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Harmonisation of the Powers of NCAs in EU Member States. A Few Remarks on the Basis of the Experience of the Czech Republic and Poland After the Deadline for Transposition of the ECN+ Directive Has Passed

Table of contents

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Summary
This article critically discusses how legal frameworks in the Czech Republic and Poland correspond to the requirements of ECN+ Directive with regard to the powers of NCAs. For that purpose, the authors analyse the obligations of EU Member States – within this scope – under this directive, as well as legal frameworks in the Czech Republic and Poland. Subsequently, the article compares the manner of regulating these issues in the national legal orders of these countries to the standard required by ECN+ Directive. The aim of this publication is to verify whether, and how, these two EU Member States meet those requirements, and to determine any potential differences in the approach taken by legislators in these EU Member States.

Key words: NCAs' Powers; Competition law; Competition law enforcement; Directive (EU) 2019/1; ECN+ Directive.

JEL: K21, K42

I. Introduction

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], which came into force on 1 May 2004, introduced decentralised *ex post* enforcement of the prohibitions contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)[2]. This act obliges the competition authorities of the EU Member States (National Competition Authorities; hereinafter: NCAs) to apply Articles 101 and 102 TFEU – in parallel to national competition law – to agreements, to decisions by associations of undertakings, to concerted practices and to the abuse of a dominant position, which are capable of affecting trade between Member States[3]. Regulation 1/2003 had not, however, harmonised institutional rules, procedures and sanctions across Member States, except for the rules contained in its Articles 5 and 35(4) (Wils, 2017, p. 13).

After ten years of the enforcement of Regulation 1/2003, the European Commission (hereinafter: the Commission) summarized that thanks to this change, NCAs have become a key pillar of the application

[1] [2003] OJ L1/1, hereinafter: Regulation 1/2003.
[2] Consolidated Version [2012] OJ C326/1, hereinafter: TFEU.
[3] Article 3(1) of the Regulation 1/2003.

of EU competition rules[4]. It also emphasized that the cooperation between the Commission and the NCAs has led to a substantial level of convergence in the application of these rules but – unfortunately – divergences subsisted[5]. Regarding the powers of NCAs, it was stressed that differences remained throughout the EU[6] and that, for the purposes of effective enforcement, it is necessary to ensure that all NCAs have a complete set of powers at their disposal. These must be comprehensive in scope and effective, in particular, NCAs must have effective investigative and decision-making powers[7].

To overcome the identified problems, the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter: ECN+ Directive)[8] was adopted. Its declared objective is to ensure that NCAs have guarantees of independence, resources, as well as enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively, and that these guarantees are the same, in order to avoid different outcomes in the cases of the parallel application of national competition law and EU law[9]. This directive obliged EU Member States to harmonize, amongst others, the investigative (i.e. power to inspect business and non-business premises, requests for information and interviews)[10] and decision-making powers of the NCAs (i.e. finding and termination of infringements, interim measures and commitments)[11].

This article critically discusses how current legal frameworks in the Czech Republic and Poland correspond to the ECN+ Directive's requirements with regard to investigative and decision-making powers of NCAs. For that purpose, the authors analyse the EU obligations of Member States under the ECN+ Directive with regard to NCAs' powers as well as – within this scope – legal frameworks in the Czech Republic and Poland. Subsequently, the article compares the manner of regulating these issues in the national legal orders of these countries to the standard required by ECN+ Directive. The aim of this publication is to verify whether, and how, these two EU Member States meet the requirements placed on the powers of NCAs, and to determine any potential differences in the approach taken by national legislators.

The authors decided to focus on the above indicated Member States for the following reasons. Firstly, those two EU Member States have not transposed the ECN+ Directive within the prescribed deadline (4 February 2021)[12]. This does not, however, necessarily mean that their rules governing the powers of the NCAs were not in line with this directive from the beginning. Secondly, both of the countries joined the EU when Regulation 1/2003 was in force. That's why decentralised *ex post* enforcement of EU competition law was for them – on one hand – revolutionary[13] but – on the other – the enforcement of the prohibitions of Article 101 and 102 TFEU under the rules of

[4] Communication from the Commission to the European Parliament and to the Council 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives', COM/2014/0453 final, para 23.

[5] Ibid., para 24.

[6] Ibid., para 32.

[7] Ibid., para 34, 46.

[8] [2019] OJ L11/3–33, hereinafter: ECN+ Directive.

[9] ECN+ Directive, Recital (3) of the preamble.

[10] ECN+ Directive, Arts 6–9.

[11] ECN+ Directive, Arts 10–12.

[12] ECN+ Directive, Art 34(1).

[13] The change of the enforcement regime of the prohibitions of Article 101 and 102 TFEU was revolutionary also for those Members States that were in the EU before Regulation 1/2003 entered into force, as they were used to the previous regime which was characterised by a centralised notification and authorisation system for Article 101(3) TFEU enforcement under Council Regulation 17 First Regulation implementing Articles 85 and 86 of the Treaty ([1962] OJ 13/204) (Wils, 2017, p. 8).

Regulation 1/2003 was not influenced by a comparison between the "new" and "previous" regimes (Regulation 17/62) (see: Jurkowska-Gomułka, 2018, p. 128). Thirdly, the numbers of decisions made by the NCAs from those countries is significantly lower in comparison to NCAs from Member States that were in the EU before Regulation 1/2003 came into force[14].

This research is based mainly on the dogmatic and comparative method of analysis.

II. Transposition of the ECN+ Directive in the Czech Republic and Poland

EU Member States were obliged to transpose the ECN+ Directive into national laws by 4 February 2021. Nevertheless, not all have performed this duty on time. Until 31 December 2022, Poland, Estonia and Slovenia have not informed the Commission on their measures brought into force to comply with this Directive[15]. Interestingly, the Czech Republic informed the Commission of the state of the transposition, indicating the 62 measures taken (legal acts)[16]. However, none of them is a legal act adopted solely for the purpose of harmonizing Czech rules in connection to the obligations arising from the ECN+ Directive.

In Poland, the legislative process on the act transposing the ECN+ Directive ended with the adoption of the Act of 9 March 2023 (hereinafter: Amending Act) amending the Act on Competition and Consumer Protection and certain other acts (hereinafter: ACCP)[17] which came into force on 20 May 2023, that is, more than two years after the prescribed deadline has passed. The adoption of this act raises questions on how it has influenced the powers of the Polish NCA, in particular whether it has removed discrepancies, if they existed, or has it created new ones.

Meanwhile, work on the act transposing the ECN+ Directive in the Czech Republic has not been finished yet. The government presented the draft act to the House of Representatives on August 2022. The current status of the legislative process on the act transposing the ECN+ Directive is such that the draft passed the second reading in the Chamber of Deputies (both, a general and detailed debate) on 4 March 2023. Further discussion is possible from 19 April 2023. After the draft passes the third reading in the Chamber of Deputies, it will be approved by the Senate and signed by the President of the Czech Republic, which can be expected in the summer of this year.

III. NCAs' investigative powers

1. Initial remarks

The ECN+ Directive obliges EU Member States to equip their NCAs with the following, minimum, set of harmonized investigative powers: (1) the power to inspect business premises[18], (2) the power to inspect other premises[19], (3) the power to request information[20], and (4) the power to conduct

[14] On the basis of the statistics available at: https://competition-policy.ec.europa.eu/european-competition-network/statistics_en (13.12.2022). See also Wils, 2015, pp. 8–9.

[15] In accordance with information available at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0001 (31.12.2022).

[16] Ibid.

[17] [2023] Journal of Laws 852, hereinafter: the Amendment Act.

[18] ECN+ Directive, Art 6.

[19] ECN+ Directive, Art 7.

[20] ECN+ Directive, Art 8.

interviews[21]. It was emphasized in Recital (28) of the Preamble of this Directive that these powers are required in order to be able to effectively enforce Articles 101 and 102 TFEU. The manner of regulating those powers in the ECN+ Directive recalls Articles 17–21 of Regulation 1/2003, which grant similar powers to the Commission (Marino, 2020, p. 16).

2. Power to inspect business and non-business premises

2.1. EU legal framework

An "inspection" constitutes an investigatory tool which – on one hand – allows a competition authority to effectively obtain evidence necessary to prove a competition law infringement but – on the other – it may encroach on the right to privacy. The problem of the interference of inspections with the right to privacy of companies, and individuals and the proportionality of such interference, constitute the subject of vivid discussion in the literature (see amongst others Bernatt, 2011b, pp. 47–66; Michałek, 2014, pp. 129–157; Lorjé and Stoffer, 2021, pp. 55–64).

The wording of Articles 6 and 7 of the ECN+ Directive, which obliges EU Member States to ensure that their NCAs have the power to inspect business and non-business premises, recalls respectively Articles 20 and 21 of Regulation 1/2003. This leads to the conclusion that the desired shape of NCAs' power to inspect business and non-business premises was modelled on similar powers granted to the Commission (Marino, 2020, p. 16).

The ECN+ Directive's requirements towards the powers to inspect premises depend on the type of premise where the inspection is carried out. This act obliges EU Member States to adopt national rules allowing NCAs to interfere with the right to privacy of undertakings and associations of undertakings (inspections of business premises) to a greater degree than in the case of inspections of non-business premises. There are three primarily aspects here. First of all, NCAs shall be empowered to conduct inspections of business premises in a wider scope of situations. They shall have the power to conduct all necessary unannounced inspections of such premises for the application of Articles 101 and 102 TFEU. By contrast, in the cases of non-business premises such possibility shall be granted only if the following conditions are met jointly: (1) there is a reasonable suspicion that books or other records related to the business and to the subject matter of the inspection are being kept in such premise; and (2) if those items may be relevant to proving an infringement of Article 101 or Article 102 TFEU. Secondly, the minimum set of powers that NCAs shall have in connection to inspections of business premises are wider than in the case of inspections of other premises. The ECN+ Directive indicates the minimum set of powers that shall be granted in connection to the conduct of such inspections. In the case of inspections of both – business and non-business – premises, NCAs shall have, at least: (1) the power to enter premises (land, and means of transport); (2) the power to examine the books and other records related to the business, irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity where the inspection is carried out; and (3) the power to take or obtain, in any form, copies of, or extracts from such books or records and, where a NCA considers it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the itself NCA or at any other designated

[21] ECN+ Directive, Art 9.

premises[22]. In the case of inspections of business premises, NCAs shall also have two additional powers: (4) the power to seal any business premises and books or records for the period and to the extent necessary for the inspection; and (5) the power to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection as well as to record the answers[23]. These are the minimum required powers that NCAs should be granted. However, EU Member States are authorised to empower their NCAs to conduct also other actions, not specified in this directive. Thirdly, the ECN+ Directive allows EU Member States to decide whether unannounced inspections of business premises require prior authorization of such inspection by a national judicial authority[24]. By contrast, inspections of non-business premises cannot be carried out without such prior authorisation[25]. In addition to the minimum set of powers connected to unannounced inspection of premises, the ECN+ Directive also obliges EU Member States to provide measures that guarantee that an entity being inspected would be required to submit to such inspection. In particular, EU Member States shall ensure that where such entity opposes an inspection, NCAs shall be able to obtain the necessary assistance of the police[26].

It should also be noted that all EU Member States are signatory of the European Convention of Human Rights (ECHR), which protects the right to privacy[27], and stipulates the conditions where an interference with the right to privacy is not prohibited[28]. Such interference is allowed provided that it: (1) is in accordance with the law; (2) is necessary in a democratic society; and (3) is justified by public interest[29]. Therefore, national laws transposing the ECN+ Directive shall also comply with the requirements of the ECHR.

Due to the above reasons, while implementing and applying their legal solutions regarding inspections, EU Member States should take into consideration the jurisprudence of EU courts[30], in cases regarding inspections conducted on the basis of Commission decisions as well as the jurisprudence of European Court of Human Rights (ECtHR)[31].

22 ECN+ Directive, Art 6(1), 7(3).

23 ECN+ Directive, Art 6(1).

24 ECN+ Directive, Art 6(3).

25 ECN+ Directive, Art 7(2).

26 The directive indicates that such assistance may also be obtained as a precautionary measure (ECN+ Directive, Art 6(2), 7(3)).

27 ECHR, Art 8(1).

28 Interference with the right to privacy is not prohibited under the ECHR provided that it: (1) is in accordance with the law; (2) is necessary in a democratic society; and (3) is justified by the public interest (ECHR, Art 8(2)).

29 ECHR, Art 8(2).

30 Amongst others in *Roquette Frères*, where the Court of Justice of the European Union confirmed that the right to privacy extends, in certain circumstances, to business premises. See Case C-94/00 *Roquette Frères v. Commission* EU:C:2002:603, para 29. See also Case T-135/09 Nexans France SAS and Nexans SA v. Commission EU:T:2012:596; Joined Cases T-289, 290 and 521/11 Deutsche Bahn v. Commission EU:T:2013:404; Case T-249/17 Casino Guichard-Perrachon, Achats Marchandises Casino SAS v. Commission EU:T:2020:458; Case T-254/17 Intermarché Casino Achats v. Commission EU:T:2020:459 and Case T-255/17 Les Mousquetaires and ITM Entreprises v. Commission, EU:T:2020:460. On the protection of the privacy rights in dawn raids see also Lorjé, N. and Stoffer, A., 2021, pp. 55–64.

31 Amongst others in *Niemietz* and *Colas Est* where the ECtHR extended the right to privacy to legal persons (see *Niemietz v Germany* Application No 13710/88 [1992] 16 EHRR 97 (ECtHR), para 31 and *Société Colas Est v France* Application No 37971/97 [2003] ECHR-III (ECtHR), para 41) as well as in *Delta Pekárny* (see *Delta Pekárny A.S. v. Czech Republic* [2014] 93 ECtHR 9611). In literature based on the Delta Pekárny ruling it is underlined that EU Member States should also provide for effective measures to challenge the reasons and proportionality of inspections by competition authorities (in the form of judicial authorization or ex post facto) (Targański, 2019, p. 196).

2.2. The Czech Republic

The Czech Competition Act (hereinafter: CCA)[32] provides the possibility of conducting an inspection of business and non-business premises within the framework of its Chapter 5, which refers to proceedings before the Czech NCA[33]. The decision-making practice in the area of the power to inspect premises brought about several interesting points in the Czech Republic.

One of the most interesting Czech case-law that is related to the power of the NCA to inspect business and non-business premises is the *Delta Pekárny* case[34]. In 2005, the Chairman of the NCA confirmed, in his 2nd instance decision, the imposition of the highest possible administrative fine of 300,000 CZK (approximately EUR 12,000) on the Delta bakery. The said company violated the Law by not allowing the employees of the Czech NCA to check all business records stored in an electronic form at its premises in Prague-Vysočany in November 2003. Delta bakery further refused to submit to the inspection concerning two of the documents taken by the NCA's employees as part of their investigation. The employees of Delta bakery identified these two documents as private correspondence, even though their executives sent them to other executives of the company, and even to the general director of a competing undertaking, which was also being investigated by the NCA at that time.

Meanwhile, the subject of these two documents (e-mails) certainly did not indicate their private nature as they were entitled "Action plan 2003" and "An overview of the current composition of the bodies of the Companies which should be changed". It could be said, therefore, that these were reports with a close relationship to the company and its competitive actions, which the NCA was investigating at the time[35].

Later, the NCA issued a decision finding an agreement restricting competition and imposing a penalty. Delta appealed the decisions to the NCA, to the Regional Court in Brno, to the Czech Supreme Administrative Court and subsequently to the Czech Constitutional Court. Delta questioned the legality of obtaining evidence during their inspection and the legitimacy of its execution. According to Delta, an inspection conducted without the prior authorization of the court and without effective control by an independent authority, violated the Czech Constitution and Article 8 of the ECHR. The NCA, as well as the courts, rejected the appeals arguing that the contested inspection was lawful and that Czech law provided entrepreneurs with sufficient means to challenge the very fact of an inspection and the way in which it had been carried out. In the Delta Pekárny judgment, the ECtHR argued that in the absence of prior consent of a court to conduct an inspection by the competition authority, the protection of individual rights resulting from the initiation of a control process that is not disproportionate and justified, should be guaranteed by *ex post* judicial review. Under the Czech law, the NCA was entitled to conduct inspections in order to verify the existence of evidence of suspected anticompetitive practices, but the existing legal measures did not allow companies to judicially review the very fact of the initiation of an inspection, neither *ex ante* nor *ex post*. In this case, the notification of the inspection was authorized by the senior director of the

[32] Act No. 143/2001 Coll., on the protection of competition and on the amendment of certain laws. Hereinafter: CCA.

[33] See: CCA, Art. 21(f–g).

[34] Decision of the Czech NCA No S 233C/03-11688/2006/620 of 27 June 2006.

[35] In the relevant administrative procedure, the NCA subsequently imposed on the companies DELTA PEKÁRNY a.s., ODKOLEK a.s. and PENAM spol. s.r.o. fines in a total amount of 2.1 million CZK. In the second half of 2003, these companies acted in concert with each other to determine the selling prices of their bakery products. See: Decision of the Czech NCA No UOHS-R 20, 21, 22/2004-1249/2009/310/ADr of 2 February 2009.

Czech NCA and the notice initiating the inspection did not precisely state the facts nor the evidence on which the presumptions of an anticompetitive practice were based (Targański, 2019, p. 196). The two appeal proceedings initiated by Delta before national courts, focused on the amount of the fine imposed for the obstruction of the contested inspection, and on substantive finding of the NCA that Delta was party to an anticompetitive practice. Finally, a violation of Article 8 of ECHR was found by the ECtHR, as Czech courts did not review the reasons for the initiation of the inspection, its duration, goal, scope and necessity. As such, the intervention into Delta's rights protected under Article 8 of ECHR could not be considered as proportionate to the legitimate goal[36]. Current Czech legislation on on-site investigations, within the CCA, gives the Czech NCA significant powers in terms of the scope and method of its implementation – basically the only limit of the local inspection of business and non-business premises is the existence of a sufficient suspicion of a violation of competition rules. On the other hand, recent jurisprudence places high demands on proving the reasonableness of such suspicion. Whether the use of an inspection is appropriate in a particular case always depends on the amount and credibility of the evidence available to the Czech NCA before an inspection is carried out. While assessing whether the interest in carrying out an inspection and the interest in protecting effective competition outbalances the right to privacy and home inviolability, the reasonableness of the suspicion itself should be considered, and the likelihood that an infringement occurs, as well as how serious the practice is, how large the relevant market is, and what type of products or services may be affected. The temporal aspect should be taken into the consideration as well. As far as the right to privacy and home inviolability are concerned, courts should, within their decision-making practice consider, in particular, that the inspection carried out by Czech NCA is not as invasive as in cases carried out by criminal law enforcement authorities. Also, the sanction that the Czech NCA imposes for conduct that is investigated within a local inspection is governed by the administrative law regime and is therefore lower (Nejezchleb, 2021, p. 65).

Czech law governing its NCA's power of inspection is not entirely in line with the provisions of the ECN+ Directive because it does not include the requirement of the necessary police assistance where the investigated undertaking refuses to submit to an inspection. Unfortunately, the Czech draft law does not include such requirement either. Frankly, this omission is unfortunate for two reasons. Firstly, the provisions of the ECN+ Directive, which require police assistance during an inspection, are very similar to the requirements of Regulation 1/2003[37], which requires the necessary assistance of the police during inspections carried out by the Commission. Secondly, the Czech NCA has been trying to include a provision related to necessary assistance of the police, or an equivalent enforcement authority, into the CCA ever since 2003, when it started preparing the first amendment to the CCA aimed at ensuring its convergence with Regulation 1/2003 (Petr, 2008, p. 220). It seems, however, that even after almost twenty years of work, these attempts have not been successful. Still, the Czech Republic did already have the obligation to ensure police assistance, or an equivalent enforcement body, in relation to the investigations of the Commission

[36] *Delta Pekárny A.S. v. Czech Republic* [2014] 93 ECtHR 9611.

[37] Regulation 1/2003, Art 20(6).

according to Regulation 1/2003[38]. However, this rule has not been explicitly implemented into Czech law, and its execution in practice caused some difficulties (Petr, 2008, p. 220).

With regard to the ECN+ Directive's requirement that different NCAs can participate in their respective investigations, the Czech NCA is indeed able to participate in investigative actions taken by another competition authority as the "requesting" entity[39]. However, in order to implement the above rule, it is also necessary for the Czech NCA to be able to carry out investigative actions based on the request of another NCA. This duty is apparently fulfilled thanks to the provision of Article 20a paragraph 3 letter f) of the CCA, which authorizes the Czech NCA to "conduct an investigation", which apparently includes other investigative actions, in addition to on-site investigations.

With regard to the ECN+ Directive's requirement related to the participation of employees of other competition authority in an investigative action(s), this is already possible in relation to on-site investigations, in which "other persons authorized by the Office"[40] can also participate. However, in the case of interrogations and oral proceedings, those would not be possible according to current Czech legislation and practice. As such, this requirement of the ECN+ Directive should have been added to Czech law. However, the proposal does not bring anything new in this respect.

2.3. Poland

Polish law provides for the possibility to conduct an "inspection" (in Polish: *kontrola*) and a "search" (in Polish: *przeszukanie*) of business premises. Initially, the search was an investigative tool that could have been used during an inspection. However, due to many difficulties arising from this connection, as of 15 January 2015 the legislature decided to separate the two enforcement tools[41]. The main difference between an inspection and a search is related to the role of the authorities and the obligations of the undertaking while using each of those tools. An inspection is a tool to obtain information[42], whereas a search is a tool to find and obtain information[43]. It means that an inspection requires the cooperation between the inspected undertaking and the NCA, whereas the role of the authority conducting it is more active during a search. Therefore, a search interferes with the right to privacy more than an inspection. In the literature an inspection and a search are considered two separate enforcement instruments (Bernatt, 2011a, p. 206 and subsequent; Bernatt In Tadeusz Skoczny (ed), 2014, p. 1290 and subsequent; Materna, 2015, p. 8; Gajewska-Leite and Modzelewska de Raad, 2020, p. 33)[44]. Nevertheless, doctrine has raised the issue that the demarcation between these two tools is not clear and complete (Gajewska-Leite, Modzelewska de Raad, 2020, pp. 58–59). The Amendment Act does not contain a necessary proposal to remedy that.

Polish rules in force before the Amendment Act came into force, which govern inspections and searches, were not fully compliant with the ECN+ Directive. Primarily, there were two issues

[38] Regulation 1/2003, Art 20(6).

[39] ECN+ Directive, Art 21(1).

[40] CCA, Art 21f (2).

[41] Those changes were introduced by the Act of 10 June 2014 amending the Act on Competition and Consumer Protection, hereinafter: ACCP, and the Act – Code of Civil Procedure [2014] Journal of Laws 945.

[42] ACCP, Art 105b (1).

[43] ACCP, Art 105n (1).

[44] On the contrary: Turno and Wardęga, 2015, p. 116 who claim that in practice both inspection and search are identical and the normative differences are sham in practice.

that required legislative intervention. The first one was connected to the minimum set of powers granted to the Polish NCA – President of the Office for Competition and Consumer Protection (hereinafter: UOKiK President). In the course of both – inspections and searches – the Act of 16 February 2007 on competition and consumer protection[45] provided no legal basis for the UOKiK President to seal the inspected (searched) premises and books or records. It was, however, stipulated that the inspected (searched) party was under an obligation to provide a separate place (room) for storing documents and secured items[46]. In the guidelines published by the UOKiK President regarding searches, it was indicated that the NCA would secure access to such room by wrapping the door with a special tape[47] – a violation of such seal may be considered as preventing or hindering the conduct of a search, which may result in fines[48]. Nevertheless, this is not enough to consider that Polish law with this regard met requirements of the ECN+ Directive. Moreover, there was no sufficient legal basis for persons conducting inspections (searches) to ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter and purpose of that inspection (search). The Amendments Act introduced several changes meant to ensure Poland's compliance with the ECN+ Directive's requirements regarding its NCA's powers during inspections and searches[49]. However, the wording of Article 105b(1) point 7 of the ACCP, which was introduced to constitute the legal basis for sealing premises and books or records, fails to stipulate that seals may be placed for a period necessary for an inspection. Secondly, before 20 May 2023 there were no explicit guarantees of appropriate safeguards with respect of the right of defence. It is worth noting that the Article 105q of the ACCP indicates specific legal provisions of the Act of 6 June 1997, Code of Penal Procedure, which shall be applied to searches, but literature emphasized that such a manner of regulation does not guarantee appropriate safeguards in regard to the right of defence, including the protection of the legal professional privilege (i.a. Korycińska-Rządca, 2020, pp. 285–286, 297–300 and the references indicated therein). The Amendment Act has introduced changes in this context, however, they raise numerous reservations too (Piszcz and Petr, 2023).

Regarding the power to inspect other premises, Polish law before the entry into force of the Amendment Act provided for the possibility of a search of non-business premises. Such possibility existed if there were reasonable grounds to suppose that objects, files, records, documents and data carriers were stored in residential premises or any other premises, real estate or means of transport, and that such objects may affect the determination of facts which were material to pending proceedings[50]. However, these rules were not entirely compliant with the requirements of the ECN+ Directive. Primarily, in accordance to the rules in force, a search of non-business premises was conducted by the police[51], and the role of an authorized employee of UOKiK (and possibly other persons) consisted solely of assisting police officers (Turno, Commentary to Art 91 In: Stawicki and Stawicki (eds), 2016). By contrast, the ECN+ Directive requires that unannounced inspections

45 Consolidated text [2021] Journal of Laws 275, hereinafter: ACCP.

46 ACCP, Art. 105e(1) point 3 and 105q point 1 in the wording in force before 20 May 2023.

47 UOKiK, Guidelines for entrepreneurs – UOKiK searches (Warsaw 2019) <https://uokik.gov.pl/download.php?plik=24037> (13.12.2022), 8.

48 Ibid., 12–13.

49 See: In particular Arts 105b(1) point 7, 105b(1a), 105b(1b), 105(4) and 105q of the ACCP in the wording in force after 20 May 2023.

50 ACCP, Art 91(1) in the wording in force before 20 May 2023.

51 Ibidem.

in non-business premises shall be conducted by the NCA, with the necessary assistance of the police or of an equivalent enforcement authority[52]. Therefore, there was a need of a legislative intervention. The Amendment Act has completely changed the wording of Art 91 of the ACCP in a way sufficient to ensure Poland's compliance with the ECN+ Directive in this regard[53].

3. Requests for information

3.1. EU legal framework

Regarding the power to request for information, the ECN+ Directive obliges EU Member States to ensure that their NCAs are authorized to request relevant information from two groups of entities: (1) undertakings and associations of undertakings, and (2) any other natural or legal persons. In the case of undertakings and associations of undertakings, NCAs shall have the power to request for any information which is accessible to the entity required to provide them. However, the request shall be proportionate and shall not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU. In the case of any other natural or legal persons, the ECN+ Directive obliges EU Member States to ensure that their NCAs are empowered to request any information that may be relevant for the application of Articles 101 and 102 TFEU. The directive's requirement is that NCAs, when requesting information, shall specify the deadline that has to be reasonable[54].

3.2. The Czech Republic

In general, the Czech NCA can request information from any entity that might be necessary for the purposes of investigating whether a violation of competition law has occurred in a relevant case or not. In principle, it is at the discretion of a NCA whether, and when to request information, as well as on what facts it decides to investigate. However, the competition authority's discretion regarding the use of a given investigative power is not unlimited. It is always necessary to proceed in accordance with the legal regulation of the given investigative power, and the fundamental rights of the subjects against whom the given investigative power is used. When this investigative power is used, there might be a conflict between – on one hand – the fundamental rights of the entities that the competition authority investigates, and the general interest of the undertaking – and in maintaining effective economic competition on the market and detecting violations of competition law[55].

The CCA is already in line with these EU requirements, as is Czech judicial practice. Therefore, this ECN+ Directive's requirement is not problematic. The Czech NCA states, within its decisional practise, that as regards the cooperation of the parties during the proceedings with the NCA, such cooperation is, in itself, not a mitigating factor. However, cooperation that extends beyond by norm can be seen as mitigating circumstance, which would allow the NCA to significantly accelerate the proceedings, not in the fact that the entity in question fulfils its legal obligations properly and on time. The obligation to provide information to the NCA comes from the law, and it is therefore

52 See: ECN+ Directive, Art 7(1) and (3).

53 See: Art 91 of the ACCP in the wording in force after 20 May 2023.

54 ECN+ Directive, Art 8.

55 See the rich case law of the CJEU in relation to the investigative powers of the European Commission, for example Case C-94/00 *Roquette Frères v Commission [2002] ECR* I-09011 and Case C-583/13 P *Deutsche Bahn v. European Commission*, ECLI:EU:C: 2015:404.

an obligation for parties to provide true and correct information in a timely manner. The fact that the subject does not obstruct the proceedings is also not seen as a mitigating factor, as this is again its fully expected behaviour[56].

At the same time, Article 21e of CCA states that anyone who provides documents and information to the Czech NCA (including business records that may be important for clarifying the subject of the proceedings) is obliged to provide them complete, correct and true. Simultaneously, everyone is obliged to provide the NCA with business records upon its written request, and within the specified period. Failure to fulfil the obligation to provide the information may result in an administrative fine.

The ECN+ Directive also establishes other rules regarding a request for information[57]; however, they seem to be also based on Regulation 1/2003. For example, a request for information can cover all information that businesses have access to. The scope of the request must be reasonable and must not force the addressee to admit to a violation of competition law, which is specified in the Preamble of the ECN+ Directive, with the fact that [?] companies are obliged to answer factual questions and provide documents, which also corresponds to EU case law[58]. Czech legislation[59] meets these requirements and does not require further legislative changes. Czech courts also interpret the obligation to provide information in accordance with EU legal doctrine[60].

3.3. Poland

Even before the Amendment Act came into force, the UOKiK President had the power to request necessary information and documents from undertakings (and associations of undertakings[61])[62]. Similarly as it is in the Czech Republic, the decision as to what information is seen as necessary rested with the UOKiK President, and not the undertaking (association of undertakings) to whom the request was addressed[63]. The verification of the scope of the requested information and documents in terms of their necessity might be left to the court in appeal proceedings against the decision imposing a fine for the failure to provide the requested information and documents (Modzelewska-Wąchal, 2002, pp. 221–222; Kohutek, Commentary to Art. 50 in Kohutek and Sieradzka, 2014, p. 3; Krüger, Commentary to Art 50 in: Stawicki and Stawicki (eds), 2016, p. 3.2; Błachucki, 2012, p. 234) or against a final decision of the UOKiK President (Banasiński and Piontek, Commentary to Art. 50 in: Cezary Banasiński and Eugeniusz Piontek, 2009, p. 3). An undertaking was under an obligation to provide the requested information and documents regardless whether it was a party to the proceeding conducted by the Polish NCA or not[64]. Despite the fact that the rules governing this

56 Decision of the Czech NCA No R3,5/2015/HS-39442/2015/310/HBt of 16 November 2015, para 200.

57 ECN+ Directive, Art 8.

58 Case C-347/87 *Okrem v Commission* [1987] ECR 1989 03283.

59 CCA, Art 21e.

60 Judgment of the regional court in Brno No 62 Af 75/2010 of 3 March 2010.

61 Any reference made in the ACCP to an undertaking shall also apply to an association of undertakings except for legal provisions regarding concentrations (ACCP, Art 4 point 1 letter d).

62 ACCP, Art 50(1).

63 *I.a.* Judgement of the Polish Antimonopoly Court of 16 December 1998, XVII AMA 62/98, [2000] Wokanda No 4, item 52; judgment of the Polish Competition and Consumer Protection Court (hereinafter: SOKiK) of 11 August2003, XVII Ama 130/02 <http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000005127_XVII_AmA_000130_2002_Uz_2003-08-11_001> (5.12.2022); judgment of SOKiK of 10 May2007, XVII Ama 79/06 <http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000005127_XVII_AmA_000079_2006_Uz_2007-05-10_001> (5.12.2022). In the literature: Martysz, Commentary to Art 50, in Skoczny, Jurkowska and Miąsik, 2009, paragraph no. 3; Błachucki, 2012, p. 234; Bernatt, 2011, p. 184; Bernatt, Commentary to art 50 In Skoczny (ed), 2014, paragraph no. 9.

64 See: judgement of Antimonopoly Court of 28 June 1995, XVII AMR 14/95, [1996] Wokanda No 7; judgement of SOKiK of 10 July 2007, XVII Ama 79/06 <http://orzeczenia.ms.gov.pl/content/$N/154505000005127_XVII_AmA_000079_2006_Uz_2007-05-10_001> (5.12.2022); judgement of SOKiK of 31 January 2008, XVII Ama 32/07, <http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000005127_XVII_AmA_000032_2017_Uz_2019-10-22_001>

power had not expressly stipulated that this obligation covered only information that was accessible to such undertakings or associations of undertakings, jurisprudence has underlined that the UOKiK President cannot request information and documents if there was no legal obligation to collect or disclose them by the entity to whom the request is made. In particular, the NCA could not have demanded the preparation of analytical studies on the basis of the requested documents and information[65]. The Amendment Act has introduced an almost entirely new wording of Article 50(1) of the ACCP, but unfortunately this has not made any significant differences within the discussed scope[66]. Similarly as before the transposition of the ECN+ Directive, legal provisions in force now indicate that the request for information shall include, amongst other, the deadline for providing information, but it fails to stipulate any requirements as to the length of the time limit. It is indicated in literature that the time limit for providing information shall be appropriate and reasonable (Krüger, Commentary to Art 50 in: Stawicki and Stawicki (eds), 2016, p. 5; Bernatt, Commentary to Art 50 in Tadeusz Skoczny (ed.), 2014, paragraph no. 14). It would be recommended to expressly indicate this requirement in legal provisions. Unfortunately, the Amendment Act has not introduced any amendments within this context[67]. Moreover, the legal provisions which were in force before the transposition of the ECN+ Directive had not contained an express guarantee that such a request shall be proportionate and nt compel the addressees of the requests to admit an infringement. However, it was stressed in literature that the privilege against self-incrimination in proceedings before the UOKiK President had to be guaranteed (Turno, 2009, pp. 44–48; Bernatt, 2011a, pp. 189–191; Turno, Commentary to Art 105b in Stawicki and Stawicki (eds), p. 1; Krüger, Commentary to Art 50 in: Stawicki and Stawicki (eds), 2016, p. 3.2; Banasiński, Piontek (n 76), pp. 3–4; see also Król-Bogomilska, 2002, pp. 221–224 and 267–268; Bernatt, Commentary to Art 50 in Tadeusz Skoczny (ed.), 2014, paragraph no. 22). Within this scope, there are significant doubts as to whether the Amendment Act ensures Poland's compliance with this requirement of the ECN+ Directive. In particular, the Amendment Act has kept the previous solution authorising the UOKiK President to require "all necessary information", without stating that this request should be proportionate[68]. Whereas in the case of the requirement of the ECN+ Directive that the request for information shall not compel the addressees of the requests to admit an infringement of Articles 101 and 102 TFEU, the Amendment Act introduced a rule which guarantees the right to remain silent for natural persons if providing the requested information would endanger this person or their spouse, ascendants, descendants, siblings and relatives in the same line or degree, as well as persons in the relationship of adoption, custody or guardianship, as well as cohabiting person, under criminal liability[69]. Moreover it added the provision that the information and documents provided to the UOKiK President by a natural person cannot be used against the abovementioned persons in the enforcement proceedings conducted by this authority[70]. As a result, the guarantee that the request shall not compel its addressees to admit an infringement, have a very limited scope (Piszcz and

(5.12.2022); judgement of the Court of Appeal in Warsaw of 1 March 2012, VI ACa 1033/11, LEX no 1642375; judgement of the Court of Appeal in Warsaw of 17 May 2016, VI ACa 630/15, LEX no 2079176.

65 Judgment of the Antimonopoly Court of 6 September 1993, XVII AMR 22/93, Legalis.

66 See: Art 50(1) of the ACCP in the wording in force after 20 May 2023.

67 See: Art 50 of the ACCP in the wording in force after 20 May 2023.

68 See: Art 50(1) of the ACCP in the wording in force after 20 May 2023.

69 See: Art 50(4) of the ACCP in the wording in force after 20 May 2023.

70 See: Art 50(5) of the ACCP in the wording in force after 20 May 2023.

Petr, 2023). Therefore, there are serious doubts as to whether it ensured full compliance with the ECN+ Directive.

Regarding the power to request information from other natural or legal persons, before the Amendment Act came into force, the only legal provision that related to obtaining information from entities without a status of an undertaking (i.e. from other natural or legal persons) was Article 50(3) of the ACCP. According to this provision, any person was entitled to submit, in written form, on their own initiative or upon a request of the UOKiK President, explanations concerning the essential circumstances of a given case[71]. Such cooperation with the NCA was voluntary, which means that the entity requested on the basis of Article 50(3) of the ACCP could not have been fined for failure to submit their explanations (Banasiński and Piontek 2009, p. 5; Róziewicz-Ładoń, 2011, p. 144; Kohutek and Sieradzka, 2014, p. 4; Bernatt, 2014 In Skoczny (ed) paragraph no. 29). Moreover, the UOKiK President had the right to obtain documents relevant to the case from third parties, pursuant to Article 84 of the ACCP in relation to Article 248 of the Act of 17 November 1964 – Code of Civil Procedure[72]. It seemed that this regulation was in line with EU requirements. The Amendment Act empowered the UOKiK President by giving the NCA the right to request all necessary information (whereas the ECN+ Directive only requires information that may be relevant for the application of Articles 101 and 102 TFEU) from entities without the status of an undertaking[73]. However, the right to impose a fine on a natural person who has not provided the requested information or provided false or misleading information has not been introduced.

4. Interviews

4.1. EU legal framework

Regarding the power to conduct interviews, the ECN+ Directive requires EU Member States to ensure that their NCAs are, at least, empowered to summon for an interview any representative of an undertaking or association of undertakings, any representative of other legal persons, and any natural person, where such representative or person may possess information relevant for the application of Articles 101 and 102 TFEU[74].

4.2. The Czech Republic

In general, Czech legislation is already in line with the requirement of the ECN+ Directive to summon any representative of an undertaking/any representative of other legal persons/any natural person, where such representative or person may possess relevant information[75]. Still, this requirement is not directly included in Czech competition law provisions. Instead, it can be found in Czech General Law on Administrative Law[76] that allows the testimony of a witness, interrogations, etc. Anyone who is not a party to the proceedings is required to testify as a witness and must tell the truth and must not withhold anything. At the same time, witnesses may not be questioned about

[71] It should be noted that the narrow subjective scope of the power to request information on the basis of Art 50(1) was criticized in literature: Bernatt, 2011a, pp. 154–167; Stankiewicz, 2012, pp. 46–56.

[72] Consolidated version [2021] Journal of Laws 1805 as amended, hereinafter Polish Code of Civil Procedure.

[73] Art 50(1) of the ACCP in the wording in force after 20 May 2023.

[74] ECN+ Directive, Art 9.

[75] Ibidem.

[76] Act No 500/2004 Coll, Art 55.

classified information protected by a special law, and may not be required to be a witness if this would put himself or a person close to them at risk of prosecution for a criminal or administrative offense. Moreover, Czech Law on Offence Liability specifically regulates the interrogation of a party to the proceedings[77], in a similar way as the Czech General Law on Administrative Law. As mentioned, and in line with these EU requirements, Czech administrative law states that all kind of evidences may be used to prove or established factual conditions, and which are not obtained or carried out in violation of legal regulations[78]. As such, it is not problematic that the above-mentioned requirements of the ECN+ Directive are not part of the Czech draft.

In relation to evidence, the ECN+ Directive requires admissibility of evidence before NCAs[79]. Basically, all types of proofs are admissible as evidence before NCAs, including documents, oral statements, electronic messages, recordings, and all other objects containing information, irrespective of their form and the medium on which the information is stored. Even records obtained secretly by natural/legal persons may be used as evidence according to the ENC+ Directive Preamble, which states that it is possible to use records secretly taken by legal or natural persons who are not public authorities[80]. Czech courts have already approved such evidence in the past[81]. Ultimately, the subsidiary use of general Czech doctrine on criminal law, which allows the use of audio and video recordings as evidence in criminal proceedings, is also not excluded (Zaoralová, 2017, p. 28).

4.3. Poland

The legal solution in force before 20 May 2023 empowered the UOKiK President to summon individual witnesses to appear for an interview[82]. However, the rules on conducing interviews were not fully convergent with the ECN+ Directive in terms of the safeguards concerning the right of defence. Unfortunately, the Amendment Act has not provided a satisfactory remedy in this context (Piszcz and Petr, 2023).

IV. NCAs' decision-making powers

1. Initial remarks

The ECN+ Directive requires that NCAs are equipped with decision-making powers in three areas: (1) finding and termination of infringements; (2) interim measures, and (3) commitments.

2. Finding and termination of infringements

2.1. EU legal framework

Regarding the finding and termination of infringements, the ECN+ Directive obliges EU Member States to ensure that when NCAs find an infringement of Article 101 or 102 TFEU, they may, by decision, require the undertakings and associations of undertakings concerned, to bring that infringement to an end, and to impose proportionate and necessary behavioural or structural

77 Act No 500/2004 Coll, Art 55.

78 Act No 500/2004 Coll, Art 51.

79 ECN+ Directive, Art 32.

80 ECN+ Directive, preamble para 73.

81 Decision of the Czech Supreme Administrative Court No 8 AFs 40/2012 of 31 October 2013.

82 ACCP, Art 52 in the wording in force before 20 May 2023 and Art 84 of ACCP in relation to Art 261 of the Polish Code of Civil Procedure.

remedies, if appropriate[83]. NCAs shall also be able to find that an infringement of these prohibitions has been committed in the past[84]. The directive requires also for NCAs to be obliged to inform the Commission if they decide that there are no grounds to continue enforcement proceedings (of which the Commission was informed in accordance with Article 11(3) of Regulation 1/2003), and as a result close such enforcement proceedings[85].

2.2. The Czech Republic

Member States shall ensure that, if their NCAs detect a competition law violation, they have the power to order the concerned undertaking to end the violation. As regards the possible methods of doing so stated in such a decision, this does not change the fact that NCAs can decide on infringements of EU competition law. However, NCAs cannot decide that a violation has *not* occurred[86]. Regarding the authorization of the Czech NCA to impose corrective measures, these, according to the ECN+ Directive, should take the form of not only behavioural but also structural remedies. The CCA anticipates remedial measures in general[87], but does not mention their possible structural form, nor has it decided in the past to impose structural remedial measures (in matters related to prohibited agreements or to the abuse of dominance). Even though Czech literature (Kindl and Munková, 2018) does not rule out the possibility of using structural corrective measures within Czech law, this would be a fundamental intervention in the functioning of competition law, and should be amended in the draft. Unfortunately, the proposal does not do so, nor does it comment on this circumstance.

The Directive also requires that NCAs are able to establish that a breach of EU competition law has occurred in the past[88]. This most likely means that NCAs have the possibility to decide, even in negotiations that have already been terminated but are not time-barred, which Czech law of course allows. On the other hand, the Commission can also decide on actions that are already time-barred[89].

2.3. Poland

The Polish legal solution in terms of finding and the termination of infringements was generally in line with the requirements of the ECN+ Directive. Even before the Amendment Act, the UOKiK President had the power to issue a decision determining a practice to be restricting competition, if he/she found an infringement of the prohibitions specified in Articles 101 or 102 TFEU, or its national equivalents (i.e. Articles 6 or 9 ACCP)[90]. In cases when the practice concerned has not ceased before the decision is issued, the Polish NCA had to order such practice to be discontinued. Such an order should have constituted a part of the decision deterring a practice as restricting

83 ECN+ Directive, Art 10(1).

84 Ibidem.

85 ECN+ Directive, Art 10(2).

86 Case C-375/09 *Tele2 Polska*, ECLI:EU:C:2011:270.

87 CCA, Art 20.

88 ECN+ Directive, Art 10(1).

89 Case T-370/09 *GDP Suez v Commission*, ECLI:EU:T:2012:333.

90 ACCP, Art 10(1).

competition[91]. It was an undertaking that should have proven that the prohibited practice ceased[92]. Those rules remain unchanged. There was only one contested issue the compliance of which was not ensured. Namely, Polish law did not provide for a provision that would have imposed on the UOKiK President the obligation to inform the Commission of the closure of the enforcement proceedings before the NCA on the basis that there were no grounds to continue them; this extended to those proceedings that the Commission had been informed of by the NCA in accordance with Article 11(3) of Regulation 1/2003. The execution of this obligation, arising from Article 10(2) of the ECN+ Directive, required legislative intervention. The Amendment Act established the duty upon the UOKiK President to inform the Commission about the discontinuation or termination of the Polish proceedings for an infringement of Articles 101 or 102 TFEU due to the lack of grounds for continuing them, in the event of a prior notification of the Commission on this matter[93]. Therefore, the Amendment Act ensured the compliance with the EU requirements towards finding and the termination of infringements.

3. Interim measures and their expedited judicial review

3.1. EU legal framework

The obligations arising from the ECN+ Directive towards interim measures are modelled on similar powers of the Commission. Regulation 17/62 did not expressly confer a power to order interim measures on the Commission. Nevertheless, this has not prevented the ECJ in *Camera Care* to infer this power as well as acknowledge that it is an indispensable tool for the effective enforcement of competition law[94]. The Commission's power to order interim measures was expressly enshrined as secondary law in Regulation 1/2003. According to its Article 8(1), the Commission may order interim measures if the following conditions are met cumulatively: (1) there is a finding of *prima facie* infringement of Articles 101 or 102 of the TFEU, and (2) there is a need to intervene urgently due to the risk of a serious and irreparable damage to competition, which justifies the imposition of measures before the prohibition decision is issued. These measures have to be limited in time and observe the principle of proportionality[95].

Interim measures constitute a powerful and intrusive tool enabling a competition authority to command undertakings to perform or refrain from certain acts before the final decision in their case is adopted, i.e. at a stage where the outcome of the investigation is still uncertain. Due to such nature of this power, the ECJ concluded already in *Camera Care* that it should be used with caution[96].

In over 40 years of enforcement, the Commission itself has ordered interim measures only in very few cases[97], which may question their significance (Farinhas, 2022, pp. 1713–1714)[98]. On

91 ACCP, Art 10(2).

92 ACCP, Art 10(3).

93 See: Art 87(4) of the ACCP in the wording in force after 20 May 2023.

94 Case 792/79 R, Camera Care, EU:C:1980:18, paras 17–19.

95 Regulation 1/2003, Art 8(2).

96 Case 792/79 R, Camera Care, EU:C:1980:18, paras 17–19.

97 Decisions of 18 Aug. 1982, IV/30.696 Ford; Decision of 29 July 1983, IV/30.698 ECS/AKZO; Decision of 29 July 1987, IV/32.279 BBI/B&H; Decision of 26 March 1990, IV/33.157 Ecosystem/Peugeot IV; IV/34.174 Decision of 11 June 1992, IV/34.174 Sealink/B&I; Decisions of 25 March 1992, IV/34.072 Mars/Langnese; Decision of 16 May 1995, IV/35.388 ICG/CCI Morlaix; Decision of 3 July 2001, COMP D3/38.044 NDC Health/IMS Health; Decision of 16 Oct. 2019, AT.40608 Broadcom.

98 On the possible reasons why the Commission has stopped to use this power see Kadar, 2021, pp. 444–445.

16 October 2019, the Commission, acting for the very first time on the basis of Article 8(1) of the Regulation 1/2003, ordered interim measures concerning Broadcom. This decision has caused vivid discussion in literature about the future of interim measures (Mantzari, 2020; Kadar, 2021; Masquelier, 2021; Farinhas, 2022).

The ECN+ Directive obliges EU Member States to empower their NCAs to order, by decision, the imposition of proportionate interim measures on undertakings and associations of undertakings. Such possibility shall be granted at least in "urgent" cases, which pose the risk of serious and irreparable harm to competition, on the basis of a *prima facie* finding of an infringement of Article 101 or Article 102 TFEU. Interim measures shall apply either for a specified time period, which may be renewed in so far as necessary and appropriate, or until the final decision is taken. The imposition of interim measures shall be communicated to the European Competition Network[99]. EU Member States shall also provide an expedited appeal procedure, which makes it possible to review the legality (in particular proportionality) of the imposed interim measures[100].

3.2. The Czech Republic

The CCA is silent on the point of interim measures. Within the Czech legal system, there is a possibility of imposing an interim measure by administrative judiciary[101], but rapid judicial review may not be guaranteed. In Czech law, neither the General Administrative Law[102], nor the Administrative Procedure Code[103] provide the possibility of an accelerated review. It would thus be appropriate to deal with it within the draft. Unfortunately, the proposal does not do so. Conversely, in the past, preliminary measures were reviewed as a matter of priority in administrative judiciary[104], but the 2011 amendment to the law removed this "acceleration" from the law.

3.3. Poland

Even before the Amendment Act, the UOKiK President was empowered to order, by decision, the imposition of interim measures. Such a decision might have been adopted if, in the course of antitrust proceedings, it has been rendered plausible that any further application of the alleged practice might have caused serious threats to competition that would be difficult to remedy later. Prior to issuing such decision, the party concerned had no right to express its standpoint as to the evidence and materials gathered, or demands submitted[105]. Such a decision should have specified the period for which it was binding, which could not gone beyond the time the decision was issued concluding the proceedings regarding the given case[106]. However, the specified period could have been extended by way of another decision[107]. Regarding the duty of Member States to ensure that the legality of the imposed interim measures can be reviewed in expedited appeal procedures, the Polish solution – unlike the Czech one – stated that in the event that an appeal

[99] ECN+ Directive, Art 11(1).
[100] ECN+ Directive, Art 11(2).
[101] Act No 500/2004 Coll., Art 61.
[102] Act No 500/2004 Coll.
[103] Act No 150/2002 Coll.
[104] Act No 150/2002 Coll. in the version in force until 2011, Art 56(1).
[105] ACCP, Art 89(1).
[106] ACCP, Art 89(2).
[107] ACCP, Art 89(3).

was filed against such a decision, the UOKiK President should have forwarded the appeal, with the case files, to the court within 10 days of the receipt of the appeal[108]. Subsequently, the court of first instance should have reviewed the appeal within two months of the day the UOKiK President had forwarded the appeal[109]. Taking into consideration the real length of court proceedings in Poland, these rules could be deemed as ensuring an expedited appeal procedure. In this sense, Polish rules were indeed in line with the ECN+ Directive. However, one may doubt whether this solution was sufficient to guarantee that the review of the legality of interim measures was, in fact, fast enough. First of all, Polish rules did not provide for any consequences of failing to meet those deadlines. Secondly, the parties might have filed an appeal against the judgment of the court of first instance and the relevant rules did not provide for a deadline for the court of second instance to make its decision. At the same time, filing an appeal should not stay the execution of the contested decision on interim measures[110]. These rules remain unchanged. The previous legal solution did not oblige the UOKiK President to inform the European Competition Network of the imposition of interim measures. The Amendment Act introduces such duty[111].

4. Commitments

4.1. EU legal framework

The ECN+ Directive requires that EU Member States provide legal rules that empower, within enforcement proceedings, their NCAs to make, by decision, commitments offered by the investigated undertakings or associations of undertakings binding. Such a commitments decision may be adopted after formally or informally consulting other market participants. The commitments shall meet the concerns expressed by the NCA and its decision has to be adopted for a specified period of time, and shall lead to the definitive closure of the proceedings[112]. NCAs shall be empowered with effective tools to monitor the implementation of commitments[113]. NCAs shall be authorised to re-open enforcement proceedings in three situations only: (1) where there have been material changes to any of the facts on which the commitment decision was based; (2) where undertakings or associations of undertakings act contrary to their commitments; or (3) where a commitment decision was based on incomplete, incorrect or misleading information provided by the parties[114].

4.2. The Czech Republic

The Czech draft deals with the issue of commitments and brings the Czech form considerably closer to the EU requirements[115].

The CCA includes the institution of commitments since its first amendment in 2004, and was fully inspired by Regulation 1/2003, which the CCA essentially copies[116]. However, while in the practice of the Commission decisions related to commitments are frequent, in the practice

108 ACCP, Art 89(5).

109 ACCP, Art 89(6).

110 ACCP, Art 89(1).

111 See: Art 89(4a) of the ACCP in the wording in force after 20 May 2023.

112 ECN+ Directive, Art 12(1).

113 ECN+ Directive, Art 12(2).

114 ECN+ Directive, Art 12(3).

115 Art 7(2) and Art 11(3) of the CCA proposal.

116 Act No 304/204 Coll. which amends Act No143/2004 on the protection of competition and on the amendment of certain laws.

of the Czech NCA the total number of proceedings related to commitments is relatively low (Petr and Zorková, 2018). That could be caused by the different understanding of the institution of commitments in the Czech Republic and in EU, which has already been pointed out in Czech literature (Petr, 2019).

Differences in the Czech and EU legal regulation of commitments did not have to be a problem, because the Member States generally benefit from procedural autonomy under EU law. Still, the EU model of commitments can be considered more effective than the Czech model (Ibid, p. 7).

However, the ECN+ Directive requires that the institution of commitments in national law corresponds to the same institution under Regulation 1/2003[117]. This is not sufficiently taken into account in the Czech draft.

First of all, already in the past, Czech commentators came to the conclusion that for the proper transposition of the ECN+ Directive provisions on commitments, it would be necessary to delete a part of the CCA. The requirements has to be eliminated whereby the NCA has to verify whether, or not there had been no significant distortion of competition, and that all participants always have to submit proposals jointly. As far as the decisional practice of the NCA is concerned, the authority should also stop tying commitments to the notification of reservations and formalize the "market testing" of commitments (Petr, 2019).

Currently, the Czech draft still requires that in the case of multiple participants in competition law proceedings, there must be a proposal submitted jointly by all participants, which does not follow the EU requirements and which, in our opinion, practically excludes the possibility of commitments in the case of prohibited agreements as well. In addition, participants in the proceedings have to start behaving in accordance with the proposal of their commitments immediately after making the proposal, without knowing whether or not the NCA will actually accept their proposal or not[118]. This might further reduce undertakings' motivation to propose commitments.

The other Czech draft condition is that commitments may be submitted in writing by all parties up to 15 days from passing on reservations which the ECN+ Directive does not require. Lastly, the Czech proposal does not mention market testing either, which could be seen as a shortcoming as well.

4.3. Poland

The Amendment Act has not introduced any changes to the rules governing commitments decisions. The UOKiK President is empowered to make, by decision, commitments offered by undertakings binding. Such decision can be adopted if, in the course of antitrust proceedings, it is rendered plausible that the prohibitions referred to in Articles 101 or 102 of the TFEU or in its national equivalents (i.e. Article 6 or 9 of the ACCP) have been infringed and the undertaking has agreed to take or cease certain actions aimed at ending such infringements or remedying the effects thereof. A commitment decision can be issued also in the case where the undertaking has ceased the infringement and agrees to remedy the effects of that infringement[119]. The UOKiK President

[117] ECN+ Directive, Art 12.

[118] Art 7(3) and Art 11(4) of the CCA proposal.

[119] ACCP, Art 12(1).

may set a time limit for the fulfilment of the commitments[120]. A commitment decision imposes upon its addressee an obligation to provide, within fixed time limits, information regarding the stage of the implementation of the commitments[121]. Where a commitment decision is issued, the UOKiK President cannot impose a financial penalty upon the given undertaking, nor the managing persons of it[122]. There are three situations where a commitment decision may be revoked. The decision may be revoked by the UOKiK President acting *ex officio* where: 1) the decision was issued on the basis of false, incomplete or misleading information or documents; or 2) the undertaking has not implemented the commitments or obligations[123]. Those two situations do not require the consent of the undertaking. In the third one, 3) a commitments decision may be revoked upon the undertaking's consent where circumstances which were a major consideration in the issuance of the decision have changed[124]. In the case where the decision is revoked, the UOKiK President shall rule on the merits of the case and is empowered to impose financial penalties in accordance with general rules[125]. Those rules are supplemented by the guidelines regarding commitment decisions[126] where the UOKiK President presented some clarifications of the NCA's practise. In particular, the guideline states that a commitment decision will not, in principle, be issued in the cases of the most severe competition-restricting agreements, because of their negative impact on the functioning of the market and significant economic benefits for the participants of such agreements[127]. Despite the non-binding nature of the guidelines, the UOKiK President declared therein that they will be applied since they reflect the manner of application of those rules by this authority[128].

V. Conclusions

Despite the fact that both – the Czech Republic and Poland – have failed to adopt proper legal acts aimed at ensuring the compliance of their national laws with the requirements of the ECN+ Directive on time, the analysis contained in this paper proves that the vast majority of the national requirements regarding the powers of their NCA are in line with this Directive (and in the case of Poland – were in fact also in line before the Amendment Act came into force). This might arise from the fact that both countries joined the EU on 1 May 2004 and that they had modelled their national competition law enforcement systems on the system followed by the Commission. Nevertheless, the analysis has also revealed certain areas that required both of the national legislators to take action.

In terms of investigative powers, the rules in force in the Czech Republic and in Poland even before the ECN+ Directive granted their NCAs all investigative powers required by the EU. However, they were not fully in line with the requirements of the ECN+ Directive. In Poland, the main issues

120 ACCP, Art 12(2).

121 ACCP, Art 12(3).

122 ACCP, Art 12(4).

123 ACCP, Art 12(5).

124 ACCP, Art 12(6).

125 ACCP, Art 12(7).

126 UOKiK, Guidelines on the issuance of a commitment decision on competition-restricting practices and practices infringing collective interests of consumers (Warsaw 2015) <https://uokik.gov.pl/download.php?plik=17177> (20.04.2023).

127 Ibid., 5.

128 Ibid., 1–2.

in this regard were related to the powers in the course of an inspection and a search, power to request information, and to the safeguards with respect to the right of defence. In the Czech Republic, there was – and still is – a need to ensure that its NCA is able to obtain the necessary assistance of the police during an inspection.

In terms of decision-making powers, Polish law was generally in line with the requirements of the ECN+ Directive. In particular, even without the adoption of a legal act aimed solely at transposing the ECN+ Directive, the UOKiK President has had the three decision-making powers required by this directive. The only issue that needed to be amended within this scope was the adoption of a legal provision ordering the UOKiK President to notify the Commission about the closure of the enforcement proceedings with respect to those proceedings that the NCA notified the Commission about in accordance with Article 11(3) of Regulation 1/2003. The Amendment Act ensured the compliance with this requirement. By contrast, in terms of the decision-making powers, the Czech Republic needs to introduce changes regarding commitment decisions. The Czech draft deals with the issue of commitments and brings the Czech institution considerably closer to the EU requirements. However, it was recently noted that when it comes to the decision-making powers of the Czech NCA, in accordance with the requirements of the ECN+ Directive, legislative changes will be necessary regarding the accelerated review of decisions on interim measures, on commitments decisions, but also structural remedial measures (Petr, 2020). However, the draft has not provided many of the required changes. Hence, regarding the Czech Republic, it is fair to summarize that in all of the three mentioned areas related to decision-making powers, we have certain doubts about the full compatibility of the draft Czech law with the requirements of the ECN+ Directive.

In conclusion, it seems that the adoption of a legal act meant to transpose the ECN+ Directive into Polish law, has not dramatically changed the rules governing its NCA's powers. Overall, the Polish Amendment Act did not fulfil its potential. Similarly, in the Czech Republic – one should not expect that the amendments which are going to be introduced in order to transpose the ECN+ Directive will significantly change the powers of the Czech NCA. Nevertheless, in the case of the Czech Republic, it must be admitted that today's Proposal has noticeably „moved in a better direction" compared to the Original Proposal from 2020 and that the Czech NCA took into account a number of objections expressed by experts concerning its earlier version. Hopefully, taking into consideration the fact that the legislative process in the Czech Republic has not been completed yet, there is still a chance that the deficiencies mentioned in this paper will be properly corrected.

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