

## Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings

by

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### *Abstract*

The general rule concerning the application of EU law in the Member States is that, unless the procedural issues are directly regulated in EU primary or secondary law, the Member States possess a so-called ‘procedural autonomy’. This rule applies fully to national antitrust proceedings, where the presumed infringement may affect trade between EU Member States (decentralised EU antitrust proceedings).

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However, the procedural guarantees offered to undertakings in EU antitrust proceedings before the European Commission, often referred to the undertakings' 'rights of defence', also form a part of the procedural *acquis* of EU law. This article examines the question whether that procedural *acquis*, stemming mainly from EU courts' jurisprudence and formulated with regard to the proceedings before the European Commission, should be applied as a standard in national (i.e. Polish) antitrust proceedings where EU law applies.

### *Résumé*

L'application du droit de l'Union européenne requiert la mise en oeuvre du principe de l'autonomie procédurale. Celui-ci signifie qu'à supposer qu'un problème procédural n'ait pas été réglé par le droit communautaire originaire ou dérivé, les États membres sont compétents pour le régler. Ce principe s'applique pleinement aux procédures de concurrence dans lesquelles la violation présumée est susceptible de produire des effets sur les échanges commerciaux entre les États membres («procédure communautaire décentralisée en matière de concurrence»). Cependant, les garanties procédurales dont les entreprises disposent en cours de procédures de concurrence se déroulant devant la Commission européenne et qu'on définit généralement comme «droits à la défense», constituent également une partie de l'acquis procédural communautaire. Le présent texte tâche de répondre à la question de savoir si cet acquis procédural, résultant de la jurisprudence des juges communautaires et concernant les procédures qui se déroulent devant la Commission européenne, doit être un standard pour les procédures de concurrence internes où l'on applique les textes juridiques de l'UE.

**Classifications and keywords:** rights of defence in EU competition proceedings; procedural autonomy in EU law; harmonization of procedural rules; fundamental rights in EU competition proceedings.

## I. Introduction

Regulation 1/2003<sup>1</sup> provides that the application of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) constitutes a joint responsibility of the European Commission and the national competition authorities<sup>2</sup>. A proceeding for infringement of Article 101 or 102 TFEU can

<sup>1</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

<sup>2</sup> Articles 4 and 5 of Regulation 1/2003. M. Bernatt treats the EU and national law (regardless whether substantive or procedural) as 'one legal system' – see M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 25. Cf

be conducted either by the European Commission (known as a ‘centralized EU antitrust proceeding’), or by a national competition authority (known as a ‘decentralized EU antitrust proceeding’<sup>3</sup>). In both proceedings, the European Commission and the national competition authorities would apply the same norms of substantive EU competition law, using however different procedural rules, different catalogues of sanctions, and differing standards of legal protection for undertakings. The decentralization of the application of EU competition law thus links the application of a variety of national procedures (currently twenty-seven). It is uncertain if this decentralization should be accompanied by a legislative or judicial harmonization of the standards of legal protection of undertakings involved in proceedings, both centralized and decentralized, concerning infringements of EU competition law<sup>4</sup>.

The aim of this article is to analyse the scope of the principle of national procedural autonomy insofar as it is applicable to undertakings’ EU rights of defence in decentralised EU competition proceedings, without however dwelling extensively on the underlying jurisprudence and doctrine of the rights of defence, as that would require a much broader analysis than the scope of this text allows<sup>5</sup>. The main issue addressed in this article is whether the procedural

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also: K. Kohutek, ‘Stosunek między art. 81 i 82 Traktatu a krajowym prawem konkurencji (reguły konwergencji)’ (2006) 4 *Przegląd Ustawodawstwa Gospodarczego* 14–20; M. Kolasiński, ‘Influence of the General Principles of Community Law on Polish Antitrust Procedure’ (2010) 3(3) *YARS* 29–51; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję*, Warszawa 2011, p. 107. Polish antitrust rules can be applied in parallel: M. Krasnodębska-Tomkiel, ‘Przeciwdziałanie praktykom ograniczającym konkurencję – art. 81 i 82 TWE a krajowe prawo antymonopolowe’ (2005) 7 *Przegląd Prawa Handlowego* 27.

<sup>3</sup> In Poland the competent authority is the President of the Polish Competition and Consumer Protection Office (UOKiK President), acting on the basis of the Act of 16 February 2007 on the protection of competition and consumers (Journal of Laws 2007 No. 50, item 331, as amended; hereafter, UOKiK Act). According to Article 3 of Regulation 1/2003, the UOKiK President would apply Article 101 or 102 TFEU if a presumed infringement of either of those provisions affects trade between Member States; cf. A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1173; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 72; K. Kowalik-Bańczyk, ‘Pojęcie wpływu na handel w decyzjach Prezesa UOKiK’ (2010) 5 *Europejski Przegląd Sądowy* 42.

<sup>4</sup> M. Kolasiński is of the opinion that national competition authorities should refer to the jurisprudence of the ECJ concerning the application of EU competition law, rather than to national law – M. Kolasiński, ‘Influence of the General Principles of Community Law on Polish Antitrust Procedure’ (2010) 3(3) *YARS* 33. A. Jurkowska states that the present UOKiK Act reflects the EU standards of procedure [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1165–1166, 1178.

<sup>5</sup> For an overview of the broad problems concerned with this issue, see: I. Van Bael, *Due Process in EU Competition Proceedings*, 2011; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008.

*acquis* formulated by the Court of Justice of the European Union (ECJ)<sup>6</sup> with regard to proceedings before the European Commission, should be included as a standard in national antitrust proceedings where EU law applies. As will be shown, one can find arguments both for and against alignment of the procedural requirements in both EU and national antitrust proceedings, when the national proceedings deal with the application of EU law. The preliminary assumption would be that the alignment of national procedural rules, as far as rights of defence standards is concerned, seems unavoidable, as the lack of such alignment might be contrary to both the constitutional principle of non-discrimination and to the EU principle of *effet utile*. However, the practice of the last seven years, during which the decentralised system of application of EU antitrust law has been functioning, does not confirm this hypothesis.

## II. Procedural autonomy

The notion of procedural autonomy appeared in the doctrine of European Community law in the 1970s<sup>7</sup>. While it was and is rarely referred to by the ECJ under this name, the broad application of this principle has been visible in its jurisprudence ever since<sup>8</sup>. The principle of procedural autonomy implies that unless the procedural issues are directly regulated in the EU primary

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<sup>6</sup> According to Article 19(1) of the Treaty establishing the European Union (TEU) ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts’. The jurisprudence cited in this text covers the judgments of the Court of Justice and of the General Court. Those courts are referred to as ‘ECJ’ or ‘EU Courts’.

<sup>7</sup> The first to use this designation was: J. Rideau, ‘Le rôle des États membres dans l’application du droit communautaire’ (1972) *Annuaire Français de Droit International* 884 ; as noted by: V. Couronne, ‘L’autonomie procédurale des États Membres de l’Union européenne à l’épreuve du temps’ (2010) 3–4 *Cahiers de droit européen* 273, 282. The judgments almost always invoked to illustrate the state of autonomy are: 33/76 *Rewe*, ECR [1976] 1989, para. 5; 45/76 *Comet*, ECR [1976] 2043, para. 13. Cf the broader comments on ECJ jurisprudence in: M. Bobek, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’, [in:] B. de Witte, H. Micklitz (eds.), *The European Court of Justice and Autonomy of the Member States*, Intersentia 2011, p. 306. There are various definitions of this principle – cf. the broad presentation of different approaches in: N. Póltorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, pp. 62–73; M. Domańska, ‘Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności’, [in:] A. Wróbel, M. Szwarz-Kuczer, K. Kowalik-Bańczyk (eds.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom II. Zasady-orzecznictwo-piśmiennictwo*, Warszawa 2007, pp. 326–357.

<sup>8</sup> Its first use in a judgment was C-201/02 *Delena Wells*, ECR [2004] I-723. The Advocates General, however, started to use it quite regularly since 1994. For an overview cf. V. Couronne, ‘Autonomie procédurale...’, p. 284.

or secondary law, the Member States possess this so-called ‘procedural autonomy’<sup>9</sup>. Put differently, the Member States remain competent to independently legislate on procedural issues so long as this possibility has not been pre-empted by the European Union<sup>10</sup>. This gives each Member State the freedom to use its own solutions in applying EU law in the absence of specific EU procedural rules pre-empting this discretion<sup>11</sup>. Procedural autonomy is as well a direct consequence of the fact that the EU legal order is an incomplete legal order, in that it does not contain exhaustive legislation on procedural issues. Nina Póltorak refers to this situation as a ‘delegated enforcement’ model, stating that the EU law is mainly enforced in the Member States in accordance with the national rules of enforcement<sup>12</sup>. Andrzej Wróbel stated in 2005 that the principle of procedural autonomy is a concept concerned with the creation of law (legislation), not its application<sup>13</sup>. If one maintains this position, it would mean that the ECJ’s jurisprudential *acquis* concerning the procedural standards applied in EU competition proceedings are not directly binding on the Member States, as that *acquis* stems mainly from ECJ judgments and is only partly codified in either primary or secondary EU law.

A procedural autonomy so defined is both conditional and limited. It is conditional because it depends on the ‘lack of exercise of competences’ by the EU<sup>14</sup>. This raises the question whether EU judicial activity (i.e. the decisions of the ECJ) would constitute an ‘exercise of competence,’ i.e. whether the requirement of ‘EU activity’ is strictly limited to legislative activity. The existing jurisprudence would rather indicate that the steps to be taken by the EU must be legislative and not judicial only<sup>15</sup>. However the two sources of law cannot be so easily separated, and the national competition authorities,

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<sup>9</sup> Cf D. Miąsik, ‘Zasada efektywności’, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom I*, Warszawa 2010, p. 240.

<sup>10</sup> In this respect there is a concept referring to this principle a ‘procedural competence’. The notion was first used by: W. van Gerwen, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501; M. Domańska, ‘Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego’, [in:] C. Mik (ed.), *Zasady ogólne prawa wspólnotowego*, Toruń 2007, p. 124; N. Póltorak, *Ochrona uprawnień...*, p. 73.

<sup>11</sup> V. Couronne, ‘L’autonomie procedurale...’, p. 276.

<sup>12</sup> N. Póltorak, *Ochrona uprawnień...*, p. 38.

<sup>13</sup> A. Wróbel, ‘Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej’ (2005) 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 41.

<sup>14</sup> M. Domańska, ‘Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego’, [in:] C. Mik (ed.), *Zasady ogólne...*, pp. 111, 115; A. Wróbel, ‘Autonomia proceduralna...’, p. 36; M. Kaszubski, ‘Dochodzenie roszczeń opartych na prawie wspólnotowym a autonomia proceduralna państw członkowskich – przegląd orzecznictwa’ (2004) *Studia Prawno-Europejskie* 282.

<sup>15</sup> 35/76 *Simmenthal*, ECR [1976] 1871.

looking to follow EU law, should not ‘drift around’ the whole judicial *acquis* on the rights of defence. This, for the time being, seems to be the case in practise.

In addition to being conditional, the procedural autonomy is also by definition limited. The solutions adopted by the Member State have to be in alignment with two principles: the national provisions cannot render the EU norms obsolete (principle of effectiveness), and they cannot place national claims in a better position than the EU ones (principle of equivalence)<sup>16</sup>. This, in turn, implies (or may imply) an obligation on the part of the Member State to undertake some legislative activity to harmonise its national law provisions with at least these two principles<sup>17</sup>. Many commentators underscore the fact that it is mainly the principle of effectiveness that is invoked in the ECJ’s jurisprudence; equivalence is much less exploited<sup>18</sup>. The ECJ’s application of these two limiting principles to procedural autonomy demonstrates yet again that the jurisprudential activity of the European Court of Justice itself introduces uncertainty in the (seemingly) clear-cut definition, based in part on the lack of legislative activity by the EU.

### **III. Procedural autonomy in national antitrust proceedings where EU law is applied (decentralised EU proceedings)**

The modernization of EU competition law has rendered the application by national authorities of Articles 101 and 102 TFEU much more common than before the entry into force of Regulation 1/2003. However, Regulation 1/2003 contains very few procedural rules for the national authorities. It is mainly concerned with the procedures for proceedings in front of the European Commission. It thus covers the centralized proceedings in some detail, while leaving it to the national legislators to decide questions of procedure in decentralized EU antitrust proceedings (when the national competition authorities apply Article 101 or 102 TFEU).

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<sup>16</sup> P. Oliver, ‘Le règlement 1/2003 et les principes d’efficacité et d’équivalence’ (2005) 3–4 *Cahiers de droit européen* 351–394, M. Domańska, ‘Miejsce zasady autonomii...’, p. 115. Some authors question the reasonability of those principles as self-excluding – M. Bobek, ‘Why there is no principle...’, p. 305 – and see under their application a struggle to find a balance between the legitimate interests of the EU and those of a Member State, p. 312.

<sup>17</sup> Even though those principles were mainly directed towards the national courts and other national organs applying EU law. In the longer term, however, a state of breach of EU law would have to be amended by legislative activity. The limitations on procedural autonomy can concern a proceeding of administrative nature: C-453/00 *Kühne & Heitz*, ECR [2004] I-837; C-392/04 *i-21 Germany*, ECR [2006] I-8559.

<sup>18</sup> V. Couronne, ‘L’autonomie procédurale...’, p. 278.

There are, however, a few important exceptions to this ‘silence’ in Regulation 1/2003: Article 5 (containing the list of decisions to be taken in the application of Article 101 or 102 TFEU); Article 11 (concerning cooperation between the European Commission and the national competition authorities); and Article 12 (concerning the exchange of information between the European Commission and the national competition authorities). All three of these articles contained in the Regulation have recently been the object of interpretation by the ECJ in light of the procedural autonomy principle. In the ECJ’s preliminary judgment in case *C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*.<sup>19</sup>, the Court stated that the Article 5 of Regulation 1/2003 contains an exhaustive list of decisions that a national competition authority might issue in the application of Article 101 or 102 TFEU, and thus it precludes the possibility of a national competition authority issuing decisions stating ‘non-infringement’ of Article 102 TFEU. While the ECJ refers to procedural autonomy as the concept by which the independent actions of national competition authorities should be assessed, such autonomy ends at the point where the uniform application of Article 101 or 102 TFEU is endangered<sup>20</sup>. In the case *C-17/10 Toshiba*, both Advocate General Kokott and the ECJ have stated, *inter alia*, that Article 11(6) of Regulation 1/2003 contains a rule of procedure such that the national competition authorities are automatically deprived of their competences to apply Article 101 or 102 TFEU as soon as the European Commission initiates proceedings for the adoption of a decision under the Regulation 1/2003<sup>21</sup>. This does not, however, definitively preclude further proceedings in the application of national competition law<sup>22</sup>. In the case *C-360/09 Pfeleiderer v Bundeskartellamt*, the ECJ interpreted Articles 11 and 12 of Regulation 1/2003 in the context of national proceedings concerning access to the file of a proceeding on the imposition of a fine (including the leniency procedure documents) which was sought in order to prepare a civil action for damages in front of a German court. The ECJ stated that such access might be granted to ‘a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages’ but on

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<sup>19</sup> Not yet reported, available at [www.curia.eu](http://www.curia.eu). As to Article 5 of Regulation 1/2003, cf A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1175.

<sup>20</sup> Paras. 27–28 of the judgment. Cf. K. Kowalik-Bańczyk, ‘Jednolite stosowanie unijnego prawa konkurencji jako ograniczenie dla autonomii proceduralnej krajowych organów ochrony konkurencji – glosa do wyroku C-375/09 Prezes UOKiK p. Tele 2 (obecnie Netia)’ (2012) 2 *Europejski Przegląd Sądowy* 39–45.

<sup>21</sup> Para. 74 of the opinion. *C-17/10 Toshiba Corporation e.a. v Úřad pro ochranu hospodářské soutěže* of 14 February 2012, not yet reported, para. 91. Article 75(1) of the UOKiK Act regulates this hypothesis; cf A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1323.

<sup>22</sup> Para. 79 of the opinion.

**the basis of national law**, with due consideration for the ‘interests protected by European Union law’<sup>23</sup>. This last judgment is of particular interest for the problem analysed in this article, as it clearly allows the EU Member States **to retain their procedural provisions** when applying Regulation 1/2003, even if it implies a different level of protection of the undertakings concerned<sup>24</sup>.

With the exception of the provisions mentioned above (Articles 5, 11, and 12 of the Regulation), Regulation 1/2003 does not regulate the procedural solutions in **decentralised** EU antitrust proceedings. In particular, the important problem of procedural guarantees for the undertakings taking part in the decentralized EU antitrust proceedings is left untouched by Regulation 1/2003<sup>25</sup>. The only exception is contained in Article 12(3), which excludes the use of certain information obtained from a national competition authority or from the European Commission if it might lead to criminal sanctions for an individual, unless the methods of gathering such information are equivalent in both authorities (the one transmitting and the one obtaining the information)<sup>26</sup>. This provision has not yet been an object of judicial interpretation.

<sup>23</sup> Para. 32 of the judgment.

<sup>24</sup> For instance, in Poland information obtained in the course of a leniency application is not revealed to the other parties of the antitrust proceeding, whereas they are revealed in the EU: cf. the broader analyses in: M. Bernatt, *Sprawiedliwość proceduralna...*, p. 170; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 206.

<sup>25</sup> One exception might be seen in point 5 of the preamble to Regulation 1/2003, which states: ‘In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law’. In fact this fragment of the preamble confirms *in fine* the principle of procedural autonomy. Due regard should be taken of the fact that the burden of proof is an issue of substantive, not procedural, law.

<sup>26</sup> Article 12(3) provides: ‘Information exchanged pursuant to para. 1 can only be used in evidence to impose sanctions on natural persons where: - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 [101] or Article 82 [102] of the Treaty or, in the absence thereof,- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions’. As to this provision, cf. P. Oliver, ‘Le règlement...’, p. 370; A. Jurkowska, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1176; M. Bernatt, [in:] T. Skoczny, T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, pp. 1305–1306; K. Różiewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 181.



#### IV. Rights of defence in EU antitrust proceedings before the European Commission (centralised EU proceedings)

The notion of rights of defence is initially a jurisprudential concept, defined mainly in proceedings connected with judicial control of the legality of European Commission decisions, led by the ECJ (Article 263 TFEU). It was developed by the ECJ as a ‘general principle of law’, stemming from the common constitutional traditions of Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the jurisprudence of the ECJ, the rights of defence were to be protected in all proceedings in which the European Commission directs towards an individual allegations which, if confirmed, might lead to negative legal consequences for this individual<sup>27</sup>. In brief the main elements of this notion, having special regard to competition enforcement proceedings, include: 1) right to be heard<sup>28</sup>; 2) right to know the allegations directed against an undertaking from the outset of the proceedings; 3) legal professional privilege protecting communications with an ‘outside lawyer’<sup>29</sup>; 4) privilege against self-incrimination<sup>30</sup>; 5) right to legal aid<sup>31</sup>; 6) protection of

<sup>27</sup> E. Barbier de la Serre, ‘Procedural Justice in the European Community Case-law concerning the Rights of Defence: Essentialist and Instrumental Trends’ (2006) 2 *European Public Law* 233; K. Lenaerts, J. Vanhamme, ‘Procedural Rights of Private Parties in the Community Administrative Process’ (1997) 34(3) *Common Market Law Review* 544.

<sup>28</sup> 17/74 *Transocean Marine Paint v Commission of the European Communities*, ECR [1974] 1063; 85/76 *Hoffmann-La Roche v Commission of the European Communities*, ECR [1979] 461; 136/79 *National Panasonic v Commission of the European Communities*, ECR [1980] 2033, para. 21; T-352/94 *Mooch Domsjo v Commission of the European Communities*, ECR [1998] II-1989, paras. 63, 73-74; C-65/02 P *ThyssenKrupp v Commission of the European Communities*, ECR [2005] I-6773, para. 92; C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, para. 44. For a broader treatment of this right as a right separate from the right of defence, see: M. Kolasziński, ‘Influence of the General Principles...’, pp. 36–39; M. Bernatt, *Sprawiedliwość proceduralna...*, pp. 99–150.

<sup>29</sup> 155/79 *AM & S Europe Limited v Commission of the European Communities*, ECR [1982] 1575, para. 27; T-125/03 *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission of the European Communities*, ECR [2007] II-3523.

<sup>30</sup> 374/87 *Orkem v Commission of the European Communities*, ECR [1989] 3283, paras. 28–31; T-34/93 *Societe Generale v Commission of the European Communities*, ECR [1995] II-545, paras. 73–74; T-305/94, T-306/94, T-307/94, T-313/94 a T-16/94, T-318/94, T-325/94, T-328/94, T-329/94 i T-335/94 *LVM v Commission of the European Communities*, ECR [1999] II-931, paras. 445–447, 449; C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, paras. 34–35; C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland e.a. v Commission of the European Communities*, ECR [2004] I-123, paras. 65, 207–208; cf. also point 23 of the preamble to the Regulation 1/2003.

<sup>31</sup> 46/87 and 227/88 *Hoechst v Commission of the European Communities*, ECR [1989] 2859, para. 16; 85/87 *Dow Benelux v Commission of the European Communities*, ECR [1989] 3137, para. 27.

confidential information<sup>32</sup>; 7) right to privacy; 8) access to the file<sup>33</sup>; 9) right to use one's own language in the relations with the European Commission. This set of procedural guarantees granted to an undertaking in EU antitrust proceedings is designated by the EU courts as 'rights of defence'. Though they mainly stem from the EU courts' jurisprudence, they have also been partly codified in the EU secondary law or in non-binding documents (such as Guidelines), but only for the centralised EU competition proceedings. Since 1 December 2009, a new element of the puzzle has appeared – the Charter of Fundamental Rights of the European Union (Charter)<sup>34</sup> has acquired legally binding force as part of EU primary law. Article 48(2) of the Charter includes the right of defence as one of the specifically protected guarantees. This provision is very short and gives no hints as to what would be its actual scope. The 'explanations to the Charter'<sup>35</sup> state only that it 'is the same as Article 6(2) and (3) of the ECHR'. This line of construction would imply that it is reserved for 'judicial' proceedings and not strictly enforceable in a proceeding in front of the European Commission as a non-judicial, administrative body. The use of the notion 'anyone who has been charged' in Article 48(2), could also be interpreted as limiting the scope of application of this guarantee to proceedings that would qualify as 'criminal'. So one might wonder if it will be fully applied to antitrust proceedings, which are perceived in EU law mainly as 'administrative' proceedings. However the European Court of Human Rights (hereafter, ECtHR), in its *Menarini v. Italy* judgment<sup>36</sup>, has recently qualified a national antitrust proceeding, even in its administrative part taking place in front of the Italian Competition Authority, as 'criminal'<sup>37</sup> for the purposes of applying Article 6 ECHR. This implies that

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<sup>32</sup> C-407/04 P *Dalmine v Commission of the European Communities*, ECR [2007] I-829, paras. 46–48; C-411/04 P *Salzgitter Mannesmann v Commission of the European Communities*, ECR[2007] I-959, paras. 40–44; T-474/04 *PerganHilfsstoffe fur industrielleProzesse v Commission of the European Communities*, ECR [2007] II-4225, para. 78.

<sup>33</sup> C-194/99 P *Thyssen Stahl v Commission of the European Communities*, ECR [2003] I-10821, paras. 30-31; T-25/95 *Cimenteries CBR i in. v Commission of the European Communities*, ECR [2000] II-508, para. 142.

<sup>34</sup> Charter of Fundamental Rights of the European Union, OJ [2010] C 83/389.

<sup>35</sup> Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/2. According to Article 6(1) TEU '(...) The rights, freedoms and principles in the Charter shall be interpreted (...) with due regard to the explanations referred to in the Charter, that set out the sources of those provisions'.

<sup>36</sup> ECtHR judgment of 11 September 2011, *Menarini Diagnostics S.R.L. v. Italy*; cf M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 57.

<sup>37</sup> The discussion concerning the character of antitrust proceedings and sanctions is not new. Cf: M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym*, Warszawa 2001, pp. 188–202. See also M. Król-Bogomilska and A. Błachnio-Parzych in this issue.

Article 48(2) of the Charter could be construed as covering all EU antitrust proceedings, regardless of whether they take place at the centralised or decentralised level.

One additional factor should be mentioned which magnifies the significance of interpreting Article 48(2) in light of the ECHR. According to Article 6 TEU, the European Union attained the legal competence to join the European Convention on Human Rights and Fundamental Freedoms. Negotiations are currently underway and it seems realistic to assume that sooner rather than later the EU will become a party to the Convention. Thus, the ECJ jurisprudential *acquis* on rights of defence would have to be, so it seems, complemented by the guarantees stemming from Article 6 ECHR. This would even further extend the scope of protection of undertakings in antitrust proceedings, as Article 6 ECHR covers, *inter alia*: the right of being informed on the essence and merits of the accusation, right to obtain time to prepare one's defence, right to defend oneself personally or by a representative, connected with the right to legal aid; right to hear the evidence of defence witnesses on the same footing as the accusation witnesses; use of free translation and/or interpretation services in cases where the accused does not understand or does not speak the language of the court.

In addition, the Charter contains a fairly new right known as the 'right to good administration' (Article 41 of the Charter)<sup>38</sup>, which corresponds partly to the ECJ's procedural *acquis* on the rights of defence, as it covers, e.g. the right to be heard, the right of access to one's file, and the right to obtain reasons for a decision. The right to good administration can be perceived as the equivalent of the right of defence in administrative proceedings<sup>39</sup>.

The as-yet open scope of application of Articles 41 and 48(2) of the Charter can only increase the impact of the existing jurisprudence on the rights of defence on the definition of individual guarantees within the context of fundamental rights.

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<sup>38</sup> K.-D. Classen, *Gute Verwaltung im Recht der Europäischen Union. Eine Untersuchung zu Herkunft, Entstehung und Bedeutung des Art. 41 Abs. 1 und 2 der Europäischen Grundrechtscharta*, Berlin 2008; A. Dauter-Kozłowska, 'Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji', [in:] C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, Toruń 2009, p. 337; A.I. Jackiewicz, *Prawo do dobrej administracji jako standard europejski*, Toruń 2008.

<sup>39</sup> AG Kokott sees in Article 41(2) and 48(2) of the Charter two complementary parts of the right of defence in EU law, cf AG Opinion in the case C-109/10 P *Solvay v Commission of the European Union*, para. 152.

## V. Application of the *acquis* ‘rights of defence’ in decentralised EU antitrust proceedings

If one fully applies the principle of procedural autonomy as defined at the outset of this text, it should be presumed that the national competition authorities **apply their own procedural rules in decentralised EU antitrust proceedings**<sup>40</sup>. There is no direct obligation to apply the ECJ jurisprudential *acquis* on the rights of defence, which has been developed in the context of centralised EU antitrust proceedings (for instance, as far as legal professional privilege is concerned). This position seems to be confirmed by the recent *Pfleiderer* judgment, where the German procedural rules were less protective for the undertakings involved in a leniency procedure than the EU rules.

However, such a lack of harmonization of procedural issues at the EU and national levels might give rise to two important consequences for undertakings in Poland. First, it carries the risk of inconsistent application of EU substantive competition law provisions. Secondly, it makes the protective guarantees for undertakings different depending on the level of proceedings (national or European). As to this latter point, it will be seen that the level of protection at the national level might be either higher or lower in comparison to the EU standards. This divergence allows some to argue that the need for alignment of procedural rules is not self-evident.

### 1. Arguments for application of the *acquis* ‘rights of defence’ in national proceedings with an EU element

Despite the procedural autonomy principle, there are arguments which would support the application of the *acquis* rights of defence in national proceedings with an EU element. The main argument for application of the procedural *acquis* rights of defence in EU decentralised proceedings is that it secures the coherence and transparency of the procedural rules applied towards undertakings, regardless of the level (national or European) of application of EU competition law. Otherwise an undertaking would enjoy a different level of protection depending on which organ (the European Commission or a national competition authority) initiates proceedings against it. Application of the jurisprudence of EU courts regarding the rights of defence might also be motivated by reference to Article 4(3) TEU (ex. Article 10 TEC) – the so-called ‘loyalty clause’ of Member States towards the European Union,

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<sup>40</sup> C-550/07 P *Akzo Nobel v Commission*, not yet reported, available at: [www.curia.eu](http://www.curia.eu), para.113.

which implies the broadest possible obligation to assure the efficiency of EU norms.

Article 6 TEU would also seem to support the argument for the application of this ECJ judicial *acquis*. The rights of defence form part of the general principles of EU law which should be protected both by the EU and the Member States applying EU law. Similarly, Article 51 of the Charter provides that ‘the provisions of this Charter are addressed (...) to the Member States only when they are implementing Union law’. This is arguably the strongest textual argument for the application of the ECJ *acquis* on rights of defence in decentralised EU antitrust proceedings. The purely internal situations would be left outside of this obligation. Maciej Bernatt argues that the procedural standards developed as general principles of EU law by the European Courts should also be applied in national proceedings, because they also stem from Article 6 ECHR<sup>41</sup>. It seems however that the scope of the judicial *acquis* on rights of defence and Article 6 ECHR are not completely identical and analogous, as Article 6 ECHR is applicable only to ‘criminal’ proceedings, even if construed in a broad manner (as in the *Mennarini* judgment).

One might also argue that such alignment is the only solution consistent with the principles of the Polish Constitution. As already indicated, any different solution would imply the possibility of different treatment of undertakings depending only on the presence or lack of a ‘Union’ element in the proceedings – thus clashing with the principle of non-discrimination. Dawid Miąsik points out also that such a divergence in the treatment of Polish undertakings in European and national proceedings might lead to a breach of the constitutional principle of freedom of entrepreneurship (Article 22 of the Polish Constitution)<sup>42</sup>.

From the perspective of a Polish undertaking, the application of the EU *acquis* on rights of defence would be particularly useful in those instances where such a solution would grant Polish undertakings a higher level of protection than that stemming from the Polish rules. Several examples may serve to illustrate this. For instance, an undertaking participating in Polish antitrust proceedings can only demand confidentiality of the business information it submits, and not of other potentially confidential information<sup>43</sup>.

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<sup>41</sup> M. Bernatt, *Sprawiedliwość proceduralna...*, p. 81. Similarly: B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Komentarz do ustawy o ochronie konkurencji i konsumentów*, Warszawa 2010, p. 1064.

<sup>42</sup> D. Miąsik, ‘Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts’ (2010) 3(3) *YARS* 15.

<sup>43</sup> M. Bernatt, ‘Right to be Heard or Protection of Confidential Information? Competing Guarantees of Procedural Fairness in Proceedings Before the Polish Competition Authority’ (2010) 3(3) *YARS* 65; G. Materna, ‘Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK’ (2008) 4 *Przegląd Prawa Handlowego* 32.

If one were to apply the solutions stemming from EU law, this additional category of documents would be protected, since all documents containing ‘confidential information’ are protected. Secondly, the Polish provisions do not contain regulations on the privilege against self-incrimination<sup>44</sup> or on the legal professional privilege<sup>45</sup> similar to those stemming from ECJ’s *acquis*. Evidence gathered in breach of those privileges, and protected according to EU law, may still be used in Polish antitrust proceedings, including those which can be qualified as decentralized EU proceedings. Thirdly, no procedural protection is given to undertakings in explanatory proceedings (in Polish: *postępowania wyjaśniające*)<sup>46</sup>, whereas according to the ECJ’s jurisprudence at least some of the rights of defence should be protected even before the formal commencement of an official proceeding against a concrete undertaking<sup>47</sup>. Fourthly, according to Article 73(2) of the 2007 Polish act on the protection of competition and consumers, the information gathered in one proceeding conducted by the President of the Polish Competition Authority (UOKiK President) might be used in other proceedings in front of this same organ<sup>48</sup>. Even though Article 73(6) of the same Act obliges the UOKiK President to inform the undertaking on the use of such documents gathered elsewhere, this is still a much less protective solution than the one applied in EU law, where such evidence would need to be gathered in each case individually. Fifthly, in Polish antitrust proceedings the Order initiating the proceeding (in Polish: *postanowienie*) does not have to contain either factual or legal reasons<sup>49</sup>. It only indicates the initial presumptions or objections of the UOKiK President. This is thus a much less protective and less informative instrument for the

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K. Różewicz-Ładoń, [in:] *Postępowanie przed Prezesem...*, pp. 174–175, 196, lists all other information that could be protected in the proceedings in front of the UOKiK President, i.e. banking information or insurance information.

<sup>44</sup> Broader: M. Bernatt, *Sprawiedliwość proceduralna...*, p. 232; cf. Article 50(1) of the UOKiK Act. However a witness in a proceeding conducted by the UOKiK President might invoke Article 265 § 1 of the Code of Civil Procedure and refuse to testify on the grounds indicated in this provision.

<sup>45</sup> For the definition and scope of both those privileges in EU law, cf. B. Turno, A. Zawłocka-Turno in this issue.

<sup>46</sup> K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 97, states that this lack of an obligation to grant to the undertakings concerned any access to the documents etc. greatly enhances the efficacy of the proceeding.

<sup>47</sup> 46/87 *Hoechst AG v Commission of the European Communities*, ECR [1987] 1549.

<sup>48</sup> M. Bernatt, *Sprawiedliwość proceduralna...*, p. 145; K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, pp. 123–124.

<sup>49</sup> K. Różewicz-Ładoń, *Postępowanie przed Prezesem...*, p. 117, 120–121 citing *a contrario* Article 124 § 2 of the Code of Administrative Procedure.

parties against whom proceedings are commenced than the ‘statement of objections’ required in the EU centralised proceedings<sup>50</sup>.

On the other hand, as is pointed out mainly in the following section, the degree of protection of undertakings in EU antitrust proceedings might in some aspects be *lower* than the protection granted to them by Polish law. Such examples constitute an argument for retaining the national procedural autonomy rather than implementing a strict alignment of procedures.

## **2. Arguments *against* application of the *acquis* ‘rights of defence’ in national proceedings with an EU element**

Despite the soundness of the arguments presented above, there are also arguments against the alignment of national procedures with the EU model. First of all, there is no legal basis for this type of harmonization. Even if Article 105 TFEU is viewed as the natural legal basis for the few procedural solutions enumerated in Regulation 1/2003 (see section III above), it is generally excluded that the EU would impose a unique procedural framework for national antitrust proceedings.

Secondly, the procedural *acquis* concerning the rights of defence has been developed by the EU Courts in proceedings under Article 263 TFEU on the control of legality of decisions issued by the European Commission. Unlike the cases based on Article 267 TFEU (preliminary questions), the statements of the ECJ do not constitute a ‘binding inspiration’ aimed at the administrative agencies and courts of the EU Member States. Rather, they are directed to the European Commission and indeed forced it to change its administrative practise.

Thirdly, as already mentioned, some national rules might be more favourable for undertakings than the procedural solutions of EU law, such as, for instance, the question of judicial authorisation for inspections (searches). In EU proceedings such judicial authorisation is not required unless the inspections take place in private premises. Also the Polish model of access to the case file might be perceived as more advantageous to undertakings than the European one, inasmuch as there is no general exception of access to the internal documents of the institution<sup>51</sup>.

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<sup>50</sup> Broader and critically on Polish practice: M. Kolasiński, ‘Influence of General Principles...’, p. 36.

<sup>51</sup> M. Bernatt, *Sprawiedliwość proceduralna...*, p. 121.

### 3. Should the *acquis* on ‘rights of defence’ be respected in purely national proceedings?

It seems logical that if, as prescribed in Article 3(1) of Regulation 1/2003, the substantive EU norms are applied in national proceedings, the procedural solutions applied should also be aligned to European standards. The more controversial issue is whether such alignment should take place in purely internal situations. As Dawid Miąsik indicates, such internal situations are becoming more and more ‘unionized’, but in a selective manner<sup>52</sup>. This practice of haphazard application or non-application of European solutions does not enhance the legal security of undertakings. Therefore some authors, like Maciej Bernatt, are of the opinion that the similarity of the substantive competition rules should also imply an alignment of procedural standards at both the European and national levels. He argues that when the UOKiK President (Polish national competition authority) applies Article 101 and/or Article 102 TFEU, he should also apply the European procedural standards<sup>53</sup>. This opinion has not, however, been fully confirmed by the Polish jurisprudence, even to the extent of requiring identical interpretation or application of substantive EU competition norms. The Polish Supreme Court stated in 2006 that even where the material norms are identical in their appearance, in purely internal cases the EU antitrust law serves only as ‘a source of intellectual inspiration, example of legal reasoning and understanding of certain legal institutions, which might be helpful in interpreting the provisions of Polish law’<sup>54</sup>. Yet on the other hand the same Supreme Court recognised a ‘factual harmonisation’ of purely internal rules and stated that the Polish courts are obliged to fully recognise the *acquis communautaire* in the application of analogous provisions of national law<sup>55</sup>. Thus one might state that the Supreme Court is vacillating on the existence and scope of its potential obligation to apply EU norms to purely internal situations.

<sup>52</sup> D. Miąsik, ‘Solvents to the Rescue...’, p. 25.

<sup>53</sup> M. Bernatt, *Sprawiedliwość proceduralna...*, p. 331; in the same way: B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Komentarz...*, Warszawa 2010, p. 982.

<sup>54</sup> Judgment of the Supreme Court of 9 August 2006, III SK 6/06; setting forth a position repeated in: judgment of the Supreme Court of 6 December 2007, III SK 16/07; judgment of the Supreme Court of 3 September 2009, III SK 9/09 (cited by: D. Miąsik, ‘Solvents to the Rescue...’, p. 14).

<sup>55</sup> Resolution of the Supreme Court of 23 July 2008, III CZP 52/081; see D. Miąsik, ‘Solvents to the Rescue...’, p. 15; A. Jurkowska-Gomułka, ‘Głosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08. W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję’ (2010) 5 *Europejski Przegląd Sądowy* 43; M. Sieradzka, ‘Głosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08’, LEX/el., 2008.



## VI. Conclusions

The question whether the procedural *acquis*, formulated with regard to the proceedings before the European Commission, should be applied as a standard in national (i.e. Polish) antitrust proceedings where EU law applies, cannot be answered in a clear-cut manner. First, it seems that there is no need for legislative harmonisation of the Polish procedural norms with the standards set in the jurisprudence or the binding norms of EU primary or secondary law if that *acquis* concerns proceedings in front of the European Commission only. An analogous application of certain solutions is in principle possible, but not necessary. The *Tele 2* case gives a clear indication **where** such a freedom of a Member States ends: the EU standard should be applied **if the uniform application of EU norms is endangered**. Thus, it is not the legal protection of undertakings in antitrust proceedings, but the interest of European Union in the consistent and uniform application of EU law that requires Member States to back away from the procedural autonomy rule. In order to understand this rather surprising conclusion, one has to understand also that the rights of defence, being based on general principles of EU law, have been defined on a case-by case basis and are sometimes quite vague<sup>56</sup>. They were ‘created’ or ‘extracted’ to resolve recurrent problems with the fairness of procedures in front of the European Commission. They were woven from the general principles of law extracted from the legal traditions of the EU Member States, adapted as it seemed fit for the resolution of a concrete dispute before the EU Courts. They were not perceived as forming a coherent general system of procedure to be followed in every EU proceeding regardless of its level (national or European).

This moderate response to the problem posed in this article – distinguishing between the *possibility* to apply EU standards *generally*, and the *obligation* to apply them if *the uniformity of EU law is at stake*, might however be undergoing critical re-examination due to the changes introduced by the Treaty of Lisbon. The direct application of the provisions of the Charter of Fundamental Rights, together with the EU’s likely accession to the European Convention on Human Rights, might shed a different light on the issue of the Member States’ procedural autonomy in national antitrust proceedings where EU law applies. The Member States might be forced to adapt their antitrust procedures to the requirements of both the ECJ and ECtHR jurisprudence,

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<sup>56</sup> T. Koopmans, [in:] ‘Judicial activism and procedural law’ (1993) 1 *European Review of Private Law* 74, while analyzing the growing importance of supreme or constitutional courts in the different legal systems, underlines that such courts are asked to find workable solutions to the problems given to them. This is why they refer to principles of law, which leave them with a ‘considerable amount of freedom’.

because the notions used in the Articles of the Charter that reflect the rights of defence [Articles 41(2) and 48(2) of the Charter] are construed in light of the existing jurisprudence. National authorities would almost certainly have to follow the European standards where the EU law is applied. In my opinion the procedural autonomy should never prevail in cases where the application of ECJ's *acquis* might grant a higher level of protection to undertakings.

One should also consider that the procedural autonomy of the European Union itself might be limited by its accession to the more universal European Convention on Human Rights and Fundamental Freedoms. Paradoxically this accession might lead to an approximation of the provisions on procedural guarantees to the requirements of Article 6 ECHR, which all the Parties to the Convention have to respect in their national law, and which concerns criminal proceedings. This would quite likely reopen the long-lasting debate on the character of antitrust proceedings as such. Both the European Court of Human Rights<sup>57</sup> and the Polish Supreme Court<sup>58</sup> seem to take the opinion that such proceedings should be seen as criminal proceedings, with higher procedural guarantees for the parties than in 'traditionally administrative' proceedings. This position is also increasingly taken by the Advocates General in their recent opinions in EU antitrust cases<sup>59</sup>.

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<sup>57</sup> M. Bernatt, 'Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC)' (2012) 1 *Państwo i Prawo* 50.

<sup>58</sup> M. Bernatt, 'Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10. Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz' (2011) 6 *Europejski Przegląd Sądowy* 40.

<sup>59</sup> Opinion of AG Kokott of 8 September 2011 in case C-17/10 *Toshiba Corporation*, para. 48; Opinion of AG Mengozzi of 17 February 2011 in case C-521/09 P *Elf Aquitaine SA v Commission of the European Union*, para. 31; Opinion of AG Bot of 26 October 2011 in case C-201/09 P i C-216/09 P *Arcelor Mittal Luxembourg SA v Commission of the European Union*, para. 41; Opinion of AG Bot of 26 October 2011 in case C-352/09 P *ThyssenKrupp Nirosta GmbH v Commission of the European Union*, para. 49; Opinion of AG Sharpston of 10 February 2011 in case C-272/09 P *KME Germany v Commission of the European Union*, para. 64.

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