Does the 'more appropriate' authority need to be independent? Rule of law implications for case referrals with respect of concentrations

by

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Abstract

In the recent *Sped-Pro* judgment, the General Court ruled that in order to guarantee effective judicial protection of the complainant, the Commission is obliged to examine the given national competition authority's independence, and overall rule of law concerns, when it rejects complaints regarding Article 102 TFEU and concludes that such an authority is 'best placed' to hear the case. This contribution aims to discuss whether such obligation applies to case referrals from

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the Commission to Member States with respect of concentrations. On one hand, these are the same national competition authorities and the same standards should apply. On the other – the case referral system differs from the characteristics of the Articles 101–102 TFEU framework. Thus, this paper contains a discussion on the General Court's judgment in *Sped-Pro*, the legal framework and practice regarding merger referrals, and, finally, the consequences of the judgment for the future approach of the Commission in the discussed matter.

Resumé

Dans le récent arrêt Sped-Pro, le Tribunal a jugé qu'afin de garantir une protection juridictionnelle efficace du plaignant, la Commission est tenue d'examiner l'indépendance de l'autorité nationale de la concurrence concernée, ainsi que les préoccupations générales en matière d'État de droit, lorsqu'elle rejette des plaintes au titre de l'article 102 du TFUE et conclut qu'une telle autorité est «mieux placée» pour connaître de l'affaire. Cette contribution vise à discuter si une telle obligation s'applique aux renvois d'affaires de la Commission aux États membres en matière de concentrations. D'une part, il s'agit des mêmes autorités nationales de concurrence et les mêmes standards devraient s'appliquer. D'autre part, le système de renvoi des affaires diffère des caractéristiques du cadre des articles 101 et 102 du TFUE. Ainsi, cet article discute de l'arrêt du Tribunal dans l'affaire Sped-Pro, du cadre juridique et de la pratique concernant les renvois en matière de concentrations et, enfin, des conséquences de l'arrêt pour l'approche future de la Commission dans la matière discutée.

Key words: referrals of concentrations; national competition authority; regulator's independence; rule of law; EU merger regulation; control of concentrations; European Competition Network; effective judicial protection; internal market.

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I. Introduction

The present contribution aims to examine whether the recent judgment of the General Court (hereinafter: GC) in the *Sped-Pro* case[1] implies any changes in the assessment of requests for case referrals with respect to concentrations under Article 4 (4) EU Merger regulation (hereinafter: EUMR).[2] In the said judgment, the GC concluded that the European Commission, when rejecting a complaint regarding an abuse of dominant position and concluding that a

[1] Case T-791/19 *Sped-Pro v Commission* EU:T:2022:67.

[2] Council Regulation 139/2004 on the control of concentrations between undertakings, [2004] OJ L 24/1.

national competition authority (hereinafter: NCA) is best placed to hear the case on the basis of EU legislation, shall have regard to the right to effective judicial protection and thus is obliged to examine, in a specific and accurate manner, the rule of law concerns raised in the course of the proceedings. In *Sped-Pro*, these concerns related to the independence of the Polish competition authority (hereinafter: UOKiK) in this specific case, given the fact that UOKiK is a governmental body but the complaint concerned alleged abuse of a dominant position held by a state-owned enterprise, PKP Cargo.

This recent example, along with Union's secondary legislation,[3] the Court's case law in this regard,[4] communications from EU institutions[5] and earlier calls voiced in the literature,[6] confirms that the discussion on the application of Article 2 TEU, the Union's values and the rule of law in particular, is not of abstract and indirect nature, as it indeed streams from such areas as internal market and competition law.

The *Sped-Pro* judgment concerns a specific legal framework related to the prohibition to abuse a dominant position that, in the discussed context, applies also to large extent to anticompetitive agreements. That framework includes Articles 101–102 TFEU, Regulation 1/2003,[7] Regulation 773/2004[8] and Directive 1/2019.[9] As discussed below, when enforcing these fundamental prohibitions, the Commission and the NCAs cooperate closely

[3] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, [2020] OJ L 433I/1.

[4] See cases C-156/21 *Hungary v. European Parliament and the Council* EU:C:2022:97; C-157/21 *Poland v. European Parliament and the Council* EU:C:2022:98.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report – The rule of law situation in the European Union, 30.9.2020, COM(2020)580 final.

[6] See *inter alia*: D. Kochenov, Bard, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement', Reconnect Working Papers No. 1 (2018), M. Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law', Legal Issues of Economic Integration (2019) 46(4), 345–362; L. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis,' German Law Journal (2019), 20(8), 1182–1213, K. Lenaerts 'New Horizons for the Rule of Law Within the EU', German Law Journal (2020), 21(1), 29–34; M. Bernatt, 'The double helix of rule of law and EU competition law: An appraisal', European Law Journal, 2022, https://doi.org/10.1111/eulj.12422.

[7] Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

[8] Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L 123/18 (as further amended).

[9] Directive 2019/1 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, [2019] OJ L 11/3.

and they both may apply directly effective Union provisions to anticompetitive conducts.[10]

For concentrations, the legal framework and conditions for the cooperation between the Commission and the NCAs are different.[11] Commonly, that cooperation takes the shape of case referrals from the Commission to Member States' NCAs or the other way. The main differences, as detailed in this article, include the application of national competition laws in cases referred from the Commission to the NCAs, or the scope of effective judicial protection granted by applicable EU legislation or national laws.

Thus, the purpose of this article is to examine whether the *Sped-Pro* judgment impacts the assessment standard in case referrals with respect to concentrations by extending the Commission's obligation to guarantee full effectiveness of individuals' rights by a requirement to assess rule of law concerns and, in particular, the NCAs' independence.

The scope of assessment in this contribution is limited to case referrals under Article 4 (4) EUMR, that is, referrals made on request of the merging parties before the transaction is notified to the Commission. These are referrals from the Commission to NCAs, that is, instances where rule of law concerns can be raised. As requests are submitted by the merging parties, this involves different perspectives on effective judicial protection, compared to the legal framework of the *Sped-Pro* case.

II. The General Court's judgment in Sped-Pro

1. Overview of the case

The *Sped-Pro* case concerns an action for the annulment of the Commission in the matter AT.40459 (Rail freight forwarding in Poland). Sped-Pro is a company seated in Poland, active in the freight forwarding market. In its business conduct, Sped-Pro relied on transportation services provided by PKP Cargo, a Polish state-owned rail company, holding a dominant position on the rail transport market in Poland. In its complaint filed to the Commission

[10] More on the interplay between decentralized system of EU competition law and the rule of law, including the consequences of the *Sped-Pro* judgment: Bernatt, 'The double helix…', 14–18.

[11] However, calls are voiced that in the context of the rule of law crisis, and following the *Sped-Pro* judgment, the Commission should act towards concentrations similarly to what it is obliged to do when Articles 101–102 TFEU are applied, see: Bernatt, 'The double helix…', footnote 138.

in November 2016, Sped-Pro claimed that PKP Cargo abused its dominant position by refusing to conclude a contract with Sped-Pro and to grant the complainant the requested, non-discriminatory rebates.

Given the circumstances of the case, the Commission concluded that UOKiK would be more appropriate to review this matter and, therefore, decided to reject the complaint, acting on the basis or Article 7 (2) of Regulation 773/2004. The Commission found that UOKiK was a better placed authority to assess the complaint (due to earlier proceedings conducted vis-à-vis PKP Cargo) and that the alleged practices concerned only relevant markets in Poland.

The Commission discussed also other arguments raised by Sped-Pro that are relevant for this article. In particular, it referred to an argument concerning Poland's violation of the rule of law (including proceedings under Article 7 TEU) and the lack of independence by UOKiK. The Commission concluded, however, that Sped-Pro's arguments were unsubstantiated and that the complainant did not submit any convincing evidence in this regard. In particular, in the Commission's view, the fact that the President of UOKiK is appointed by the Polish Prime Minister did not suffice to conclude that UOKiK would not be independent in proceedings regarding a state-owned company.

Indeed, in the course of the proceedings, Sped-Pro argued that UOKiK would be indulgent towards a state-owned company, also given the fact that it is appointed by the Prime Minister for an undefined term and they can be dismissed at any time. Additionally, Sped-Pro argued that PKP Cargo was one of the those that funded the Polska Fundacja Narodowa (the Polish National Foundation), which was funded by the largest Polish state-owned companies and conducted several media campaigns advocating the recent changes in the Polish judicial system (questioned from the perspective of the rule of law by the EU Courts and the Commission on several occasions).

In the action for annulment, Sped-Pro raised three pleas, two of which deserve further discussion. The second plea concerned an infringement of the right to effective judicial protection, by failing to have regard to the reasonable doubts as to the upholding of the rule of law in Poland and, in connection with this, the independence of the courts and of UOKiK. In the third plea, Sped-Pro argued that the Commission committed manifest errors in the assessment of the interest of the European Union and in the delimitation of the relevant market in this case.

The GC acknowledged the pleas regarding the obligation to guarantee effective judicial protection, and a precise assessment of rule of law concerns. The GC found that the Commission limited its assessment of UOKiK's independence to a general conclusion that the concerns raised by Sped-Pro were unsubstantiated and not supported by evidence. In particular, the GC

noted that such conclusions did not prove that the Commission conducted a substantive analysis of the premises raised by the complainant. It also did not explain why the Commission has considered all these premises as unsubstantiated.

Thus, the GC concluded that the decision did not prove that the Commission would concretely and precisely assess the complaint's arguments with respect to rule of law concerns in Poland. Such concise conclusions did not allow the complainant to understand the precise reasons underlying the rejection. It also did not allow the GC to effectively control the compatibility of the decision with EU law, and to examine whether there were serious and verified grounds to conclude that the complainant's rights would not be negatively affected if the case was dealt with by national authorities.

2. The Union's interest in maintaining the case

The discussed plea concerned essentially the interpretation of the notion of Union's interest in retaining the infringement proceedings, within the meaning of Article 102 TFEU, Articles 17 (1) and 7 (2) of the Regulation 773/2004, Article 7 of the Regulation 1/2003 and their full effectiveness. Although the plea was ultimately dismissed, the GC made two observations that are relevant for this contribution.

Firstly, Sped-Pro raised the argument that the Union's interest in retaining the case with the Commission resulted from the fact that Polish law does not grant any judicial remedies against UOKiK's orders dismissing complaints regarding an infringement of Articles 101–102 TFEU.

In this regard, the GC relied on the Court's settled case-law, confirming the principal conclusion that by Article 19 (1) paragraph 2 TEU, Member States committed themselves to provide in their national laws remedies that sufficiently ensure effective legal protection in the fields covered by Union law. Therefore, it is not for the Commission to remedy the possible defects in national laws in that regard by initiating Articles 101–102 TFEU investigations. Indeed, such conclusion has been consistently maintained by the Court in many different contexts regarding the effectiveness of national and EU legal remedies.[12]

Secondly, the GC confirmed the Commission's wide margin of discretion when deciding on the Union's interest in accepting or refusing a complaint regarding an infringement of Articles 101–102 TFEU. This discretion is limited by the obligation to investigate fully factual and legal circumstances included

[12] See e.g. cases C-619/18 *Commission v. Poland* EU:C:2019:531, paras 48-50; C-583/11 *P Inuit Tapiriit Kanatami* EU:C:2013:625, paras 97–102.

in the complaint, as well as by guidelines issued by the Commission itself.[13] However, in a specific case, the Commission's margin of discretion allows it to select and apply specific criteria stemming from the Court's case-law and omit the other.[14]

Admittedly, observations regarding the Union's interest, within the meaning of the Articles 101–102 TFEU legal framework, do not translate directly into such considerations in merger control and case-referrals specifically. In particular, the application of the former is regarded as a matter of public policy.[15] At the same time, it is debatable if such public interest can be observed in the case of merger referrals, and whether it would imply the need for the Commission to maintain its jurisdiction in specific matters.

In any event, one should bear in mind the two discussed observations from the *Sped-Pro* judgment. Firstly, the Commission enjoys a wide margin of discretion when applying specific criteria regarding Union's interest. Secondly, any potential flaws in national legislation should be examined from the perspective of Article 19 TEU and not remedied by Commission proceedings.

3. Rule of law and the competition authority's independence

In the discussed plea, Sped-Pro claimed that the Commission's refusal decision infringed the claimant's right to effective judicial protection, as stipulated in Article 2 TEU, Article 19 (1) paragraph 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union. Specifically, the Commission should have retained the case if systemic and general anomalies in respecting the rule of law in Poland and, in particular, the lack of independence of UOKiK and of Polish courts having jurisdiction in that area, were confirmed. For UOKiK, Sped-Pro raised the general and already discussed issue of the authority's subordination vis-à-vis the executive. For courts having jurisdiction to review UOKiK decisions (from SOKiK, the court of first instance for competition matter, to the appropriate chamber of the Supreme Court), Sped-Pro claimed that these courts did not enjoy adequate guarantees of independence and impartiality, as defined in the Court's case-law regarding changes in the Polish judicial system.

The GC firstly reflected on whether the verification of a NCA's independence should be conducted with the use of, by analogy, the two criteria set out in

[13] Ibid, paras 39–40. See to that effect the Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

[14] Case T-791/19 *Sped-Pro v Commission* EU:T:2022:67, paras 55–60.

[15] See e.g. recital 1 of Directive 2019/1; case C-126/97 *Eco Swiss* EU:C:1999:269, para 39.

the Minister for Justice and Equality case (or, the *LM* case).[16] In that regard, Poland argued that the said judgment concerned a very different case, namely the cooperation between courts in criminal matters, and thus it could not be compared to a rejection of a complaint in a competition law matter, which has an administrative character.

The GC acknowledged the differences between criminal proceedings and competition matters. However, it concluded that there were several significant reasons justifying the application, by analogy, of the LM criteria in the assessment whether a NCA is more appropriate then the Commission to hear a case on the basis of Articles 101–102 TFEU.

Firstly, the GC reconfirmed the principle that all Member States share, respect and promote common values, as referred to in Article 2 TEU. As a result, the Union is built on mutual trust that these values are respected in all Member States.[17] That fundamental basis remains effective in the relations between the Commission, NCAs and national courts in the context of the application of Articles 101–102 TFEU. It is so, because, just like the provisions regarding the area of freedom, security and justice, the legal framework establishing the European Competition Network and regulating the cooperation between national courts and the Commission, establishes a system of strict cooperation between respective bodies, which is based on the principles of mutual recognition, mutual trust and sincere cooperation.

In the context of the application of Articles 101–102 TFEU this fundamental basis is further specified in secondary law and other Union principles. First, Regulation 1/2003 grants the NCAs parallel competences to apply Articles 101–102 TFEU. In that context, the NCAs are obliged to secure full effectiveness of these provisions, and to cooperate with each other closely. Secondly, Article 4 of Directive 2019/1 expressly requires that the NCAs shall be independent when applying Articles 101–102 TFEU, that is, perform their duties impartially and in the interest of the effective

[16] Case C-216/18 *PPU Minister for Justice and Equality* EU:C:2018:586. Importantly, the Court concluded that when assessing the independence of a national court, a twofold test needs to be performed. Firstly, it needs to be examined on the basis of information that is objective, reliable, specific and properly updated concerning the operation of the justice system in a given Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalized deficiencies therein, of the fundamental right to a fair trial being breached. Secondly, if the first criterion is met, it is necessary to assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the judiciary's surrender to the Member State, a given person will run the risk of a breach of the essence of her fundamental right to a fair trial (para 68).

[17] The General Court referred to that effect to case C-619/18 *Commission v. Poland* (quoted above).

and uniform application of those provisions, subject to proportionate accountability requirements, and without prejudice to the close cooperation between competition authorities in the European Competition Network.[18] Third, Articles 101–102 TFEU are directly effective and constitute a source of rights, which has been directly conferred on individuals, which need to be protected by national courts.[19]

Secondly, the settled case law allows the Commission to reject a complaint if the effects of the alleged Article 101–102 TFEU infringement are limited to the territory of a given Member State, and its NCA has conducted proceedings on the given infringements. In such circumstances, there is no Union interest to retain the case, provided that rights of the complainant are adequately protected by national bodies (including both competition authorities and courts). In this context, the GC noted that if systemic or generalised deficiencies that threaten the independence of those bodies existed, the complainant's rights would be exposed to a real risk of being infringed.[20]

Thirdly, the right to an effective remedy and to a fair trial, as stipulated in Article 47 of the Charter, has particular significance for the effective application of Articles 101–102 TFEU. In that regard, national courts are obliged to review the legality of a competition authority's decisions on one hand, and to apply these provisions directly on the other. This is further reflected by Article 19 (1) TEU and the Member States' obligation to ensure effective legal protection in the fields covered by Union law, including competition law.[21]

Consequently, the GC concluded that the Commission needs to take into account the issue of compliance with the rule of law when it makes a decision that NCAs are more appropriate to deal with Articles 101–102 TFEU matters. In its assessment, the Commission may apply, by analogy, the criteria set out in the LM judgment.

Further, the GC referred to arguments made by the claimant in relation to UOKiK's general lack of independence vis-à-vis Polish state-owned enterprises and PKP Cargo in particular. The GC concluded that it could not be deduced

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[18] On UOKiK's independence, also within the context of the discussed provision, see: M. Kozak, 'Raz, dwa, trzy, niezależny będziesz ty… O konieczności szerszego spojrzenia na niezależność polskiego organu antymonopolowego w świetle dyrektywy ECN+', iKAR 2019, 6(8), 23–38 or more broadly: I. Małobęcka-Szwast, 'The Appointment and Dismissal Procedure of the Polish NCA in the Light of EU and International Independence Standards'. Wroclaw Review of Law, Administration & Economics (2018) 7(2). On the NCAs' independence under the ECN+ Directive see: M. Patakyová, I'ndependence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic', Yearbook of Antitrust and Regulatory Studies (2019) 12(20), 127–148.

[19] Case *T-791/19 Sped-Pro v Commission* EU:T:2022:67, paras 84–88.

[20] Ibid, paras 89–90.

[21] Ibid, para 91.

from the rejection decision whether the Commission actually verified these arguments and properly assessed UOKiK's independence in that specific case. Since the GC found a violation of the general obligation to take into account rule of law and independence matters, it annulled the Commission's decision to reject the requested referral.

The present contribution does not aspire to reflect on the adequacy of the LM criteria to be applied, even by analogy, to NCAs and national competition courts[22]. Due to the specific context of that judgement, and extremely severe consequences of a potential declaration that a given national court lacks independence, the LM test is strict and still difficult to apply in practice.[23] It seems to be even more challenging to apply it in order to assess the independence of a given NCA or of national competition courts.[24] That concerns particularly the second criterion, namely establishing if there are substantial grounds for believing that, following the authority's surrender to the government of its Member State, a given undertaking will face the risk of an infringement of the essence of the fundamental right to a fair trial. For national competition courts these considerations might be too indirect and hypothetical, when conducted in circumstances similar to the *Sped-Pro* proceedings or merger referrals. For the NCAs, one may try to establish that such risk materializes when the other party is a state-owned undertaking (or otherwise connected to the State Treasury), and the practice of a given NCA is to treat such entities leniently (give them a favoured treatment). Such arguments would, however, require a further in-depth discussion taking into consideration *inter alia* Commission practice regarding the concept of state-owned enterprises[25] or Article 345 TFEU, and the principle of neutrality of the Treaties with regard to the system of property ownership in Member States.

[22] See on that point: Bernatt, 'The double helix…', 7–10.

[23] For further discussion see: Filipek, 'Rozproszona europejska kontrola przestrzegania prawa do rzetelnego procesu sądowego w świetle zasady wzajemnego zaufania i wyroku C-216/18 PPU LM', Europejski Przegląd Sądowy (2019) (2) 14–31.

[24] Especially given that in many Member States NCAs have not been independent in a broader sense, also before the discussion on the relation between that factor and the rule of law or effective judicial protection took place, see: M. Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union'. Comparative European Politics, (2014) 12(3).

[25] Critically on the Commission's approach towards Polish SOEs: A. Svetlicinii, 'Ownership-neutral or ownership-blind? The case of Polish state-owned enterprises in EU merger control', Journal of Antitrust Enforcement 2022.

III. Case referrals under Article 4 (4) EUMR

1. Purpose and effect of Article 4 referrals

Before discussing in detail rules governing the application of Article 4 (4) EUMR, it is worth outlining the key purposes, features and effects of case referrals under this provision. Similarities and differences between these aspects, on one hand, and the rules regarding the application of Articles 101–102 TFEU, on the other, need to be taken into account when commenting on the relevance and applicability of the *Sped-Pro* case to the scope of the Commission's obligations and competence when conducting Article 4 (4) EUMR proceedings.

With respect to concentrations, the system of case referrals serves the purpose of facilitating the reattribution of cases between the European Commission and Member States. It is designed to appropriately adjust the default mechanism for jurisdiction and case allocation, that result from the fixed turnover criteria defined in Article 1 paras (2) and (3) EUMR. These adjustments are made in line with the principle of subsidiarity, in order to ensure that the authority is more appropriate to deal with the case carry out particular merger control proceedings.[26]

Both Article 4 paras (4) and (5) EUMR concern pre-notification referrals, and cover, respectively, referrals from the Commission to Member States and from Member States to the Commission. As a result, in these instances, the request for a referral (or, the reasoned submission) can only be submitted by the parties to the envisaged concentration.[27] Thus, these are the merging parties that identify their interest in the reattribution of jurisdiction, and preliminarily assess the fulfilment of applicable criteria in the reasoned submission.

Therefore, in regular circumstances, the parties will not regard the change of jurisdiction as leading to the limitation of their rights resulting from directly effective Union law. By contrast, they will request that change to obtain the expected benefits resulting from a more effective allocation of the case. As a result, a case referral, even to a non-independent NCA, would not adversely impact rights and legal status of the decision's addressees. However, it may be regarded as potentially affecting third parties' or (Union) public interest.

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[26] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), [2005] OJ C 56/2 (Notice on referrals) paras 3, 5. On broader reasons underlying referrals from the Commission to Member States, see: M. Mainenti, 'Delegation in EU merger control: The determinants of referrals to national competition authorities (2004–2012)', Public Policy and Administration 2019, 34(3), 329–348.

[27] Notice on referrals, paras 47, 49.

Similarly to other merger proceedings, initial contacts with the Commission, taking place before the formal submission of a referral-request, are of vital importance.[28] Indeed, many aspects of the case can be debated and decided at this early stage. This may apply to rule of law issues and the NCA's independence considerations, if conducted in such proceedings.

Importance of such initial contacts results also from the shortness of statutory deadlines. The Commission has 25 working days for a decision whether or not to refer the case to NCAs. It also communicates the reasoned submission to all Member States, which then have 15 days to express their agreement or disagreement on the referral.

As it follows from the statistics published on the Commission's website,[29] from 2004 to date, the Commission received 211 reasoned submissions, 200 of which were decided positively (full or partial referral) and only one was refused.[30] The remaining requests might have been withdrawn after the initiation of proceedings, probably when the requesting parties learned from the Commission that they would be refused. It can be presumed that the Commission has been approached by the merging parties more times than the reported 200+ cases, and that effectively the requests were not submitted at all due to an informal refusal from the Commission.

This may confirm that the requesting parties accept the fact that the Commission enjoys a wide degree of discretion when deciding on case referrals, and that chances for challenging a formal refusal decisions are limited.

The discussed margin of discretion granted to the Commission results from the wording of Article 4 (4) subparagraph 3 EUMR. It provides that unless the Member State identified in the request disagrees with the referral, and when the Commission concludes that legal requirements for a referral have been fulfilled, the Commission 'may decide to refer the whole or part of the case to the competent authorities of that Member State.' Therefore, even if all criteria established by Article 4 (4) EUMR are met, the Commission may still refuse to refer the case as requested by the merging parties. Some authors criticise the exercise of these discretionary powers by the Commission. On one hand, in the event of refusal, it leads to asserting jurisdiction in certain areas[31], despite the fulfilment of legal requirements, and therefore affects legal certainty. On

[28] On the importance of such contacts before the notification of the merger see: J. Leitenberger, M. Zedler, 'Making Merger Review Work' in J. Kokott, Pohlmann, R Polley (eds), *Europäisches, Deutsches und Internationales Kartellrecht' Festschrift für Dirk Schroeder zum 65. Geburtstag* (1st edn, Verlag Dr. Otto Schmidt KG 2018), 466–467.

[29] See: https://ec.europa.eu/competition-policy/mergers/statistics_en, accessed 29 June 2022.

[30] *MOL / OMV SLOVENIJA* (M.10438).

[31] V.K. Kigwiru, 'Case Referrals under the European Union (EU) Merger Regime' (2020), available at SSRN: http://dx.doi.org/10.2139/ssrn.3534985.

the other, it may serve shifting the blame for policy failures,[32] and thus expose the referral decisions to risk of being more political than substantive.

A very important feature of case referrals under EUMR is that they result not only in the change of forum, but also in the change of applicable competition law.[33] It follows from Article 4 (4) EUMR subparagraphs 3 and 5 that the Commission 'may decide to refer (…) the case to the competent authorities of [the Member State referred to in the reasoned submission] with a view to the application of that State's national competition law' and that 'if the Commission decides (…) to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply'. That is reflected in settled case-law of the Court confirming that 'by adopting a referral decision, the Commission terminates the procedure applying [EUMR] to those aspects of the concentration which are the subject of the referral and transfers exclusive competence to the NCAs to assess those aspects on the basis of national law. It thus loses any power to deal with those aspects.'[34] This is significantly different from rules provided for in Regulation 1/2003,[35] where the NCAs apply EU competition rules to anti-competitive practices.

2. Requirements for referral and scope of examination by the Commission

Article 4 (4) EUMR provides for two legal requirements for a case referral to a Member State: 'that [1] the concentration may significantly affect competition in a market within a Member State [2] which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.' Essentially, the first requirement means that within a given Member State, there must be a market significantly affected by the envisaged concentration and so, the transaction deserves a more detailed scrutiny and competitive assessment. According to the second criterion, the market affected by the envisaged concentration should be national or narrower

[32] See: M. Mainenti, 'Delegation in EU merger control: The determinants of referrals to national competition authorities (2004–2012)', Public Policy and Administration (2019), 34(3), 329–348.

[33] It can be debated if that change involves only a change of the law applicable to the scope of the notification duty and the assessment of the case, or additionally to a wider scope of matters, such as a breach of standstill obligations, or gun jumping. However, this discussion is of secondary relevance for the purposes of the present contribution.

[34] Case T-380/17 *HeidelbergCement* EU:T:2020:471, para 684.

[35] See Article 3 (3) of the Regulation 1/2003.

in scope, and thus covered by the jurisdiction of a Member State referred to in the reasoned submission.[36]

While the interpretation and application of these substantive requirements deserves separate discussion,[37] they will not be further examined in the present contribution, as they do not fall within the scope of the question whether the independence of a NCA needs to be examined in the course of the application of Article 4 (4) EUMR.[38]

Apart from the said two legal requirements, when deciding on a referral, the Commission takes into account other guiding principles, as referred to in Recital 11 EUMR and further specified in the Notice. Paragraph 8 of the Notice provides that decisions on a referral need to 'take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a "one-stop-shop" system, and the importance of legal certainty with regard to jurisdiction'. Moreover, when exercising its discretion, the Commission will be guided with 'the need to ensure effective protection of competition in all markets affected by the transaction.'

The assessment whether the NCA is a 'more appropriate authority' includes specific characteristics of the case, but also tools and expertise available to that authority.[39] The Notice reads further that 'particular regard should be had to the likely locus of any impact on competition resulting from the merger' and that 'regard may also be had to the implications, in terms of administrative effort, of any contemplated referral', such as costs of/and time delays as well as risks of conflicting assessments if the case is examined by several authorities.

Thus, the discussed criterion of 'more appropriate authority' does not explicitly refer to the authority's independence. At the same time, the notion remains open for a wide interpretation, especially if the Commission were to assume that troubles with meeting the independence criteria may impact the given NCS's substantive assessment and, consequently, lead to a clearance (a prohibition) that would have (would have no) adverse effect on competition.

Further, a case referral should not undermine the benefits inherent in the 'one-stop-shop' approach. Therefore, a case shall be handled by a single authority, and the fragmentation of cases through referrals, need to be

[36] O. Bretz, M. Leppard, 'EU Merger Control' (2019), available at SSRN: http://dx.doi.org/10.2139/ssrn.3385447, 33–34.

[37] For instance, the question whether the existence of affected markets wider than national in scope precludes the possibility to refer the case. To that effect, see the Commission's decisions: M.8971 INA/PPD/Petrokemija, paras 21, 33; M.9952 PKN ORLEN / PGNiG, paras 51–67.

[38] For an in-depth analysis of the discussed legal requirements see: U. von Koppenfels, D. Dittert in Ch. Jones, L. Weinert, *EU Competition Law Volume II: Mergers and Acquisitions*, (3rd edn, Elgar 2021), 169–194.

[39] Notice on referrals, par 9.

avoided if possible. That contributes to efficiencies from both perspectives of administration and the undertakings concerned, who avoid multiple filings.[40]

According to the principle of legal certainty, 'referral should normally only be made when there is a compelling reason for departing from "original jurisdiction" over the case in question.'[41] As it follows from paragraph 14 of the Notice, this principle applies also to the referral criteria. For pre-notification requests, the criterion implies that referrals should be limited to cases where it is rather straightforward to assess, from the outset, the fulfilment of the substantive legal requirements, and thus promptly decide on the request.

Additionally to the legal requirements and guiding principles, paras 19–23 of the Notice discuss other factors to be considered when specifically assessing a request made under Article 4 (4) EUMR. These factors mainly concern the preliminary competitive assessment of the transaction, and its impact on markets other than those of the Member State referred to in the request.[42]

One of these criteria applies to NCAs as it concerns the authority's 'specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned.'[43] This may include a given NCA's expertise resulting from previous cases conducted with respect to, either the markets affected by the envisaged transaction, or the parties concerned. Additionally, national legislation may provide that authority with specific (or sectorial) competences on a given market, which helps the NCA to be better placed in understanding its specific features, and conducting a competitive assessment of the case. Since this criterion discusses the characteristics of a particular NCA, it may be argued that 'lack of independence' could negatively impact the exercise of that very expertise, and so this specific condition needs to be taken into account also when deciding on the referral to a given Member State.

To conclude on this part, neither the legal requirements explicitly provided in Article 4 (4) EUMR, nor other criteria and guiding principles specified in the Notice, refer to the independence of NCAs as a factor requiring examination when deciding on a merger case referral. However, the criterion of 'more appropriate authority' seems to be wide and flexible enough to cover the discussed matter, in particular if the lack of such independence could lead to the issuance of decisions adversely impacting competition. Moreover, one could argue that problems with the independence of NCAs could negatively affect the exercise of specific expertise or competences resulting from previously conducted cases or from particular competences. On the other

[40] Ibid, paras 11–12.
[41] Ibid, para 13.
[42] Ibid, paras 19–22.
[43] Ibid, para 23.

hand, it may be argued that the principle of legal certainty, as referred to in Recital 11 EUMR, specified in the Notice and applied to the referral criteria, opposes the development of additional conditions – such as independence – to be taken into account within an assessment of a given referral request. In any event, neither the EUMR nor the Notice establish or foresee a duty of the Commission to assess the independence of a NCA during referral proceedings.

Similar conditions apply to case referrals under Article 9 EUMR.[44] Although this type of referrals is not subject to an analysis in the present article, it suffices to conclude that neither the EUMR, nor the Notice require, in particular, for the Commission to examine the independence of a NCA when assessing its request for a post-notification case referral.

3. The Commission's decisional practice

Following legislation and soft law, it is worth reviewing the Commission's decisional practice. This makes it possible to verify if concerns regarding the independence of NCAs were taken into account in the past and whether the Commission had examined any factors other than those expressly provided in the EUMR or the Notice.

Firstly, this section focuses on recent positive referral decisions in the matters *PKN ORLEN*/*PGNiG* and *PKN ORLEN*/*RUCH*, as they seem to be particularly relevant in the context of the questions contemplated in this article. Secondly, the Commission's decision in *MOL*/*OMV SLOVENIJA* is briefly discussed, which constitutes the only instance so far of a refusal to refer the merger proceedings to a given NCA. Thirdly, this section concludes with an overall analysis of all other Article 4 (4) EUMR referral decisions, in order to verify which criteria were assessed when referring given matters to Member States.

The cases *PKN ORLEN*/*PGNiG* of 25 March 2021 and *PKN ORLEN*/*RUCH* of 12 February 2020 concerned referral requests submitted by PKN ORLEN, an undertaking with a significant shareholding of the Polish State Treasury. PKN ORLEN is a Polish oil company, which adopted a multi-utility strategy and started its expansion on different (mostly energy-related) markets. Although in the *PKN ORLEN*/*Grupa LOTOS* merger decision of 14 July 2020, the Commission did not conclude that PKN ORLEN was controlled by the Polish State Treasury,[45] it is undisputed that regardless of the current political setting, the discussed undertaking has always been strongly connected with

[44] Ibid, paras 33–41.

[45] And it remained skeptical with respect to arguments regarding the State's *de facto* control over PKN ORLEN. See: *PKN ORLEN* / *Grupa LOTOS* (M.9014), paras 26–37.

the State Treasury and Poland's policy.[46] On the other side, the transactions involved PGNiG, the state-owned incumbent on the Polish gas markets (the merger between PKN ORLEN and PGNiG was, after it was referred to UOKiK, the largest one in the history of UOKiK) and RUCH, one of the largest distributors of printed press as well as owner of kiosks and newsagents located in Poland.

It could be assumed in *PKN ORLEN*/*PGNiG* that any clearance of the transaction would be conditional, given the market positions of the parties (*inter alia* PGNiG being the largest natural gas supplier in Poland while PKN ORLEN is the largest customer on that market) and the Commission's earlier decisional practice in similar cases.[47] Therefore, it cannot be excluded that a change of forum might impact the ultimate shape of commitments required by a given competition authority, especially due to the transaction's strategic meaning for the Polish government and the subtle nature of markets affected by the envisaged concentration. As a result, the discussed case seems to be particularly relevant when reflecting on the independence assessment of a NCA in the course of referral proceedings.

Importantly, the *Sped-Pro* case had been pending before the GC for over a year, while the Commission was proceeding the *PKN ORLEN*/*PGNiG* referral to the UOKiK, the independence of which was questioned by *Sped-Pro*.

Moreover, almost parallel to the M.9952 PKN ORLEN/PGNiG referral proceedings, in another national merger decision from 5 February 2021, *PKN ORLEN*/*Polska Press*, the UOKiK cleared PKN ORLEN's acquisition of Polska Press, a press publishing house particularly present in regional press segments. The UOKiK approved the concentration despite statements given in the course of the proceedings by the Commissioner for Human Rights and some other market participants. They argued, *inter alia*, that the merger would threaten media pluralism and competition on several media markets due to PKN ORLEN's strong connection with the State, governmental control over public media and the its overall hostility with respect to media other than pro-governmental. In a wide public debate following that decision, the UOKiK was criticised for not taking into consideration the broader context of the transaction and insufficient competitive assessment. Some of the arguments were directly questioning UOKiK's independence. The Commissioner for Human Rights brought an action for judicial review of that decision, which is a highly exceptional instance in merger proceedings in Poland, as well as proves the significance of that case in terms of scope of the competitive

[46] See: A. Svetlicinii, 'State-Controlled Entities in the EU Merger Control: the Case of PKN Orlen and Lotos Group', Yearbook of Antitrust and Regulatory Studies 2020, 13(22), 204.

[47] *E.ON* / *MOL* (M.3696), *DONG* / *Elsam* / *Energi E2* (M.3868) or *Gaz de France* / *Suez* (M.4180).

assessment in merger proceedings, and the impact of current State policy on UOKiK's decisions[48].

The Commission's referral decision in *PKN ORLEN/PGNiG* was issued on 25 March 2021, a little later than a month after UOKiK's decision regarding the acquisition of Polska Press by PKN ORLEN and the intense debate surrounding the latter decision witnessed in Poland. In the decision, the Commission extensively and precisely examined the fulfilment of the substantive legal requirements for a referral. The wide scope of the assessment resulted from the high number of markets affected by the envisaged transaction, and the fact that, technically, some of these markets were wider than national in scope and thus, *prima facie*, not meeting the second legal condition of a referral.

Further, the Commission assessed additional factors, as provided in paras 19–23 of the Notice. Firstly, it followed the conclusions from the preliminary competitive assessment that the effects of the transaction were likely to be confined to Poland and that UOKiK was thus well placed to review the transaction. Secondly, it relied on evidence submitted in the reasoned submission confirming UOKiK's experience in assessing competition in the affected markets, as it examined several concentrations and competition-related conducts in the Polish energy sectors in recent years.[49] Additionally, the Commission positively verified if following the referral, the benefits of the 'one-stop-shop' would be preserved.[50]

Therefore, in PKN ORLEN/PGNiG, the Commission did not apply any other criteria (such as the independence of UOKiK) than the requirements and factors explicitly provided in the EUMR and the Notice. By taking such approach, it relied on its well-settled practice of examining referral requests. This is particularly relevant given the slightly earlier UOKiK decision in *PKN ORLEN/Polska Press*, and the fact that *PKN ORLEN/PGNiG* involved a merger between a company controlled by the Polish State Treasury and another undertaking strongly connected with that State Treasury.

The Commission's referral decision in *PKN ORLEN/RUCH* was delivered on 12 February 2020. Similarly, it includes an assessment of legal requirements[51]

[48] This article does not seek to comment or analyze in detail UOKiK's decision, which however remains subject to debate in Poland from several perspectives. From the viewpoint of the present contribution, the decision is relevant to the extent that it was delivered while a referral request of a relatively political and significant case regarding the same undertaking and the same NCA was pending before the Commission, so it might have been reflected in the application of the referral criteria. In any event, UOKiK's decision was upheld by the relevant Polish court of first instance (SOKiK) on 8 June 2022. The Ombudsman announced that it would not appeal against that judgment.

[49] *PKN ORLEN / PGNiG* (M.9952), para 73.

[50] Ibid, para 74.

[51] *PKN ORLEN / RUCH* (M.9561), paras 19–31.

and additional factors.[52] With regard to the former, the Commission noted that the competitive assessment would require a detailed examination of the 32 affected local markets in Poland, and that UOKiK had conducted several merger proceedings involving daily consumer markets. It also concluded that the UOKiK had relevant expertise to assess the level of competition between fuel stations (PKN ORLEN) and newspaper kiosks (RUCH) as well as to conduct a competitive assessment of the vertically affected press distribution markets. Finally, the Commission found that the 'one-stop-shop' principle would be maintained.

The decision does not discuss such factors as the independence of the Polish NCA, nor its unwillingness to acknowledge the negative impact of the transaction on the markets for the distribution of press or media pluralism.

To date, the only decision issued under Article 4 (4) EUMR where the Commission refused to refer a case to the relevant NCA regards the matter *MOL/OMV SLOVENIJA*. The parties to the concentration requested the transaction to be examined by the Slovenian Competition Protection Agency. However, in the course of the proceedings Slovenia disagreed with the request. As discussed above, the agreement of the relevant Member State constitutes a procedural condition for the case to be referred. Since this had not been fulfilled, the Commission issued a negative decision – refused the referral request – without conducting any further assessment of the referral requirements or factors. The decision does not elaborate on the reasons why Slovenia did not agree to the referral.

The analysis of all other referral decisions issued on the basis of Article 4 (4) EUMR leads to the conclusion that, so far, the Commission has been adopting a similar, well-settled approach when assessing reasoned submissions in all these cases. It firstly examines the fulfilment of legal requirements provided in the discussed provision; and secondly, it assesses other factors as referred to in paragraphs 19–23 of the Notice. Thus, the Commission verifies if the NCA has specific expertise to hear the case, and whether the 'one-stop-shop' principle would be preserved. None of these assessments includes an examination of any other factors, such as the independence of the named NCA.

It is worth noting that the Commission followed the same pattern in referral decisions delivered after the *Sped-Pro* judgment: Euroapotheca/Oriola[53] (referral to the Swedish NCA), *PPF/MMB*[54] (Czechia), *ITM/MESTDAGH*[55] (Belgium). Thus, to date, the *Sped-Pro* case and the assessment of the

[52] Ibid, paras 32–36.

[53] *EUROAPOTHECA / ORIOLA* (M.10677), paras 29–36 on legal requirements and paras 37–40 on additional factors.

[54] *PPF / MMB* (M.10668), paras 35–41; 42–45.

[55] *ITM / MESTDAGH* (M.10631), paras 21–30; 31–35.

independence of a NCA has not been reflected in the Commission's later decisions to refer merger cases to Member States.

Although referrals made under Article 9 EUMR are not subject to this contribution, analysis of these decisions makes it possible to conclude that the Commission does not consider in such cases a standalone independence condition. In particular, when deciding on a refusal to refer a case to a given Member State, the Commission relies on arguments such as: the margin of discretion it enjoys in these cases, the Commission's particular interest to ensure that competition is preserved in a given market or sector, the fact that the Commission itself is well placed to examine the transaction, the fact that it has already, post-notification, been investigating the transaction (including conduct of a market test or other important substantive and procedural steps), or the need to avoid additional administrative efforts for the parties, especially when they already have started complying with the procedure under the EUMR, having submitted large amounts of information, internal documents or data to the Commission.

To conclude, effective judicial protection or the independence of a NCA has not been a criterion examined by the Commission so far in the course of proceedings under Article 4 (4) EUMR. It is neither foreseen in this provision, nor discussed in the Notice. In particular, it was not applied in *PKN ORLEN/PGNiG*, even though the matter concerned two Polish companies strongly connected with the State Treasury, was highly political and took place while *Sped-Pro* was already pending before the GC as well as shortly after the controversies surrounding UOKiK's clearance of Polska Press. Additionally, until the date of handing in this article, the independence of the NCA had not been contemplated in Commission decisions following the *Sped-Pro* judgment.

IV. Implications for merger referrals

Neither the EUMR, nor Regulations 1/2003 or 773/2004 require the Commission to examine the independence of a NCA when deciding that the NCA may be more appropriate to hear a given case. However, as discussed above, in *Sped-Pro* this obligation was inferred from Article 2 TEU and the individuals' right to effective judicial protection. However, given the significant differences between the application of Articles 101–102 TFEU, on one hand, and the merger control regime, on the other, it deserves separate reflection whether these conclusions apply to referral proceedings under Article 4 (4) EUMR.

One may draw three alternative preliminary conclusions in that regard. Firstly, it follows from *Sped-Pro* that the Commission is obliged to assess the independence of the named NCA also when deciding on referral requests to that authority. Failure to fulfil this obligation constitutes grounds for an annulment of the positive referral decision. Secondly, the Commission is not under an obligation to assess the independence of a NCA, but may exercise its competence in this regard. Thus, if the lack of independence of the given NCA was the reason for refusing the referral, this factor would not constitute grounds to seek an annulment of the rejection decision by the requesting parties. Thirdly, the Commission has neither obligation, nor competence to assess the independence of a NCA in the course of referral proceedings. The refusal of a referral on this basis would, in turn, constitute grounds for an annulment of the decision. These alternative conclusions are further discussed below.

In *Sped-Pro*, Article 2 TEU and the idea that Member States share EU values, so they can mutually trust each other, was further specified with respect to three already discussed characteristics of Articles 101–102 TFEU. These were the key arguments making it possible to conclude that rule of law and the independence of a NCA should have been taken into account by the Commission, in order to guarantee effective judicial protection for individuals. However, these features do not seem to occur in the context of the application of Article 4 (4) EUMR.

Firstly, EU law does not grant NCAs competences to apply EU merger legislation. To the contrary, the result of a case referral is that the NCA applies its own, national competition law to examine the concentration. Thus, in this context, the NCA is not under an obligation to guarantee full effectiveness of any piece of EU legislation, whether on the substantive assessment of the case, or on judicial protection of individuals in the proceedings.

Secondly, contrary to the discussed Article 4 of Directive 2019/1, no provisions of EU legislation expressly require for NCAs to be independent when dealing with merger cases. Looking at this part from a more systemic viewpoint, one may conclude that such requirement results directly from Article 2 TEU. On the other hand, the lack of such requirement seems to be coherent with the fact that NCAs apply their national laws when examining the referred case. It can be argued, therefore, that inferring such requirement from general EU provisions would be disputable regarding the division of competences between the Union and its Member States.

Thirdly, a merger referral does not seem to undermine the full effectiveness of rights of the undertakings concerned. Indeed, in the discussed procedure, these are the parties to the concentration that request a referral from the Commission to the NCA before the case is even notified to the Commission.

Therefore, it is difficult to assume that the parties would be voluntarily acting to their own detriment. Moreover, even if one distinguishes individuals' rights that require protection in such matters, it follows from the Court's established case-law that EU law does not prevent entities from agreeing to limit the full effectiveness of their rights.[56] Consequently, effective judicial protection of the requesting parties does not seem to imply the obligation to assess the independence of a NCA.

However, the conclusion on effective judicial protection of the merging parties needs to be supplemented by the perspective of other undertakings potentially affected by the referral, and, more broadly, the overall Union interest in maintaining the Commission's jurisdiction over given proceedings.

The level of protection of third parties in referral cases is rather low. They normally do not participate in the proceedings in other way than providing replies to the Commission's requests for information. However, third parties do have the right to bring an action for annulment of the referral decision. To do so, they firstly need to prove their legal interest in that application.[57] In practice, such legal interest is accepted, for example, in the case of the competitors of the merging parties, as their commercial position might be affected by the Commission decision.[58] Furthermore, a third party needs to prove, as stipulated by Article 263 (4) TFEU and interpreted in well-known case law of the Court, that they are directly and individually concerned by a referral decision. In the context of merger cases and, similarly, referrals, it is the competitors[59] or potential competitors[60] of the parties, or undertakings active in upstream or downstream markets[61] that are most likely to prove their direct and individual concern.[62]

Third parties may argue that a referral of the case would imply a more lenient (for instance, unconditional clearance or moderate remedies compared to what would have been expected from the Commission's practice) approach of the NCA towards certain types of merging parties (for example, when the State Treasury is an important shareholder or the Member State has any other interest in the merger). However, the EUMR does not grant third parties

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[56] See e.g. cases C-126/97 *Eco Swiss* EU:C:1999:269; C-102/81 *Nordsee* EU:C:1982:107.

[57] Case T-79/12 *Cisco Systems* EU:T:2013:635, para 35; see also J. Faull, A. Nikpay, D. Taylor, Faull & Nikpay: *The EU Law of Competition*, (3rd edn, 2014) 5.1140.

[58] See cases T-177/04 *easyJet* EU:T:2006:187 and T-79/12 *Cisco Systems*, para 36.

[59] See cases T-2/93 *Air France* EU:T:1995:45; T-119/02 *Royal Philips Electronics* EU:T:2003:101; T-79/12, *Cisco Systems* EU:T:2013:635.

[60] Case T-114/02 *Babyliss* EU:T:2003:100.

[61] Case T-158/00 *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* EU:T:2003:246.

[62] To the effect that these conclusions also apply to referrals, see: I. Kokkoris, H. Shelanski, *EU Merger Control. A Legal and Economic Analysis* (1st edn, OUP 2014) 564.

such rights, the effectiveness of which would have been threatened by a case referral. Even if they may bring an action for an annulment of the referral decision, this takes place within the framework of Article 263 TFEU, with the primary objective to protect and observe EU law, rather than protect individual rights.[63]

Third parties could also argue that under national laws (as it stands, for example in Poland) their access to judicial review and complaints towards a clearance decision is much weaker than under EU law. This argument, however, does not seem to be very successful given settled case-law regarding Article 19 TEU and the Member States' duty to ensure effective judicial protection in their national laws, as confirmed also in the GC's conclusions on the third plea in *Sped-Pro*.

In *Sped-Pro*, these conclusions do not seem to be altered by the GC's observation on the relevance of Article 47 of the Charter and the right to an effective remedy and to a fair trial, for the effective application of Articles 101–102 TFEU. As discussed, for concentrations, the referral of a given case results in the application of national competition law to that matter. Since Union law ceases to apply, the matter will not fall within the scope of the Charter.[64] At the same time, it seems that Article 47 of the Charter does not allow the Commission to assess the third parties' perspectives on judicial remedies and fair trial under national law when the case follows Article 4 (4) EUMR proceedings.

As a result, the effectiveness of judicial protection of the merging parties, or third parties, does not seem to translate into the obligation to assess the independence of a NCA in case referrals.

However, it needs to be assessed whether Union's interest implies the obligation, or at least the competence, of the Commission to examine rule of law and independence concerns in the course of merger referral proceedings. In this context, the Union's interest could be understood broadly as a matter of public policy, and the principles of open market economy and free competition, to which the Treaty and the EUMR refer to. Such approach would thus imply a switch of perspective from the protection of the rights of individuals (as in *Sped-Pro*) to public considerations. This is, however, questionable for a number of reasons.

The first concern results from the characteristics of the referral system. The Commission's jurisdiction is based on rather technical and fixed turnover criteria, which may be verified on the basis of substantive, legal requirements included in Article 4 (4) EUMR (that the concentration may significantly affect competition in a market within a Member State which presents all the

[63] Ibid, 559.

[64] Article 51 of the Charter.

characteristics of a distinct market). Therefore, if these conditions are met, and following the principle of subsidiarity, it would be difficult to identify overall Union interest in maintaining the Commission's jurisdiction to assess a case that is substantively limited to that Member State.

Second, as merger referral results in the transfer of the competence to examine the concentration on the basis of national law, the system is based on the assumption that Union law ceases to apply if the discussed referral requirements and criteria are fulfilled, and the Commission issues a positive referral decision in this regard. Thus, one may identify a systemic assumption that no Union public policy concerns persist in concentrations affecting only a national (or narrower) market.

Third, the Commission enjoys a margin of discretion when identifying Union interest or when taking actions to ensure the effectiveness of EU law. This naturally results not only from Sped-Pro and the case-law quoted therein, but also from the Commission's general role and competence as the guardian of the Treaties. As noted by the GC, this discretion is limited by the obligation to protect the effectiveness of individuals' rights, as well as by guidelines issued by the Commission itself. However, these limitations do not seem to apply to merger referrals. Therefore, *Sped-Pro* does not seem to modify the discretion granted to the Commission in this regard.

Therefore, given all the discussed systemic differences between Articles 101–102 TFEU and case referrals under the EUMR, it seems that the *Sped-Pro* judgment should not be interpreted as implying that the Commission has the duty to examine the independence of a NCA in the course of Article 4 (4) EUMR proceedings, even if such concerns are raised.

At the same time, it does not seem that EU law would prevent the Commission from conducting an 'independence assessment' when deciding on merger referral. As recently noted by the Court, 'the European Union must be able to defend those [contained in Article 2 TEU, including the rule of law] values, within the limits of its powers as laid down by the Treaties.[65] At the same time, the EUMR grants the Commission a wide margin of discretion when examining the legal requirements and other criteria that might be relevant in a specific case. Indeed, those additional criteria are discussed in the Notice on referrals and no other factors have been reflected so far in the Commission's practice. However, this does not mean that the Notice includes an exhaustive list of these criteria and that the Commission cannot infer from the Court's case-law and the wording of the EUMR the requirement that NCAs are capable of hearing the case independently.

[65] Case C-157/21 *Poland v. European Parliament and the Council* EU:C: 2022:98, para 145.

Specifically, the referral system operates as a corrective mechanism, ensuring that a case is dealt with by the most appropriate authority. It remains, however, an exception to general rules on jurisdiction, and thus should be interpreted strictly. Therefore, the application of criteria that maintain such narrow approach would not be regarded as contrary to the principles governing the concentrations referral system.[66]

At the same time, the 'more appropriate authority' criterion may include an 'independence assessment' as long as it serves effective reattribution of jurisdiction in light of the principle of subsidiarity. Since the Commission holds primary jurisdiction over the case, it needs to have adequate tools to assess if, in specific matters, a NCA will be able to examine the concentration so that effective protection of competition would be ensured.

Therefore, the *Sped-Pro* judgment does not imply that the Commission has a duty to assess the independence of a NCA, or other rule of law concerns, when processing a referral request with respect of a given concentration. However, the *Sped-Pro* judgment should be read as confirming the Commission's competence to conduct such an assessment in a specific case. Thus, refusal to refer a case for such reasons would not constitute an infringement of the Treaties within the meaning of Article 263 TFEU, nor would it become grounds for an annulment of such decision.

V. Conclusion

To conclude, the *Sped-Pro* judgment does not seem to bring any significant change to the standard of assessment that the Commission is obliged to follow in proceedings regarding requests for case referrals with respect to concentrations. In particular, the judgment does not supplement existing merger law, nor the decisional practice of the Commission, with an obligation to examine the independence of a NCA, and other rule of law concerns, in the course of Article 4 (4) EUMR proceedings.

Given the significant differences between the characteristics and the application of Articles 101-102 TFEU and Article 4 (4) EUMR, the settled practice with respect to the latter will most likely remain the same. As discussed in this article, arguments on Article 2 TEU, which led the GC to conclude on the Commission's obligation to examine the independence of the NCA with respect to the former legal framework, do not apply directly to merger

[66] Which is in line with the postulate that the Commission shall decide on a referral 'when a compelling reason to deviate from the original jurisdiction (…) exists', R. Whish, D. Bailey, *Competition Law* (8th ed OUP) 890.

referrals. This results from the fact that post-referral, NCAs would not apply EU merger legislation, thus its full effectiveness would not be threatened. Contrary to Articles 101–102 TFEU, no specific piece of merger legislation requires for the NCAs to be independent. Additionally, a case referral would not result in undermining the effectiveness of judicial protection of the undertakings concerned. Such conclusion would not be altered when taking into consideration the interests of third parties or the overall interest of the Union.

However, *Sped-Pro* can be read as confirming that the Commission has the competence to interpret the notion of 'more appropriate authority' as including the independence of a given NCA, and thus to examine that matter in a specific case. The principles underlying the referral system require that jurisdiction is reattributed most efficiently, in light of the principle of subsidiarity and to ensure that competition is not distorted. These clearly allow the Commission to take into consideration rule of law concerns when they seem to be particularly relevant in a given case. In that respect, the judgment in *Sped-Pro* may invite the Commission to conduct such examination with respect to referral requests to Member States that have been encountering problems respecting the rule of law.

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