IIC (2023) 54:1081–1104
https://doi.org/10.1007/s40319-023-01353-4

ARTICLE

(Dis)Respect for Fundamental Rights in EU Competition Law Enforcement Proceedings Before National Authorities: In What Way Does Article 3 of the ECN+ Directive Prove To Be too Open-Ended?

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Accepted: 30 May 2023 / Published online: 20 June 2023
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Abstract The ECN+ Directive gives national competition authorities more power in order to make them more effective enforcers of EU competition law. However, Art. 3 of the ECN+ Directive counterbalances this by requiring that appropriate safeguards are in place to ensure that undertakings' fundamental rights are respected in EU competition law enforcement proceedings. The aim of this article is to critically reflect on the requirements of the ECN+ Directive with respect to safeguards for the fundamental rights that fall within the ambit of Art. 3 of the ECN+ Directive and the implementation of those requirements by EU Member States. To this end, the article first provides an overview of this provision. Second, by means of an overview of national laws, it analyses whether the very general Art. 3 is capable

Sections 1, 2, 3.3, 4.1, 4.2, 5.1, 5.3 and 6 were written by Anna Piszcz. Anna Piszcz acknowledges that this article is part of the project "Enhancing competition enforcement by the competition authorities of the EU Member States: Procedural issues in the Czech Republic and Poland" co-financed by the Polish National Agency for Academic Exchange (project No. PPN/CZ/2019/1/00007/U/00001). Sections 3.1, 3.2, 4.3 and 5.2 were written by Michal Petr.

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 Anna Piszcz and Catherine Grynfogel in IIC 53:1071–1102 (2022) https://doi.org/10.1007/s40319-022-01215-5; "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 Paulina Korycińska-Rządca and Alexandra Mendoza-Caminade in IIC 53:1506–1540 (2022) https://doi.org/10.1007/s40319-022-01268-6 and Magdalena Knapp and Diogo Costa Cunha "Antitrust Fines and Limitation Periods After the Implementation of Directive (EU) 2019/1 Throughout Member States: Focus on French and Polish Perspectives" in IIC https://doi.org/10.1007/s40319-023-01337-4.

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of harmonising the safeguards in question. A set of comparative examples from EU Member States, including in particular examples Poland and the Czech Republic, shows how the wording of Art. 3 invites national legislatures to misuse the potential of this provision. This results in undertakings continuing to face disparity in the extent to which their fundamental rights are protected in competition law enforcement proceedings before the various national competition authorities.

Keywords Fundamental rights · Enforcement proceedings · National competition authorities · EU competition law · Directive (EU) 2019/1 · ECN+ Directive

1 Introduction

The first decade of enforcing EU competition rules under Regulation 1/2003[1] has resulted in a substantial level of convergence in the application of these rules by competition authorities.[2] Yet, even after a decade, certain divergences remain. The 2014 landmark anniversary prompted the European Commission to issue a Communication on Ten Years of Council Regulation 1/2003. It found scope for the national competition authorities (hereinafter "NCAs") of EU Member States to be more effective enforcers. A number of areas were also identified for action to boost effective enforcement by the NCAs.[3] The Commission argued that the EU should take measures to address the problems identified because the NCAs were applying EU rules with a cross-border dimension.

In March 2017, the European Commission proposed a Directive of the European Parliament and of the Council to empower the competition authorities of the EU Member States to be more effective enforcers and to ensure the proper functioning of the internal market.[4] Article 3 thereof addressed the issue of respecting fundamental rights in enforcement proceedings before NCAs. However, at the same time, some commentators supported convergence through "spontaneous harmonisation", rather than binding measures.[5] And some argued against the application of the *acquis* "rights of defence" in national competition proceedings with an EU element.[6]

[1] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, 4.1.2003, p. 1), hereinafter "Regulation 1/2003". It entered into force on 1 May 2004.

[2] *Cf.* Rodger and Lucey (2018), pp. 236–270.

[3] 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 and the accompanying Commission Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003 SWD(2014) 230 final and Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues SWD(2014) 231 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0453 (all internet references in this paper were accessed on 7 November 2022).

[4] 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.

[5] Nazzini (2005), p. 30.

[6] Kowalik-Bańczyk (2012), p. 229.

Ultimately, it has taken almost three years to adopt Directive (EU) 2019/1 (ECN+ Directive).[7] Fortunately, the EU legislature has not lost momentum on the issue of the respect of fundamental rights in enforcement proceedings before the NCAs. On the contrary: the provision previously proposed has been adopted in the final text as Art. 3(1). At the same time, additional paragraphs have been added. First, they concern the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.[8] Second, they provide for a reasonable timeframe for enforcement proceedings before the NCAs and require NCAs to adopt a statement of objections.[9]

The aim of this article is to critically reflect on the requirements of the ECN+ Directive with respect to safeguards for fundamental rights that fall within the ambit of Art. 3 of the ECN+ Directive, and the implementation of those requirements by EU Member States. To this end, the article first provides an outline of this provision. By means of an overview of relevant national laws, it then analyses whether the very general Art. 3 is capable of harmonising the safeguards in question. A set of comparative examples from EU Member States, including in particular examples from Poland and the Czech Republic, shows how the wording of Art. 3 invites national legislatures to misuse the potential of this provision. As a result, undertakings still face disparity in the extent to which their fundamental rights are protected in competition law enforcement proceedings before the various NCAs. Later, we consider what the reform processes have actually achieved, and where they have fallen short. We suggest certain amendments to legal frameworks, bearing in mind that the European Commission is bound to review the ECN+ Directive before 12 December 2024.

This article covers a subset of fundamental rights that fall within the ambit of Art. 3 of the ECN+ Directive. First, it focuses on protecting the confidentiality of communications between a lawyer and an undertaking, that is to say legal professional privilege (LPP), as an unmentioned element of the right of defence referred to in Art. 3(2). Second, it considers the right to a reasonable timeframe for enforcement proceedings before NCAs, which is explicitly recognised in the first sentence of Art. 3(3). Third, it looks at the right to a statement of objections, explicitly provided for in the second sentence of Art. 3(3). To sum up, this article focuses on the concepts (within the ambit of Art. 3) that, in our opinion, are among the easiest to spot in national laws and to compare, distinguishing between those explicitly mentioned in Art. 3 and the unmentioned element of the right of defence merely referred to therein. We designed the research material to be not too wide-ranging in scope in order that it could be boxed within several categories and addressed, especially as our findings have indicated that this would suffice to demonstrate a tendency for Member States to have and/or develop differing interpretations of the same requirements of Art. 3 of the ECN+ Directive.

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

[8] Directive (EU) 2019/1, Art. 3(2).

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

The research methods employed in this article include a doctrinal legal method, as well as systemic and teleological approaches, and a comparative analysis.

2 Article 3 of the ECN+ Directive: An Overview and EU Member States' Approaches

2.1 Main Issues Covered and Uncovered by Article 3 of the ECN+ Directive

In the research literature and jurisprudence,[10] there has long been debate on the nature of administrative competition proceedings as such.[11] Given the limits of this paper, we would just like to mention that the European Court of Human Rights (ECtHR) adopted an autonomous and broad concept for such proceedings, considering them criminal in nature (for the purpose of Art. 6 of the European Convention on Human Rights). As a result, the procedural guarantees required for the parties are not the same as in "traditional" administrative proceedings.[12] Administrative competition proceedings constitute a special case. Bellamy explains that there is an apparent divergence between the requirements of Art. 6(1) of the Convention on the one hand and the EU Treaties and jurisprudence on the other; however, the cumulative consequences of a fine imposed by the Commission may be at least as severe, if not more so, than those resulting from some kinds of conduct traditionally regarded as criminal.[13] Therefore, he proposed that Art. 261 TFEU[14] and Art. 31 of Regulation 1/2003 be amended.[15] Furthermore, courts in some EU Member States have not adopted the ECtHR's concept with regard to national competition proceedings, while the judiciary of other Member States[16] has taken the opposite view. The concepts may vary across Member States. Therefore, procedural guarantees for parties to administrative competition proceedings are more limited in some EU Member States than in others. Hence, it can be considered justified to advocate for more protection of fundamental procedural rights when enforcing Arts. 101 and 102 TFEU.

[10] *See*, *inter alia*, Nazzini (2005), pp. 6 *et seq.*; Kowalik-Bańczyk (2012), pp. 224–232.

[11] Here, and throughout the paper, we elide the separation between two separate prongs of proceedings, that is to say, first, administrative proceedings, which only allow for administrative injunctions, and, second, regulatory offence proceedings, which may lead to the imposition of a fine. This distinction is still maintained in German procedural competition law.

[12] *A. Menarini Diagnostics S.r.L. v Italy*, Application No. 43509/08; *SA-Capital Oy v Finland*, Application No. 5556/10.

[13] Bellamy (2012).

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

[15] Bellamy (2012).

[16] *See*, *inter alia*, the Polish Supreme Court judgment of 21 April 2011, III SK 45/10; the Hungarian Supreme Court judgment of 20 May 2014, Kfv.III.37.690/2013/29, and Tóth (2018), pp. 49–50.

When analysing Art. 3 of the ECN+ Directive,[17] it is essential to consider not only the rights that are explicitly listed (undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal, the right to a reasonable timeframe for enforcement proceedings before NCAs, and the right to a statement of objections), but also the references in that Article. However, does their design actually strike a balance between respecting undertakings' fundamental rights and the duty to ensure that Arts. 101 and 102 TFEU are effectively enforced? Article 3(1) of the ECN+ Directive refers, *inter alia*, to "general principles of Union law and the Charter of Fundamental Rights of the European Union".[18] It may be assumed, therefore, that Art. 3(1) of the ECN+ Directive needs to be complemented,[19] as it merely repeats what already follows from the previous status quo.[20] Article 3(1) of the ECN+ Directive does not seem to offer the necessary guidance. It tends to focus primarily on issues that do not provide any added value compared with the previous status quo.[21] From the perspective of the right of defence in competition proceedings, the following concepts are important: the right to a fair trial (Art. 47 of the Charter); the presumption of innocence (Art. 48(1) of the Charter); the protection of the confidentiality of communications between a lawyer and an undertaking, or legal professional privilege (LPP) (derived, at EU level, from Art. 48(2) of the Charter in particular); the principles of legality and proportionality of penalties, including the non-retroactivity of the law (Art. 49 of the Charter); the *ne bis in idem* principle (Art. 50 of the Charter); the right to privacy (in the context of searches); and freedom from self-incrimination, that is to say privilege against self-incrimination.[22] However, some Member States seem to pretend that what is not explicitly mentioned in the ECN+ Directive does not need to be analysed in legislative processes.

Furthermore, Art. 3(2) of the ECN+ Directive is only slightly more concrete than Art. 3(1) in the sense that it lists "the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal".[23] However, Art. 3(2) of the ECN+ Directive fails to clearly outline requirements regarding

[17] It is worth emphasising that this Article corresponds to a certain extent to para. 6.5 of the non-binding International Competition Network Recommended Practices for Investigative Process: "Parties under investigation should be given the opportunity to exercise their rights of defence and respond to agency concerns and evidence. Parties should be permitted to express views, present factual, legal, and economic evidence to the agency, and make substantive submissions during the investigation". *Cf.* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf.

[18] Hereinafter the "Charter".

[19] *Cf.* Art. 51(1) of the Charter, according to which the provisions of the Charter are addressed to "[…] the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers" and respect the limits of the powers of the European Union as conferred on it in the Treaties.

[20] *Cf.* Wils (2020), part IV.A; Botta (2018), p. 6; Wils (2011), part II; Wils (2017), fn. 105: "The obligation for NCAs, when applying Arts. 101 and 102 TFEU, to respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union and in general principles of Union law already exists today".

[21] Botta (2018), p. 6.

[22] *Cf.*, *inter alia*, Moisejevas and Nasutavičienė (2019), pp. 167–170; Targański (2019), pp. 187–191.

[23] *Cf.* Art. 41(2)(a) of the Charter of Fundamental Rights of the European Union.

"appropriate safeguards". The open expressions used are practically worthless from the Member States' perspective. *Inter alia*, the privilege against self-incrimination (PASI) should also be matched with the rights of defence.[24] In the case of PASI, the minimum requirements to be met by EU Member State competition laws are now regulated in the ECN+ Directive. There is no doubt that the European Parliament has had a crucial impact on this legal framework as it added Art. 8 of the ECN+ Directive as well as Recital 35 in this regard. However, Art. 8 is in Chapter IV ("POWERS") of the ECN+ Directive, while safeguards for fundamental rights are regulated in Art. 3 ("Safeguards") of Chapter II ("FUNDAMENTAL RIGHTS"). The EU legislature neglected PASI issues to a certain extent. It should be noted that the applicable provisions present a very narrow understanding of the required function of PASI (especially when looking at the second sentence of Art. 8). They limit PASI to the guarantee that requesting any undertakings and associations of undertakings to provide all necessary information for the application of Arts. 101 and 102 TFEU within a specified and reasonable timeframe does not compel the addressees of such requests to admit an infringement of Arts. 101 and 102 TFEU. This implies that there may be no significant national actions to strengthen PASI.[25] The EU legislature should focus its attention also on the other investigative powers of NCAs and recognise PASI in Art. 3 of the ECN+ Directive as a vital element of the undertakings' right of defence, intended to prevent their self-incrimination whenever an NCA carries out investigative measures of any type (and not only requests information). This would provide Member States with incentives to improve national mechanisms, while simultaneously giving undertakings more protection.

The aim of the ECN+ Directive does not include requiring Member States whose legislation does not provide for requests for information made by decision to change their legal frameworks and introduce this type of request. Member States might be inclined not to introduce it, even if such a change is thought to be a wise response to the need to safeguard the right to an effective remedy.[26] This certainly puts a question mark over whether such legal frameworks are really fit for the purpose of striking a balance between respecting the fundamental rights of undertakings and effectively enforcing competition rules.[27]

Recital 14 of the ECN+ Directive does not focus only on whether safeguards on the exercise of NCAs' powers comply with general principles of European Union law and the Charter. It also looks at whether they are in accordance with the case-law of the Court of Justice of the European Union[28] "in particular in the context of

[24] *Consob* is one of the recent CJEU rulings to take into consideration the rights of natural persons to remain silent and to avoid self-incrimination; *see* C-481/19, ECLI:EU:C:2021:84.

[25] For a more extensive explanation we refer to analyses in current literature; Piszcz and Knapp (2023).

[26] Requests made by decision are subject to judicial review. For more, *see*, *inter alia*, van de Gronden (2021), part III.8, 2.2.

[27] For a more extensive explanation we refer to studies in current literature; Korycińska-Rządca and Zorková (2023); Korycińska-Rządca (2023).

[28] Hereinafter the "CJEU".

proceedings which could give rise to the imposition of penalties".[29] In terms of what safeguards are required, Recital 14 lists the "right to good administration"[30] as well as "the respect of undertakings' rights of defence, an essential component of which is the right to be heard".[31] While NCAs must respect the undertakings' right to be heard, as Wils finds, "their decisions should be based on their own, impartial judgment, with a view to the effective and uniform application of Arts. 101 and 102 TFEU in the general interest, without any bias in favour of or against any particular economic operator or category of economic operators".[32] However, Recital 14 incorporates in its structure also the second component of the undertakings' rights of defence, namely the right to an effective remedy before a tribunal. Among other things, Recital 14 confirms this right, referring to Art. 47 of the Charter of Fundamental Rights of the European Union. It requires that NCAs' decisions, in particular those that find infringement of Art. 101 or Art. 102 TFEU and impose remedies or fines, should be reasoned so as to allow the addressees of such decisions to exercise their right to an effective remedy.[33]

Recital 14 requires the design of safeguards to strike a balance between respecting the fundamental rights of undertakings and the duty to ensure that Arts. 101 and 102 TFEU are effectively enforced.[34] However, the insufficiencies of Art. 3 of the ECN+ Directive might lead to a paradox, whereby NCAs might be granted equal and enforced investigative and sanctioning powers on the one hand, while, on the other hand, companies might still face disparity in the extent to which their rights are protected in competition proceedings before the NCAs of the various EU Member States.[35] Therefore, this might mean, in fact, that the balance required by the ECN+ Directive is not attained.

2.2 National Attitudes Towards the Requirements of Article 3 of the ECN+ Directive

We adopt the view that the overly laconic and open-ended legal framework contained in Art. 3 have meant that "the EU institutions have actually missed an excellent opportunity to enforce and unify the protection of the rights of companies involved in competition law investigations and proceedings".[36] That is illustrated by the diverse national attitudes shown towards the requirements of Art. 3 of the ECN+ Directive. An analysis of the laws and policies of specific Member States has revealed several distinctive approaches in this context.

One group, consisting of France, Hungary, Italy, Latvia, the Netherlands, and Sweden, decided that Art. 3 of the ECN+ Directive did not need to be transposed

[29] Directive (EU) 2019/1, Recital 14. *Cf.* sentence 1.

[30] *Cf.* Art. 41 of the Charter.

[31] Directive (EU) 2019/1, Recital 14. *Cf.* sentence 2.

[32] Wils (2017), p. 29.

[33] Directive (EU) 2019/1, Recital 14. *Cf.* sentences 6 and 7. Also *see* Art. 41(2)(c) of the Charter.

[34] Directive (EU) 2019/1, Recital 14. *Cf.* sentence 9.

[35] Michałek-Gervais (2021), p. 123. *Cf.* Rea (2019), p. 115.

[36] Michałek-Gervais (2021), p. 113.

into their national legislation.[37] However, this approach raises the further point of whether that was not in fact an ill-considered decision. For instance, in the Netherlands, general administrative law stipulates that a measure similar to a statement of objections be adopted and presented to the undertaking concerned if a fine of more than EUR 340.00 can be imposed.[38] The question arises as to how this complies with Art. 3(3) of the ECN+ Directive, which does not provide for a threshold or a minimum fine.

By contrast, some Member States, such as Malta, Portugal, Spain and Croatia[39] took a different approach and transposed Art. 3(1) of the ECN+ Directive, but limited it to the introduction of a "programmatic" provision reflecting Art. 3(1). Nevertheless, this may be seen as a statutory *superfluum*. The usefulness of a declaratory provision is questionable, as it follows from the overall principle of the primacy of EU law. However, at the same time, including a programmatic provision is also deemed to support or strengthen legal arguments that certain procedural safeguards apply when there is uncertainty regarding their application.[40]

A third group of Member States seems to take the view that the requirements imposed by Art. 3 of the ECN+ Directive need more elaborate solutions. In addition to programmatic provisions mirroring Art. 3(1) of the ECN+ Directive, Austria, Bulgaria, Lithuania, Luxembourg and Malta introduced other national provisions related to safeguards to protect the fundamental rights of undertakings.[41]

A fourth group of Member States consists of a number of countries, namely Cyprus, Denmark, Finland, Germany, Poland, Slovenia and Slovakia, that complemented their legal frameworks for protecting undertakings' fundamental rights, but not simply with the programmatic provisions mentioned above.[42]

However, a distinction should be made within the third and fourth group between Member States that have improved their procedural standards and Member States that have taken a step back under the veil of implementing the Directive. Furthermore, irrespective of which group they belong to, some Member States remain silent on a number of issues that have been known for many years but have never been (properly) implemented. Below we explore examples of both good and not-so-good practices of Member States that demonstrate how, because of the wording of Art. 3 of the ECN+ Directive, it is entirely possible to have different national arrangements in relation to matters covered by Art. 3.

[37] *Cf.* Van Rompuy (2021), p. 212.

[38] *Cf.* de Groes and Raats (2021), p. 294.

[39] *See* Art. 13B(8) of the Maltese Competition and Consumer Affairs Authority Act; Art. 2(5) of the Portuguese Competition Act; Art. 45bis of the Spanish Competition Protection Act; Art. 2.b(2) of the Croatian Competition Protection Act.

[40] Kühnert and König (2021), pp. 216–217.

[41] *See* Sec. 13(1)–(2) of the Austrian Competition Act; Art. 8(2), 74(2)–(3), 77(1)–(2) of the Bulgarian Competition Protection Act; Art. 25(2), 26(3)–(5), 21, 29 of the Lithuanian Competition Act.

[42] *See* Art. 42 of the Cypriot Law on Competition Protection; Clauses 15(5), 17(1), 17b of the Danish Competition Act; Secs. 33(2), 38a(1) of the Finnish Competition Act; Sec. 28(1) of the Slovak Competition Protection Act; § 59(3) et al. of the German Act against Restraints of Competition. *See* Art. 105da and Art. 49(3) of the Polish Competition Act, added by the Amendment Act of 9 March 2023.

Finally, there are Member States that have yet to implement the ECN+ Directive – Estonia and the Czech Republic have still not adjusted their legal frameworks to the requirements of the ECN+ Directive.[43] In Estonia, this is because of the dilemmas posed by the ECN+ Directive for a system in which supervisory powers and sanctioning powers are used in dual proceedings. In the Czech Republic Art. 3 of the ECN+ Directive has not been discussed at all, and the proposed amendment of the Competition Act does not contain any provisions on its transposition.[44]

3 Legal Professional Privilege (LPP)

3.1 The ECN+ Directive Is Silent on LPP …

Legal professional privilege (LPP) is clearly not mentioned in Art. 3 of the ECN+ Directive. However, it should be recalled that Art. 3(1) of the ECN+ Directive refers to "general principles of Union law and the Charter of Fundamental Rights of the European Union", while Art. 3(2) requires "appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal".

Lawyer-client confidentiality was recognised by the CJEU as a "general principle of Community law" in *AM & S Europe Limited v Commission*, and "general principles of Union law" are referred to in Art. 3(1) of the ECN+ Directive.[45] However, LPP is also perceived as an extremely important component of the right of defence,[46] which implies that it falls within the ambit of Art. 3(2) of the ECN+ Directive.

Legal professional privilege is the expression commonly used to describe the confidentiality of communications between lawyers and their clients concerning their defence in criminal proceedings. As the CJEU put it, the aim of LPP is to protect "the confidentiality of written communications between lawyer and client provided that […] such communications are made for the purposes and in the interests of the client's right of defence".[47]

[43] On 29 September 2022, the Commission formally requested Estonia (INFR(2021)0112), Luxembourg (INFR(2021)0122), Poland (INFR(2021)0126) and Slovenia (INFR(2021)0130) to fully implement the ECN+ Directive; *see* https://ec.europa.eu/commission/presscorner/detail/%20en/inf_22_5402. The Czech Republic has not received such a request.

[44] At the end of 2022, the proposal was still being discussed by the Czech Parliament. The draft amendment of the Czech competition law is available (in Czech) at: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=283&CT1=0 (hereinafter: "Czech draft amendment"). The Czech draft amendment is discussed in Petr (2021).

[45] CJEU judgment in *AM & S Europe Limited v Commission of the European* Communities, 155/79, ECLI:EU:C:1982:157.

[46] Bailey and John (2018), p. 1147, state clearly that "The protection of confidentiality of certain communication between lawyer and client is an essential corollary to the rights of the defence and serves the important requirement that everyone should be able to without restraint to consult a lawyer to obtain independent legal advice". For similar conclusions, *see e.g.* Nazzini (2016), p. 185.

[47] *AM & S*, 155/79, *supra* note 47, para. 21.

Therefore, it is essential to distinguish LPP as an essential component of the right of defence in Art. 3(2) of the ECN+ Directive, alongside the right to be heard and the right to an effective remedy before a tribunal. This is especially so because it is not very common among Member States to have LPP regulated in competition law, and some Member States, do not regulate it at all. What is commonly regulated is the lawyers' professional secrecy, that is to say their duty not to disclose information conveyed to them by their clients, but not legal privilege, that is to say the protection of the information itself.

These two concepts are not to be confused: "Referring to 'professional secrecy' or 'confidentiality' as the 'equivalent' doctrine to legal privilege in civil law jurisdictions […] leads to confusion. Professional secrecy as such is a duty, a generic obligation imposed on a professional to keep matters discussed with the client in strict confidence and not to disclose them to third parties […]. But there is no automatic relationship between such duties of 'professional secrecy' or 'confidentiality' and a privilege against the compelled production of evidence, even where these duties emanate from legislation. Many professions have a duty of secrecy, few have privilege".[48]

In Spain, for example, LPP is not regulated at all, even though there are extensive provisions concerning lawyer secrecy. Despite the lack of regulation, the Spanish courts consider LPP to be a part of the right to defence, enshrined in the Spanish constitution. The same approach may be identified in antitrust proceedings. The Spanish Competition Authority adjusted its internal procedures in order to guarantee the confidentiality of LPP, in particular during dawn raids.[49] No legislative changes were thus proposed to adopt LPP in the Spanish legal order.[50]

However, in some Member States, lawyers' professional secrecy is understood more broadly, as including also the privileged character of information. This broad interpretation of secrecy then serves as a basis for the internal practice of competition authorities, which enables them to protect the confidentiality of LPP.

An interesting example of this may be found in Latvia, where the Advocacy Law guarantees independent lawyers – advocates – professional secrecy. According to that law, protection is accorded not only to lawyers, who need not provide information concerning their legal advice to clients, but also to their clients. Thus, clients may not be requested to provide information regarding the assistance of advocates and the contents of such assistance. The Latvian Competition Authority had already in 2011 adopted internal procedures that aligned its proceedings with the Advocacy Law and provided detailed rules on how to process LPP. Interestingly, the number of cases actually involving LPP has been very low – only five cases over five years.[51] However, the legislator found the level of

[48] Gippini-Fournier (2004), p. 973.

[49] Note by Spain for the OECD Working Party No. 3 on Co-operation and Enforcement Treatment of legally privileged information in competition proceedings at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)44/en/pdf.

[50] Maillo (2021), p. 321.

[51] For details *see* Note by Latvia for the OECD Working Party No. 3 on Co-operation and Enforcement Treatment of legally privileged information in competition proceedings at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)42/en/pdf.

protection afforded to LPP in competition proceedings adequate and thus no change of law was proposed in that regard.[52]

Conversely, LPP is not often regulated expressly for the purposes of competition proceedings. Hungary may serve as a rare example. The Hungarian Competition Act provides for the protection of "documents prepared for the purposes of defence". The Hungarian law even specifically provides for judicial review of the Authority's conduct in this matter.[53] As this regulation was already in place, no substantive changes in legislation were deemed necessary in Hungary.[54]

3.2 … So Member States Are Silent on LPP …

When implementing the ECN+ Directive, the Member States have generally not taken the opportunity to clarify the LPP regime. In some cases, discussed in the previous section, this was because the regime already in place was deemed to be sufficient. However, in many Member States, there were no rules on LPP before the ECN+ Directive. And, surprisingly, no new rules were adopted while implementing it.

For example, in Austria, the principle of LPP was introduced in 2016 only in criminal, not competition, proceedings. Even though the Austrian competition authority has not adopted any measures to protect LPP, the amendment of the Austrian Competition Act did not address this issue at all.[55] The situation changed only in mid-2022 after intervention by the Austrian Cartel Court, which decided that LPP must be protected in competition proceedings. Only after that did the Austrian competition authority issue new internal guidelines that finally accorded protection to LPP.[56]

The silence on LPP in competition proceedings was also broken in Finland. The original proposed amendment to the Finnish Competition Act did not address the issue of LPP (or indeed fundamental rights) at all. The issue of LPP was first addressed in the Parliament, but the changes that were finally adopted were only minor ones. Concerning LPP, the Finnish Competition Act states that information provided to the competition authority should not include LPP.[57]

In other Member States, complete silence prevailed. In this regard, the Czech Republic may serve as an example. As in Latvia, independent lawyers – advocates – are bound by professional secrecy concerning the legal advice they give. Czech legislation does not use the term LPP, but various criminal law provisions do protect communication between lawyers and their clients. The Constitutional Court of the Czech Republic recognised that those provisions, contained in various pieces of

[52] Merwin (2021), p. 273.

[53] For details *see* Note by Hungary for the OECD Working Party No. 3 on Co-operation and Enforcement *Treatment of legally privileged information in competition proceedings* at: https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)40/en/pdf.

[54] Horányi and Mezei (2021), p. 263.

[55] Kühnert and König (2021), pp. 216–217.

[56] Kühnert (2022), p. 237.

[57] Kauranen (2021), p. 248.

legislation, were the "concretisation of a constitutional right to defence […] and a right to legal aid […], the essential constituent of which is *a right to confer with a defence lawyer under conditions that do not convey information to authorities responsible for criminal proceedings*".[58]

Czech competition law does not contain any provision on LPP. The jurisprudence nonetheless does recognise it. In a similar vein of argument to that in Austria, the Czech Supreme Administrative Court declared in the first (and only) case in which the issue of LPP arose that, even though not expressly contained in Czech legislation, the right to defence, which includes the protection of lawyer-client communications, needs to be applied in administrative proceedings. According to the court, LPP should be protected under Czech competition law to the same extent as under EU law.[59]

Unlike in other countries discussed so far, the Czech Competition Authority has not published any internal guidelines on its approach to LPP. Czech practice thus does not have any procedure for ascertaining whether a given document is indeed privileged.[60] The implementation of the ECN+ Directive does not address the issue of LPP at all. It is therefore doubtful whether it was sufficiently implemented in the Czech Republic.

It is interesting that LPP was also not implemented sufficiently in respect of the Damages Directive,[61] which obliges the Member States to ensure that national courts give full effect to applicable legal professional privilege under European Union or national law when ordering the disclosure of evidence.[62] The confusion starts in the Czech version of the Damages Directive, which does not employ the term "legal professional privilege" (as the English one does). Instead, it employs the term "professional obligation of secrecy" (in Czech: "*profesní povinnost mlčenlivosti*").[63] As we have discussed above, this legal obligation is conceptually different. The same terminology is then adopted by the legislation that transposes the Damages Directive, which requires respect for lawyers' secrecy.[64]

3.3 … Or Member States Take a Step Back Under the Veil of Implementation

A stark example of "taking a step back" is found in the changes recently introduced in Poland to the legal framework for LPP in client communications with their

[58] Ruling of the Czech Constitutional Court of 3 January 2017, Ref. No. III. ÚS 2847/14 (emphasis added).

[59] Judgment of the Supreme Administrative Court of 29 May 2009, Ref. No. 5 Afs 95/2007. These conclusions were ultimately approved by the Constitutional Court in its ruling of 23 January 2014, Ref. No. III. ÚS 2461/12.

[60] Petr (2019), p. 162.

[61] Directive (EU) 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, 5.12.2014, p. 1).

[62] Damages Directive, Art. 5 (6).

[63] Intriguingly, the Slovak language version of the same provision retains the diction of professional privilege (in Slovak: *výsada právnických povolaní*).

[64] Act No. 262/2017 Coll., Competition Damages Act, Sec. 14(4).

lawyers. The drafters of the amendment reported that Art. 3(1) of the ECN+ Directive did not need to be transposed.[65] One exception to this was LPP. During the law-making consultation process, various stakeholders were critical of making the right of defence and LPP pseudo safeguards and decreasing the standards of protection for parties to competition proceedings. However, the government, the Polish NCA[66] and those actually drafting the amendment (a team in the NCA's office) stood by their legislation.[67] They stressed the need for conformity with competition proceedings at EU level.[68] It is particularly disappointing to see that the level of protection of client communications with their lawyers has not only not increased but actually decreased from the previous national status quo.[69]

Analysis of the new legal framework reveals several concerns. The new legal framework for the *ratione personae* aspect of LPP in Poland provides for the protection of written communications between clients and their attorney/barrister (Pol. *adwokat*), their legal adviser (Pol. *radca prawny*) and/or a lawyer from another EU Member State.[70] It only covers independent lawyers, excluding, *a contrario*, in-house ones.[71] Under EU law, in-house lawyers (employees of an undertaking) are not included in the *ratione personae* aspect of LPP.[72] The previous Polish legal framework provided for more extensive protection of communications between clients and their lawyer, which included in-house lawyers.[73] The new provisions do not take into account two specific aspects relating to the professional status of in-house lawyers under Polish law. In-house lawyers are frequently employed by a given company as its "legal advisers", whereas attorneys/barristers need not have a relationship of employment with their clients. Legal advisers are obliged to be enrolled with a bar association and to observe appropriate rules of professional conduct, including professional ethics. They cannot be considered as having waived their ethical autonomy by reason of their employment relationship with their client. Therefore, "legal advisers" who are in-house lawyers should still benefit from LPP, provided that they are allowed to be members of the bar association responsible for applying the relevant ethical rules. In the event of minimum harmonisation, existing, but more extensive, national protection should not be "trimmed down" when implementing the ECN+ Directive just because the EU keeps the *ratione*

[65] In Polish *see* https://legislacja.gov.pl/docs//2/12342403/12757034/12757035/dokument503551.pdf, pp. 7–8.

[66] On the Polish NCA *see* Piszcz and Grynfogel (2022), p. 1079 *et seq*.

[67] *See* the compilation of comments in Polish at: https://legislacja.gov.pl/projekt/12342403/katalog/12757018#12757018, p. 176.

[68] Reference was made to the CJEU judgment in *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, ECLI:EU:C:2010:512.

[69] On the previous national status quo *see* Korycińska-Rządca (2020), pp. 287–290.

[70] Art. 105da(1)(1) of the Polish Competition Act.

[71] The legal drafters of the Amendment Act explain, however, that the level of protection is higher, and refer to the application of the CJEU judgment in *Uniwersytet Wrocławski and Republic of Poland v Research Executive Agency*, Joined Cases C-515/17 P and C-561/17 P, ECLI:EU:C:2020:73, on a case-by-case basis. *Supra* note 69, pp. 170 *et seq.*

[72] Andreangeli (2005), pp. 32 *et seq*.; Wils (2019), part IV.A.

[73] For more details *see* Korycińska-Rządca (2020), pp. 277–282.

personae scope of LPP narrow. This approach reflects the EU's fear that if LPP were granted broader scope, the Commission's powers of investigation would be jeopardised, making its inspections ineffective.[74]

The Polish reform also affects the *ratione materiae* aspect of LPP. Legal changes reported to be part of implementing the ECN+ Directive put persons subject to searches at a disadvantage when compared with the rights they previously enjoyed in this respect.[75] The *ratione materiae* aspect of LPP under the new Polish legal framework is "narrower". Among the items protected are letters and documents: (1) containing written communications, created in order to enable persons subject to inspections/searches to exercise the right to legal protection in connection with the subject matter of given proceedings conducted by the NCA in the course of which an inspection/search is carried out, or (2) prepared solely for the purpose of enabling lawyers to exercise the right to legal protection[76] in connection with the subject matter of given proceedings conducted by the NCA in the course of which an inspection/search is carried out.[77] Polish legal drafters reported that the new legal framework complied with CJEU case-law.[78] They gave the *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* case[79] as an example.[80] However, in order to reflect CJEU case-law, protection should cover all communications exchanged between clients and their lawyers in connection with the clients' rights of defence, and made for the purposes and in the interests of those rights.

A second area for consideration is the *ratione temporis* aspect of LPP. Key here is the realization that LPP currently applies not only in the case of searches but also in the case of inspections.[81] However, as the draft Amendment Act progressed through the legislative process, its drafters did not, at any stage, take into account proposals to refine the legal framework so that LPP could be used in the case of NCA requests for information.

The new scope of protection is excessively restricted also in terms of the measures available to the NCA when persons subject to a search or inspection claim LPP. The inspectors may take a cursory (that is to say casual/superficial) look at the letter or document in a way that allows them to identify the author, addressee, title and subject matter of the letter or document as well as the date of its creation.[82] However, how does one measure how cursory a look at a letter or document is? The subject matter itself is not a casual feature of a letter or document. Ascertaining what the subject matter is may directly give access to information covered by LPP.

[74] *Cf.* Wils (2019), part IV.A; Turno and Zawłocka-Turno (2012), p. 198.

[75] For more details *see* Korycińska-Rządca (2020), pp. 282–285.

[76] Art. 105da(1)(1) of the Polish Competition Act.

[77] Art. 105da(1)(1)–(2) of the Polish Competition Act.

[78] *Cf.* the reference made in: Directive (EU) 2019/1, Recital 14, sentence 1.

[79] C-550/07 P, ECLI:EU:C:2010:512.

[80] *Supra* note 69, pp. 170 *et seq.*

[81] Art. 105da of the Polish Competition Act. Even though the first draft provided for the application of LPP only in the case of searches, inspections were added after the public consultation process.

[82] Art. 105da(2) sentence 1 of the Polish Competition Act.

This may negatively affect the cursory nature of the examination. In this context, it is worth referring to the legal framework for LPP contained in the provisions on criminal procedure.[83] That differs substantially from the one analysed here, in that the officials conducting a search on the basis of criminal procedure look at neither the layout nor the content of the materials.

Next, when inspectors have doubts about LPP claims made by those subject to inspections/searches, the Competition Act provides a specific deadline by which inspectors must submit a given letter or document to the Polish Competition and Consumer Protection Court (SOKiK).[84] The inspectors are required to submit such material to the Court in a way that ensures adequate protection against disclosure of the content “immediately, no later than after the end of the inspection”.[85]

4 A Reasonable Timeframe for Enforcement Proceedings

4.1 ECN+ Directive Is Unreasonably Laconic on the Reasonable Timeframe for Proceedings …

The first sentence of Art. 3(3) of the ECN+ Directive reads as follows: “Member States shall ensure that enforcement proceedings of national competition authorities are conducted within a reasonable timeframe”. Recital 14 speaks of the right to expect that NCAs conduct their enforcement proceedings within a reasonable timeframe[86] in accordance with the overall right to good administration. Apart from respecting undertakings’ rights of defence, the right to good administration is, in turn, one of the “appropriate safeguards” on the exercise of the powers conferred by the ECN+ Directive on NCAs, in particular in the context of proceedings that could give rise to the imposition of penalties.[87] While it is not obvious how to precisely define a reasonable timeframe for competition proceedings, Art. 3(3) of the ECN+ Directive does not set out any specific criteria on the issue. Recital 14 clarifies that Member States should ensure that, when applying Arts. 101 and 102 TFEU, NCAs conduct proceedings within a reasonable timeframe, while taking into account the specificities of each case.[88]

[83] Art. 225(3) of the Polish Code of Criminal Procedure.

[84] Art. 105da(3) of the Polish Competition Act.

[85] The Court has one month to decide whether to return the letter or document to those subject to the inspection/search if it qualifies for LPP or to give it to the President of the Competition and Consumer Protection Office (UOKiK). Act on Competition and Consumer Protection, 2007, Art. 105da(5).

[86] In other words, the right to a decision within a reasonable time. *See* Wils (2020), part II.C and footnote 18.

[87] Directive (EU) 2019/1, Recital 14. *Cf.* sentence 8 and sentence 2 in conjunction with sentence 1, respectively. Also *see* Art. 41(1) of the Charter.

[88] Directive (EU) 2019/1, Recital 14. *Cf.* sentence 8.

4.2 … So Member States Copy the Directive or Change Nothing …

"Reasonable" is one of the adjectives frequently used by the ECN+ Directive. However, the concept of a "reasonable" timeframe is hard to define. Depending on from whose perspective the timeframe is to be assessed, this concept facilitates inconsistent choices. Therefore, Member States may find it difficult to translate the requirement of being reasonable into concrete national provisions, and content themselves with simply copying the EU requirement. When analysing the right to a reasonable timeframe for enforcement proceedings before NCAs, one has to compare national definitions thereof (if there are any), keeping in mind the limitations involved in the possibility of extending the duration of proceedings.

For example, instead of regulating for specific guarantees, such as mandatory time periods, the legal drafters in Luxembourg proposed a provision whereby proceedings be conducted within a reasonable time. They underlined that compliance with this requirement must be assessed on a case-by-case basis, according to the specificities and complexity of the case in question; furthermore, it is repeatedly stressed throughout the legislative materials that compliance with the reasonable timeframe requirement will only be achievable if the NCA has adequate human resources.[89]

The situation in Poland is quite different. There, a 5-month deadline for completing proceedings before the NCA is explicitly provided for.[90] Polish legal drafters decided that this was a reasonable timeframe and that the relevant provision of the ECN+ Directive did not need to be implemented.[91] However, general rules of administrative procedureapply as well, which allow the NCA to extend the duration prescribed for completing its proceedings. As a result, reality may differ from the statutory 5-month deadline. Of the proceedings in which the NCA adopted a decision in 2020, the shortest lasted 8.5 months and the longest over four years.[92] We were unable to identify any patterns in relation to the specificities of each case. Thus, it seems impossible to create a typology of the length of proceedings on the basis of this aspect.

Malta serves as an example of a Member State that changed nothing in its existing legal framework with regard to the timeframe of proceedings. Maltese legislation does not impose any timeframes on its NCA for carrying out an investigation, filing proceedings or delivering a judgment in infringement proceedings. The literature proceeds from the assumption that it is not easy to set strict timeframes, given the many variables affecting the duration of an investigation or judicial proceedings, such as the complexity of the case and the pending workload. However, this assumption does not hold for all proceedings, and there may be nuances. It has been said that it would have been useful for competition law to at least explicitly require investigations and court proceedings to be conducted within

[89] Hornkohl (2021), p. 282.

[90] Article 92 of the Polish Competition Act.

[91] In Polish *see* https://legislacja.gov.pl/docs//2/12342403/12757034/12757035/dokument503551.pdf, p. 8.

[92] *See* the decisions database in Polish: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf.

a reasonable timeframe (as provided for in Art. 3(3) of the ECN+ Directive), given the strong public interest at stake, the serious nature of the allegations, and the possibility of high fines.[93] It is believed that important features of such a "mirroring" provision would be the recognition of the importance of expediency in competition cases and greater accountability.[94]

Similarly, nothing has changed in the Czech legal order. The deadline is nominally limitless. However, as described below, the courts still exercise some control over the length of the proceedings.

4.3 … Or Member States Understand "Reasonable" as "Even Longer" or "Unlimited"

We have already seen that some Member States, while not limiting the length of proceedings, did not see any need to amend their competition legislation when implementing the ECN+ Directive. And even if they did adopt some amendments, that has not fundamentally changed.

For example, in Bulgaria, the length of proceedings remains unlimited, even though the Bulgarian Competition Act was amended to the effect that the decision of the chairman of the competition authority needs to be adopted within six months of the open hearing; the timeframe before that remains unregulated.[95]

The timeframe remains unlimited in the Czech Republic too, although clarification is required here. Originally, the timeframe for competition proceedings was only 30 days, which was arguably quite unrealistic. However, the chairman of the competition authority was empowered to "reasonably" prolong this deadline, without further limitations.[96] This changed in 2004, when the new Code of Administrative Procedure was adopted and the deadline for all administrative proceedings in the Czech Republic was abandoned.[97] However, the competition authority was still limited by the fact that the proceedings needed to be completed within three years of the competition authority's learning about the infringement.[98] This was further prolonged in 2009, when the deadline was extended to five years but the competition authority merely had to open the proceedings within those five years, not finish them.[99] Thus, the length of the proceedings ceased to be limited.

While nominally imposing no limits, the Czech courts still require that the length of the proceedings be proportionate to the difficulty and complexity of the case.[100] Average proceedings last 25 months,[101] which arguably meets the "reasonable"

[93] Zahra (2021), p. 288.

[94] *Cf. ibid*.

[95] Papazova (2021), p. 221.

[96] Act No. 71/1967 Coll., Code of Administrative Procedure, Sec. 49.

[97] Act No. 143/2001 Coll., on the protection of competition, as amended, Sec. 25a.

[98] *Ibid*, Sec. 22(5).

[99] *Ibid*, Sec. 22b(3).

[100] Judgment of the Supreme Administrative Court Ref. No. 1 Ans 2/2009.

[101] Petr and Zorková (2020).

requirement of the ECN+ Directive. However, the actual length of proceedings varies widely, from 3 to 49 months.

Unlike Bulgaria and the Czech Republic, some Member States actually changed the timeframe for proceedings. However, in Slovakia, the new competition act implementing the ECN+ Directive actually increased the timeframes. Originally, the timeframe for finishing competition proceedings had been six months. This was seen as rather short, but it is important to add that, as in Poland, the deadline could be repeatedly extended up to 30 months.[102] Under the new legislation, the deadline was extended, without any explanation, to three years.[103]

5 A Statement of Objections or a Similar Measure

5.1 ECN+ Directive Lets Member States Choose …

According to Art. 3(3) of the ECN+ Directive, Member States are required to ensure that, before taking a decision pursuant to Art. 10 of the ECN+ Directive (a decision finding an infringement), their NCAs adopt a statement of objections. This provision is complemented by Recital 14, which explains that the parties under investigation should be informed, by means of a statement of objections or a similar measure, of preliminary objections raised against them under Art. 101 or Art. 102 TFEU. The parties should then have the opportunity to make their views on those objections effectively known before such a decision is taken.[104] The right to access the relevant case file of an NCA should be available to parties notified of such preliminary objections. This issue needs to be addressed by Member States in order for the parties to be able to effectively exercise their rights of defence. One of the goals of the ECN+ Directive is to make the right to access the file of an NCA available to the parties to whom preliminary objections have been notified, subject to the legitimate interest of undertakings in the protection of their business secrets. However, access to the file should not extend to the confidential information and internal documents of, or correspondence between, the NCAs and the Commission.[105]

5.2 … So Member States Choose to Keep Issuing a Statement of Objections …

In the Czech Republic, for example, the statement of objections was introduced already in 2009. The relevant regulation is specific to antitrust proceedings, with no statement of objections in other kinds of administrative proceedings. The Czech Competition Act defines it in a way that conforms with the practice of the EU. The statement of objections comprises "the basic *res gastae* of the case, their legal

[102] Act No. 136/2001 Coll., on the protection of competition, Sec. 30.

[103] Act No. 187/2021 Coll., on the protection of competition, Sec. 28(1).

[104] Directive (EU) 2019/1, Recital (14). *Cf.* sentence 3.

[105] Directive (EU) 2019/1, Recital (14). *Cf.* sentence 5. Also *see* Art. 41(2)(b) of the Charter.

assessment and reference to the main evidence in the administrative file".[106] In 2012, the definition was expanded to cover the fine expected.[107]

It is fair to note that this provision in fact added a third layer to the decision-making of the Czech competition authority, arguably significantly prolonging proceedings. In practice, the Czech statement of objections corresponds to the final decision of the authority in detail, structure and length. It is in fact a decision, merely labelled as a "statement of objections". The parties to the proceedings are entitled to raise objections against it, which in fact constitutes an appeal in terms of detail, structure and length. Only after that does the competition authority issue a decision, which is – in fact – practically identical to the statement of objections. This decision may be appealed before the chairman of the authority. Only once the chairman has reviewed the appeal is the final decision issued.

Implementation of the ECN+ Directive is not going to amend this system. A new definition of the statement of objections was proposed, but is practically the same as the current one.[108] Interestingly, even though the Czech competition authority is frequently criticised for excessively long proceedings, the possibility of reforming the "three-layer" system of decision-making was not even discussed.

5.3 … Or Choose a Dissimilar "Similar Measure"

Scholars consider some references in Art. 3 of the ECN+ Directive not useful,[109] including the reference to a statement of objections. However, without such references, the Polish legislature would most likely continue to resist the introduction of statutory provisions related to a statement of objections. In the case of practices restricting competition (anticompetitive agreements and abuses of a dominant position), the statement of objections has never been regulated by Polish legislation.[110] However, in 2015, the NCA introduced a framework for statements of objections via soft-law guidance (quasi-regulatory document).[111] Nevertheless, the resistance of Polish legislators is so strong that the impact of the ECN+ Directive on the new legal framework has been negligible – what has been introduced via the Amendment Act can be read as a sort of "pre-statement" of objections, the beginning of a statement of objections, or even a "pseudo statement" of objections, when compared with both the EU statement of objections and the existing Polish soft-law solution. The new Polish legislation supposedly implements the second sentence of Art. 3(3) of the ECN+ Directive, but actually only obliges the NCA to justify its own enforcement instrument – such as the Polish "order to initiate proceedings" issued by the NCA.[112]

[106] Act No. 143/2001 Coll., on the protection of competition, as amended, Sec. 7(3).

[107] *Ibid*, Sec. 22ba(1)(b) and (2).

[108] Czech draft amendment, Sec. 2(3).

[109] Botta (2018), p. 10.

[110] *Cf.* Bernatt (2012), p. 261.

[111] The current version in Polish is available at: https://www.uokik.gov.pl/wyjasnienia_i_wytyczne2.php.

[112] Article 49(3)–(4) of the Polish Competition Act.

The Polish legal drafters noted in the memorandum (explanatory notes to the draft Amendment Act) that the solution introduced "remains consistent with the specifics of the Polish administrative procedure". According to them, this is particularly so, as competition proceedings may be preceded by explanatory proceedings that "do not have parties and, by nature, more closely resemble the stage of European Commission proceedings preceding the adoption of a statement of objections".[113] Dividing Commission proceedings into two stages – before and after the statement of objections – and comparing them to, respectively, Polish explanatory proceedings and competition proceedings is, to say the least, a misunderstanding. The "orders to initiate competition proceedings" adopted by the Polish NCA are not similar to the statement of objections referred to in the Commission Notice on best practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU.[114] The EU statement of objections is an act very similar in form and content to a final decision.[115] It is a procedural document that prepares for the adoption of a final decision and limits the scope of the Commission's objections. Indeed, the Commission cannot rely in its final decision on any other objections than those set out in the statement of objections (although it can withdraw such objections in part or in full).[116] The EU statement of objections contains a full factual and legal description of the presumed infringement as well as a section on fines, giving a preliminary calculation of the fine.[117]

By contrast, the Polish NCA's order to initiate proceedings has always been a much less protective and less informative instrument for those against whom the proceedings are initiated.[118] A written justification of the order to initiate proceedings should include both clarification of the objections against the undertaking being investigated and information on the rules for determining the amount of the fine, if it is ultimately found that the undertaking infringed competition rules.[119] However, as a rule, not only does such justification not provide a statement of objections as per that in Commission proceedings, but it also cannot replace that statement, as it appears that, when proceedings are initiated, it is in most cases too early to give the parties a precise statement of objections. This might be the case even if explanatory proceedings were conducted before the initiation of the competition proceedings. Furthermore, it is important to note that, hypothetically, the Polish NCA is not in fact obliged to conduct explanatory proceedings in any case. If, when competition proceedings are initiated, the NCA were almost ready to adopt a final decision, and had a detailed justification of its objections, the proceedings would be completed within a more reasonable timeframe overall and there would be fewer laconic justifications of orders initiating competition

[113] In Polish to be retrieved from: https://legislacja.gov.pl/projekt/12342403/katalog/12757054#12757054, p. 19.

[114] OJ 2011 C 308, 20.10.2011, p. 6, para. 3.1.1.

[115] Kolasiński (2010), p. 37.

[116] Durande and Williams (2005), p. 24.

[117] Bernatt (2012), pp. 261–262.

[118] *Cf.* Kowalik-Bańczyk (2012), pp. 228–229.

[119] Act on Competition and Consumer Protection, 2007, Art. 49(3). *Cf.* sentence 2.

proceedings. Indeed, if there were no need for a "real" statement of objections, no efforts would have been made to implement it via a soft-law document in 2015. Such statements are well known to the NCA due to its own practice of using them since September 2015. The current retreat from the 2015 policy is, to say the least, surprising. In order to implement the second sentence of Art. 3(3) of the ECN+ Directive, the existing soft-law guidance should be included in the Competition Act. As long as an order to initiate competition proceedings is issued as a first act in the proceedings, and not just before the adoption of a decision, written justification of such an order does not resemble the statement of objections adopted in Commission proceedings.

6 Conclusions

Article 3 of the ECN+ Directive (in particular paragraph 1 thereof) does not in fact devote enough space to giving concrete form to the requirements regarding general principles of EU law and the Charter. This makes national legislative drafters/legislatures interpret that provision differently and to suit themselves. The differences between the various national implementing measures are linked to divergence in the use of minimum harmonisation clauses and available regulatory options. Both differences in national interpretation and differences in utilising minimum harmonisation clauses can lead to irregular implementation of the ECN+ Directive. As a result, there is no single model for safeguarding the fundamental rights that fall within the ambit of Art. 3 of the ECN+ Directive. Furthermore, our research shows that Member States often tend to focus on ensuring the required minimum (or how to circumvent it) rather than on a more comprehensive reform. This is so even if the latter is advocated in a public debate, including in the context of achieving a balance between respecting the fundamental rights of undertakings and effectively enforcing competition rules.[120]

The research material compiled indicates that some national legislatures are excessively reserved, even when the amendments required by the ECN+ Directive are fairly clear. The most striking example of supposed implementation of Art. 3 of the ECN+ Directive found when analysing the national legislation appears to be the statement of objections as "implemented" in Poland. The amendments to Polish law raise serious doubts with regard to achieving a balance between respecting the fundamental rights of undertakings and effectively enforcing competition rules. For this reason, we suggest urgent intervention by the legislature to deal with the shortcomings of the implementing measures analysed.

Some Member States are silent on safeguards for the fundamental rights that fall within the ambit of Art. 3 of the ECN+ Directive, even though their legal frameworks are not complete and need to be adjusted by implementing the ECN+ Directive. For example, although the protection of fundamental rights during competition proceedings in the Czech Republic is not yet fully in line with EU standards, that was not discussed at all during the transposition process there.

[120] Materna (2018), p. 41; Błachucki (2021), p. 66; Petr (2021), p. 238.

Furthermore, while a veil of silence hung over the need to work on national provisions regarding LPP in Austria and initially also in Finland, it is fair to say that the framework introduced in Poland is of a rather low standard and does not follow the EU pattern. When formulating these legal provisions, the Polish legal drafters have used "distortional" arguments based on compliance with EU case-law to cover up the fact that the quality of the Polish legal framework (or some important aspects thereof) has actually deteriorated.

Furthermore, the issue of timeframes for enforcement proceedings varies widely across Member States. Paradoxically, the provisions proposed in the Czech Republic or those introduced in Bulgaria may not make proceedings shorter but actually prolong them to a certain degree.

There is no doubt that more attention needs to be paid to successfully implementing the requirements of the ECN+ Directive. However, safeguards for the fundamental rights of undertakings should first of all be addressed in a much more concrete manner in EU legislation with a view to improving the uniformity of the protection of undertakings' fundamental rights in competition law enforcement proceedings.

Funding Open access publishing supported by the National Technical Library in Prague.

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