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PROTECTION OF THE FUNDAMENTAL RIGHTS OF COMPANIES UNDER THE ECN+ DIRECTIVE: A MILESTONE OR A MISSED OPPORTUNITY?

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Abstract:

The main aim of the ECN+ Directive consists in ensuring a more effective and uniform enforcement of Articles 101 and 102 TFEU by providing the national competition authorities with a minimum common toolkit and enforcement powers, as well as improving cooperation between the NCAs. This article focuses on the question that appeared somewhere on the margins of the adoption of the ECN+ Directive, namely the protection of companies' fundamental rights in the ECN+ Directive. The text presents the background of the adoption of the ECN +Directive, the evolution of the wording of the regulation regarding the protection of fundamental rights in the course of the legislative procedure, and a brief analysis of the scope of protection eventually introduced in the ECN+ Directive. As the regulation is too laconic and fails to deal with several important issues, it is concluded 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.

Keywords:

ECN+ Directive, striking a balance, fundamental rights, right to a defence

INTRODUCTION

The ECN+ Directive[1] was adopted on 14 December 2018 and published in the Official Journal on 14 January 2019. The main aim of the ECN+ Directive consists in ensuring a more effective and uniform enforcement of Articles 101 and 102 TFEU by providing the national competition authorities (the NCAs) with a minimum common toolkit and enforcement powers,[2] as well as improving cooperation between the NCAs.[3]

This article focuses on the question of protecting companies' fundamental rights through the ECN+ Directive. The author considers, in particular, whether the shape and scope of this protection, as introduced in the ECN+ Directive, might be regarded as sufficient and progressive in light of the current status quo, or whether it should be considered incomplete and lacking significant progress. Having presented the background of the adoption of the ECN+ Directive, the text concentrates on provisions regarding the companies' safeguards, in particular Article 3 and Recital 14. The evolution of the wording of the regulation regarding the protection of fundamental rights in the course of legislative procedure is followed by a brief analysis of the scope of protection eventually introduced in the ECN+ Directive. The author will address the insufficiencies of the adopted regulation using the example of the legal professional privilege ('the LPP') and the privilege against self-incrimination ('the PASI').

As the regulation is too laconic and fails to deal with several important issues, it is concluded 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.

BACKGROUND OF THE ADOPTION OF THE ECN+ DIRECTIVE

Over 15 years ago, a ground-breaking modification of EU competition law took place. Namely, the decentralisation of the application of EU rules on substantive competition law was introduced by Regulation 1/2003,[4] becoming effective from 1 May 2004. This reform led to a transformation of the competition enforcement landscape, since

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

2 MALINAUSKAITE, J. (2019) *Harmonisation of EU Competition Law Enforcement*. Cham: Springer, p. 187.

3 For more on cooperation between the Member States and the European Competition Network ('the ECN'), see, for instance, BŁACHUCKI, M. (2019) Nowe formy współpracy międzynarodowej członków Europejskiej Sieci Konkurencji w świetle dyrektywy ECN+. *Europejski Przegląd Sądowy,* 10, pp. 11-18 and BŁACHUCKI, M. (2019) *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)*. Warszawa: INP PAN. Available from: http://www.doi.org/10.5281/zenodo.1494958.

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

Regulation 1/2003 provided for an obligation for NCAs to directly apply Articles 101 and 102 TFEU whenever an investigated practice affects trade between the Member States.[5] In practice, the European Commission generally conducts antitrust proceedings when the contested practice involves three or more Member States. Practices involving one or two countries that affect trade between Member States, and which therefore require the application of EU law, are conducted by the NCAs, which have expertise on how markets work in their own Member State.[6] Therefore, following the introduction of the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, most antitrust decisions based on EU law are issued by NCAs[7] and "EU competition rules are being applied on a scale that the Commission could never have achieved on its own."[8]

In addition to the increase in the number of cases with an EU element, the decentralisation also resulted in most agreements between companies being treated in a similar way throughout the European Union. The Commission considered, however, that there was 'untapped potential' for the more effective enforcement of EU competition rules by the NCAs.[9] In particular, the consistent application of substantive antitrust rules in Member States has revealed the need to introduce consistency in procedural rules as well.

Therefore, in order to further improve the enforcement of competition law within the EU Member States, the Commission prepared the Communication on Ten Years of Regulation 1/2003[10] and subsequently held a public consultation.[11] This consultation

5 Other important changes consisted in (i) putting an end to the previous notification system under which companies notified agreements to the Commission for approval under the antitrust rules, and (ii) creating the ECN, in order to allow a better coordination of the EU antitrust rules between Commission and national competition authorities.

6 EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels. Available at: https://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf [Accessed: September, 12 2020]; KOWALIK-BAŃCZYK, K. (2019) Dyrektywa ECN+ – sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych?. *Europejski Przegląd Sądowy*, 10, pp. 4-10.

7 As indicated in the Proposal: 'Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%.' EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 50.

8 The Commission's press release: EC (2015) *Antitrust: Commission consults on boosting enforcement powers of national competition authorities,* Brussels November, 4 2015. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5998 [Accessed September, 12 2020].

9 EC, *Proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 2

10 The Commission's EC, Communication from the Commission to the European Parliament and the Council, COM(2014) 453. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and future perspectives {SWD(2014) 230}_{SWD(2014) 231}. Available from: https://ec.europa.eu/competition/antitrust/antitrust_enforcement_10_years_en.pdf [Accessed September, 12 2020].

11 The consultation was held from 4 November 2015 until 12 February 2016 in the form of an EU

identified a number of areas of action to boost the powers of the NCAs in order to better enforce EU competition rules.[12]

It was stressed, in particular, that many NCAs do not have all the tools they need to effectively detect and tackle competition law infringements or to impose effective fines. Such gaps and limitations in the NCAs' powers and guarantees undermine the system of parallel powers, as they lead to divergences in the outcomes of proceedings depending on the Member States in which companies engaging in anti-competitive practices are active.[13]

The matter of protecting companies' fundamental rights (the significant divergences, the need to increase and unify such protection) was never included in the central points of the envisaged new regulation, always appearing only somewhere on the margin.[14]

Nevertheless, the question of striking a fair balance between the NCAs' powers and the companies' safeguards, and in particular providing adequate protection for companies involved in antitrust investigations and proceedings should be considered of the utmost importance.

THE EVOLUTION OF THE REGULATION REGARDING PROTECTION OF THE COMPANIES' FUNDAMENTAL RIGHTS IN THE COURSE OF THE LEGISLATIVE PROCESS

Initial Proposal of the Commission

The Commission's initial proposal of the ECN+ Directive ('the Proposal') contained only a single-paragraphed extremely laconic provision (Article 3) whereby: "

> *The exercise of the powers referred to in this Directive by national competition authorities shall be subject to appropriate safeguards, including respect of*

Survey, split into two parts: the first part with general questions seeking input from non-specialised stakeholders, and the second part for stakeholders with a deeper knowledge/experience of competition matters. In addition to the public consultation, on 19 April 2016, the European Parliament's Committee on Economic and Monetary Affairs (ECON) and the Commission co-organised a public hearing in order to provide experts and stakeholders with an additional opportunity to share their views.

12 The Commission identified the following four key issues: (i) the resources and independence of the NCAs; (ii) the enforcement toolbox of the NCAs; (iii) the powers of NCAs to fine undertakings; and (iv) leniency programmes.

13 Companies may even be subject to no enforcement at all under Articles 101 or 102 TFEU, or to ineffective enforcement, for example, because evidence of anti-competitive practices cannot be collected, or because undertakings can escape liability for fines.

14 For instance by adding at the end of a press release a phrase like: "The Commission's proposal underlines the importance of companies' fundamental rights and requires authorities to respect appropriate safeguards for the exercise of their powers, in accordance with the EU Charter of Fundamental Rights". See the Commission's press release, *Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth*, Brussels, 22 March 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_685.

undertakings' rights of defence and the right to an effective remedy before a tribunal, in accordance with general principles of Union law and the Charter of Fundamental Rights of the European Union.[15]

Article 3 was accompanied by Recital 12 of the Preamble, which provided a brief explanation of the right to be heard (considered an essential component of the right to a defence) as well as the right to an effective remedy before a tribunal. Namely, the right to be informed[16] and the right to access the case file[17] were indicated as relevant elements of the right to be heard. With regard to the right to an effective remedy before a tribunal, it was further stated that final decisions of NCAs applying Article 101 or Article 102 TFEU require justification that would allow their addressees to first ascertain the reasons for the decision, and second exercise their right to an effective remedy. Finally, it was stressed that "the design of those safeguards should strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced."[18]

The Commission's lenient approach to the question of protecting the companies' fundamental rights met with criticism and was in particular incomprehensible since – as stressed in the Proposal, "during the public consultation process, there was a clear demand from lawyers, businesses and business organisations to ensure that NCAs have effective enforcement powers to be counter-balanced by increased procedural guarantees."[19]

Nevertheless, despite this demand, the proposed regulation of the question of protecting the companies' rights did not bring any added value to the status quo. Indeed, the recognition of the EU's general principles and the Charter of Fundamental Rights of the European Union ('the Charter') were derived in particular from Article 6 of the Treaty on the EU.[20] Moreover, this fact was directly acknowledged in the Commission

15 EC proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM/2017/0142 final - 2017/063 (COD). Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0142 [Accessed: September, 12 2020].

16 "In particular, NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU prior to taking a decision which adversely affects their interests and those parties should have an opportunity to effectively make their views known on these objections before such a decision is taken." Ibid, Recital 12.

17 "Parties to whom preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU have been notified should have the right to access the relevant case file of NCAs to be able to effectively exercise their rights of defence This is subject to the legitimate interest of undertakings in the protection of their business secrets and does not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission." Ibid.

18 EC, *Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market March,* 22 2017. Brussels, p. 13.

19 Ibid, Recital 15

20 As introduced by the Treaty of Lisbon.

staff working document 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues' (accompanying the Commission's Communication on Ten Years of Regulation 1/2003). It was namely stated that procedures and sanctions for the application of EU competition rules in the Member States "are only subject to general principles of EU law [...] as well as the observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable."[21]

Significant modifications introduced by the European Parliament

In March 2018, the Committee on Economic and Monetary Affairs (being the lead committee on the Commission's proposal) adopted the report on the proposal for a directive.[22] It recommended that the Parliament approve the Proposal, with certain amendments. In the context of fundamental rights in addition to the regulation proposed by the Commission, the committee members considered it particularly essential to modify Article 3 by expanding its wording into three points. In point 2, the right to be heard was indicated as component of the right to a defence. In point 3, it was stated that NCAs should conduct proceedings within a reasonable timeframe and that, prior to taking a decision, they should adopt a statement of objections.

In relation to the Preamble, the following further complements were recommended:

- Adding a reference also to the case law of the Court of Justice of the European Union ('the CJEU') stating that powers conferred on NCAs should be subject to appropriate safeguards;
- with regard to the right to an effective remedy before a tribunal – adding a reference also to Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('the EConHR').[23]

Moreover, one other recommendation of high importance for the protection of companies' rights has to be stressed as well. Namely, introducing in Article 8 an obligation to respect the PASI and principle of proportionality when making requests for information.[24]

21 EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final. Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues accompanying the document communication from the Commission to the European Parliament and the Council. Ten years of antitrust enforcement under Regulation 1/2003: Achievements and Future Perspectives {COM(2014) 453 final} {SWD(2014) 230 final}, point 43. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0231&from=EN [Accessed September, 12 2020].

22 Prepared by rapporteur Andreas Schwab (EPP, DE).

23 In addition to the reference to Article 47 of the Charter of Fundamental Rights.

24 As well as in Recital 26 "Whilst the right to require information is crucial for the detection of infringements, such requests should be appropriate in scope. Such requests should not compel an undertaking to admit that it has committed an infringement, which is incumbent upon the NCAs to prove." Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers

The European Parliament's position on the Commission's Proposal[25] included most of the amendments recommended by the Committee.[26]

SCOPE OF THE PROTECTION OF THE COMPANIES' FUNDAMENTAL RIGHTS – REGULATION INTRODUCED IN THE ECN+ DIRECTIVE

Wording of the regulation

In the end, the final wording of Article 3 is as follows:

Article 3

Safeguards

1. Proceedings concerning infringements of Article 101 or 102 TFEU, including the exercise of the powers referred to in this Directive by national competition authorities, shall comply with general principles of Union law and the Charter of Fundamental Rights of the European Union.

2. Member States shall ensure that the exercise of the powers referred to in paragraph 1 is subject to appropriate safeguards in respect of the undertakings' rights of defence, including the right to be heard and the right to an effective remedy before a tribunal.

3. Member States shall ensure that enforcement proceedings of national competition authorities are conducted within a reasonable timeframe. Member States shall ensure that, prior to taking a decision pursuant to Article 10 of this Directive, national competition authorities adopt a statement of objections.[27]

This provision is accompanied by Recital 14 of the Preamble setting out more details.

Firstly, in relation to Article 3 (1), it is stated therein that the exercise of the powers conferred by this directive on NCAs, including investigative powers, besides complying with the general principles of Union law and the Charter of Fundamental Rights of the European Union, should also be in accordance with the case law of the Court of Justice of the European Union, in particular in the context of proceedings that could lead to penalties being imposed.

Secondly, regarding Article 3 (2), indicated examples of the relevant safeguards include the right to good administration and the respect of an undertaking's rights of a defence, together with its 'essential component' – the right to be heard. As for the right to be informed and the right to be heard, it is clarified that

and to ensure the proper functioning of the internal market, published on 14 January 2019.

25 Adopted at first reading on 14 November 2018 under the ordinary legislative procedure.

26 The reference to the EConHR was nevertheless rejected.

27 Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, published on 14 January 2019.

> *NCAs should inform the parties under investigation of the preliminary objections raised against them under Article 101 or Article 102 TFEU in the form of a statement of objections or a similar measure prior to taking a decision finding an infringement, and those parties should have an opportunity to make their views on those objections known effectively before such a decision is taken.*[28]

Consequently, undertakings that are the addressees of preliminary objections about an alleged infringement of Article 101 or Article 102 TFEU should have the right to access the relevant case file of the NCAs,[29] in order to be able to exercise their rights of defence effectively.

Furthermore, the protection of the right to an effective remedy before a tribunal should be in accordance with Article 47 of the Charter of Fundamental Rights of the European Union, and is in particular important in relation to decisions finding an infringement of competition rules and imposing remedies or fines. It is also added that, for this right to be effectively exercised, such decisions should be justified.

With regard to Article 3 (3), it is further clarified that the obligation of Member States to ensure that NCAs conduct proceedings within a reasonable timeframe should be subject to the specifics of each case and stems from the right to good administration.

As in the Proposal, Recital 14 ends by stressing the requirement to strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure the effective enforcement of competition rules.

Moreover, with regard to PASI and the principle of proportionality it is stated in Article 8 that "requests for information shall be proportionate and not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU."[30] However, according to Recital 35 the so-called Orkem rule[31] applies. This means the right to be silent is limited to a direct admission of wrongdoing since it "should be without prejudice to the obligations of undertakings or associations of undertakings to answer factual questions and to provide documents."[32]

28 Ibid, Recital 14.

29 This right must, however, be "subject to the legitimate interest of undertakings in the protection of their business secrets and should not extend to confidential information and internal documents of, and correspondence between, the NCAs and the Commission." Ibid.

30 Ibid, Art. 8.

31 The protection of the right to silence applies merely to direct self-incriminating admissions and does not cover compelling undertakings to give answers of a factual nature. The CJEU consequently refused to acknowledge the existence of an absolute right to silence. Its approach, focusing mainly on the effectiveness of the Commission's powers of investigation in the context of the privilege against self-incrimination may be subject to criticism. It is commonly argued that the criminal or quasi-criminal nature of competition law proceedings requires the full application of the privilege against self-incrimination, even if this may lead to potential hindrances to the effectiveness of conducted inspections. The protection afforded by Article 6 EConHR goes appreciably beyond the 'Orkem' rule and it should also apply without any limitation to competition law proceedings.

32 See also Recital 23 of Preamble to Regulation No 1/2003 of 16 December 2002: "Undertakings

Assessment of the regulation

An assessment of the ECN+ Directive in the context of protection for companies' fundamental rights is quite a controversial issue.

On the one hand, according to the co-authors of the final wording of the ECN+ Directive, the regulation strikes a good balance between effectively empowering NCAs and protecting the companies' right of a defence.[33] Some commentators have refrained from criticising the ECN+ Directive and point towards its added value. As K. Kowalik-Bańczyk has stressed, "by the introduction of a general rule concerning application of fundamental rights acquis of the EU to both European and national antitrust proceedings, the Directive allows the undertakings concerned to use a whole new set of arguments in antitrust proceedings, regardless of whether a link to EU law is present."[34] The General Court's judge notes further that, since the solutions adopted in the ECN+ Directive should, among other things, ensure that the same guarantees and instruments exist irrespective of which law is applied (i.e. EU or national), the ECN+ Directive will actually lead to a partial harmonisation of national antitrust procedures, regardless of whether or not EU law applies.

On the other hand, the ECN+ Directive has met with disappointment and strong criticism, in particular due to the incompleteness and vagueness of Article 3.[35] The majority of the opinions underline the 'rather generic' or even 'laconic' character of the provisions relating to the company safeguards.[36] It has been argued that the ECN+ Directive had not gone beyond the current level of the protection of the companies' fundamental rights, in particular the right to a defence and to due process.[37] For instance,

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cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement."

33 See, for instance, the statement of A. Schwab, rapporteur of the report of the Committee on Economic and Monetary Affairs on the proposal for a directive in the European Parliament's press release *Deal struck on protecting the internal market against secret cartels and law breaching firms*, 30.05.2018, EP, *Legislative train schedule. Deeper and fairer internal market with a strengthened industrial base / Services including transport. Empowerment of national competition authorities (NCAs)*. Available from: https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-empowerment-nca [Accessed September, 12 2020].

34 KOWALIK-BAŃCZYK, K. (2019), pp. 4-10.

35 BOTTA, M. (2018) *The right of defence in ECN+ Directive.* [Presentation at Advanced Competition Seminar of the Florence Competition Programme, ECN+ Directive. Consequences for National Competition Law Enforcement, September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/2_BOTTA-seminar-ECN-13.8.2017.pdf [Accessed September, 12 2020].

36 KELLERBAUER, M., KLAMERT, M., TOMKIN J. (eds.) (2019) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford: OUP, p. 1082

37 MIRCEA, V. (2018) *The competition enforcement design in the EU at crossroads*. [Presentation at Advanced Competition Seminar of the Florence Competition Programme, ECN+ Directive. Consequences for National Competition Law Enforcement, September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/4_Presentation-Valentin-Mircea-

the reference to the Charter only confirmed the current status quo.[38] As stressed by W. Wils, Article 3(1) of the ECN+ Directive merely repeats what already follows from the case-law of the EU Court of Justice[39] and from Article 51(1)[40] of the Charter.[41]

Some authors doubt whether the new regulation would actually lead to any stronger convergence of company safeguards in antitrust proceedings since the state of non-uniformity of the protection of the right of defence risks remaining unchanged.[42]

Even though the ECN+ Directive has made an explicit reference to the right to be heard (the right to be informed and right to access files), as well as the right to an effective remedy before a tribunal,[43] and has eventually introduced the protection of the PASI (albeit in a very limited scope), at least one other extremely significant component of the right to a defence is visibly missing, namely the LPP.

Due to the introduction of the regulation of rights of companies to such a limited extent, there is a serious risk of failure, or the merely illusory nature of the awaited result of greater consistency in this regard.

It should be further noted that the LPP and the PASI are, in particular, of utmost importance in the context of antitrust proceedings, since they constitute two main sets of limitations of the powers of investigation.[44] Moreover, the lack of convergence of company procedural guarantees in Member States is particularly visible in the case of these two privileges.[45]

FCP-15.09.2018.pdf [Accessed September, 12 2020].

38 The Charter became legally binding with the entry of the Lisbon Treaty in 2009, and since then it is regarded as the core element of the protection of fundamental rights in the EU.

39 "The requirements flowing the protection of fundamental rights in the [EU] legal order are also binding on the Member States when they implement [EU] rules", see instance *Karlsson and Others*, C-292/97, EU:C:2000:202, para. 37 or *Eturas and Others*, C-74/14, EU:C:2016:42, para. 38.

40 "The provisions of this Charter are addressed to [...] the Member States [...] when they are implementing Union law." Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

41 WILS, W. (2020) Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network. *World Competition*, 43 (1), p. 5-34.

42 See, for instance, REA, M. (2019) New Scenarios of the Right of Defence Following Directive 1/2019. *Yearbook of Antitrust and Regulatory Studies*, 12(20), pp. 111, 122.

43 However, the right to an effective remedy should relate not only to the NCAs' decisions, but also to measures undertaken during the inspections. For more on this issue see, for instance, MICHAŁEK, M. (2014a) *Right to Defence in EU Competition Law: The Case of Inspections*, Warsaw: University of Warsaw Faculty of Management Press, pp. 328-337; MICHAŁEK, M. (2014b) Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe, *Yearbook of Antitrust and Regulatory Studies*, 7(10), pp. 129–158.

44 WILS, W. (2003) Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition*, 26 (4), p. 574.

45 BERNATT, M., BOTTA, M., SVETLICINII, A. (2018) The Right of Defence in the Decentralized System of EU Competition Law Enforcement. A Call for Harmonization from Central and Eastern Europe. *World Competition,* 41(3)*,* pp. 309 – 334; WILS, W. (2020).

LPP

The unfettered ability to communicate with a lawyer on a confidential basis is a fundamental right that exists in many legal systems around the world. According to the CJEU, the protection of the confidentiality of communications between a lawyer and a client is an essential corollary to the full exercise of the rights to a defence.[46] Thus, the LPP (deriving from Article 6 of the EConHR[47]) has to be respected already from the preliminary inquiry stage of proceedings.[48] Indeed, the LPP relates mostly to the investigative phase of the competition authorities' enforcement proceedings. It namely limits the Commission's/NCAs' powers of inspection by preventing any documents covered by the LPP from being examined or seized by the inspectors. Furthermore, the premises of an undertaking's external lawyer cannot be inspected by officials.

Given that the scope of protection of the LPP granted by the CJEU remains subject to criticism,[49] the author believes that the explicit introduction of at least a minimum

46 The exclusion of certain communications between lawyers and clients from the Commission's powers of enquiry derives from the general principles of law common to the laws of the Member States as clarified by the Court of Justice of the European Union: judgment of the CJEU (former the European Court of Justice) of May, 18 1982, Case 155/79 *AM&S Europe Limited v. Commission*, ECLI:EU:C:1982:157; order of the General Court (former the Court of First Instance) of April, 4 1990, Case T-30/89 *Hilti v. Commission*, ECLI:EU:T:1990:27; judgment of the CJEU of September, 17 2007, Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECLI:EU:T:2007:287, as confirmed by the CJEU in its judgment of September, 14 2010, Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECLI:EU:C:2010:512.

47 At an EU level, the LPP can only be deduced from Article 28 of the Regulation 1/2003 and Article 48(2) of the Charter.

48 Judgment of the CJEU of September, 21 1989 in joined cases 46/87 and 227/88 *Hoechst vs Commission*, E.C.R. 1989, 02859, see also TURNO, B., ZAWŁOCKA-TURNO, A. (2012) Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty – Is It Time for a Substantial Change?, *Yearbook of Antitrust and Regulatory Studies,* 5(6), p. 195

49 The CJEU should, in principle, follow the reasoning of the European Court of Human Rights and be fully in line with Strasbourg's approach. In order to adjust to the EConHR standards, the expected modifications of the LPP within the EU would require, for example, establishing a more extensive and generous level of lawyer-client communication confidentiality. In particular, expanding the scope of the EU LPP has been suggested, so that it would also at least include those in-house lawyers who, while being employed by an undertaking, are members of the Bar or the Law Society. The LPP should be further granted to lawyers who are members of the Bar in non-EU countries. It seems important that the scope of the LPP also cover those communications that were prepared, exchanged or originated under competition law compliance programmes. See, for instance, MICHALEK, M. (2014b), p. 272; ANDREANGELI, A. (2008) *EU Competition Enforcement and Human Rights.* Cheltenham: Edward Elgar Publishing, pp. 115–120, ANDREANGELI, A. (2005) The Protection of Legal Professional Privilege in EU Law and Impact of the rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back. *Competition Law Review*, 2(1), pp. 53–54*;* TURNO, B., ZAWŁOCKA-TURNO, A. (2012)*,* p. 205.

level of protection of the LPP[50] in antitrust proceedings would be crucial in order to strike a fair balance between the powers of NCAs and the safeguards of companies.

PASI

The privilege against self-incrimination (*nemo tenetur*) is certainly 'an indispensable bulwark of the rights of an accused in any modern system of criminal justice. [51] It aims at 'avoiding miscarriages of justice and securing the aims of Article 6' EConHR.[52] However, this privilege plays a significant role within competition law proceedings (acknowledged as having a repressive and quasi-criminal nature). It namely constitutes important grounds upon which the production and disclosure of documents requested by the Commission/NCAs, as well as the production of oral explanations during inspections may be resisted.

The lack of any regulation of the PASI in the Commission's initial Proposal was even more surprising, given that the Commission itself had used the PASI as an explicit example when pointing out differences that existed in relation to the procedural rights of companies under investigation[53.]

Even though the obligation to respect the PASI was eventually introduced in Article 8, the scope of this protection is far too limited, since it relates only to requests for information. The protection of the PASI should have been placed in Chapter 2 on Fundamental Rights, in order to underline that this privilege is to be respected throughout antitrust proceedings, including the investigative phase (in particular during inspections and oral explanations).

CONCLUSIONS

The successful enforcement of EU competition law, in particular rules introduced in Articles 101 and 102 TfEU, means granting effective instruments to the NCAs in order to improve such matters as the detection of competition law infringements. The ECN+ Directive will undoubtedly contribute to improving the enforcement of competition law by NCAs, and will make it more difficult for companies to resort to anti-competitive practices.[54]

50 Including, however, the so-called 'envelope procedure'.

51 GARDNER, P., WARD, T. (2003) The Privilege Against Self-Incrimination: In Search of Legal Certainty. *European Human Rights Law Review*, 4, p. 388.

52 Judgment of the ECtHR of 3 May 2001 in case *JB v Switzerland*, Appl. No. 31827/96, para. 64, HUDOC.

53 "Differences also exist with regard to the procedural rights of parties under investigation, e.g. different scope of the privilege against self-incrimination for undertakings". EC, Commission staff working document, Brussels, July, 9 2014, SWD(2014) 231 final, point 46.

54 DENKERS, M. (2018) *ECN+ and the Dutch practice, A NCA perspective on ECN+.* [Presentation at Advanced Competition Seminar of the Florence Competition Programme, *ECN+ Directive. Consequences for National Competition Law Enforcement,* September, 15 2018]. Available from: http://fcp.eui.eu/wp-content/uploads/sites/7/2019/02/5_ Denkers_180915-Florence-ECN-and-the-Dutch-practice-1.pdf [Accessed September, 12 2020].

Nevertheless, the extensive powers of investigation must be balanced by the enhanced protection of the companies' fundamental rights, in particular the right to a defence. This is particularly important since the standards for protecting the rights of companies differ within the EU Member States. In some cases, the EU standard is higher than the national one.[55]

Although the aim of the ECN+ Directive is to improve convergence of the powers of the authorities and the guarantees of companies, due to the insufficiencies in the provisions on the latter, as indicated above, the new regulation may lead to a paradox, namely of NCAs being granted equal and enforced investigative and sanctioning powers on the one hand, and the companies still facing a state of disparity of the level of protection of their rights in antitrust proceedings between the various Member States.[56]
Member States have to implement the directive by 4 February 2021, and are free to introduce a greater level of protection of companies' rights in their national legal order.[57] The hope is that, in practice, Member States will compensate for the deficiencies in the regulation by effectively basing the interpretation of the provisions of the ECN+ Directive on the relevant developments in jurisprudence of the CJEU (as well as the ECtHR, which provides for a greater level of protection than provided under EU standards), and that they will take the opportunity to transpose at least the most crucial principles of the protection of a company's right to a defence into the national provisions.

Nevertheless, in the author's opinion, the ECN+ Directive should be considered a missed opportunity since, even at the stage of public consultations, many commentators were calling for the ECN+ Directive to pay greater attention to the question of fundamental rights. The insufficiency of convergence through soft tools is one of the main reasons for the adoption of the ECN+ Directive,[58] and the EU institutions could have done much more to prevent the uneven protection of companies' rights throughout the EU. All in all, a phrase from the period of preparing the ECN+ Directive still remains valid and may serve as a good conclusion: "But there is still room for improvement.[59]" The author would add that there is the strong need for improvement as well.

55 BERNATT, M., BOTTA, M., SVETLICINII, A. (2018); WILS, W. (2020).

56 REA, M. (2019), p. 115

57 The ECN+ Directive sets only a minimal standard of such protection.

58 The Commission's document, Regional competition agreements: benefits and challenges - contribution from the European Commission, 29 November 2018, DAF/COMP/GF/WD(2018)6, para. 22, p. 6. Available at https://one.oecd.org/document/DAF/COMP/GF/WD(2018)6/en/pdf [Accessed September, 12 2020]

59 EC (2015) *Antitrust: Commission consults on boosting enforcement powers of national competition authorities,* Brussels November, 4 2015. Available from: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5998 [Accessed September, 12 2020].