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ARTICLE

Overview of Compliance with the Requirements of Directive (EU) 2019/1 with Regard to the Independence and Resources of National Competition Authorities: The Examples of France and Poland

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Abstract The aim of this article is to critically reflect on how two EU Member States – France and Poland – meet the requirements of the ECN+ Directive with regard to the independence and resources of national competition authorities (NCAs). The article provides an overview of the ECN+ Directive in this respect. It also provides an overview of the French and Polish legal frameworks for the independence and resources of their NCAs – pre and post implementation of the ECN+ Directive. To this end, the article firstly sheds light on the legal status of the French and Polish NCAs and their independence; the distinctive features of the procedures for appointing and dismissing their decision-making bodies/staff; and a concise comparison of their powers to set priorities and their resources, also against the background of examples from other EU Member States. Secondly, the article identifies some inconsistencies and shortcomings in both the ECN+ Directive and (post-ECN+ Directive) national laws. Thirdly, it suggests some amendments to the

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legal frameworks, bearing in mind that the European Commission is bound to review the ECN+ Directive before 12 December 2024. The point of the analysis in this article is both descriptive and normative.

Keywords Independence · Resources · National competition authority · Competition law · Directive (EU) 2019/1 · ECN+ Directive

1 Introduction

Regulation (EC) 1/2003[1] set up a decentralised system of competition enforcement and gave significant impetus to Member States' national competition authorities (NCAs) to actively enforce European Union (EU) competition rules. After ten years of antitrust enforcement under Regulation 1/2003, the European Commission summarised the situation regarding EU Member States' cooperation within the European Competition Network (ECN).[2] It concluded that, while enforcement priorities had been a matter for each ECN member to determine, they had regularly informed each other about their own areas of focus in terms of enforcement and advocacy. By doing so, they had contributed to mutual awareness and fostered potential further exchanges among authorities with similar priorities and/or facilitated the use of experience from other ECN members.[3] However, Regulation 1/2003 had not harmonised institutional structures, procedures or sanctions across Member States, except for the rules contained in its Arts. 5 and 35.[4]

After more than a decade of the enforcement of EU competition rules by NCAs under Regulation 1/2003, with divergent outcomes that reduced companies' incentives to comply with EU competition rules, and the extensive (but rather ineffective) use of soft actions to address these divergences, the European Commission considered that the voluntary actions at the national level needed to make the decentralised enforcement system of Regulation 1/2003 work better and empower the NCAs to be more effective enforcers were unlikely to ensue.[5] To circumvent this problem and make NCAs – as enforcers of EU competition rules – move in the same direction, a legislative proposal for a directive of the European

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (OJ 2003 L1, 4.1.2003, p. 1), hereinafter Regulation 1/2003.

[2] Commission Staff Working Document: Ten Years of Antitrust Enforcement under Regulation 1/2003, 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, SWD(2014) 230/2.

[3] *Ibid.*, p. 70.

[4] *See* Wils (2017a), p. 13.

[5] European Commission, 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 final, 22.3.2017. *See* p. 8.

Parliament and of the Council was presented by the European Commission in March 2017.[6]

Directive (EU) 2019/1 was ultimately adopted in December 2018.[7] Its Arts. 4 and 5 require all EU Member States to ensure, *inter alia*, that their NCAs have guarantees of independence and sufficient resources. As such, these provisions have a concrete impact on national frameworks.[8] The emphasis in the literature tends to focus on the application of EU competition rules by NCAs, and Patakyová is correct in observing that the ECN+ Directive diminishes the institutional autonomy of EU Member States.[9] She argues that "Recital 3 interferes with the application of national law, in particular when EU law and national law are applied in parallel".[10] However, in practice, the ECN+ Directive affects also the application of national competition law to infringements that do not affect trade between EU Member States. It is justified to say that it does not seem feasible for EU Member States to have duplicate institutional and procedural standards with respect to the two different types of infringement (those with EU effect and those of purely national scope). Stankiewicz explains that, "through a backdoor", the ECN+ Directive "accomplishes the partial harmonisation of national antitrust procedures, regardless of whether EU law is applied or not".[11] The same can be said for national institutional contexts.

The aim of this article is to critically reflect on how two EU Member States – France and Poland – meet the requirements of the ECN+ Directive with regard to the independence and resources of their NCAs. The article provides an overview of the ECN+ Directive in this respect. It also provides an overview of the French and the Polish legal frameworks for the independence and resources of their NCAs – pre and post implementation of the ECN+ Directive. To this end, the article firstly sheds light on the legal status of the French and Polish NCAs and their independence; the distinctive features of the procedures for appointing and dismissing their decision-making bodies/staff; and a concise comparison of their powers to set priorities and their resources, also against the background of examples from other EU Member States. Secondly, the article identifies some inconsistencies and shortcomings in both the ECN+ Directive and national laws post implementation of the ECN+ Directive. Thirdly, it suggests amendments to legal frameworks, bearing in mind that the European Commission is bound to review the ECN+ Directive before 12 December 2024.

The authors of this article are based in Poland and France, and these jurisdictions were chosen for detailed comparison. The implementation of the ECN+ Directive is

[6] *Ibid.*

[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 (OJ L 11, 14.1.2019, p. 3), hereinafter: ECN+ Directive or Directive (EU) 2019/1.

[8] But *see* Jurkowska-Gomułka (2020), p. 143.

[9] Patakyová (2019), p. 143.

[10] *Ibid.*

[11] Stankiewicz (2021), p. 185.

still delayed in Poland. Even though the Polish model of competition law borrows more from Germany, France was chosen for comparison, as it is also a country whose legal system is rooted in Romano-Germanic law. Importantly, France was one of the first EU Member States to fully transpose the ECN+ Directive, and did so within EU deadlines. France is also a Member State with the administrative model of NCA in which (unlike in Austria, Ireland and Sweden, and – outside the EU – the United States, Canada and Australia) the authority's decisions are appealable to a general court (and not an administrative court), and the authority is not entrusted with the enforcement of sectoral regulations.[12] Therefore, irrespective of differences in the detailed design of the NCAs, we could expect them to experience similar problems to a certain extent, and could analyse how they are solved. On the other hand, with a rather different approach to some aspects of the ECN+ Directive, the French NCA, as one of the best performing NCAs in the world, could be a source of inspiration for the Polish solutions implementing the Directive. After identifying the problems in the ECN+ Directive and examples of solutions from various Member States, we turn to France for detailed examples of (assumed) good practice. After a critical analysis of these practices, we look at problematic provisions of Polish competition law and solutions that could be imposed in order to implement the ECN+ Directive. Taking into account especially that several Member States have still not implemented the ECN+ Directive,[13] the conclusions could be useful for the future development of national legal frameworks for competition protection that are intended to implement the Directive. The analysis is not limited to homogenous pairs/groups of Member States;[14] otherwise, it would be limited to Eastern Europe and closed to new ideas from outside. The point of the analysis in this article is both descriptive and normative.

2 Legal Status of an NCA and Its Independence

2.1 Provisions of the ECN+ Directive

The ECN+ Directive seeks to strengthen the administrative NCAs' operational independence. Article 4(1) of the ECN+ Directive requires all Member States to ensure that:

1) such NCAs perform their duties and exercise their powers impartially;[15] and

[12] It is worth adding that France is also similar to Poland (a country ruled by populists) in that the reappointment of the NCA's President is subject to the appointer's decision; *see* Sect. 3.2 of this paper. To find out more on the populist influence on Polish competition law *see* Bernatt (2022).

[13] https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX%3A32019L0001&fbclid=IwAR0dtfAYNlwiETKhTz31sAdsZLpNUhM0O4sg5f_WdF9GoTPfIuXTlsan3zw (10.05.2022).

[14] With similar histories, culture, languages, geography, ideology (including ideas of competition), legal cultures, relationships to other values, procedural solutions etc. *See* Townley (2018), pp. 285–286.

[15] *Cf.* Directive (EU) 2019/1, Recital (17).

2) they do so in the interests of the effective and uniform application of Arts. 101 and 102 TFEU;[16]
3) the NCAs are subject to proportionate accountability requirements;[17] and
4) they operate without prejudice to close cooperation between competition authorities in the ECN.[18]

To this end, express provision should be made in national law to ensure that, when applying Arts. 101 and 102 TFEU, administrative NCAs are protected against external intervention or political pressure that is liable to jeopardise their independent assessment of the matters before them.[19] Article 4(2)(a)–(c) of the ECN+ Directive establishes an open catalogue of minimal, sufficient guarantees that Member States should maintain or introduce.[20] It develops the laconic Art. 4(1) and sets the minimum core criteria for ensuring the independence of the staff and persons that exercise the decisional powers of administrative NCAs within their competence for the application of Arts. 101 and 102 TFEU. These criteria are based on their:

1) ability to perform their duties and to exercise their powers independently of political and other external influence;
2) not following instructions from the government or any other public or private entity when carrying out their duties and exercising their powers, without prejudice to the right of a government of a Member State, where applicable, to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings;[21] and
3) not taking actions that are incompatible with the performance of their duties and/or with the exercise of their powers, and being 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.[22]

[16] Treaty on the Functioning of the European Union (consolidated version OJ C 326, 26.10.2012, p. 47), hereinafter: TFEU.

[17] To find out more *see* Sect. 5 of this paper.

[18] *Cf.* Directive (EU) 2019/1, Recital (7).

[19] Directive (EU) 2019/1, Recital (17).

[20] Directive (EU) 2019/1, Art. 4(2)(a)–(c).

[21] Similar provisions were included in *e.g.* §14a of the Danish Competition Act 155/2018, Art. 10(3bis) of the Italian Competition and Fair Trading Act 287/1990, Art. 12(1) of the Greek Competition Act 3959/2011, Art. 10(2) of the Cypriot Law on Competition Protection, Art. 13A(a) of the Malta Competition and Consumer Affairs Authority Act, Art. 26(11) of the Croatian Law on Competition Protection, and Art. 4(3) of the Bulgarian Law on Competition Protection (general policy rules are understood as strategies, programmes and plans for development of the respective sectors of the economy adopted by the National Assembly and by the Council of Ministers).

[22] Also *see* Directive (EU) 2019/1, Recitals (19)–(20). To this end, national legal frameworks do not allow such staff to *e.g.* take on additional posts or engage in any gainful activity that is incompatible with the NCA's duties (*see e.g.* Art. 10(3) of the Italian Competition and Fair Trading Act 287/1990; Art. 12(5) of the Greek Competition Act 3959/2011; Art. 13 of the Cypriot Law on Competition Protection; and Art. 4(3) of the Bulgarian Law on Competition Protection, which does, however, exclude teaching, research and arbitration).

Wils explains that EU directives in the areas of electricity, natural gas, electronic communications and railways contain provisions concerning the independence and resources of national regulatory authorities (NRAs) comparable to those prescribed for administrative NCAs in Art. 4(1) and (2)(a)–(c) of the ECN+ Directive; so the approach is similar when it comes to other regulatory bodies (sector regulators).[23] Wils also rightly explains that Art. 4 contains the most general and basic minimum requirements.[24] Many EU Member States already have had at least such standards in their legislation on the civil service, e.g. the Czech Republic, Finland, Germany, Lithuania and Slovakia.[25] As Wils continues, "the fact that actual independence depends on numerous factors that significantly vary between EU Member States justifies limiting EU legislation", adding after Currie's concerns,[26] that actual (real, *de facto*) independence of NCAs depends on, *inter alia*, the general political and administrative culture of the state in which the NCA functions.[27]

The ECN+ Directive does not propose a single institutional model of an NCA for Member States to follow. It does not impact on the composition of NCAs; in particular, it allows them to be either collegial decision-making bodies (the model that is by far the most widespread, e.g. in France, Luxembourg, Belgium, Denmark, Portugal, Spain, Italy, Greece, Cyprus, Hungary, Romania, Bulgaria, Lithuania and Latvia)[28] or single "commissioners" (such as in the case of e.g. the Czech Republic, Germany and Poland). However, it is explained in the literature that the transformation from "single-headed management", i.e. an individual office holder, to a board consisting of several persons reinforces the independent operation of NCAs, as their policy approach is no longer dependent on the views of just a single individual.[29] Moreover, the ECN+ Directive does not require a readily recognisable

[23] Wils (2017b), para. 32. *Cf.* Patakyová (2019), p. 131.

[24] Wils (2019a, b), p. 21.

[25] *See* Czech Act No. 234/2014 on the civil service (Zákon č. 234/2014 Sb., o státní službě), the Finnish State Civil Servants Act 750/1994 (Valtion virkamieslaki/Statstjänstemannalag 750/1994) and Government Civil Service Regulation 971/1994 (Valtion virkamiesasetus/Statstjänstemannaförordning 971/1994), the German Federal Act of 27 June 1979 on the law of civil servants (Bundesgesetz vom 27. Juni 1979 über das Dienstrecht der Beamten), Lithuanian Law No. VIII-1316 on the Civil Service of the Republic of Lithuania (Lietuvos Respublikos valstybės tarnybos įstatymas Nr. VIII-1316), Slovak Act No. 55/2017 on the civil service and amending certain acts (Zákon č. 55/2017 Z. z. o štátnej službe a o zmene a doplnení niektorých zákonov v znení neskorších predpisov) and Slovak Government Office Decree No. 400/2019 establishing a Code of Ethics for civil servants (Vyhláška Úradu vlády Slovenskej republiky č. 400/2019 Z. z., ktorou sa vydáva Etický kódex štátneho zamestnanca). On the other hand, solutions to conflicts of interest are contained in provisions of competition law, *e.g.* in Austria, Bulgaria, Croatia and Slovakia (*see* § 7(3) of the Austrian Competition Act, § 15 of the Slovak Competition Protection Act, Art. 10 of the Bulgarian Law on Competition Protection and Art. 29(5) of the Croatian Law on Competition Protection, where a "reasonable period after leaving office" is defined as one year/12 months; Art. 12(11) of Greek Competition Act 3959/2011 and Art. 10(3ter) of the Italian Competition and Fair Trading Act 287/1990 give it as three years.

[26] Currie (2016).

[27] Wils (2019a, b), p. 21; Wils (2017b), para. 102.

[28] On pros and cons *see* Jenny (2016), part 3.

[29] Van de Gronden and de Vries (2006), p. 63; Patakyová (2019), p. 133.

separation between investigative, prosecutorial and decision-making functions.[30] For example, in France and Spain, a full functional separation between investigative and decision-making bodies has been established, with the respective competences being carried out independently of one another. On the other hand, there is no separation between investigative, prosecutorial, and adjudicative functions at any stage of the European Commission proceedings or Polish NCA proceedings; the case team is responsible for investigating the case, drafting the decision, and recommending the remedy.

2.2 The French ADLC as the NCA not Instructed by the Government

In France, Art. 37(I) of the Act of 3 December 2020 on various provisions for adapting to European Union law in the economic and financial fields[31] empowered the government to transpose the provisions of the ECN+ Directive by way of an ordinance. But this statute has done more than that, since it has also directly introduced into French law measures to modify certain procedural provisions of competition law (it should be noted that this law goes well beyond competition law, since it includes various EU directives and regulations). Some of these measures, essentially in force since 5 December 2020, are thus complementary to the provisions of the ECN+ Directive, the rest having been integrated into French positive law by the transposition ordinance of 26 May 2021.[32] Some authors believe this has resulted in a strengthening of the innovations contained in the ECN+ Directive.

The French competition authority is the *Autorité de la concurrence* (ADLC). Its organisation combines the elements of a traditional administration authority with those of a court. This model is now used by almost all NCAs in Europe. The ADLC is said to be one of the best performing NCAs in the world. In particular, statistics provide evidence that it tops the list of NCAs in terms of the number of final decisions, which is the most important single indicator of performance available.[33]

The independence of the ADLC stems from its status, as it belongs to the legal category of independent administrative authority: an independence reinforced by the

[30] The lack of such separation is criticised in the literature from the perspective of due process; *cf.* Jones and Sufrin (2016), p. 991.

[31] Act No. 2020-1508 of 3 December 2020 on various provisions for adapting to European Union law in the economic and financial fields, Official Journal of the French Republic – JORF – No. 0293 of 4 December 2020, www.legifrance.gouv.fr/eli/loi/2020/12/3/ECOM1935457L/jo/texte (10.12.2021).

[32] Ordinance No. 2021-649 of 26 May 2021 on the transposition of the ECN+ Directive (Ordonnance n° 2021-649 du 26 mai 2021 relative à la transposition de la directive (UE) 2019/1 du Parlement européen et du Conseil du 11 décembre 2018 visant à doter les autorités de concurrence des États membres des moyens de mettre en œuvre plus efficacement les règles de concurrence et à garantir le bon fonctionnement du marché intérieur), Official Journal of the French Republic – JORF – No. 0121 of 27 May 2021, www.legifrance.gouv.fr/eli/jo/2021/5/27/0121 (10.12.2021).

[33] Wils (2017b), para. 123.

reform it underwent following the Act of 20 January 2017 on the general status of independent administrative authorities and independent public authorities.[34] Article 9 thereof underlines the ethical rules applicable to its members (in the case of the NCA, 195 staff and 17 board members), who must perform their duties with "dignity, probity and integrity (…)".[35] The text also reiterates their independence, since these members "neither receive nor seek instructions from any authority".

Independent administrative authorities occupy a special place in French institutions, insofar as strong guarantees of independence are attached to the exercise of their public service mission: independence from the executive power, from the sectors they control and from the parties to the proceedings. This means that the government does not exercise any hierarchical supervision over the ADLC, giving it neither orders nor instructions. In other words, the Minister of the Economy has no control over the activity of the ADLC, which takes its decisions alone and free of interference. This implies the absence of any tutelage or higher power of any kind, even if the NCA acts on behalf of the State and can therefore engage the responsibility of the State.

This independence is further reinforced by the ECN, which provides for a number of powers, duties and safeguards for the NCAs and the European Commission. Finally, its inclusion in the Framework on Competition Agency Procedures, set up by the International Competition Network,[36] a cooperation tool designed to promote procedural fairness, can only reinforce these requirements.

To conclude on this point, the institutional status and powers of the ADLC already largely comply with EU standards. But not all of them do, since the ECN+ Directive has forced the French lawmaker to modify the positive law, including on cooperation with other NCAs, with regard to the ADLC's means of action – and, above all, with regard to its power to reject complaints.[37]

However, for completeness, it is worth recalling a report published in 2017 by the Council of Economic Analysis (*Conseil d'analyse économique*, CAE) attached to the services of the French Prime Minister, which focused in particular on the lack of independence of the French competition authority. Its authors indicated that "France has progress to make, as much on the practice of deontology, the independence of the authorities, as on the appointment of its members".[38]

On the first point (ethics), there are indeed strict ethical rules surrounding the functioning of the board (appointment of the board members and the nature of their mandate), in order to preserve the total impartiality of its functioning and to prevent

[34] Law No. 2017-55 of 20 January 2017 on the general status of independent administrative authorities and independent public authorities (Loi n° 2017-55 du 20 janvier 2017 portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes), Official Journal of the French Republic – JORF – No. 0018 of 21 January 2017. www.legifrance.gouv.fr/eli/loi/2017/1/20/2017-55/jo/texte (10.12.2021).

[35] "(…) And ensure that any conflict of interest, within the meaning of Law No. 2013-907 of 11 October 2013 on transparency in public life, is prevented or stopped immediately".

[36] https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf (10.12.2021).

[37] To find out more *see infra* Sect. 4.2 of this paper.

[38] Bacache-Beauvalleta and Perrot (2017), pp. 6–8.

any risk of conflicts of interest. In principle, this should guarantee the independence of the college. Furthermore, after leaving office, former board members, as well as other former ADLC staff, remain subject to rules for monitoring the compatibility between their former duties within the ADLC and the exercise of a private activity, aimed in particular at ensuring compliance with the rules on conflicts of interest. The compatibility of functions is verified for a period of three years.

However, French legislation has given the government the opportunity to express itself officially on the requests made by the ADLC, particularly on practices in key sectors of the economy (telecommunications, energy, transport, etc.). The ordinance[39] of 1 December 1986 thus created a new organism – a Directorate General for Competition, Consumer Affairs and Repression of Fraud (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*, DGCCRF).[40]

The DGCCRF acts as a Government Commissioner before the ADLC: it formulates an opinion, at all stages of the procedure, on each of the cases investigated by the ADLC; produces written observations at both stages of the adversarial process (the notification of objections, report, etc.); and makes oral observations during the hearing. The Minister of the Economy can thus take an interest in or state his/her opinion about competition cases in a clear and transparent manner, while respecting the independence of the ADLC. The Minister's position is thus known to all the parties involved and is subject to an adversarial debate.

The DGCCRF is both an expert, due to its current practice of competition law, and a representative of the public authorities, able to voice its "general interest" concerns related to economic and competition policy. Its position thus makes it possible to contextualise the case and to keep the ADLC informed in its decision-making. The government may also give its opinion on cases handled by the ADLC before the Paris Court of Appeal, the court that reviews decisions rendered by this authority.

Does this whole mechanism fully respect Art. 4(1) of the ECN+ Directive, where the government of a Member State is allowed to issue general policy rules, provided that they are not linked to specific sectorial investigations or enforcement procedures? The question remains open.

2.3 The Polish OCCP President as NCA Dependent on the Executive

Over the last year (2021), Polish government drafters have continued to work on adapting the Polish competition law enforcement system to the requirements of the ECN+ Directive in order to make it more compatible with the latter and strengthen the NCA's formal independence guarantees. They propose in particular changing the 2007 Act on Competition and Consumer Protection[41] through the Amendment

[39] Ordinance No. 86-1243 of 1 December 1986 on the freedom of prices and competition has been repealed, its principles being included in the Commercial Code since 2000.

[40] Within the Ministry of the Economy, the DGCCRF ensures the proper functioning of markets for the benefit of consumers and businesses.

[41] Act of 16 February 2007 on Competition and Consumer Protection (consolidated text Journal of Laws 2021 item 275), hereinafter: the 2007 Competition Act.

Act.[42] In the meantime, the Polish NCA's independence has been questioned by the EU General Court in the *Sped-Pro* case.[43] The General Court noted that Art. 4 of the ECN+ Directive provides that Member States must guarantee the independence of NCAs, and recalled that, pursuant to the case-law of *Inter-Environnement Wallonie*,[44] Member States are obliged to refrain from taking any measures that are liable to seriously compromise the result prescribed by the directive before its transposition.[45]

So far, the government has not submitted the draft Amendment Act to the parliament, and the ECN+ Directive has not been transposed into Polish law yet. However, it is now clear that what the draft Amendment Act offers is insufficient, and that more needs to be done on the implementation of the requirements of the ECN+ Directive for the above-mentioned aims to be achieved.

Poland has developed the monocratic model of competition law enforcer, where a single President heads the organisation (the Office of Competition and Consumer Protection, hereinafter OCCP) and acts as one of the central authorities of government administration.[46] The OCCP President, as an NCA, is supervised by the prime minister, who appoints and dismisses him/her.[47] The Polish NCA has never been a collegial body.

The OCCP President exercises his/her powers for the application of competition rules, in particular, under the conditions and within the limits of the 2007 Competition Act. However, the 2008 Act on the Civil Service[48] and the 2011 Regulation No. 70 of the Prime Minister on guidelines for compliance with the principles of the civil service and the principles of ethics of the civil service corps (known as the Civil Service Code of Ethics)[49], which lay the foundations for *inter alia* impartiality in the Polish civil service, also apply.[50] These legal instruments provide *inter alia* for the impartial carrying out of duties and for political neutrality.[51] Their aim is to prevent conflicts of interest and maintain independence from instructions and external influence.[52]

[42] *See* in Polish at: https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757018#12757018 (7.12.2021).

[43] CJEU, 9 February 2022, case T-791/19, *Sped-Pro S.A. v European Commission*, paras. 71–106.

[44] CJEU, 19 December 1997, case C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne*, para. 45.

[45] CJEU, 9 February 2022, case T-791/19, *Sped-Pro S.A. v European Commission*, para. 86.

[46] To find out more *see* Martyniszyn and Bernatt (2020), pp. 165–215.

[47] *See* Sect. 3.3 of this paper.

[48] Act of 21 November 2008 on the Civil Service (consolidated text Journal of Laws 2021, item 1233).

[49] Regulation No. 70 of the Prime Minister of 6 October 2011 on guidelines for compliance with the principles of the civil service and the principles of ethics of the civil service corps (Polish Monitor 2011 No. 93 item 953).

[50] *Cf.* Błachucki (2019a), p. 270.

[51] *Cf.* Materna (2018), pp. 41–42.

[52] For more on the Polish civil service *see* Itrich-Drabarek (2015).

Moreover, the 1960 Administrative Procedure Code[53] defines the rules for excluding a public administration employee from proceedings and preventing a public administration authority from adjudicating a case.

What is the difference between the Competition Act pre the ECN+ Directive and the draft Amendment Act? Several provisions are going to be added to the 2007 Competition Act. Firstly, an absolute prohibition is going to be introduced against the President and Vice-Presidents of the OCCP taking on additional posts (except for certain academic posts) or any other gainful activity incompatible with their duties.[54] Secondly, provisions mirroring Art. 4(2)(a)–(c) of the ECN+ Directive are going to be added, even though their scope overlaps to a certain extent with that of pre-existing (pre ECN+ Directive) provisions referred to above.[55] Article 34a(2) of the 2007 Competition Act is going to define a “reasonable period” during which to prevent conflicts of interest. The President, Vice-Presidents and decision makers within the OCCP will be prohibited from getting involved in a case that they handled within the OCCP for three years after leaving the NCA. The specified period for preventing conflicts of interest will thus be the same as in France.

Regarding the requirement of the ECN+ Directive to abstain from seeking and/or taking instructions from the government, it must be admitted that both Poland’s pre- and post-Directive legislation does not and will not meet the set goal. According to Arts. 33a(1)(6) and 33b(1)–(2) of the 1997 Act on government administration departments,[56] the OCCP President may be dependent on instructions from the prime minister, as the latter issues binding guidelines and orders to the OCCP President. Still, these instructions or guidelines cannot concern decisions on the merits issued in individual matters. The literature is aware that this normative embrace is a declaration of what can be done by the prime minister, but, officially, no use has ever been made of this power.[57] However, as long as this legal basis is still not deleted from Polish legislation, the prime minister can give official instructions to the OCCP President on that basis and the NCA will not formally have full independence. And, as a result, the reform required by the ECN+ Directive has not yet been carried out in full in Poland.

3 NCA Appointment and Dismissal Procedures

3.1 Provisions of the ECN+ Directive

The grounds for dismissing NCA staff, as well as clear and transparent rules and procedures for the selection, recruitment and appointment of decision makers,

[53] Act of 14 June 1960, Administrative Procedure Code (consolidated text, Journal of Laws 2021, item 735, as amended).

[54] Act on Competition and Consumer Protection, 2007, draft Arts. 29(3aa) and 30(2).

[55] Act on Competition and Consumer Protection, 2007, draft Art. 34a(1)(1)–(3) and 34a(2).

[56] Act of 4 September 1997 on government administration departments (consolidated text, Journal of Laws 2020, item 1220, as amended), Arts. 33a(1)(6) and 33b(1)–(2).

[57] Błachucki (2019a), p. 265.

should be laid down in advance in national law in order to remove any reasonable doubt as to their impartiality and their imperviousness to external factors and thus strengthen the operational independence of administrative NCAs.[58]

The requirement for clear and transparent procedures is established in Art. 4(4) of the ECN+ Directive and applies to the selection, recruitment and appointment of decision makers, that is to say the members of the decision-making bodies of administrative NCAs.[59] The literal wording here includes institutional models with a functional separation between investigative and decision-making bodies (whereby the final decision is adopted by a board/council of an NCA), such as exist in many EU Member States.[60] However, the scope of this provision cannot be reduced to this literal wording: it must be interpreted more broadly, obliging Member States with more unitary NCA structures to make such procedures apply to the heads of their NCAs insofar as the heads make the decisions referred to in the ECN+ Directive. Since NCAs have a pivotal quasi-judicial role to play in competition law enforcement, and enjoy broad powers of discretion,[61] their selection and appointment procedures should be carefully designed in advance.[62] However, the ECN+ Directive does not by any means require EU Member States to hold (at least) parliamentary hearings in order to select or appoint members of the decision-making body;[63] these processes can be left to the government. The ECN+ Directive neither rules out the political character of the selection and appointment of members of the decision-making body, nor does it preclude the appointment of active politicians.[64] It does not set any minimal criteria in respect of candidates' expert knowledge or previous experience.[65]

Furthermore, consistent implementation of the ECN+ Directive does not mean that EU Member States need to introduce or maintain a fixed term for members of the decision-making body. However, it has been rare for there to be no fixed appointment terms for agency heads (German *Bundeskartellamt*, Polish OCCP President). The ECN+ Directive does not require that members of decision-making bodies be appointed for a fixed term of a particular length. Therefore, their mandate varies across jurisdictions. For example, its duration is four years in Denmark; five

[58] Directive (EU) 2019/1, Recital (17). *Cf.* first, third and fourth sentences.

[59] Directive (EU) 2019/1, Art. 4(4).

[60] *Supra* note 24.

[61] *Cf.* Townley (2018), pp. 122–124.

[62] *Cf.* Mateus (2007), p. 19.

[63] *E.g.* the President of the Hungarian NCA, who is nominated by the prime minister, is heard by the Hungarian Parliament and is appointed by the President of Hungary; *cf.* Cseres (2019), p. 76. Members of the Bulgarian NCA are appointed by the National Assembly; *see* Art. 4(1) of the Bulgarian Law on Competition Protection; also *see* Art. 12(3) of the Greek Competition Act 3959/2011. On the other hand, *e.g.* the President of the Slovak NCA is appointed by the President of the Slovak Republic based on a nomination by the Slovak government; *cf.* Patakyová (2019), p. 136.

[64] Bernatt (2022), p. 181.

[65] But *see e.g.* Art. 12(2) of Greek Competition Act 3959/2011, which requires that members of the Competition Commission be persons distinguished for their scientific training or professional competence in the legal or economic sector, in particular in matters of free competition. Article 9(2)(c) of the Cypriot Law on Competition Protection follows the same model.

years in France, Greece, Cyprus, Romania and Slovakia; six years in Belgium, Lithuania and Hungary; and seven years in Bulgaria and Italy. The ECN+ Directive also does not contain any rules concerning the reappointment of the same person. Some authors point out that reappointments may decrease the level of independence of the NCA, due to the fact that the government may require a person who is in charge of the NCA "to follow its instructions, otherwise the person will not be re-elected".[66]

Article 4(3) of the ECN+ Directive provides an essential guarantee of the independence of NCAs – namely protection against dismissal for persons who take decisions exercising the powers referred to in the ECN+ Directive.[67] They must not be dismissed from their NCA posts for reasons related to the proper performance of their duties or to the proper exercise of their powers for the application of Arts. 101 and 102 TFEU.[68] However, the ECN+ Directive does not extend the safeguard against undue dismissal to the head of an NCA where the NCA's institutional model does not award decision-making powers under Arts. 101 and 102 TFEU to the NCA's head (instead reserving such power to a collegial body within the agency); still, as illustrated by Hungary, the NCA's head, even if not involved in the formal decision-making under Arts. 101 and 102 TFEU, plays an important role in the functioning of the NCA and a core role in the process of appointing the members of the agency's decision-making body.[69]

Article 4(3) of the ECN+ Directive reaches far beyond the negative "non-dismissal clause". It is also about the fundamental options available to supervisory authorities. They may dismiss decision makers only if the latter no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law.[70] This means that a supervisory authority must demonstrate reasonable grounds showing that such a person is no longer able to perform his/her duties. Another basic requirement, set out in Art. 4(3), that needs to be stressed here reads "[t]he conditions required for the performance of their duties, and what constitutes serious misconduct, shall be laid down in advance in national law, taking into account the need to ensure effective enforcement".

3.2 The French ADLC as NCA Protected Against Dismissal

In France, the independence of the ADLC is ensured by several mechanisms, such as the way in which the members of the board are appointed, the conditions for exercising their mandate, the status of its members and its collegiate nature. Better

66 Patakyová (2019), p. 138.

67 Directive (EU) 2019/1, Art. 4(3).

68 A similar provision was included in *e.g.* Art. 5(7) of the Bulgarian Law on Competition Protection, Art. 29(4) of the Croatian Law on Competition Protection, Art. 10(3) of the Italian Competition and Fair Trading Act 287/1990, and Art. 13A(b) of the Malta Competition and Consumer Affairs Authority Act.

69 Bernatt (2022), p. 182.

70 *E.g.* in Bulgaria these are "wilful indictable offences" (*see* Art. 4(3) of the Bulgarian Law on Competition Protection).

still, this independence has been consolidated by the *Conseil d'Etat* (the "Council of State" – the French Supreme Administrative Court), which, in the Assembly decision of 7 July 1989,[71] enshrined the principle of the irrevocability of the mandate given by the executive to the head of an independent administrative authority. As stated above,[72] the organisation of the ADLC thus combines the elements of a classic administration authority with those of a court. Even dismissal based on misconduct is impossible, except in cases strictly defined by Art. L 461-2 of the Commercial Code,[73] and this last provision deals only with issues relating to conflicts of interest.

That said, we can still consider, in the light of recent events, the issue of the appointment of members of the ADLC in France. This issue is all the more interesting since the President of the ADLC, Ms Isabelle Da Silva, appointed in 2016, was not reappointed to her position – which she left on 13 October 2021 – and will therefore not serve a second term.

According to Art. 13 of the French constitution,[74] the President of the Republic is vested with the power to appoint certain posts or functions because of their importance for the guarantee of rights or freedoms or the economic and social life of the nation. The list of these posts and functions – including that of the President of the NCA – is set by the organic law of 23 July 2010.[75]

However, the French President can only exercise this power after having received the public opinion of the competent standing committee of each of the two assemblies of the Parliament of the Republic, namely the National Assembly and the Senate. As regards the appointment of the President of the ADLC, the two competent committees are the economic affairs committees of the National Assembly and the Senate. This appointment can only be made by a decree of the President of the Republic after the candidates have been questioned by these two committees, and provided that this appointment has not been rejected by 3/5 of the votes cast within these committees.

The appointment process begins with the publication of a press release in which the President of the Republic indicates that he/she intends, on the proposal of the prime minister, to appoint the named person as the President of the ADLC.

If the outgoing President of the ADLC has completed his/her five-year term and has not been reappointed, the longest-serving Vice-President will act as the interim President of the NCA until the new President is appointed.[76]

The duration of the mandates is linked to the imperative of independence, which is itself linked to competence: a truly independent person is one who masters both

[71] *Conseil d'Etat*, Assembly, 7 July 1989, No. 56627, *Ordonneau*, published in *Receuil Lebon*, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007744097 (10.12.2021).

[72] *Cf.* Sect. 2.2 of this paper.

[73] *Code de commerce* of 18 September 2000 (Official Journal of the French Republic – JORF – No. 0219 of 21 September 2000).

[74] Constitution of 4 October 1958 (Official Journal of the French Republic – JORF – No. 0238 of 5 October 1958).

[75] Organic law No. 2010-837 of 23 July 2010 on the application of the fifth paragraph of Art. 13 of the Constitution (Official Journal of the French Republic – JORF – No. 0169 of 24 July 2010).

[76] Commercial Code, Art. R 461-1.

the object of his/her action (technical sector, social situation) and the means thereof (powers, relations with stakeholders). Sufficient time is therefore needed for such an apprenticeship to take place, in particular to ensure that the members of independent administrative authorities are not recruited solely from the pool of experts already familiar with the sectors or issues in question. Of course, this learning period may vary from one authority to another, but in order to make the system clearer, it might be effective to provide for a standard period of time, for example six years, or five years (as in the case of France), unless the legislator provides otherwise.

Better still: why not make mandates irrevocable, which would be an even better guarantee of independence? This principle would not only prevent dismissal *ad nutum*, but also, by going beyond the ordinary rule, would block dismissal based on misconduct. The aim is to avoid retaliatory measures by the government.

But this is far from being the case, as we saw in France in 2021, when the President of the Republic, who is the sole decision maker on the appointment of the president of the authority, chose not to reappoint the outgoing president.

The reason "why" was quickly found, or at least raised in the media: Had Ms da Silva paid the price for being too independent-minded about the *TF1/M6* merger? The competition authority has promised to rigorously analyse the consequences of the creation of this giant, which would capture three quarters of television's advertising resources and an audience share of 30%. The project – which, according to TF1 and M6, is essential for resisting international competition, in particular from the major global internet players – is supported by the executive, and has been judged "understandable" by the President of the Superior Audiovisual Council (*Conseil supérieur de l'audiovisuel*).

Certainly, Art. 4(3) of the ECN+ Directive offers an essential guarantee of the required independence, by protecting the decision makers within the NCA against dismissal. While this is not the same as not reappointing the authority's chair, it does raise questions. Would real and complete independence, despite all the guarantees described above, be an empty formula? In view of these recent "dissonances", one may wonder.

3.3 The Polish OCCP President as NCA not Protected Against Dismissal

To start with, it is important to recognise two problems in the draft Amendment Act relating to the appointment of the Polish NCA.

First, the OCCP President is going to be appointed by the prime minister for a five-year term from among persons selected as a result of an "open and competitive recruitment process";[77] however, a very different rule will apply to the first OCCP President after the entry into force of the draft Amendment Act. Applying the guidance in Art. 4(4) of the ECN+ Directive, but keeping in mind its briefness, we are of the opinion that the appointment mode of the NCA cannot be called into question as long as procedures are clear, transparent and laid down in advance in national law.[78] Prior to the amendment, the Polish NCA has had no fixed term of

[77] Act on Competition and Consumer Protection, 2007, Art. 29(3).

[78] Directive (EU) 2019/1, Art. 4(4).

office and so can be referred to as a "lifetime" office holder;[79] however, the prime minister can dismiss the NCA without any limitation.[80] The draft Amendment Act is going to introduce a five-year term of office, but will not change the "open and competitive recruitment process". This process is not a competition.[81] It is conducted by a team appointed by the prime minister, composed of at least three persons. The team selects a maximum of three candidates, who are subsequently presented to the prime minister. The final decision is taken solely by the prime minister and is not subject to review by any other authority. The profiles of candidates are not publicly available. Solely the final result of the selection process, that is the name of the chosen OCCP President, is communicated to the public.[82] These rules cannot be considered clear and transparent. They give no guarantee that the best candidate is chosen.[83] They should evolve towards a much more transparent structure of the selection process. Notwithstanding the above, the last OCCP President appointed before the entry into force of the draft Amendment Act is deemed *ex lege* "appointed" for the first five-year term (which can be renewed once) with the entry into force of this Act. Taking into account that he has already been in office for almost three years, this solution gives him a "combined" first term of office of almost eight years.[84]

Second, one of the requirements of Art. 29(3a) of the 2007 Competition Act is that the OCCP President must have an education and knowledge in matters relevant to his/her competence.[85] Protection of competition is not explicitly mentioned. The OCCP President has for a long time combined competition and consumer protection functions.[86] However, the dynamics in this area are changing, and we need to look at the wider picture of the Polish NCA as it continues to develop. The number of its new functions is significant. The competence of the OCCP President also extends to product safety, state aid monitoring, fuel quality monitoring, counteracting contractual advantage abuses, preventing excessive delays in commercial transactions, investment control related to the COVID-19 pandemic and some fining powers related to the COVID-19 pandemic. In practice, it would be difficult to find a candidate with such vast knowledge and education, so this requirement cannot be applied to all competences of the OCCP President. On the other hand, the unreasonably broad wording of this requirement may cause problems in that the lack of knowledge and/or education in the field of competition protection *ad casum* will not be treated as a failure to meet a minimum requirement, which disqualifies a candidate.

[79] Critically Martyniszyn and Bernatt (2020), pp. 174–179.

[80] As a result, from 2007 to 2019, four successive Presidents of the OCCP were in office for, one year, six years, two years and four years, respectively.

[81] Błachucki (2019a), p. 267.

[82] For more *see* Małobęcka-Szwast (2017), p. 30.

[83] Błachucki (2019a), p. 267.

[84] Critically, on the NCA's long term of office, *see* Błachucki (2019a), p. 269.

[85] Act on Competition and Consumer Protection, 2007, Art. 29(3a).

[86] This model is present in *e.g.* Finland, Malta and the Netherlands.

The obligation to implement the ECN+ Directive also requires that the existing dismissal regime for the OCCP President be modified. Despite an improvement compared to the pre-amendment legal regime, the draft Amendment Act will fail to fulfil one of the requirements in this area. The OCCP President may, before the end of his/her term of office, be given – by the prime minister – one of eight specified reasons for dismissal.[87] According to Art. 4(3) of the ECN+ Directive, the decision makers within administrative NCAs may be dismissed only if they no longer fulfil the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law.[88] Those conditions, and what constitutes serious misconduct, must be laid down in advance in national law, taking into account the need to ensure effective enforcement. In our opinion, the draft Amendment Act will not include serious misconduct under national law in the reasons for dismissal. One of those reasons, namely a conviction by a final judgment for an intentional crime or an intentional fiscal crime,[89] can be recognised as an element of "having been found guilty of serious misconduct under national law", as it corresponds with the condition (for performance of his/her duties) that the OCCP President must not be convicted by a final judgment for any such crime. At the same time, it is narrower than "having been found guilty of serious misconduct under national law". Therefore, we are of the opinion that the Polish solution will not fully implement Art. 4(3) of the ECN+ Directive.

4 Power to Set NCA's Priorities

4.1 Provisions of the ECN+ Directive

Pursuant to Art. 4(5) of the ECN+ Directive, administrative NCAs must have the power to set their own priorities for carrying out the tasks for the application of Arts. 101 and 102 TFEU.[90] As many EU Member States still face challenges relating to their resources,[91] the aim of this provision is to facilitate effective use of those resources. The need to allow the NCAs to focus on preventing and putting an end to anti-competitive behaviour that distorts competition in the internal market is taken into account as well.[92]

Since all NCAs appear to already have, like the European Commission, the power to set positive priorities, that is, the power to initiate investigations and proceedings on their own initiative (*ex officio*), without having received any formal notification or complaint from another party,[93] Art. 4(5) applies in practice to the power to set negative priorities. It means that if, according to national law, the NCA

[87] Act on Competition and Consumer Protection, 2007, draft Art. 29(4).

[88] Directive (EU) 2019/1, Art. 4(3).

[89] Act on Competition and Consumer Protection, 2007, draft Art. 29(4)(1).

[90] Directive (EU) 2019/1, Art. 4(5).

[91] To find out more on resources *see* Sect. 5 of this paper.

[92] Directive (EU) 2019/1, Recital (23), first sentence.

[93] Wils (2017a), p. 36; also *see* Wils (2011), part III.A.1, and Idot (2015).

is obliged to consider formal complaints, it must also have the power to reject such complaints on the ground that it does not consider them to be an enforcement priority.[94] Therefore, some Member States have introduced provisions to allow NCAs to reject complaints on the grounds that they do not consider such complaints to be an enforcement priority.[95] The requirement to have this "tool" is without prejudice to the power of administrative NCAs to reject complaints on other grounds defined by their national law.[96] In practice, administrative NCAs can identify their lack of competence in the subject matter of the complaint, or decide that there are no grounds for action on their part.

However, systems vary among EU Member States. While in some Member States there is a legal status of "complainant", and NCAs are obliged to consider formal complaints, other Member States do not follow this pattern. The ECN+ Directive does not require the Member States that do not have frameworks for formal complaints to implement such frameworks. For this reason, national legal systems with no legal status of "complainant" are compatible with the ECN+ Directive.[97]

Have powers of administrative NCAs grown substantially as a result of Art. 4(5)? It would be difficult to substantiate such an outcome, especially since the power of NCAs to set priorities is without prejudice to the right of a government of a Member State to issue general policy rules or priority guidelines to administrative NCAs, provided they do not relate to sector inquiries or specific proceedings for the enforcement of Arts. 101 and 102 TFEU.[98] However, from the perspective of the literature, it is the issue of Member States versus EU enforcement policies, and not of NCAs versus national governments' enforcement policies, that is much more fundamental. For Jurkowska-Gomułka, instead of approximating "national priorities to EU priorities in applying substantive competition rules, the [ECN+] Directive proposes a competition policy consisting of [27] national EU-related policies – this is how Art. [4(5)] can be understood"; she rightly doubts whether this really enhances uniformity in the application of Arts. 101 and 102 TFEU.[99]

Moreover, the ECN+ Directive does not adopt a system of principles for setting priorities and the NCAs' powers in this regard. Commentators acknowledge that some "kind of" progress has been made, stating that the ECN+ Directive "mainly

[94] Directive (EU) 2019/1, Art. 4(5), second sentence. *See also* Recital (23), second and fourth sentences.

[95] *Cf. e.g.* Art. 27(4) of the Cypriot Law on Competition Protection, Art. 15(1)(f) of the Malta Competition and Consumer Affairs Authority Act, Art. 12(1ter) of the Italian Competition and Fair Trading Act 287/1990, § 16(2) of the Slovak Competition Protection Act. *See also* Art. 26(4) of the Croatian Law on Competition Protection. Interestingly, in Greece, the NCA – after a public consultation – sets out criteria for prioritising cases and strategic objectives, taking into account, in particular, the public interest, the possible effects on competition, consumer protection, the limitation periods, and the outcome expected from its intervention; these criteria are quantified according to a scoring system, and the NCA may reject complaints with a low score according to the scoring system used (Art. 14(2)(n)(aa) and Art. 14(2)(o) of the Greek Competition Act 3959/2011).

[96] Directive (EU) 2019/1, Art. 4(5), third sentence.

[97] Wils (2017a), p. 38.

[98] Directive (EU) 2019/1, Recital (23), fifth sentence.

[99] Jurkowska-Gomułka (2018), part 4.2.1.

covers procedural elements".[100] However, the ECN+ Directive does not touch upon the substantive principles of priority setting. It is thus rightly recognised that the ECN+ Directive "regulates merely the tip of the iceberg of priority setting".[101] Further efforts should be made to deal with many of the core weaknesses of the current enforcement regime, especially since it allows NCAs to directly or indirectly take public policy considerations into account when setting their enforcement priorities. This kind of doubt leads to the discussion in the literature on Member States ruled by populist governments (Hungary, Poland), where the power to reject complaints mentioned above may serve as a convenient excuse for not opening politically sensitive cases, and may in fact promote an attitude of self-restraint within the agency.[102] The ECN+ Directive should require Member States to adopt tools that would bring more transparency into the NCAs' decision-making processes vis-à-vis the opening of cases, and would protect against abuses related to the prioritisation of cases. For instance, a public registry of rejected complaints, together with an explanation of why the case was not opened, could have been proposed as at least good practice.[103]

4.2 The French ADLC Having the Power to Set Negative Priorities at Last

The principle regarding the power to set negative priorities was welcomed in France as the "flagship measure" of the ECN+ Directive, especially since the European Commission in particular, as well as most NCAs in the EU, already had this power, with the French NCA being the exception. The ADLC was pleased, believing that this would facilitate "a better allocation of its resources, which will be able to be fully devoted to the rapid resolution of the most important cases (including complex cases that involve large digital platforms or algorithmic processes)".[104] Therefore, the ADLC now has the possibility to optimise its resources by devoting them to cases corresponding to its priorities.

Before the implementation of the ECN+ Directive, the ADLC had the power to set only positive priorities, that is, to pursue cases it considered suitable for prosecution. It did not have the power to set negative priorities, that is, to reject complaints if they did not appear to have priority.[105] The NCA could be forced to act by a complaint from a company, the Minister of Economics, a local authority, a professional organisation, a trade union or a consumer association. Unless the facts were more than five years old, or the complaint was manifestly lacking in supporting evidence, the ADLC was obliged to decide on all cases brought before it.[106] However, Isabelle Da Silva, as the ADLC President, stressed that the authority

[100] Brook (2020), p. 485.

[101] *Ibid.*

[102] Bernatt (2022), p. 184.

[103] *Ibid.*, p. 185.

[104] Press release, 27 May 2021, https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lordonnance-de-transposition-de-la-directive-ecn-ete-publiee (10.12.2021).

[105] And thus make efficient use of its resources (Directive (EU) 2019/1, Recital 17).

[106] Wils (2017b), para. 106.

had limited means and was not able to deal satisfactorily with all the cases submitted to it.[107] Hence, the ADLC had used various procedures to remove from its inventory of cases any case deemed not to be a priority.

Articles L 462-8 and L 464-9 of the French Commercial Code, as amended by Art. 2 of the transposition ordinance,[108] authorises the ADLC to reject contentious complaints and to refer cases to the DGCCRF where the practices invoked can be dealt with by the Minister of Economy. This covers cases that do not fall under Arts. 101 and 102 TFEU and in which the turnover of each of the companies concerned in France during the last closed financial year did not exceed EUR 50 million, with their combined turnover not exceeding EUR 200 million.[109]

The ADLC may also, on the basis of Art. L 462-8(4)–(5) of the Commercial Code, reject a complaint if it has been informed that another NCA is dealing with or has dealt with the same case. Finally, the ADLC may have some flexibility to close a non-priority case. For example, in the *Vitamins* case,[110] the French Finance Minister withdrew his complaint to the Competition Council (which was the former name of the ADLC) less than a week after the condemnation of the cartel in question by the European Commission, and the President of the Competition Council immediately closed the case, as it was of limited interest.

In essence, therefore, the NCA could reject a complaint only when it considered that the facts invoked were not supported by sufficient evidence. It did not have the power to dismiss a complaint that merely did not correspond to its priorities.

As mentioned above, this shortcoming was remedied by the requirements of Art. 4(5) of the ECN+ Directive.[111]

The analysis of the content of Art. 4(5) of the ECN+ Directive shows its essential flaw, namely its failure to define its term “priorities”.

The mechanism therefore assumes that the NCA will determine its priorities in advance, by specifying the criteria justifying the rejection of a complaint, just as it will have to specify the procedural regime for the rejection. It should also specify the procedures for appealing against an ADLC decision that rejects a complaint, since such a decision must be subject to judicial review: this is already the case for the European Commission, which has the power to open proceedings, and is provided for in Art. 23 of the ECN+ Directive.[112] One might wonder, according to Alain Ronzano, who in the ADLC should adopt such a decision: the general rapporteur or the board (the assembly) of the ADLC?[113]

[107] Idot (2019), p. 1.

[108] *Supra* note 26.

[109] Commercial Code, Art. L 464-9 on “micro-PAC” (anti-competitive micro-practices).

[110] 2003/2/EC: Commission Decision of 21 November 2001 relating to a proceeding pursuant to Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement (Case COMP/E-1/37.512 – *Vitamins*), OJ L 6, 10.1.2003, p. 1; *see* Peiró (2002). Competition Council No. 01-D-79, 13 December 2001, *Vitamines pour l’alimentation animale*.

[111] Delpech (2021).

[112] Directive (EU) 2019/1, Art. 23 (“In the case of formally filed complaints, the resulting dismissals should be subject to the existence of effective remedies under national law”).

[113] A. Ronzano, l’Actu-Concurrence, Hebdo No. 20/2021, 31 May 2021. https://lactu-concurrence.fr/2021/05/ (10.12.2021).

Various elements plead in favour of the general rapporteur, after having drawn a parallel with the *ex officio* procedure, to which we can add that he/she is accountable for the proper use of the institution's resources; but Ms da Silva, the President of the ADLC at that time, decided in favour of an assessment by the ADLC's board, which, after having previously defined its priorities, will therefore decide alone to reject complaints.[114]

Still, because Art. 4(5) of the ECN+ Directive does not define these priorities, there may be reason to fear abuses linked, for example, to the taking into account of elements totally independent of the decision to be made, such as strong lobbying by the companies involved in the complaint.[115]

Nevertheless, this risk is limited, since the rejection decision must be reasoned and is subject to judicial review. That said, the possibility of such an appeal may seem illusory, particularly in view of the time required to process it, considering that procedures are generally very long in France.

Should we also fear an excessive use of this power by the NCA? Not necessarily, since the new principle does not mean that it has discretionary power in this area. The decision will certainly depend on the issues at stake in each complaint. For example, if the resources required are disproportionate to the issues at stake in a case, the NCA could decide not to pursue it – which may result in cases deemed less important being redirected to the DGCCRF (this body, placed under the aegis of the French Ministry of the Economy, ensures the proper functioning of markets for the benefit of consumers and businesses) or to ordinary courts. The decision of the ADLC not to pursue a given case could also be based on a test weighing the interest in prosecuting it against the general interest, the seriousness of the case and the ability to punish it. This is the reference model for criminal justice. We are therefore not starting from scratch in defining the French model.[116]

4.3 The Polish System Without Legal Status of "Complainant"

As for the power to set negative priorities, it is important to keep in mind that, in Poland, the statutory grounds for initiation by the NCA of proceedings regarding anticompetitive practices do not provide for initiation upon a complaint (upon request).[117] Still, a kind of "informal" complaint is in fact provided for in the 2007 Competition Act.[118] If such a complaint does not persuade the OCCP President to open proceedings *ex officio*, the complainant will be informed accordingly through a letter; however, this letter is not subject to judicial review. If, on the contrary, the OCCP President is persuaded by such a complaint to open proceedings, the complainant will not be able to obtain the rights of a party/intervener, etc. to the proceedings; in particular, the complainant will not be able to appeal the resulting decisions. Since the initiation of proceedings regarding anticompetitive practices is

[114] *See* Letellier, Delaunay and Portmann (2019), p. 5.

[115] *Ibid.*, p. 4.

[116] *Ibid.*

[117] To find out more *see* Piszcz (2016), p. 211.

[118] Act on Competition and Consumer Protection, 2007, Art. 86.

fully in the hands of the OCCP President, who opens them *ex officio*, the provisions of the second and third sentences of Art. 4(5) of the ECN+ Directive do not need to be implemented. Moreover, in order to be in compliance with the ECN+ Directive, Poland does not have to establish a system with a legal status of "complainant", nor place a duty on its NCA to consider formal complaints.

The drafters of the Amendment Act reported[119] that Art. 4(5) of the ECN+ Directive did not need to be transposed into national legislation.[120] They indicate the existence of Art. 31(4) of the 2007 Competition Act as a reason for this.[121] This provision states that the OCCP President prepares draft government competition development programmes and draft government consumer policy. However, the most recent of documents titled "Competition and Consumer Protection Policy" was adopted in 2015 for an indefinite period of time, and has not been developed since (it is still in force in its original version).[122] It is not focused on the enforcement of Arts. 101 and 102 TFEU at all; therefore, it lacks relevance for the topic of the power to set priorities for carrying out the tasks for the application of Arts. 101 and 102 TFEU. The reality is, however, not very different from the situation presented in this document. Indeed, it appears that, in recent years, in proceedings regarding anticompetitive practices, 4 out of 15 decisions adopted in 2020 applied national competition law in parallel to Art. 101 or 102 TFEU, as did 1 out of 12 in 2019, 2 out of 8 in 2018 and 1 out of 19 in 2017. Reasons suggested by researchers for this include, in particular, a "narrow" interpretation of the "effect on trade" concept and the fact that proceedings regarding infringements of Arts. 101 and 102 TFEU are initiated only when the alleged infringement has an "obvious" cross-border dimension.[123] If the OCCP President systematically avoids applying EU competition rules, he/she is certainly not performing his/her duties or exercising his/her powers "in the interests of the effective and uniform application" of Arts. 101 and 102 TFEU,[124] explicitly mentioned in Art. 4(1) of the ECN+ Directive.[125]

In our opinion, one should rather focus on Art. 1(1) of the 2007 Competition Act as a legal basis for prioritisation in enforcement.[126] It focuses on the "public interest" concept that has been used for years to separate trivial cases from important ones; the "public interest" doctrine has developed into the most important

[119] *See* the table in Polish at: https://legislacja.gov.pl/projekt/12342403/katalog/12757034#12757034 (7.10.2021).

[120] Directive (EU) 2019/1, Art. 4(5).

[121] Act on Competition and Consumer Protection, 2007, Art. 31(4).

[122] English version: https://www.uokik.gov.pl/what_we_do.php (7.10.2021).

[123] Similarly in some other Central and Eastern European countries, whereas "the current approach employed by the European Commission and the Courts with regard to the broadly interpreted element of 'effect on trade between Member States' implies that this aspect should be easily met in small Member States due to their integrated national markets and therefore, the EU competition law provisions should be applied instead (or simultaneously) of national law"; Malinauskaite (2016), p. 20. As a matter of fact, Poland is not a small Member State. Also *see* Semeniuk (2018), pp. 8–9.

[124] *Cf.* Botta, Svetlicinii and Bernatt (2015), pp. 1262–1265.

[125] Directive (EU) 2019/1, Art. 4(1).

[126] Act on Competition and Consumer Protection, 2007, Art. 1(1).

precondition for the application of Polish competition law.[127] However, it must not be narrowly interpreted by the OCCP President as “national public interest”; otherwise, it will not be in conformity with Art. 4(1) of the ECN+ Directive, which requires the performance of duties and exercise of powers “in the interests of the effective and uniform application” of Arts. 101 and 102 TFEU.

5 NCA’s Resources

5.1 Provisions of the ECN+ Directive

The resources of administrative NCAs are very diverse, but this should not have an impact on the ability of NCAs to be effective. The issue of resources is interlinked with the issue of the power to set negative priorities.[128] Administrative NCAs should be able to prioritise their proceedings for the enforcement of Arts. 101 and 102 TFEU to make effective use of their resources.[129] If an NCA that is obliged to investigate formal complaints receives a large number of such complaints and has only very limited resources at its disposal, the NCA may end up with a backlog of cases or having to spend all its resources on dealing with those complaints, leaving no resources to investigate cases *ex officio*.[130] It should be noted that this type of problem could be resolved if the NCA were either to receive more resources (and/or make more efficient use of the resources already at its disposal) or be granted the power to set negative priorities.[131]

With regard to resources – more precisely human, financial, technical and technological resources – the ECN+ Directive does not use uniform terminology. Article 5(1) requires Member States to at least ensure that NCAs have a “sufficient” number of qualified staff (able to conduct proficient legal and economic assessments)[132] and “sufficient” financial, technical and technological resources[133] (technical and technological expertise and equipment including adequate information technology tools) for the effective performance of their duties, and for the effective exercise of their powers for the application of Arts. 101 and 102 TFEU, as set out in Art. 5(2) of the ECN+ Directive. Without prejudice to any higher guarantees of resources that Member States may give, each Member State is required to provide “sufficient” resources (as much as is needed), as referred to in Art. 5(1). However, Recital (8) recognises resources that are “adequate” (large

[127] Miąsik (2008), pp. 41–43.

[128] Wils (2017a), p. 41.

[129] Directive (EU) 2019/1, Recital (23), first sentence.

[130] Wils (2017a), p. 41.

[131] *Ibid.*

[132] Directive (EU) 2019/1, Recital (24), first sentence.

[133] Similar provisions were included in *e.g.* Art. 12(1) of the Greek Competition Act 3959/2011, Art. 8(2) of the Cypriot Law on Competition Protection, Art. 13(3) of the Malta Competition and Consumer Affairs Authority Act, Art. 7(2) of the Bulgarian Law on Competition Protection, and Art. 26a(5) of the Croatian Law on Competition Protection.

enough for a particular task) and Recital (26) mentions “necessary” resources (not more than is needed for performance of their tasks).[134]

Article 5(3) requires Member States to ensure that NCAs are granted independence in the spending of the allocated budget for the purpose of carrying out their duties.[135] Being aware of the difficulties that NCAs experience with regard to resources, the EU legislature allowed for different means of financing, such as from sources other than the state budget.[136] Therefore, there may be different models of NCA budget, including one relying solely on the state budget (e.g. in Poland, Croatia and Lithuania). However, to ensure the impartiality of administrative NCAs, the fines that they impose for infringements of Arts. 101 and 102 TFEU should not be used to finance these NCAs directly.[137] The proportionate accountability requirements referred to in Art. 4(1) of the ECN+ Directive might include the control or monitoring of administrative NCAs’ financial expenditure, provided this does not affect their independence.[138] Some additional resources are mentioned in Recitals (68) and (69),[139] with those in the former requiring close cooperation among different NCAs and between the NCAs and the European Commission. In particular, when an NCA carries out an inspection or an interview under its national law on behalf of another NCA, officials from the latter should be able to attend and assist in order to enhance the effectiveness of such inspections and interviews by providing additional resources, knowledge and technical expertise. Similarly, NCAs should be able to request mutual assistance for the notification of documents related to the application of Art. 101 or 102 TFEU on a cross-border basis, and the enforcement of decisions imposing fines or periodic penalty payments by authorities in other Member States. The NCAs of which such requests are made should be able to recover the costs they incur in providing that assistance. This solution is aimed at ensuring that NCAs devote sufficient resources to requests for mutual assistance and incentivising such assistance.

If the duties and powers of NCAs are extended under national law, Member States should also ensure that NCAs have sufficient resources to perform those tasks effectively.[140] Agencies with many duties and policies under one roof may be more likely to receive relatively less funding for their duties as an NCA than their foreign counterparts dealing with competition protection alone.

[134] Directive (EU) 2019/1, Recitals (8) and (26).

[135] Directive (EU) 2019/1, Art. 5(3).

[136] Directive (EU) 2019/1, Recital (26).

[137] Directive (EU) 2019/1, Recital (17), fifth sentence (but *see* Martyniszyn (2021), part IV, who recommends that “fines levied on foreign violators could be left, at least partially, in domestic competition agencies’ budgets to facilitate future enforcement and advocacy activities”). This model is not widespread in the EU, but *see* Art. 13(2) of the Bulgarian Law on Competition Protection defining the structure of the NCA’s budget, where fines are mentioned *expressis verbis*.

[138] Directive (EU) 2019/1, Recital (22), second sentence.

[139] Directive (EU) 2019/1, Recitals (68) and (69).

[140] Directive (EU) 2019/1, Recital (24), second sentence.

Furthermore, Art. 5(4) of the ECN+ Directive reflects the objective related to proportionate accountability requirements resulting from Art. 4(1).[141] Member States are required to ensure that administrative NCAs submit periodic reports on their activities and their resources to a governmental or parliamentary body.[142] Such reports must include information about the appointments and dismissals of members of the decision-making body, the amount of resources that were allocated in the relevant year, and any changes in that amount compared to previous years.[143] Such reports must be made publicly available. Indeed, the analysis of the ECN+ Directive showed that it solely emphasised independence, while barely acknowledging the issue of accountability and the rather vague examples thereof, such as the publication of reports.[144]

According to Art. 33(2), the European Competition Network must be able to develop and, where appropriate, publish best practices and recommendations on matters such as, *inter alia*, resources.[145] The question arises whether Member States can expect a set of concrete measures to come from this. The ECN+ Directive is characterised by open-ended terms and apparent autonomy left to Member States with regard to resources. Therefore, some commentators would prefer for it to have set measurable targets to be achieved by Member States in order to define sufficiency of resources.[146]

5.2 The French ADLC as an NCA with Sufficient Resources

The resources referred to in Art. 5 of the ECN+ Directive concern both the staff of the NCA, which must be sufficient in number, and the financial, technical and technological resources, which must also enable the NCA to perform its functions and exercise its powers properly with a view to the application of Arts. 101 and 102 TFEU; there are no difficulties to report in France in this respect.

With respect to its organic independence, the French NCA carries out its missions in total autonomy, as mentioned above. It has its own paid staff and its own budget: in 2019, the ADLC's budget amounted to EUR 22.53 million, of which – in terms of structure – EUR 17.23 million were for staff expenses and EUR 5.3 million for operating and capital expenses. This budget amounted to EUR 22.95 million the following year, so a slight increase (by almost 2%) was registered. It should be

[141] *See* Directive (EU) 2019/1, Recital (22): "Proportionate accountability requirements include the publication by national administrative competition authorities of periodic reports on their activities to a governmental or parliamentary body." *See* also Recital (27).

[142] *See e.g.* Art. 14 of the Bulgarian Law on Competition Protection, where annual reporting to the National Assembly is required (by 30 May); Art. 26(6) of the Croatian Law on Competition Protection requires annual reporting to the Parliament by 30 June.

[143] Such provision was included in *e.g.* Art. 6 paragraph 1 of the Netherlands Authority for Consumers and Markets Establishing Act, and Art. 58 of the Malta Competition and Consumer Affairs Authority Act.

[144] *See* Malinauskaite (2020), pp. 152–153. Also *see* Townley (2018), p. 125, according to whom in order to be accountable, "an actor must give information and explanation about its actions to another", and "it must also be possible to sanction the accountable actor".

[145] Directive (EU) 2019/1, Art. 33(2).

[146] *Cf.* Stankiewicz (2021), p. 186.

recognised that, for some researchers, this is not a particularly high budget.[147] However, combining the available budget with the indicators of vibrant activity in terms of *ex officio* investigations and the ADLC's concurrent inability to reject complaints on the ground of lack of priority interest, confirms that the ADLC has made efficient use of the resources that it had at its disposal.[148]

The Authority strives to make maximum use of existing procurement procedures of the State Procurement Department (*Direction d'achats de l'État*, DAE) and the Union of Public Purchasing Groups (*Union des groupements d'achats publics*, UGAP) for certain expenses (purchase and maintenance of computer equipment, purchase and maintenance of software, office furniture, energy, subscriptions or mobile telephony) and to limit the specific procedures related to its own needs.

In 2019, the ADLC joined the interdepartmental market for business travel. The effort was continued in 2020 with the inclusion of office supplies in the UGAP market.

The question of human resources, similarly to that of budgetary and financial resources, is still directly linked to independence; indeed, sufficient resources in terms of, *inter alia*, remuneration ensure effective independence.

The ADLC employs about 200 people from a variety of backgrounds and profiles, including 17 board members, who combine their expertise and disciplines. In accordance with the principle of the separation of the investigative and decision-making functions, investigation teams are placed under the authority of the general rapporteur.

Administrative services (under the authority of the Secretary General) as well as three specialised services (Office of the President, Legal Service and Communication Department), report directly to the President of the ADLC.[149]

Furthermore, the documentary resources that the ADLC makes available to the parties in connection with competition law compliance also come under the umbrella of resources. Numerous studies are available on the authority's website,[150] for example concerning small and medium-sized enterprises, professional organisations, big data, algorithms, online commerce, gun jumping in merger cases, behavioural commitments, etc.

As for reporting, according to the Law on the general status of independent administrative authorities and independent public authorities, the ADLC must send the Government and Parliament each year, before 1 June, a non-confidential report on the exercise of its missions and its resources.[151] This system has worked well in France for years.

[147] Wils (2017b), para. 122.

[148] *Ibid.*

[149] A complete organisation chart is available on the website of the competition authority. https://www.autoritedelaconcurrence.fr/fr/charte-des-valeurs (10.12.2021).

[150] *See* in French at: https://www.autoritedelaconcurrence.fr/fr/ressources (7.11.2021).

[151] Law on the general status, Art. 21.

5.3 The Problem with Multifunctional NCAs: The Polish Example

The Polish NCA's budget in fact follows the simplest of the budget models resulting from the ECN+ Directive, with 100% of its funding coming from the state budget.[152] Even more importantly, it complies with Recital (17) in that the fines imposed by the OCCP President are not used to finance the OCCP.[153]

As regards the periodic reports provided for in Art. 5(4) of the ECN+ Directive,[154] it needs to be emphasised that this paragraph is the only one in the entire article that was considered by the drafters of the Amendment Act to require transposition into national legislation.[155] Before the amendment, the Polish NCA was obliged, under Art. 31(9) of the 2007 Competition Act,[156] to submit to the government periodic reports on the implementation of government competition development programmes and government consumer policies. This provision, however, set no deadline for submitting such reports, leading in practice to a large variation between the periods of their preparation, from several months to over one year. The addition of Art. 31aa of the 2007 Competition Act will make some progress concerning the requirements for reporting, without any major changes in the general direction of the approach – reports will now need to be submitted to the prime minister and to be made publicly available.[157] However, the draft provision sets out a four-month deadline to submit annual reports and establishes an open catalogue for their content. The draft provision covers only a limited number of issues that are required, such as: (1) the performance of the tasks of the OCCP President and the results within individual areas of his/her activity; (2) the functions performed by the OCCP President and the OCCP Vice-Presidents in a given calendar year; and (3) resources that the OCCP President had at his/her disposal in a given calendar year, along with information on changes in these resources compared to previous years.

While this draft provision is certainly a positive development, the last point should be made clearer. To be able to identify resources dedicated to antitrust enforcement (including the enforcement of Arts. 101 and 102 TFEU) and assess whether those resources have the desired "sufficiency", it is advisable for the OCCP President – when preparing the reports – to take into account the proportion of financial and human resources dedicated to this enforcement area within a wider budget for all his/her functions.

There is clear evidence that the 1996 legislative reform, which provided for the merger of competition and consumer protection policies in Poland, was followed by

[152] *Cf.* Martyniszyn and Bernatt (2020), pp. 183–185.

[153] Directive (EU) 2019/1, Recital (17).

[154] Directive (EU) 2019/1, Art. 5(4).

[155] *See* the table in Polish at: https://legislacja.gov.pl/projekt/12342403/katalog/12757034#12757034 (7.10.2021).

[156] Act on Competition and Consumer Protection, 2007, Art. 31(9).

[157] Act on Competition and Consumer Protection, 2007, Art. 31aa.

reorganisations of the OCCP and the "takeover" of functions other than antitrust enforcement by the OCCP President.[158] Currently, the overall picture of OCCP funding is encouraging – in 2020, overall annual public expenditure on the OCCP budget was around EUR 20 million. However, this was its general budget. The picture for human resources is similar: there were over 500 employees in the OCCP, but this was only a general number. The budget of such a multifunctional authority is a challenging concept. It needs to be "broken down" into different elements in order to compare the financing of the individual areas of OCCP activity.

There is hardly any published data on how many employees actually participate in antitrust enforcement and how much money is used to fund it. The reports of the OCCP President provide only general data, so that it is not possible to assess the "sufficiency" of human resources or the proportion of the budget dedicated to antitrust enforcement. Following a request for information, under the provisions on public access to information, the OCCP responded that, in 2020, around PLN 21.9 million (EUR 4.75 million, that is to say 23% of the budget) and 63 employees (12% of the staff) were dedicated to enforcing the prohibition on anti-competitive practices.[159] As recent years have seen dynamic growth in the competences of the OCCP President, the need to continue to dedicate a significant proportion of the budget to the field of competition protection (and not marginalise this area's financing in favour of other duties of the OCCP President) should be accentuated. The budget should be adapted to new functions and developing needs without neglecting the OCCP President's main original mission – competition protection.

6 Conclusions

The findings of our research raise concerns that, despite the reforms in institutional settings, which together form the framework of EU competition law enforcement by Member States, divergence problems will persist. Indeed, the experience of Member States confirms that, while some of the national provisions mirror the requirements of the ECN+ Directive, others – in different ways – take advantage of the options the ECN+ Directive has to offer. Undertakings engaging in anti-competitive practices may still face different outcomes in proceedings, depending on the Member State in which they are active.

First, the power to set negative priorities seems contrary to proposals for competition policy and practice aimed at enhancing uniformity in the application of Arts. 101 and 102 TFEU, as well as at approximating national priorities to EU priorities in the application of substantive competition rules. Implementation of the main elements of reform required in this area will, instead, lead to a competition policy consisting of 27 national EU-related policies. The reform may, in fact, make it easier for competition authorities to take public policy considerations into account when setting their enforcement priorities.

[158] *See* Sect. 3.3 above.

[159] The OCCP's letter of 9.9.2021 responding to our request for access to information, No. DPR.0143.434.2021.

While France adopted legislation granting the ADLC power to reject formal complaints on priority grounds, a number of issues remain open to debate regarding how to use this power, including who within the ADLC is equipped to deal with the rejection of complaints, and what should be covered by “priorities”. At the same time, the system maintained by France is still difficult to compare with the Polish system, which is more like Germany’s. In Poland, there is no formal status of “complainant” before the NCA, and rejections of “complaints” are not subject to (even limited) judicial review. Such a system does not constitute a breach of the obligation to implement the ECN+ Directive and, combined with the doctrine of the “public interest” as a criterion for rejecting complaints, might even be an important source of inspiration for Member States with no such system. Nevertheless, it would be a significant development if the EU legislature chose to address these issues.

Second, the comparisons provide an important insight into the frameworks for the legal status of NCAs and their independence. Since the actual independence of an NCA depends on, *inter alia*, the general political and administrative culture of the Member State in which it functions, the requirements that the ECN+ Directive sets in this respect may be of secondary importance compared with ensuring the effectiveness of the NCA, especially if we take into account the open-ended terms used by the ECN+ Directive and national frameworks.

However, a more detailed look at the French model (as well as examples from Denmark, Italy, Greece, Cyprus, Malta, Croatia and Bulgaria) supported our recommendation that the legal basis for the Polish prime minister’s issuing of binding guidelines and orders to the NCA (even though not used in practice) should be scrapped. Furthermore, the ECN+ Directive requires refraining from dealing with enforcement proceedings that could give rise to conflicts of interest. The analysis of the draft amendments to the Polish legal framework, compared with the French model, led to the proposal that, to prevent conflicts of interests, the ECN+ Directive could regulate at least the minimum “reasonable period” after leaving the NCA office (which is one year in e.g. Austria, Slovakia, Bulgaria and Croatia, and three years in e.g. France, Greece and Italy, with the latter period being proposed for Poland).[160] In our view, the questions here are whether different periods should be adopted for top management versus other decision makers within the NCA; whether there should be a relatively short, paid, period of time during which all addressees of these provisions would be prohibited from engaging in the same case they had handled at the NCA; and whether the three-year period would be consistent with the ECN+ Directive’s intent, in particular whether it would not place too great of an obstacle in the career paths of those affected.

Further, issues regarding implementation of the provisions for procedures for appointing and dismissing NCA employees were addressed. The framework of the ECN+ Directive was from the perspective of how the national legal frameworks had changed or are going to change under its influence. The ECN+ Directive does not require members of decision-making bodies to be appointed for a fixed term of a particular length. The experience of Member States other than Poland and Germany shows that it is rare for there to be no fixed appointment terms for agency heads.

[160] *Supra* note 19.

However, practically, the requirements of the ECN+ Directive may force a Member State to regulate this, as illustrated by Poland. A comparison demonstrated that the greatest risk of defective implementation lies in the open-ended terms used by the ECN+ Directive. The analysis suggested that the relevant EU rules were already nearly fully implemented in the French model, while progress is needed in Poland. According to the analysis, the proposed Polish model may be faulty in how narrowly it defines "serious misconduct" as a reason for dismissing staff with decision-making powers within the NCA. On the other hand, in France there is no such reason for dismissal at all.

Last but not least, data were collected and compared on the NCAs' resources. The ECN+ Directive gives the Member States apparent autonomy with regard to resources. However, it could be advisable for the EU to regulate the issue of the "sufficiency of resources" by setting a number of measurable indicators to be achieved by Member States.

Taking into account the various categories of NCA, it should be noted that the budget and reporting of a multifunctional authority such as the Polish NCA may be a challenging concept. Contrary to what we observed in the case of the single-function French NCA, the data available does not necessarily reflect the real situation. The reports submitted should provide data on the distribution of resources, including the proportion of financial and human resources dedicated to antitrust enforcement (including the enforcement of Arts. 101 and 102 TFEU) within a wider budget for all of the functions of a given NCA. Then, reports would be in accordance with the model of the ECN+ Directive.

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