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ARTICLE

Antitrust Fines and Limitation Periods After the Implementation of Directive (EU) 2019/1 Throughout Member States: Focus on French and Polish Perspectives

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Abstract The article focuses on the issue of implementation of Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. It discusses recent developments in competition law with a special focus on fining powers of the national competition authorities (NCAs). The article compares different approaches adopted by EU Members States, with a special focus on Poland and France, to implement provisions of the ECN+ Directive referring to antitrust fines and

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For more on this topic, see the articles "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" by Piszcz and Grynfogel in IIC 53:1071–1102 (2022) https://doi.org/10.1007/s40319-022-01215-5 and "Harmonisation of National Leniency Programmes in the EU: Is This Mission Accomplished? Remarks on the Case of France and Poland Compared with Other EU Member States" by Korycińska-Rządca and Mendoza-Caminade in IIC 53:1506–1540 (2022) https://doi.org/10.1007/s40319-022-01268-6.

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limitation periods. The article sheds light on the process of implementation and problems encountered by national legislators. This article analyses steps taken towards uniformity in this area of law within the EU. It contributes to the research on how NCAs approach the enforcement of competition law and ensure the deterrent effect of antitrust fines. The conclusions cast doubt on the effectiveness of raising the level of fines as a means of enhancing enforcement if it is not supported by other measures such as a coherent fining policy or sanctions ensuring compliance. The methodology used in the article includes descriptive research based on an analysis of relevant provisions of national law and EU law relating to fining powers of NCAs.

Keywords Antitrust fines · Periodic penalty payments · Limitation periods · Calculation of fines · Directive (EU) 2019/1 · ECN+ Directive

1 Introduction

In 2018, Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market came into force.[1] It is another step towards enhancing public enforcement of EU competition rules by national competition authorities (NCAs) and national courts. Previous significant legislation, namely Regulation 1/2003,[2] changed the face of EU competition law and encouraged voluntary changes in national laws that resulted in partial convergence across the EU.[3] Regulation 1/2003 led to an unprecedented decentralisation of the enforcement of EU competition law.[4] In 2014 the Commission released a Communication[5] which summed up and evaluated the last ten years of antitrust enforcement and called for action to empower NCAs in areas that were not addressed by Regulation 1/2003.[6] Particularly, it stressed the need to reduce the disparities in fining powers across

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

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

[3] Commission Staff Working Document: Enhancing competition enforcement by the Member States competition authorities: institutional and procedural issues SWD(2014) 231/2 accompanying Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives COM(2014) 453, pp. 15–18, hereinafter: Commission Staff Working Document SWD(2014) 231/2.

[4] Ost (2014), p. 125.

[5] Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453, p. 3, hereinafter: Communication.

[6] Communication, pp. 8–12.

Member States.[7] Besides full harmonisation of competition rules established in Arts. 101 and 102 TFEU[8] there are significant differences in institutional design[9] and sanctioning powers among Member States which directly translate into the effectiveness of enforcement. Based on published recommendations and adopted mechanisms, the ECN+ Directive is another step in the process of further strengthening the position of NCAs. It is aimed at creating a level playing field among Member States, attempting to provide them with the same toolbox of competition law powers.

It is stressed numerous times in the ECN+ Directive that one of the key elements that contribute to the effective enforcement of competition rules are proportionate and dissuasive fines that help prosecute the most serious infringements.[10] The importance of this issue is further emphasised by the fact that the chapter on fines specifically refers to minimum thresholds and provides a framework for the calculation of fines. However, it does not provide a specific method of calculation or a detailed catalogue of relevant factors for calculating fines.

The degree of harmonisation in the ECN+ Directive is uneven depending on the issue. Chapter V on antitrust fines sets minimum requirements for Member States and provides guidelines for the implementation of its provisions. It should be noted that a higher degree of convergence does not imply the necessity of introducing maximum harmonisation.[11] This holds true in the case of Member States' sanctioning powers, which should be left some leeway due to differences in adopted institutional models of antitrust enforcement.

Generally, the ECN+ Directive obliges Member States in Art. 12 to "ensure that national administrative competition authorities may either impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings". Another topical issue relating to sanctioning powers addressed by the ECN+ Directive is the varying amount of fines in Member States expressed in Motive 49: "the deterrent effect of fines differs widely across the Union, and in some Member States the maximum amount of the fine that can be imposed is very low (…)". Other differences concern the measures available to NCAs to enforce compliance with their decisions. The ECN+ Directive aims to address these shortcomings and proposes to (1) even out the differences between the level and methods of calculating fines in the Member States; (2) enhance the deterrent effect of fines; (3) strengthen the enforcement regime to prevent undertakings from escaping liability for anti-competitive conduct; (4) provide a harmonised interpretation of rules and relevant notions crucial to competition law in the EU, such as the notion of "undertaking"; and (5) remedy the problem of limited

[7] Communication, p.10.

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

[9] *See* more on institutional design and independence of NCAs in light of ECN+ Directive, Piszcz and Grynfogel (2022).

[10] Motive 40 and 49 of the ECN+ Directive.

[11] *Cf.* Pitruzzella (2016), p. 1.

sanctioning powers of some NCAs. Nevertheless, it is important to bear in mind that in order to enhance the effectiveness of enforcement, sanctioning powers should be supplemented with other mechanisms such as introducing more incentives for settlements and leniency procedures,[12] both of which greatly reduce the burden and shorten the proceedings for NCAs. There is a need for more cross-state coordinated programmes. Antitrust fines in these cases aim at rewarding collaboration with NCAs and compliance with their decisions.

The article compares different approaches adopted by Member States, with a special focus on Poland and France, to implement provisions of the ECN+ Directive referring to antitrust fines and limitation periods. The aforementioned countries were chosen due to their different experiences in implementing the ECN+ Directive as well as to differences in the position of their NCAs and the competences these authorities have been equipped with to tackle anti-competitive practices. The French NCA is known as one of the most active in enforcing competition rules and imposing high fines.[13] It monitors the behaviour of the biggest corporate groups in the market.[14] The French NCA is also present in the digital market, where it targets big tech for competition-restricting practices.[15] The Polish NCA is small in comparison, as is the size of the Polish economy,[16] and has had different experiences than its French counterpart.[17] In 2020, the Autorité de la concurrence reported a record level of imposed fines, which amounted to more than

[12] *See* more on transposition of the requirements of the ECN+ Directive relating to leniency programmes: Korucińska-Rządca and Mendoza-Caminade (2022).

[13] Sanctions pronounced by the French NCA come close to EUR 7.5 billion in ten years (2011–2021), imposing in total EUR 497.8 million fines on undertakings in 2017, EUR 237,5 million in 2018, EUR 632 million in 2019, EUR 1,785.7 million in 2020 and EUR 874.7 million in 2021: https://www.autoritedelaconcurrence.fr/fr/competence-contentieuse (accessed 26 March 2023).

[14] A EUR 300 million fine imposed on EDF group for abuse of dominant position, from 22 February 2022 (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2022-02/22d06.pdf; accessed 9 August 2022); a EUR 444 million fine on pharmaceutical laboratories for unfair practices, from 9 September 2020 (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-09/20d11.pdf; accessed on 9 August 2022); a EUR 302 million fine on flooring companies for cartel constitution, from 18 October 2017 (https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//17d20.pdf; accessed on 9 August 2022).

[15] French NCA imposed fines on GAFA, *e.g.* decision from 16.03.2020 in Apple case of a EUR 1.2 billion fine (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20d04.pdf; accessed 1 July 2022); decision from 9 April 2020 in Google case of a EUR 500 million fine (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-07/21d17_0.pdf; accessed 9 August 2022); decision from 7 June 2021 in Google case of a EUR 220 million fine (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-06/21d11_0.pdf; accessed 9 August 2022).

[16] According to data of the World Bank, the gross domestic product of France in 2021 was USD 2,957,879.76 million, while in Poland it was USD 679,444.83 million, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name_desc=false (accessed 23 February 2023).

[17] When it comes to the case law of the Polish NCA, authority issued nine decisions in antitrust cases, imposing in total PLN 136.9 million in fines on undertakings in 2017; eight decisions imposing in total PLN 1.1 million in fines on undertakings in 2018; 12 decisions imposing in total PLN 5.2 million in fines on undertakings in 2019; 13 decisions imposing in total PLN 187.2 million in fines on undertakings in 2020; and 11 decisions imposing in total PLN 127.3 million fines on undertakings in 2021 (reports on activity of Polish NCA in 2017–2021; https://uokik.gov.pl/publikacje.php?tag=1; access: 1 July 2022).

EUR 1.78 billion.[18] Despite having the same fining cap (set at 10% of turnover of the undertaking in question), the Polish NCA never came close to the amount of fines imposed by the French NCA. If we compare types of fines, the basis for their calculation and limits, the conclusion is that the two fine-setting systems do not differ considerably. Though both encounter similar problems, they have developed different solutions. The different approaches may stem not only from discrepancies in other competences but also from availability of resources. It is worth examining what may lie behind the high activity and unparalleled level of imposed fines from the perspective of the authority's fining powers – that is, whether it is a different methodology for calculating the fines or other factors like higher efficacy of detection of anti-competitive practices that have resulted in a higher number of proceedings. Nevertheless, they may serve as an inspiration or good practice to be shared. The focus on both states is also influenced by the fact that the authors conducted a research project that concentrated on an analysis of the provisions of national laws of the mentioned countries.

The article focuses mainly on one type of sanctions available to NCAs, that is monetary administrative fines. It does not discuss other sanctioning powers. In EU competition law, the primary function of fines is deterrence,[19] but fining policy may pursue other objectives as well, such as punishment for violation of the law (usually mentioned as the second priority), retribution or recovery of unlawfully obtained profits.[20] Two types of fines are analysed: (1) fines imposed for anti-competitive practices, and (2) fines for non-compliance with NCAs' decisions. The former are designed to sanction anti-competitive behaviour, deter the undertaking in question from committing infringement in the future and ensure compliance with competition rules by other undertakings. The second type of fines punish procedural infringements and force undertakings to comply with the imposed obligations. Periodic penalty payments are strictly connected to antitrust fines because they strengthen their enforcement and play an important role in fining policy. The methodology used in the article includes descriptive research based on the analysis of relevant provisions of national laws, EU law and legal literature. The article contributes to the research on how NCAs approach the enforcement of competition law infringements based on an analysis of national laws and procedures relating to fining powers.

The structure of the article is as follows. Section 2 focuses on addressees of fines and therefore analyses the notion of "undertaking" and the obligation to introduce parental liability for anti-competitive practices. It also refers to NCAs' power to impose a fine on associations of undertakings. Section 3 describes the method for setting fines and the upper limits of fines. Section 4 discusses the issue of periodic

[18] 2021 Annual Report of the Autorité de la concurrence, https://fr.zone-secure.net/266541/1638738/?token=8BA2AC4889EE02B26A41159854E000C7#page=14 (accessed 23 February 2023), p. 13.

[19] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210 1.9.2006, pp. 2–5, para. 4.

[20] ICN (2008), Report on setting of fines for cartels in ICN jurisdictions, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_SettingFines.pdf (accessed 23 February 2023), pp. 7–8.

penalty payments. Section 5 is devoted to limitation periods, and Sect. 6 concludes with the results of the analysis.

2 Fines Imposed on Undertakings and Associations of Undertakings

2.1 ECN+ Directive

One of the arguments for increased harmonisation of sanctioning powers that was frequently underlined was that fines and systems of calculating them remain inconsistent among Member States.[21] As a result, it affects the proper functioning of the internal market. The ECN+ Directive tries to address these problems, stressing that effective and uniform enforcement of competition rules requires giving the NCAs the power to impose strict fines that result in effective deterrence.[22]

Most Member States adopted a fining system based on administrative sanctions complemented by criminal or civil sanctions. However, there are countries that have only criminal sanctions without administrative sanctions, e.g. Iceland, Denmark and Estonia. Similarly, Irish competition law allowed for criminal sanctions.[23] The Commission in those cases recommended a transfer from criminal to administrative procedure, and the ECN+ Directive further confirms this shift.[24] Regardless of the variety of sanctions available, the ECN+ Directive confirms in Art. 13 the observations made by the Commission[25] and in the literature[26] that administrative sanctions are central to the enforcement of competition rules. Consequently, the change will be most pronounced in countries where competition law enforcement was based on criminal sanctions.

One of the conclusions reached by the Commission in 2014 was that NCAs are not equipped with the same set of powers, which may impede their effectiveness since sanctions imposed by NCAs are governed by national laws.[27] The ECN+ Directive harmonises the rules of liability for competition law infringement, specifically parental liability, legal and economic succession. These are issues which proved to be a source of many problems, as in some Member States undertakings were able to escape liability by restructuring.[28] These concepts are inherently linked with the notion of "undertaking", which also differs among national laws. The same applies to the concept of parental liability, which was not

[21] *See* Król-Bogomilska (2018), pp. 13–14.

[22] Motive 40 ECN+ Directive.

[23] Goggin (2017), p. 549; Commission Staff Working Document SWD(2014) 231/2, pp. 15–16, 20.

[24] In some cases the same infringement may be subjected to both administrative and criminal sanctions, *e.g.* bid-rigging cartels.

[25] Commission Staff Working Document SWD(2014) 231/2, p. 20.

[26] Ost (2014), pp. 125–136.

[27] Commission Staff Working Document SWD(2014) 231/2, p. 18.

[28] Motive 5 ECN+ Directive. Similar problems were raised in Germany, *see* Ost (2014), p. 128. This concept is known to Slovak competition law, but it was expressly included in Art. 20(3) Act No. 187/2021 Coll. on Protection of Competition and on Amendments of other laws, which stipulates that liability for the infringement shall pass to the legal successor of the undertaking.

present or not codified in national competition laws of a few Member States, e.g. Poland,[29] Slovak Republic,[30] Lithuania[31] and Croatia.[32] The concept of single economic entity was subjected to critique due to its construction and related case law of the CJEU, which is inconsistent.[33] When it comes to the scope of the single economic entity and notion of the undertaking, the wording of the ECN+ Directive is vague and creates uncertainty. On one hand it allows Member States to introduce some adjustments (e.g. in case they raise constitutional concerns[34]); on the other hand, leaving the door open too wide might lead to gold-plating.[35]

Additionally, Art. 13(2) of the ECN+ Directive introduces a list of procedural infringements and specifies that fines imposed on undertakings are calculated in proportion to their total worldwide turnover. Another requirement imposed by the ECN+ Directive relates to the power to fine associations of undertakings (Art. 13(1)), which some NCAs were lacking. Even among those that had the power to sanction associations of undertakings there was no unanimity as to how to calculate the fine, whether the base amount should be solely an association's turnover or should also include its members' turnover. The ECN+ Directive removed any doubts by introducing the latter solution. Many Member States decided to adopt the same mechanism of attributing liability and fining the associations of undertakings as provided in the ECN+ Directive.[36]

2.2 Enhanced Framework for Pursuing Infringements by an Association of Undertakings in France

The fines imposed by the French Competition Authority have been modified by the transposition of the ECN+ Directive through the Ordinance of 26 May 2021.[37]

[29] *See* Sect. 2.3.

[30] On the differences between the definition of "undertaking" in EU and Slovak law and its implication for enforcement of competition law, *see* Blažo (2014), pp. 114–119. Act No. 187/2021 Coll. on Protection of Competition and on Amendments of other laws, implementing the ECN+ Directive, defines in Art. 3(1) single economic entity as an entity that may comprise several natural or legal persons who have organisational, personal or economic links or who exhibit an element of control in their relationship.

[31] Amendments to the Law on Competition of the Republic of Lithuania (No. VIII-1099, as amended) specifically added definitions of subsidiary and parent undertaking in Arts. 13^1 and $13,^2$ respectively. They are both based on a concept of "decisive influence" and defined in Art. 11 as the possibility to control or influence the decision-making process of another undertaking.

[32] The Act on the Amendments to the Competition Act (Official Gazette 41/2021), which implements the ECN+ Directive in Croatia and has entered into force on 24 April 2021, specifies in Art. 2(4) (amended Art. 3(4) of the Competition Act (Official Gazette, 79/09)) that notions of single economic entity and legal economic successors shall be interpreted in accordance with the concept of "undertaking" developed in CJEU case law.

[33] *See e.g.* Kalintri (2018), Thomas and Dueñas (2018).

[34] *See* case of Germany, Thomas and Dueñas (2018), pp. 17–19; Ost (2014), p. 128.

[35] *Cf.* case of Poland in Sect. 2.3.

[36] *E.g.* Slovak Republic, Greece, Lithuania, Latvia, Croatia, Poland, Spain.

[37] Ordonnance no 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, *JORF*, No. 0121, 27 mai 2021, texte No. 11.

Thus, the criterion of the duration of the infringement as an element of assessment of the penalty is explicitly introduced in French law, while the criteria relating to the damage to the economy are removed.[38]

Above all, the Ordinance enshrines in the new provision VI of Art. L. 464-2 of the French Commercial Code the principle of the financial liability of members of an association of undertakings. This new provision in the article provides for several things.

Firstly, where a financial penalty is imposed on an association of undertakings, taking into account the turnover of its members, and the association is not solvent, the Competition Authority may order the association to issue a call for contributions from its members to cover the amount of the financial penalty.[39] Secondly, in the event that these contributions are not paid in full to the association of undertakings within a time limit set by the Competition Authority, the latter may directly require the payment of the financial penalty by any undertaking whose representatives were members of the decision-making bodies of that association.[40] It is also provided that where necessary to ensure full payment of the fine, after having required payment by those undertakings, the Competition Authority may also require payment of the outstanding amount of the fine by any member of the association which was active on the market where the infringement was committed. However, such payment is not required from undertakings which demonstrate that they did not implement the contested decision of the association and were unaware of its existence or actively disassociated themselves from it before the initiation of the procedure.[41]

Given the new framework provided by the ECN+ Directive, trade associations will have to find the right balance to continue to carry out their tasks and defend the interests of their members – in particular by providing them with technical and commercial services and advice – while avoiding anti-competitive behaviour. Thus, as the French Competition Authority points out, "not only must a trade association refrain from taking part in anti-competitive practices, but it has a duty to explicitly oppose anti-competitive behaviour within its bodies as soon as it becomes aware of it".[42] Several mechanisms can be implemented in associations to avoid any possible anti-competitive practice and the risk of sanctions arising from it. They are invited to set up a competition law compliance policy within their structures, or to appoint a person in charge of monitoring and supervising compliance with legal recommendations.[43]

Associations are also advised to set up training courses to raise awareness of competition rules among their members and staff. It is indeed essential that this

[38] Delpech (2021).

[39] Article L. 464-2, VI, al. 1, French Commercial Code.

[40] Article L. 464-2, VI, al. 2, French Commercial Code.

[41] Article L. 464-2, VI, al. 2, French Commercial Code.

[42] Aut. conc., étude «Les organismes professionnels», janv. 2021, § 148, [online] available at: https://www.autoritedelaconcurrence.fr/sites/default/files/EtudeThematique-OrganismesProfessionnels_final.pdf.

[43] Aut. conc., Document cadre du 11 octobre 2021 sur les programmes de conformité aux règles de concurrence, [online] available on: https://www.autoritedelaconcurrence.fr/sites/default/files/conformite_nouveau%20doc_cadre_0.pdf.

compliance approach is known and applied in the different groups or committees of each association – and not only at the level of the legal committee, for example. This concern for rigour and organisation will also be an obvious necessity for active members or those involved in management functions in order to reassure them with regard to the risk of members being held jointly liable.

2.3 Difficulties with Introduction of the Concept of Parental Liability into National Competition Law: Polish Example

Member States were given a deadline to implement the provisions of the ECN+ Directive by 4 February 2021 (Art. 34(1)). Poland, as well as some other Member States, e.g. Spain[44] and Belgium,[45] has exceeded the period for the adoption of the laws, as the legislation was passed and entered into force on 20 May 2023. Provisions transposing the ECN+ Directive are laid down in the 2023 Amendment Act,[46] amending the Act of 16 February 2007 on competition and consumer protection.[47]

Fines are imposed in administrative proceedings by the Polish Competition Authority (President of the Office of Competition and Consumers Protection, hereinafter: UOKiK President), which can impose fines on undertakings and associations of undertakings for breach of competition rules. Undertakings that were fined may appeal the UOKiK President's decisions before the civil court. The powers of the court regarding review of the level of fines include increasing or reducing the level of fines. Recent years have shown that it is very common for undertakings to appeal the NCA's decisions, which often results in receiving a significant reduction in the amount of fine.[48]

Polish law is mostly harmonised in respect of the fining powers of the UOKiK President. However, the Polish legislator has taken the opportunity to introduce more changes than the necessary minimum required by the ECN+ Directive and additionally strengthen the NCA.[49] One of the major changes that was implemented by the 2023 Amendment Act is the liability of a parent undertaking. Though the concept of parental liability is well developed in EU law and jurisprudence,[50] there was no equivalent in Polish law. The UOKiK President did not have the power to impose a fine on parent undertakings that did not directly participate in the infringement. The EU law adopts a wide definition of undertaking, understood as a single entity or group of entities forming a single economic unit. The determining

[44] Neira Barral (2021), pp. 467–476.

[45] Lepièce and De Volder (2022).

[46] Act of 9 March 2023 on the amendment of the act on competiton and consumer protection and certain other acts (Journal of Laws 2023 item 852), hereinafter: 2023 Amendment Act.

[47] Act of 16 February 2007 on competition and consumer protection (consolidated text Journal of Laws 2021 item 275), hereinafter: the 2007 Competition Act.

[48] *See* Bernatt (2016a), pp. 148–152.

[49] The last set of amendments that significantly modified Polish competition law in respect of antitrust fines were introduced in 2015. For overview of changes *see* Król-Bogomilska (2015), pp. 4–11.

[50] The landmark case of the CJEU in this matter is the judgment of 10 September 2009, Case C-97/08 *Akzo Nobel NV v. Commission*, ECLI:EU:C:2009:536.

factor is whether they act independently on the market, not the formal or legal structure.[51] Such a broad definition eliminates most of the problems with attribution of liability to parent undertakings or legal successors. The definition of a single economic unit and liability for the anti-competitive conduct of a subsidiary are also well described and researched.[52] In Poland, the personal scope of the competition law is defined by the notion of an undertaking (Art. 4 of the 2007 Competition Act), which has a narrow scope in comparison to the EU law definition.[53] The emphasis is on structural and legal links. It does not encompass economic connections and unity of conduct on the market.

The 2023 Amendment Act also eliminates the gap which allows some undertakings to escape liability by restructuring, namely in the case of termination of business activity by natural persons.[54]

The possibility to fine a parent undertaking for infringement committed by its subsidiary was introduced by 2023 Amendment Act, which states that an undertaking exercising decisive influence over the undertaking infringing competition rules is also participating in the infringement[55] and can therefore be held liable. Exercising decisive influence is defined as a situation where economic, legal or organisational links exist between undertakings as a result of which the subsidiary undertaking follows or obeys the instructions given by the undertaking exercising decisive influence in a way that limits or prevents the independent determination of its market conduct. In addition, the 2023 Amendment Act establishes a legal presumption that the requirement of decisive influence is met if the undertaking exercising decisive influence holds more than 90% of the capital of the subsidiary undertaking, which is more severe than the threshold set in CJEU case law. Both parent undertaking and its subsidiary are parties to the antitrust proceedings. The concept of parental liability and its wording raised many concerns and were subjected to several changes at the various steps of the legislative process.

Another problematic issue associated with the concept of liability present in the 2023 Amendment Act is liability based on an assumption that a parent undertaking exercising decisive influence over its subsidiary is inconsistent with rules relating to the attribution of liability for antitrust infringements in Polish law. The NCA may impose a fine only on the undertaking that committed the infringement and is at fault. Liability based on fault plays an important role in Polish competition law and

[51] Judgment of 14 July1972, Case C-48/69 *Imperial Chemical Industries v. Commission*, ECLI:EU:C:1972:70, para. 134; Case C-97/08 P *Akzo Nobel NV v. Commission*, para. 58.

[52] *See e.g.* Kalintri (2018); Koenig (2017), for a Polish perspective *see* Semeniuk (2015); Deroudille (2016); Bolze (1994); Barbier (2015); Ferrier (2016).

[53] The difference in scope of definition of undertaking in Polish and EU law often results in a different translation of the notion in legal literature. In order to further highlight the difference, the notion of "entrepreneur" is frequently used in reference to Polish competition law.

[54] Article 1(2) of the 2023 Amendment Act. A similar problem with imposing fines related to restructuring was also reported by Germany, *see* Ost (2014), pp. 127–128.

[55] Article 1(4) of the 2023 Amendment Act.

as such should not be disregarded. The proposed rules permit holding liable a parent undertaking that did not directly participate in unlawful behaviour.

The definition of undertaking set out in Art. 4(1) of the 2007 Competition Act also covers associations of undertakings and thus provides grounds to impose fines on associations of undertakings. The 2023 Amendment Act implements rules on liability that draw directly from Arts. 14(3), 14(4) and 15(2) of the ECN+ Directive, that is, within the scope and limits set in the Act (up to 10% of the total worldwide turnover of the undertaking or association of undertakings) in case of infringement of both EU and national competition law. Provisions of the 2023 Amendment Act relating to the liability of associations of undertakings were heavily criticised in the public consultation process,[56] especially the provision concerning the upper limit of financial liability of an individual member of the association for the penalty imposed on this association. It is an issue that will be further discussed in Sect. 3.3. In addition, the provision on the recovery of fines imposed on associations of undertakings was criticised for not taking into account the relative size of the member of the association, in particular whether it is a small or medium-sized enterprise.

3 Calculation of Fines and Maximum Level of Fines

3.1 ECN+ Directive

Most of the NCAs use a similar methodology for setting antitrust fines.[57] However, there is no universal base amount used by NCAs for calculating the amount of fines or even the fine limit. Most commonly, the calculation of fines was related to a percentage of the undertaking's turnover or a lump sum. For instance, prior to transposition of the ECN+ Directive, Spanish law[58] set maximum fines of up to 1%, 5% or 10%[59] of the total turnover of the infringing undertaking in the financial year immediately preceding the financial year in which the fine was imposed. Furthermore, there is no common catalogue of aggravating and mitigating circumstances that should be taken into consideration for the purpose of calculating the fines.[60] A catalogue of such factors is crucial, considering that fines are repressive in nature. They are not used as a mean of compensation, therefore proportionality based on consistent and transparent methodology is essential to avoid the imposition of excessive fines.

[56] *See* Summary of submissions to the public consultations (Tabela – konsultacje publiczne – UC69), https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757018#12757018 (accessed 30 December 2021).

[57] Commission Staff Working Document, p. 20.

[58] BOE-A-2007-12946 Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[59] Depending on the gravity of the infringement, "light", "high" and "very high": *see* Art. 62 of Spanish Law 15/2007 of 3 July.

[60] *See* Sinclair (2017), p. 632. The author suggests that a catalogue of aggravating and mitigating factors can be introduced in a form of soft law on the EU level as a result of cooperation of Member States within the ECN.

The ECN+ Directive provides general guidelines on how to calculate antitrust fines. The basic amount is determined by a percentage of undertakings' or associations of undertakings' total worldwide turnover. The same applies to periodic penalty payments, which are the subject of Sect. 4. They are determined in proportion to the average daily total worldwide turnover. There is no unanimity among Member States when it comes to the amount of periodic penalty payments, but the prevailing model includes fines amounting up to 5% of the daily total turnover of the undertaking.[61] Some Member States decided to introduce two thresholds for the periodic penalty payments, e.g. Slovak Republic,[62] or indicate the minimum threshold of the fine by quantitative threshold, e.g. Latvia.[63]

The threshold for fines for competition law infringements set in Art. 15 of the ECN+ Directive is high. It is also considered severe, as it does not allow undertakings to foresee the amount of the fine imposed on them, nor to determine the upper limit of the possible fine. The Regulation 1/2003 capped the fine at 10% of total turnover in the preceding business year. Article 15 of the ECN+ Directive raises said threshold of the maximum amount of fine, setting it at not less than 10% of the total worldwide turnover of the undertaking or association of undertakings. The previous "maximum" became the new minimum level of fine. All Member States were required to transpose this method into national law, i.e. the calculation of fines with reference to the total worldwide turnover of the undertaking. The ECN+ Directive significantly raised the cap and adjusted the basis for the calculation of the fine to total turnover of the corporate group. Even without those changes, fine limits in EU competition law are unprecedented.[64] However, not every Member State decided to apply the same rules to both national and EU competition law infringements.[65] There is no methodology of calculation nor maximum cap of a fine. These issues are left to the discretion of Member States.

[61] *E.g.* the Greek NCA may impose for non-compliance periodic penalty payment of up to 3% of the average daily total turnover of undertaking (Art. 25B of the Law 3959/2011 on the Protection of Free Competition).

[62] Article 46(1) and (2) of Act No. 187/2021 Coll. on Protection of Competition and on Amendments of other laws lists two catalogues of infringements that may lead to imposition of periodic penalty payments, first in the amount of up to 5% of the average daily total turnover of the undertaking, the latter being set at up to 3% of the average daily total turnover.

[63] Article 8^1 (5^1) of Competition Law act (Latvijas Vēstnesis, 151, 23 October 2001) states that the NCA may impose periodic penalty payments for infringement of EU competition law up to 5% of the average daily total turnover of the undertaking but not less than EUR 250.00 per day.

[64] *Cf.* the maximum limit under the GDPR is 4% of the undertaking's total worldwide annual turnover. In case of unfair trading practices, which are enforced by NCAs in the majority of Member States, if the fine is determined on the basis of the infringing party's turnover, the maximum limit in most cases is a lot lower than 10% (*e.g.* Poland – 3%, Romania – 1%, Sweden – 1%, Latvia – 0,2%), *see also* Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the state of the transposition and implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, COM/2021/652 final.

[65] *E.g.* Latvia introduced said method of calculation only in case of infringements of EU competition rules. Fines for violations of national competition law are calculated in reference to national turnover (Arts. 12 (3^1) and 14 (2^1) of Competition Law Act (Latvijas Vēstnesis, 151, 23 October 2001)).

The ECN+ Directive stresses that NCAs should be able to impose deterrent and effective fines. Raising the amount of fines relates to a deterrent effect, but its impact on effectiveness is dubious. It might even prove to be economically inefficient.[66] The effectiveness of the fines depends on various factors such as inevitability, recovery of the fines, and proportionality, requiring an overall assessment of the infringement and the undertaking in question that committed it.[67] It should be assessed from the perspective of the fines' functions – prevention and repression of anti-competitive behaviour, resulting in fewer infringements. However, demonstration of such effects is very problematic, and it is difficult to obtain any data that would prove it or study that shows it.[68]

3.2 Ensuring Deterrent Effect by Raising the Ceiling of Fines

The calculation of fines is an important part of the French Ordinance of 26 May 2021. The system of financial penalties, which is based on Art. L. 464-2 of the Commercial Code, the wording of which has been amended, is now intended to be more dissuasive and better harmonised at the European level. Associations of undertakings are no longer subject to a specific penalty regime in the event of an infringement of the competition rules (until now they benefited from a penalty ceiling of EUR 3 million), but are now subject to a much higher ceiling, equal to 10% of the total turnover of the undertakings belonging to the association.

Thus, under the new mechanism provided for by the ECN+ Directive, transposed by the Order of 26 May 2021, the Competition Authority will be able to impose a fine of up to 10% of the association's total worldwide turnover when the association participates in an infringement and is held liable alongside its members. Alternatively, it may impose a fine of up to 10% of the sum of the worldwide turnover of its members where the association is the sole defendant in an infringement for practices carried out vis-à-vis its members.

Recovery of fines is also facilitated because, if the association is insolvent, the Competition Authority will be able to demand payment of the outstanding amount of the fine from those members of the association whose representatives were members of the association's decision-making bodies or active in the market in which the infringement was committed.

In addition, in a press release from 30 July 2021,[69] the Competition Authority provides some clarifications regarding the calculation of fines.

First of all, it is specified that the "value of all categories of products or services directly or indirectly related to the infringement or, where applicable, to the infringements, sold by the undertaking or association of undertakings concerned

[66] Thomas and Dueñas (2018), pp. 10–12.

[67] *Cf.* judgment of 15 March 2006, Case T-15/02 *BASF AG v. Commission*, ECLI:EU:T:2006:74, para. 235; judgment of 8 October 2008, Case T-69/04 *Schunk v. Commission*, ECLI:EU:T:2008:415, paras. 192–210; judgment of 7 June 2011, Case T-217/06 *Arkema France, Altuglas International SA and Altumax Europe SAS v. Commission*, ECLI:EU:T:2011:251, para. 213.

[68] *Cf.* Veljanovski (2022).

[69] Aut. Conc., comm., La méthode de détermination des sanctions pécuniaires, 30 July 2021, [online] available on: https://www.autoritedelaconcurrence.fr/sites/default/files/Communique_sanction.pdf.

during its last full accounting period of participation" will be taken into account.[70] The notion of "indirect link to the infringement", which could potentially broaden the base of the basic amount and thus increase the penalty, is not defined. The Authority has nevertheless improved its text concerning the elements taken into account to determine the value. It is up to the undertaking (or association of undertakings) to communicate the value of its sales to the Authority, as well as the data enabling its verification. Otherwise, the Authority may take into account the data available to it or publicly available data, at the risk that they may be less favourable to the undertaking.[71]

In addition, the assessment of the seriousness of the facts makes it possible to determine the percentage of the value of sales that will be taken into account in the calculation of the basic amount. This percentage ranges from 0 to 30%, with the most serious cases (e.g. cartels) being between 15 and 30%. The criteria for assessing the seriousness of the facts are merely the same as before. Nonetheless, the nature of the activity is now taken into account, such as the impact on health, innovation and the environment.[72] It can therefore now be considered that this criterion can be taken into account either as an aggravating factor of the seriousness (e.g. the practice contributes to the deterioration of the environment) or as a moderating factor (e.g. the practice contributes to the improvement of the environment).

Finally, the 2021 press release introduces into the methodology the application of what is often referred to as an "entry ticket" of 15–25%, i.e. a sum with a dissuasive value added to the proportion of the value of sales already retained for gravity, in accordance with the Commission's guidelines.[73] This addition is likely to raise the amount of the penalties considerably, as has been the case in EU law.

3.3 Increasing Transparency of Polish NCA's Fining Policy

In Poland, according to Art. 106 of the 2007 Competition Act, an undertaking may be fined up to 10% of its annual turnover. Implementation of the ECN+ Directive has not changed that. Modifications introduced by the 2023 Amendment Act include the method of setting (1) fines imposed on undertakings in case of parental liability; (2) fines imposed on associations of undertakings; (3) fines imposed for procedural infringements; and (4) periodic penalty payments.[74]

Rules on penalties applicable to competition law infringements are also set out in Art. 111 of the 2007 Competition Act, stipulating the aggravating and mitigating circumstances to be taken into account when determining the amount of fine. As mentioned in Sect. 2.3 it is common for undertakings to challenge fining decisions issued by the UOKiK President and receive a substantial reduction of the fine. While courts in the majority of cases agree with the NCA on finding an

[70] Aut. Conc., comm., *op. cit.*, pt. 23.

[71] Aut. Conc., comm., *op. cit.*, pt. 24.

[72] Aut. Conc., comm., *op. cit.*, pt. 28.

[73] Aut. Conc., comm., *op. cit.*, pt. 31.

[74] Further discussed in Sect. 4.3.

infringement, there is no such consensus on the amount of the fine. The courts developed their own guidelines for calculation of antitrust fines in decision-making practice. As a result, the list of mitigating and aggravating circumstances slightly differs from guidelines provided by the UOKiK President.[75] The list of circumstances is supplemented by the 2023 Amendment Act in relation to fines imposed on natural persons that failed to provide information or documents requested by the NCA.[76] The draft law states that calculation of fines imposed on natural persons in breach of this obligation must include the impact the infringement has on the antitrust proceedings and must take into account the "personal situation" of the person on whom the fine is being imposed.[77]

The method of setting fines imposed on associations of undertakings introduced by the 2023 Amendment Act has been criticised for exceeding the limits established in Art. 15 of the ECN+ Directive. The provision that has drawn many concerns states that where contributions from members of the association have not been made in full to the association of undertakings, the NCA may require the payment of the outstanding amount of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of that association.[78] The provision stipulates that those members are jointly and severally liable for that payment. It is pointed out that the outstanding amount of the fine will most likely exceed the limit of 10 % of the total worldwide turnover of that member, thus contradicting the maximum amount of the fine set in the ECN+ Directive.

The next change refers to the method of setting fines for procedural infringements. The upper limit of EUR 50,000,000 set in Art. 106(2) of the 2007 Competition Act is replaced by a limit established in proportion to the undertaking's turnover. This is another case where the 2023 Amendment Act goes beyond the scope of the ECN+ Directive. The threshold of the fine is set at up to 3% of total worldwide turnover. The 3% cap raised many reservations,[79] as it is higher than the 1% limit set in Regulation 1/2003. It may lead to the imposition of disproportionate fines. Also, the catalogue of procedural infringements was extended to include: lack of cooperation; providing incomplete or false documents and information; interfering or hindering inspections or interviews conducted by the NCA; failure to comply with the decisions imposing behavioural or structural measures; failure to comply with decisions imposing obligations to prevent or mitigate further harm caused by infringement.

[75] *See* Piszcz (2016), pp. 107–108; Famirska (2020), pp. 146–148.

[76] Article 50 of 2007 Competition Act states that only undertakings are obliged to provide information and documents on request of the NCA. The 2023 Amendment Act broadens the personal scope of the binding request in stating that the NCA may also demand information and documents from natural persons.

[77] Article 1(45) of the 2023 Amendment Act.

[78] Article 1(40) of the 2023 Amendment Act.

[79] *See* Summary of submissions to the public consultations (Tabela – konsultacje publiczne – UC69), https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757018#12757018 (accessed 30 December 2021).

In July 2020 the UOKiK President published guidelines on imposing fines on undertakings' managing persons liable for infringement.[80] Another soft law instrument providing transparency around the fining policy of the UOKiK President was issued in April 2021 regarding the imposition of fines on undertakings for competition-restricting practices.[81] Guidelines issued by the UOKiK President are an important tool in its decision-making practice, although they are non-binding in nature. The guidelines intend to clarify how aggravating and mitigating circumstances are included in the methodology for setting fines by categorising them and attributing a specific percentage value. The methodology outlined in the guidelines allows the NCA to simplify the process to an arithmetic equation. However, a potential risk and downside pointed out in the legal literature is that the application of an algorithm without taking into consideration other factors may lead to the imposition of fines that insufficiently differentiate the amount of penalty.[82]

It is also worth noting that the revised soft law guidelines were issued by the UOKiK President shortly after the first draft of the 2023 Amendment Act was introduced, despite the fact that the 2023 Amendment Act significantly modifies the methodology for the calculation of fines.

4 Periodic Penalty Payments

4.1 ECN+ Directive

The power to impose periodic penalty payments is defined in Art. 16 of the ECN+ Directive. The European legislator thus wished to harmonise the possibility for Member States' NCAs to impose effective, proportionate and dissuasive periodic penalty payments on undertakings and associations of undertakings. Two scenarios are envisaged. Firstly, periodic penalty payments may be imposed in order to obtain information from undertakings or associations of undertakings on the application of Arts. 101 and 102 of the TFEU. They can therefore be imposed to obtain information on possible cartels or abuses of a dominant position[83] but also in order to summon a representative of the undertaking to an interview to provide such information.[84] Secondly, in addition to the request for information, periodic penalty payments may also be imposed to subject the undertaking or association of undertakings to the inspection described by Art. 6 of the ECN+ Directive, or to the

[80] UOKiK, Wyjaśnienia w sprawie sposobu wymierzania kar pieniężnych dla osób zarządzających na podstawie art. 106a i 111 u.o.k.k., https://www.uokik.gov.pl/news.php?news_id=16655 (accessed 30 December 2021).

[81] UOKiK, Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych dla przedsiębiorców w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję, https://www.uokik.gov.pl/news.php?news_id=17361 (accessed 30 December 2021). Previous guidelines referring to rules on calculation of antitrust fines were issued in 2015.

[82] Błachucki (2015), pp. 57–59.

[83] Article 8 of the ECN+ Directive.

[84] Article 9 of the ECN+ Directive.

enforcement of an injunction, whether it be the termination of an infringement,[85] the enforcement of interim measures[86] or the fulfilment of commitments given by the undertakings.[87]

In this sense, the power to impose periodic penalty payments is a welcome complementary addition to the other tasks incumbent on the NCAs. They are effective means of combating persistent and future non-compliance by undertakings and associations of undertakings with their measures and decisions referred to in Arts. 6, 8, 9, 10, 11 and 12 of the Directive. The purpose of periodic penalty payments, like fines, is to ensure compliance with obligations, whether substantive (cessation of an infringement) or procedural (delay in providing complete and accurate information, refusal to submit to an inspection imposed by a decision), which may be imposed on undertakings by the Commission or by national competition authorities. Unlike fines, periodic penalty payments do not have a punitive dimension, so that even undertakings that are not prosecuted for competition law infringements can be subject to periodic penalty payments, for example if they do not cooperate with the authority in question. Such an imposition is thus an instrument enabling these authorities to ensure the cooperation of these undertakings in their investigations.

Therefore, the ECN+ Directive also specifies, with some precision, the method of calculation of periodic penalty payments. Indeed, Art. 16 goes on to specify that they are calculated in proportion to the average daily total worldwide turnover achieved during the preceding business year. This deterrent calculation will then be multiplied by the number of days of delay from the date set in the NCA's decision. This method of calculation makes it possible to reconcile the deterrence sought by the European legislator with proportionality in order to create effective actions: indeed, periodic penalty payments must be "effective, proportionate and dissuasive". The periodic penalty payments accumulate periodically, usually on a daily basis, for as long as the undertaking in question remains in default of its obligations. Although the final amount of the periodic penalty payments is usually calculated when the undertaking has complied with the obligations imposed on it, this is not always the case, as the authority may, for example, in the case of a refusal to comply, determine an "intermediate" amount for a period already elapsed and demand payment, while imposing a higher periodic penalty payment than from that decision.

4.2 French NCA Closing the Gap in Enforcement by Cooperating with Other NCAs

It is now provided in French law that, except in cases where public force may be required, when an undertaking or association of undertakings refuses to submit to an investigation measure, the Authority may issue an injunction accompanied by a periodic penalty payment. However, as regards penalty payments, many of the

[85] Article 10 of the ECN+ Directive.

[86] Article 11 of the ECN+ Directive.

[87] Article 12 of the ECN+ Directive.

provisions of the Directive did not have to be transposed, as French law already complied with the rules adopted.

Nevertheless, Art. 16 of the Directive provides that periodic penalty payments must be effective, proportionate, dissuasive and determined in proportion to the average daily aggregate worldwide turnover of the undertakings or associations of undertakings concerned by a procedure. In this sense, the French Commercial Code[88] was therefore completed to specify that the turnover taken into consideration to calculate the periodic penalty payment is the average total worldwide daily turnover. Thus, the Competition Authority will be able to impose on the parties concerned periodic penalty payments of up to 5% of the total average daily turnover for each day of delay from the date it sets, to compel them to comply with a decision or to respect the measures pronounced.[89]

Furthermore, in accordance with the intention of the ECN+ Directive, the Competition Authority, for the application of Arts. 101 or 102 TFEU, may request the assistance of a competition authority of another Member State for the notification of the addressee of any procedural act or for the enforcement of its decisions imposing a pecuniary sanction or a periodic penalty payment. Indeed, the French transposition order strengthens the cooperation mechanism between competition authorities and introduces four sets of measures. Firstly, the NCA must inform the European Commission and the NCAs of the other Member States of the issuance of a decision imposing interim measures or of a decision not to pursue the procedure. Secondly, in order to establish whether an undertaking or association of undertakings has refused to comply with the investigative measures and decisions taken by an NCA of another EU Member State, the Competition Authority may, at the request and on behalf of the requesting authority, use its investigative powers. Thirdly, subject to the safeguards provided for in Art. 12 of Regulation (EC) No 1/2003 of 16 December 2002, the national authority may request the assistance of an NCA of another Member State in notifying the addressee of any procedural step or in enforcing its decisions imposing a financial penalty or a periodic penalty payment. Finally, the Competition Authority may transmit the statement made to obtain the benefit of the leniency procedure.

4.3 Raising the Limit of the Fines as an Additional Disciplinary Mechanism

Polish competition law already provided the UOKiK President with the possibility to impose fines for non-compliance with the NCA's decisions. In accordance with Art. 107 of the 2007 Competition Act Polish, the NCA can impose a fine of up to EUR 10,000 for each day of delay in implementing the authority's decisions. However, EU Member States adopt varying lists of undertakings' conduct that leads

[88] Article L. 464-2, II of the French Commercial Code.

[89] E. Claudel, Ordonnance no 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 : la directive ECN+ enfin transposée!, *RTD. Com.*, 2021, p. 562.

to the imposition of periodic penalty payments. The catalogue from Art. 24 of Regulation 1/2003 has served so far as a model solution.

Article 1(42) of the 2023 Amendment Act stipulates that periodic penalty payments are determined in proportion to total worldwide turnover. The new cap replacing the lump sum is set at 5% of average daily total worldwide turnover. The grounds for imposing this type of fine are significantly extended in comparison to Art. 107 of the 2007 Competition Act, which sanctions only non-compliance with the NCA's decisions. The grounds are relatively similar to the catalogue of procedural infringements stipulated in the 2023 Amendment Act.[90] As required and stipulated in Motive 44 of the ECN+ Directive, imposing periodic penalty payments does not preclude fining the same undertaking for procedural infringements. While the former type of fine is intended to compel undertakings to satisfy obligations imposed by the NCA, the latter aims to punish the failure to respect measures imposed by the NCA. Despite the different objectives of these fines, they may cover one and the same conduct of an undertaking. The grounds for imposing a fine for procedural infringement and periodic penalty payment should not overlap. However, the risk that an undertaking might be fined twice for the same behaviour is not eliminated. While the authors of the 2023 Amendment Act ensure that such a situation will not occur,[91] there are no safeguards in the Act.

The change in the amount and calculation method of periodic penalty payments should increase effective enforcement of the NCA's sanctions, particularly due to the trend that can be observed. National courts hearing appeals against NCA decisions tend to reduce the amount of the fine imposed on undertakings. In extreme cases, fines are reduced by more than 90%.[92] This in turn may lead to the imposition of lenient fines that do not achieve their purpose, mostly because paying such a fine might be more favourable to the undertaking than compliance with imposed obligations or simply because the amount of fine is grossly disproportionate to the revenue of the undertaking.[93] Nevertheless, raising the amount of fines should be followed by diminishing discrepancies between the fining policy adopted by the UOKiK President and the national court reviewing the authority's decision.

5 Limitation Periods

5.1 ECN+ Directive

Limitation periods are addressed by the ECN+ Directive in its Art. 29. They concern fines and periodic penalty payments. The aim of the ECN+ Directive is to seek to harmonise limitation periods within the Member States with a twofold purpose. Firstly, the harmonisation of these limitation periods should allow for

[90] *See* Sect. 3.3.

[91] *See* Explanatory memorandum (*ECN+ uzasadnienie KP*), https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757054#12757054 (accessed 30 December 2021), pp. 41–42.

[92] *See* Bernatt (2016b), pp. 23–24.

[93] *See* Piszcz (2016), pp. 109–110.

better European action and consequently better cooperation between the various NCAs. Secondly, Art. 29 of the ECN+ Directive seeks to ensure that the various procedures, whether judicial or administrative, are harmonised so that action by the authorities and courts avoids the limitation period for the other.

Recital 70 of the Directive refers to the need for realistic limitation rules. In addition to the various time limits which must be harmonised within a Member State, it is specified that these must be interrupted when proceedings are pending before an NCA of another Member State or the Commission. The purpose of this cooperative harmonisation is thus to make the implementation of Arts. 101 and 102 of the TFEU, which respectively prohibit cartels and abuses of dominance liable to affect trade between Member States, more effective. The provisions of these articles influence the wording of national law, which has been amended several times to bring it into line with the European texts.

The intention of the ECN+ Directive is to reconcile the rules on limitation periods with the need to ensure the effectiveness of the rules of European Union law. National rules which exclude that prosecution, subsequent to the decision to open an investigation by the competent authority, may have the effect of interrupting the limitation period. When such exclusion presents a systemic risk of impunity for the facts constituting such offences, it must therefore be set aside.[94] Similarly, the duration of the statute of limitations should not be so short that, in combination with the rules on its regime, it makes it excessively difficult for victims to exercise their right to seek redress.[95]

In this respect, the harmonisation of limitation rules tends to reinforce the application of sanctions to anti-competitive practices. In France, for example, their transposition has made it possible to reconcile administrative and judicial procedures, seeing that the European Directive has only a structural effect. In Poland, on the other hand, they create new grounds for interruption with the aim of strengthening the powers of the Polish NCA.

5.2 Bridging the Gap between Different Limitation Periods in France

Article 2 of the Ordinance of 26 May 2021, in its provisions II, X and XI, amended Arts. L. 420-6, L. 462-6 and L. 462-7 of the French Commercial Code relating to acts interrupting the statute of limitations before the Competition Authority.[96] In particular, it is specified that "the statute of limitations of the action before the Competition Authority is also interrupted by the transmission [of the file to the public prosecutor] mentioned in the second paragraph of Art. L. 462-6".[97] The impact of these amendments should therefore be analysed.

To begin with, it is important to remember that in French law there are two types of limitation periods that must necessarily be considered. Firstly, the five-year

[94] CJEU, 21 January 2021, aff. C 308/19, *Consiliul Concurenţei v. Whiteland Import Export SRL.*

[95] CJEU, 28 March 2019, aff. C-637/17, *Cogeco Communications Inc. v. Sport TV Portugal SA e.a.*

[96] Articles L. 462-6 and L. 462-7 of the French Commercial Code on limitation periods. *See also*: X. Delpech, *op. cit.*

[97] Article L. 462-7, French Commercial Code.

statute of limitations following the specific anti-competitive practice or the cessation of a continuous anti-competitive practice: beyond this period, the action is time-barred except in the case of "investigation, establishment or sanction"[98] of the facts. Secondly, the statute of limitations expires ten years after the cessation of the anti-competitive practice if the Authority has not taken a decision, except in the case of an appeal against a decision.

It is also important to underline that there are three types of possible sanctions under French law against anti-competitive practices: civil, criminal and administrative sanctions. Article L. 481-1 of the French Commercial Code provides for a civil action for compensation (albeit before an administrative court): "any natural or legal person forming an undertaking or [an association of undertakings] shall be liable for the damage it has caused as a result of the commission of an anti-competitive practice". In addition, Art. L. 420-6 of the French Commercial Code provides a criminal response of up to four years' imprisonment and a fine of EUR 75,000 for "the fact that any natural person fraudulently takes a personal and decisive part in the conception, organisation or implementation of [anti-competitive] practices". Finally, administrative sanctions are those imposed by the Competition Authority. While the first two are part of a judicial procedure, the Authority's sanctions are subject to its own procedure. However, by specifying that the statute of limitations is interrupted as soon as the file is transmitted, the Order of 26 May 2021, transposing the provisions of the ECN+ Directive, has linked all procedures, whether judicial or not, in terms of statute of limitations. Any judicial or administrative action automatically interrupts the limitation period of either action.

Therefore, any action before the Competition Authority to investigate, find or punish anti-competitive practices interrupts the five-year statute of limitations for any type of action where such is a possiblity Similarly, any decision by a judicial authority to sanction anti-competitive behaviour interrupts the expiry of the ten-year limitation period.

All in all, these are the major contributions of the ECN+ Directive with regard to the rules of prescription in French law; they have made it possible to harmonise the judicial and administrative procedures in order to avoid the foreclosure of certain acts. In this sense, the transposed provisions allow for a better application of competition rules.

5.3 New Grounds for Suspension of Limitation Period as an Attempt to Empower the Polish NCA

Modifications of limitation periods introduced by the 2023 Amendment Act include transposition of rules set in Art. 29 of the ECN+ Directive relating to suspension of limitation periods for the imposition of fines or periodic penalty payments for the duration of proceedings carried out by NCAs of other Member States or the Commission for infringement of Arts. 101 or 102 TFEU.

Article 1(27) of the 2023 Amendment Act introduces another change concerning limitation periods, one that goes beyond the minimum required by the ECN+

[98] Article L. 462-6, French Commercial Code.

Directive. It revises the procedural time limits for initiating antitrust proceedings that may result in the imposition of a fine. Previously, the NCA's power to initiate antitrust proceedings was subjected to a five-year limitation period. The limitation period is calculated from the end of the year in which (1) the infringement was committed; (2) the decision imposing the fine became final; and (3) the undertaking ceased infringing competition rules.[99] There were three attempts to regulate this issue. The first draft stated that the limitation period is interrupted by any investigative measure carried out by the UOKiK President in relation to anti-competitive practice. This led to strong criticism, which was well deserved considering the implications of that wording and the poor justification that was provided. The main critical remarks concerned the decision to interrupt the limitation period rather than suspend it. In addition to that, the interruption of limitation period by any investigative measure might have created the risk of the NCA carrying out actions that are artificial in nature with the sole purpose of interrupting the limitation period. The effects, or rather repercussions, of a parallel solution can be observed in tax law. Practice has shown that the tax authority acts arbitrarily in this respect. The introduction of a similar provision in the first draft of 2023 Amendment Act entailed a similar risk and may have had an adverse effect on the principle of legal certainty. The second draft was still lacking, though it could be considered as an improvement in comparison to previous attempt. It stated that the limitation period is suspended after the investigation proceedings concerning anti-competitive practices were initiated. Finally, the wording of 2023 Amendment Act that entered into force specifies that the limitation period is suspended following the notification of the undertaking in investigation proceedings. Notice from the NCA must concern investigative measures carried out in relation to this undertaking. The exhaustive list of investigative measures includes: (1) a binding request for information;[100] (2) conducting an inspection or search;[101] and (3) summons for an interview. Although the provision of the 2023 Amendment Act concerning new grounds for suspension of limitation periods extends the powers of the Polish NCA, it is by far the most balanced proposition out of three attempts taken to regulate this issue.

6 Conclusions

The ECN+ Directive aims at equipping NCAs with a common minimum set of fining powers. It may be regarded as a further decentralisation and a shift of competences in favour of NCAs. There is no doubt that it is not feasible to create one-size-fits-all solution, as institutional models of NCAs substantially differ across Member States. It is a result of a variety of circumstances, such as differences in

[99] Articles 76 and 93 of 2007 Competition Act.

[100] Request of information referred to in Art. 50 of 2007 Competition Act.

[101] Inspection referred to in Art. 105a of 2007 Competition Act or the search referred to in Art. 105n of 2007 Competition Act.

prevailing aims and priorities of NCAs, competences,[102] access to resources and many more factors. Our analysis shows that amendments to national legislation are required to meet the standards set by the Directive, but laws of many Member States are to a large extent in line with the ECN+ Directive. Though in some Member States the scope of the sanctioning powers of the NCAs goes beyond the minimum set in the ECN+ Directive. Is this level of harmonisation in respect to fining powers sufficient to achieve the objectives of the ECN+ Directive and address the above-mentioned inconsistencies? Our answer, based on an analysis of national laws of Member States with a special focus on France and Poland, is that there will be no significant differences in the maximum cap of fines, but the amount of fines will be substantially increased as a result of the calculation of fines referring to total worldwide turnover as opposed to national turnover (e.g. Greece, Spain). While raising the ceiling and amount of fines might not be sufficient to achieve all goals, extending the catalogue of procedural infringements and introducing periodic penalty payments further empower NCAs and give them more tools to enforce compliance. The requirement of the ECN+ Directive to determine the fines in proportion to turnover instead of a lump sum makes the fines more predictable for the undertaking. Another desirable change in national laws would be the application of a fining system to both EU and national competition law infringements. Applying the concept of parental liability and imposing fines on legal and economic successors of undertakings narrows the gap allowing undertakings to escape liability for fines. It was not present in several jurisdictions (e.g. Poland, Slovak Republic, Lithuania, Croatia). However, the enforcement policy of NCAs will still differ considerably.

The Polish act implementing the ECN+ Directive addresses some shortcomings of previous legislation, such as the gap enabling undertakings to escape liability by restructuring. It also grants additional powers to the UOKiK President to compel undertakings to comply with its decisions. Though the introduced changes are mostly welcome, they also raise many concerns, especially when it comes to the system of calculating fines in respect to parental liability and the limits of fines imposed on members of associations of undertakings in case of insolvency of the association. The maximum level of fines in those cases poses a risk of imposition of excessive penalties. High and dissuasive fines are essential to achieving the deterrent effect, but without an efficient enforcement mechanism they do not guarantee the effectiveness of the system. The deterrent effect of a sanction is not solely based on the amount of the fine. Enforcement policy resulting in the inevitability of the fine plays a significant role in the process. Other measures contributing to a coherent fining policy are fines ensuring cooperation of the undertaking. A transparent and consistently applied methodology for calculating fines will also strengthen the position of the NCA in case of judicial review. Another important issue is limitation period. Rules on limitation periods must strike a balance. Empowering the authority in this matter should not lead to decreased legal certainty for undertakings.

[102] Some NCAs were entrusted with additional competences beyond the area of competition policy and consumer protection, *e.g.* the Polish NCA was tasked, among others, with tackling unfair trading practices and late payments.

The French transposition, on the other hand, does not substantially modify the mechanisms that existed prior to the ECN+ Directive. It does, however, make it possible to enshrine and legitimise the French NCA's prior practices at the EU level. The establishment of a harmonised calculation method at the European level, as well as rules on limitation periods, does however allow for a better coordinated response by NCAs.

Nevertheless, some gaps are impossible to reconcile due to differences in fundamental concepts in national competition laws, such as the notion of undertaking[103] or the specific method of calculating fines, i.e. the relative weight of mitigating and aggravating factors expressed as a percentage or the equation used for calculating the amount of fine. It should be borne in mind that differences in NCAs' sanctioning powers among Member States may remain because each authority has developed independently in accordance with national law and total uniformity might not produce the desired effect.

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[103] Not every Member State decided to define the notion of "undertaking" and parental liability in the same way that CJEU case law specifies them.

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