of the book content thus consists of national reports from eight CEE countries. Their value lies, first, in the fact that they represent the part of the EU that

quite often falls out of comparative studies of European legislation, carried out in the western part of the continent. Thanks to this, the book completes in a unique way the ongoing debate on the regulation of significant market power and its unfair trading practices. Second, the information provided by the book is itself very interesting and useful. The editors succeeded in gathering contributions from local experts on the issue, who thoroughly analyzed the factual and legal status of unfair trading practices in their respective countries, as well as the tools and methods used to combat them. Some of these national reports are very thorough and detailed (Lithuania, Czech Republic) while some others (Hungary) focus more on summarizing basic facts and principles. Although the extent of (and depth of) each national report varies slightly, these differences are quite acceptable, since each report performs well as an up to date guide to country specific legislation and its enforcement. One can only regret that, for instance, the Estonian contribution lacks the final part (Conclusion), which the other reports are equipped with, since, especially in the concluding remarks, the overall assessment of the national experience is usually provided.

On the one hand the book can be praised as a detailed and updated encyclopedic guide to regulations of UTPs in the food retail sector in the aforementioned CEE countries. On the other, this main part of the book is framed by very insightful analyses that widen its focus significantly. The comparative information on eight national regulations is not only summarized and evaluated there, but also juxtaposed with a brief outline of similar regulations in selected West-European countries, as well as to the first assessment of the draft EU Directive. These introductory and summarizing studies themselves bring a number of empirically based findings and conclusions that retroactively help to evaluate the information and experience described in the national reports.

It is thus clearly shown that, in 2018, only 5 out of the 28 Member States did not have specific regulations addressing UTPs, however, in spite of that, there is still no empirical evidence that the issue of extensive bargaining power and economic dependency can be solved by the means of legislation! A perceived occurrence of UTPs in the supply chain of food remains roughly the same in the countries that regulate them most strictly (France) and those that do it rather leniently (the Netherlands). Local political culture and relative strength of organized group interests correlate more with the intensity of existing national regulation than statistic-based data on the level of concentration (and possible dominance) in the food retail sector.

Among the CEE countries analyzed, there are many similarities that could be expected. In debating the necessity to regulate, a certain role has been played in this part of Europe by politically significant arguments about massive food imports imposed by foreign-owned large retail chains. All of these countries, with the exception of Estonia, have now relatively recent regulations in place (Slovakia from 2003, Hungary, Czech Republic and Lithuania from 2009, Bulgaria 2015, Poland 2016, Croatia 2017). They still need to be verified in practice, as the already existing experience remains in many (not all) of the countries limited to only low numbers of final decisions enforced by administrative authorities or courts. Similar UTPs are prohibited in all jurisdictions, such as late payments for delivery, return on perishable goods, or slotting fees. As

a rule, an administrative agency (quite often the national competition authority) is entrusted with the enforcement of their ban.

There are also quite interesting differences that authors of the final summary rightly highlighted. Some countries have food sector-limited laws against UTPs (Croatia, Czech Republic, Hungary, Lithuania, Poland, Slovakia), whereas others do not limit them to food supply chains. Although the most popular solution in CEE countries is 'one-sided' protection, that is, the protection of suppliers against the buyers (Croatia, Czech Republic, Hungary, Lithuania, Slovakia), there are also countries (Bulgaria, Poland) that introduced 'two-sided' protection of both suppliers and buyers etc.

The wealth of information contained in the book offers so many opportunities to think, to compare, to argue, to propose… that any reader, whether coming from legal or business practice, political or academic environment, would undoubtedly benefit from it. Even though the information provided would become quickly outdated due to the duty of all EU Member States to implement EU Directive 2019/633 by mid-2021, this interim report decisively has the quality to become an important milestone on the road leading to the next European-wide stages of UTPs regulation. The conclusion of the review cannot be different from the following: the book is a success in terms of its content and structure. One cannot but wish it to reach quickly interested specialists in the field throughout Europe.

Václav Šmejkal
Associate Professor of European Law at Charles University Law School
and ŠKODA AUTO University, Czechia
vaclav.smejkal@savs.cz

CONFERENCE REPORTS

Third Annual Conference: Innovation Economics for Antitrust Lawyers. London, 1 March 2019

3rd annual conference entitled **'Innovation Economics for Antitrust Lawyers'**, organized by Concurrences Review in partnership with King's College London was held at King's College London on the 1st of March 2019. The conference brought together antitrust lawyers, legal counsel, regulators, competition agencies and economists to discuss the latest thinking on the link between competition policy and innovation.

Professor Gillian Douglas (Executive Dean, King's College London) delivered the welcoming speech and opened the conference by referring to the long history of law teaching at King's College London, one of the oldest law schools in the United Kingdom.

The first panel discussion focused on banking and Big Data and, more specifically, the question whether incumbents should get access to FinTechs' data. **Ms Ingrid Vandenborre** from Skadden stated that there is a risk that technology and innovation can develop too quickly at the disadvantage of consumers. When it comes to data sets, the reasoning focuses on indispensability and market barriers. However, if a given data set can be replicated, then it will not be identified as indispensable. It raises the question of the relevance of competition regulation. She also considered what the specificities of the financial sector in relation to data access issues are, and is competition law the right tool to address these issues.

Mr Adam Land from the Competition and Markets Authority (hereinafter: CMA) explained that the CMA had the opportunity to look at some of those markets holistically, to assess competitive structures and practices, and to intervene using a broad range of options. The issues which were identified by the CMA related to high concentration levels, barriers to entry and expansion, demand-side characteristics, for example low levels of customer switching and pricing complexity. There was a clear need for change. The CMA now created a new body, the Open Banking Implementation Entity (OBIE), to drive forward these changes, with the CMA providing strategic direction and enforcement action, if necessary, to support the work of the OBIE. The CMA is focusing on the quality of the consumers' experience with open banking services in prioritizing its interventions.

Mr Sheldon Mills from the Financial Conduct Authority (hereinafter: FCA) reminded that competition was added by the FCA to other objectives (market integrity

and consumer protection), to enable the FCA to consider how the process of rivalry works in financial services as consumers can benefit from the promotion of effective competition in financial services markets.

Mr Matthew Readings from Shearman & Sterling stated that the key features of financial services, which can result in entry barriers and other competition law problems, are the need to have access to data to compete with incumbents, platform technologies and interoperability. However, access to data could result in over transparency, which, linked with artificial intelligence, can cause a wide range of problems. A solution to interoperability issues (that is, companies need to use a specific technology to compete) is standardization, although it can result in chilling the innovation incentives of incumbents.

Ms Natalia Przystasz from Auka noticed that Directive 2015/2366 of 25 November 2015 on payment services did not change the mobile payment business model, but it made it easier. It took out one of the constraints that related to API (application programming interface). In fast-paced moving sectors, it is important to be proactive rather than reactive. Regulators involved with FinTech actors should initiate discussions across countries.

Dr Stefano Trento from Compass Lexecon explained that big tech companies are likely to enter the markets for consumer lending and small business lending. For example, Amazon has started lending money to merchants who sell products through Amazon. He suggested that data will be the key asset for competition between large tech companies and traditional banks. The data advantage of traditional banks is bank accounts information, which can be used to screen out borrowers who are likely to face repayment difficulties and default.

Mr Peter Freeman QC, Chairman of the United Kingdom Competition Appeal Tribunal (hereinafter: CAT), delivered the keynote speech. He noticed that the conference's topics are drawn from the array of challenges that the digital economy has brought to competition law at the age of fast-moving innovation, big data and the growth of IT-based companies. He addressed some of the concerns that the appeal system for competition infringement cases is not fit for purpose and should be in some way curtailed, or lightened, or reduced. It has been said that the system imposes an unnecessary second tier, substantive assessment, that it allows the CAT to conduct a complete re-hearing of an authority's decision, using evidence not available to the authority, and that the CAT substitutes its own decisions, thus thwarting the effectiveness of the enforcement system. According to Peter Freeman, these criticisms are greatly overstated and do not accord with the facts. The CAT is required to determine the appeal on the merits by reference to the grounds of appeal. It is not able to roam freely over the subject matter of the decision; appeals are often on quite narrow and specific points and even on those specific issues. The process is adversarial and not inquisitorial. The CAT's approach is conditioned by the case that is being made to it. Also, the CAT will also give due weight to the authority's findings that are properly and reliably arrived at. The CAT is merely holding the decision-maker to account.

The second panel was focused on 'Post-Mortem' analysis of cleared mergers in the context of innovation. **Dr Maria Ioannidou** from Queen Mary University of London

started with stating that there is no consensus on the appropriate role of innovation in merger control. Trying to decipher the impact of merger control on innovation is very topical, especially in the light of recent criticisms against competition authorities and competition policy, both in the UK and internationally, that there has been a perceived increase in concentration and lessening of competition in many markets in recent years. Retrospective analyses of completed mergers are very useful in that regard.

Mr Colin Raftery from the CMA noticed that not only businesses, but also authorities, have to challenge themselves to innovate. There is an ongoing debate about merger control in fast moving industries, in the context of a broader debate about how competition law should be enforced. Competition analysis in digital sectors raises a number of specific challenges. First, the M&A activity is very intense. Second, prospective analysis is particularly important, as markets are fast moving, but also difficult, given the rapid development of technology. Different theories of harm and substantive questions have been applied and raised in previous cases.

Mr James Aitken from Freshfields Bruckhaus Deringer suggested that mergers should be assessed considering the markets' conditions at the time of the transaction, rather than assessed in light of how markets have developed. All antitrust cases in digital sectors are about evidence. Documentary evidence is critical and the authorities have huge powers to gather it. A key concern seems to be whether the authorities have been careful enough regarding the potential for entrants to become competitors.

Professor Richard Whish QC from King's College London considered that although the issues raised by antitrust in digital markets seem new, they take place in a fairly well-established legal order. In the Dow/Dupont case, the European Commission came up with apparently new theories of harm, seemingly in a context of legal uncertainty. However, the approach taken was not innovative. Another example is the Siemens/Alstom case. Regardless of the excitement surrounding this case, it raised concerns and debates similar to those related to the Aerospatiale/Alenia case back in 1991. Also, in a number of cases dated from the early 1990s, the question was raised as to the existence of a technology market. It was debated for several years. The European Commission first defined a technology market in the Shell/Montecatini case in 1994. A remedy – a non-exclusive worldwide license of intellectual property – was already deemed necessary to address related competition issues.

Mr Justin Coombs from Compass Lexecon agreed that focusing on innovation does not necessarily mean that a new theory of harm or paradigm is adopted. Focusing on innovation can be required while conducting conventional analyses within the well-known framework of horizontal merger control: companies do not only compete on prices. Innovation is just another dimension of competition.

Mr Alvaro Ramos from Qualcomm also agreed that the substance of the analysis is not new. However, from a procedural perspective, three aspects should be noted. Competition authorities need to assess whether the current filing threshold based on the parties' volume of sales allows them to review large deals (deal value) where the target has limited sales. There should be no presumption of illegality on deals where there is a reduction in the number of innovators. The scope of discretion of

authorities in merger control is quite wide, notably outside of the European Union and the United States.

Professor Richard Whish responded that the standard of proof and the burden of proof are established by the General Court, not by the Commission. Nothing can be concluded from the Dow/Dupont case in that regard, especially as it resulted in commitments and thus the decision was not appealed. A related question is how to apply the innovation theory of harm in practice when it requires assessing theoretical research and development. It would be reasonable to require that specific evidence is found to support the case.

The last panel was focused on killer acquisitions and the question whether they can be prevented. **Dr Colleen Cunningham** from London Business School explained that killer acquisitions occur when incumbents acquire nascent startups solely to shut down their technology and pre-empt potential future competition. According to his research, approximately 6% of all acquisitions in the pharmaceutical industry are pure killer acquisitions. Such acquisitions occur disproportionately just below the thresholds for antitrust scrutiny. There are discussions about lowering thresholds, but other policy options should also be considered, as killer acquisitions can be of companies without any turnover. Because of the potential for negative innovation-related effects, killer acquisitions raise important concerns.

Ms Jacquelyn MacLennan from White & Case said that killer acquisitions can be prevented either by using existing tools, or by changing the tools, but the core of the debate is whether killer acquisitions should be prevented. Does the situation require changing the law? One change suggested is to revise the thresholds in some jurisdictions, for example to move away from revenue-based thresholds to adopt value-based thresholds. But is this necessary? In Germany, where the thresholds according to which transactions are or are not subject to filing requirements have been modified in 2017, one third of the filed deals were in the tech sector, one third in the pharmaceutical sector and one third in other sectors. None of these cases raised substantive concerns. Therefore, lowering the thresholds and increasing the filing burdens on companies and work for competition authorities may not be justified. The other legal test which has been focused on for change is the burden of proof. At the moment, it is considered that companies should be allowed to merge or acquire other companies unless a regulatory authority has proved that this results in anticompetitive effects. Should it be assumed that in some defined circumstances mergers should not happen unless the parties prove that their transaction is not anticompetitive? The case for such a radical move has not yet been made.

Ms Sarah Harper from Visa noticed that the real value of an acquisition is unknown until it is materialized. It cannot be evaluated at the outset as consumer needs are constantly and very quickly changing and developing. Fast-paced moving markets are characterized by high levels of uncertainty. A lot of assumptions have to be made to assess the impact of killer acquisitions, given that markets are not static.

Dr Lorenzo Coppi from Compass Lexecon added that the burden of proof regarding effects on competition should not be reversed. From a policy perspective, the burden

of proof should not be reversed unless the standard of proof on efficiencies is lowered, or it would result in a large number of prohibitions.

Dr Giulio Federico from the DG COMP reminded that in some digital markets, large platforms benefit from network, winner-takes-all effects. Protecting competition in these markets can be difficult. Merger control is an instrument to make sure that at least some threats to competition are mitigated.

Professor Renato Nazzini from King's College London closed the conference sharing his final thoughts on the issue of the burden of proof. In his view it goes much broader than just competition policy. The reality that we should recognize is that competition law and the competition infrastructure, competition authorities and specialist tribunals and so on and so forth, is part of a wider legal and political environment, and certain things will inevitably happen whatever the merits or otherwise of the competition regime are. He said he would be happy with a system where things like reversing the burden of proof or other reforms were just based on whether the competition regime works well or not, the fear is that actually they may happen for other reasons. But that doesn't mean that we shouldn't listen to concerns including political concerns, or concerns from the public opinion more generally.

Marcin Mleczko
Researcher at Department of Competition Law
of the Institute of Law Studies of the Polish Academy of Sciences,
trainee at the Competition and Markets Authority (London)

Cartel Facilitating as a Special Form of Participation in Anticompetitive Agreements under EU and Polish Competition Law. Warsaw, 3 April 2019

On 3rd April 2019, a scientific seminar entitled '**Cartel facilitating as a special form of participation in anticompetitive agreements under EU and Polish competition law'**, organized by the Department of Competition Law of the Institute of Law Studies of the Polish Academy of Sciences, was held in Warsaw. During the event lectures were given by Paweł Podrecki (professor of the Institute of Law Studies of the Polish Academy of Sciences – INP PAN), Katarzyna Wiese (L.LM., PhD) and Grzegorz Materna (professor of the Institute of Law Studies of the Polish Academy of Sciences – INP PAN).

At the beginning, Professor **Grzegorz Materna** (INP PAN) drew attention to the tendency of competition authorities to extend antitrust liability due to a broad interpretation of the scope of anticompetitive agreements, as well as new forms of involvement in an infringement of competition, other than 'perpetrators', which regards to cartel facilitators.

In the first speech, Professor **Paweł Podrecki** (INP PAN) presented the concept of new forms of 'group practices' restricting competition. The Speaker emphasized that the emergence of new forms of agreements is mainly the result of the development of innovative business models, such as Uber. Subsequently, Professor Podrecki analysed intermediary liability on the examples of liability of internet service providers, liability of intermediaries for infringements of intellectual property rights, and liability of instigators and helpers under the Polish Civil Code. According to the Speaker, competition law might not be suitable for a proper market regulation in times when traditional agreements concluded in smoke-filled rooms shift toward the digital market and when algorithms are used to bring anticompetitive effects.

The next speech, given by **Katarzyna Wiese** (PhD), focused on antitrust liability of cartel facilitators on the basis of EU law. A cartel facilitator is an undertaking that knowingly contributes to the common anticompetitive goal of the agreement. According to the practice of the European Commission (EC) and case-law of the Court of Justice of the European Union (CJEU), agreements that distort competition in the EU are caught by Article 101 of the Treaty on the Functioning of the European Union (TFEU), irrespective of whether the parties operate in the same market. Therefore, cartel facilitators can be liable for such conduct even where such facilitators are not active on the cartelized product market as well as when the cartel

does not limit their autonomy of intent. According to the Speaker, neither Article 101 TFEU, nor any other provision of EU competition law, provide for a legal basis for an extension of its scope on undertakings that do not realize directly the premises of the prohibited practice, but merely support actions undertaken by others. Katarzyna Wiese recommended an adjustment of the liability test of cartel facilitators so that it includes an additional qualitative premise, namely the appreciability of a contribution to the common anticompetitive goal.

In the last speech, Professor **Grzegorz Materna** (INP PAN) presented critical remarks regarding the application of the EU concept of cartel facilitators' liability in antitrust proceedings before the Polish Competition Authority. According to the Speaker, the concept of liability for a single and continuous infringement and the concept of anticompetitive agreement, which was adopted by the CJEU as a basis for cartel facilitators' liability, are not adequate tools in such cases. That's because the problem of cartel facilitators' liability regards instead a different issue, namely the scope of antitrust liability, which should expressly stem from the letter of the law. Polish competition law provides for antitrust liability of the direct participant to a prohibited practice only, that is, the undertaking concluding an agreement restricting competition, not of 'contributing' or 'facilitating' involvement of other parties in the agreement. Therefore, the application of the concept of cartel facilitators raises serious doubts in the light of the principle of certainty in relation to legislation providing for financial penalties. When the Polish Competition Authority conducts antimonopoly proceeding under Article 6 of the Polish Competition Act[1] exclusively, this concept should not be used by the Authority. In the case of parallel application of Polish and EU competition law, the possibility of using the above mentioned concept of cartel facilitators' liability is also doubtful. Article 3 para. 1 Council Regulation No 1/2003 (OJ L 1, 4.1.2003, p. 1–25) stipulates that where the competition authorities apply national competition law to agreements which may affect trade between Member States, they also apply Article 101 TFEU. Therefore, according to Professor Grzegorz Matera, the lack of grounds for cartel facilitator's liability under the Polish Competition Act excludes the competence of the Polish Competition Authority to address to them antimonopoly decisions through the application of Article 101 TFEU.

During the discussion with the audience that followed two opposing positions regarding the legitimacy of the concept of a cartel facilitators' liability were presented. In the opinion of Professor **Małgorzata Król-Bogomilska** (WPiA UW), taking into consideration such common patterns pertaining to criminal liability for aiding and abetting (helpers and instigators), they should also be 'transplanted' into competition law respectively. Thanks to this, the principle of specificity that offences and penalties must be defined by law, also binding in antitrust law, would be fulfilled.

By contrast, according to **Jan Polański** (LL.M., Department of Competition Protection, UOKiK), due to the effectiveness of EU competition law, the Polish Competition Authority has to apply the concept of a cartel facilitators' liability,

[1] Act of 16 February 2007 on competition and consumer protection (uniform text: Official Journal of the Republic of Poland of 2009, pos. 369).

created by the CJEU case law, regardless of the lack of a clear legal basis in Polish law, insofar as a given agreement may affect trade between Member States. The provisions of the prohibition of an anticompetitive agreement do not specify that the concept of an 'anticompetitive agreement' relates only to 'perpetrators'. It should be rather admitted that this concept also includes agreements with other undertaking such as facilitators, as long as they have an anticompetitive effect.

In response to a question from the audience, Professor **Grzegorz Materna** explained that in some cases, undertakings referred to as facilitators are at the same time direct participants of the cartel, operating on the same cartel market or related market. Therefore, they are interested in the success of this cartel (that is, the implementation of its anticompetitive effects). In these cases, their liability should not raise any objections (for instance, participants of hub and spoke agreements).

In the opinion of **Agnieszka Stefanowicz-Barańska** (Dentons, attorney at law), there is a possibility under Article 101 TFEU that a given agreement between a facilitator and a cartelist would have as their object or effect the prevention, restriction or distortion of competition within the internal market. Had there been no legal basis for cartel facilitators' liability (confirming by the CJEU), proceedings against undertakings for actively contributing to a restriction of competition in the relevant market could have been blocked.

Katarzyna Wiese (PhD) did not agree with the above mentioned opinion. She pointed out that even if it had been established that the action taken by a cartel facilitator had a positive effect on the operation of the cartel, by making it more effective and concealing it, the effects of that action on competition stem exclusively from the conduct of the cartel members. In this situation, when there is no clear legal basis, and the CJEU case-law has contributed to blurring the definition of an 'anticompetitive agreement', it is hard to accept that effectiveness of EU competition law could justify such liability in itself.

Artur Szmigielski
M.A., a researcher at Department of Competition Law of the Institute of Law Studies of the Polish Academy of Sciences
a.szmigielski@inp.pan.pl

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