INDEPENDENCE OF COMPETITION PROTECTION AND TELECOMMUNICATIONS MARKET REGULATORY AUTHORITIES IN EU LAW: A REAL REQUIREMENT OR A THEORETICAL ASSUMPTION?*

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Abstract: The EU legislator aims to construct a model in which matters related to competition protection and sector regulation will be examined by independent authorities. The recently adopted legal acts provide guarantees in service of this goal. However, the adopted method of regulation impairs the implementation of this correct assumption. This is due to the rudimentary nature and inconsistent definition of the bundle of guarantees that make up the independence models in various EU directives. Moreover, this imprecision in the description of the guarantees causes legal uncertainty and, in extreme cases, may lead to them being incorrectly implemented in the national legal order. To illustrate the thesis, examples of such irregularities are presented, taken from Polish law on competition protection and electronic communications.

Keywords: independence; antitrust authority; telecommunications market regulation authority; ECN+ Directive; EECC Directive

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1. INTRODUCTION

Public administration authorities, by their nature, are not indifferent to socioeconomic stimuli – for example, specific interest groups or media reports – in the scope of the tasks they perform. Their activities are also determined by the policies of the state authorities and the public funds which finance them.[1]

Due to the increasing use of administrative authorities to authoritatively decide on the rights and obligations of individuals, including punishment for violating applicable standards, a discussion has appeared among legal scholars[2] about the need to ensure the

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1 MONTI, G. Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network. In: RITLENG, D. (ed.). *Independence and Legitimacy in the Institutional System of the European Union*. Oxford: Oxford University Press, 2014, pp. 180–181.

2 SHAPIRO, M. Deliberative, independent technocracy v. democratic politics. Will the globe echo the EU Law & Contemporary Problems. *Law and Contemporary Problems*. 2004, Vol. 68, No. 3–4, pp. 352–353; BANASIK, M. *Administracyjnoprawne formy działań regulacyjnych niezależnych organów administracji*

independence of public administration authorities, especially antitrust and regulatory authorities. So far, however, no uniform position on this subject has been developed.

This discourse also covers the EU institutions, due to the development of legislation on models of independence for antitrust and regulatory authorities. It has been observed that the frameworks utilised in European Union law are drawn from United States law. In this legal framework, agencies are established and tasked with the administration and implementation of government policy. The political and legal accountability for these actions is assigned to the executive branch. This paradigm was adopted in the formation of EU bodies and is reflected in the legal frameworks of EU Member States through a process of harmonisation. Consequently, Member States are mandated to establish or modernise antitrust and regulatory authorities according to the agency model, a strategy that may not always yield effective results for national institutions.[3]

The following questions thus arise: 1) Is the EU model for regulating the independence of regulatory and antitrust authorities the same for all authorities (in terms of the level of protection)? 2) Is there a real possibility of enforcing this independence? The answers to these questions will help determine whether the EU model of independence for regulatory and antitrust authorities is coherent, comprehensive and enforced. The prevailing assumption is that by comparing the levels of protection, we can identify consistent standards of independence for all administrative authorities, regardless of their distinct functions and competencies. Such an analysis will allow us to draw overarching conclusions regarding the feasibility of establishing a cohesive framework of formal guarantees that determines the independence of all administrative authorities within the European Union, notwithstanding the prevailing political differences and the intricate legislative processes. An unequivocal definition of an essential set of independence guarantees for institutions tasked with market functioning regulation, such as antitrust and regulation authorities, would assure market participants that, irrespective of the specific EU Member State in which their matter is adjudicated, it will be addressed by a authority that adheres to clearly defined minimum standards of independence. It is essential to acknowledge that this assertion is predicated on the assumption that all Member States will fulfil their obligations under EU law in good faith, adhering to the principle of loyal cooperation.

The analysis will examine the regulations on the independence of authorities adopted in the ECN+ Directive[4] and the European Electronic Communications Code

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publicznej [Administrative-legal forms of regulatory action by independent public administration]. Warszawa: C. H. Beck, 2019, pp. 117–118.

[3] SHAPIRO, *c. d.*, pp. 352–353; BŁACHUCKI, M. Niezależność organów administracji publicznej na przykładzie ewolucji statusu prawnego Prezesa UOKiK [Independence of public administration bodies as exemplified by the evolution of the legal status of the President of the OCCP]. *Acta Universitatis Wratislaviensis*. 2019, No. 3977, pp. 263–264; DAVITKOVSKI, B. – PAVLOVSKA-DANEVA, A. – SHUMANOVSKA-SPASOVSKA, I. – DAVITKOVSKA, E. Independent bodies as a model of organization of the public administration. *Juridical Tribune-Review of Comparative and International Law, Bucharest Academy of Economic Studies*. 2018, Vol. 8, No. 2, pp. 456–457.

[4] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019, L 11, p. 3) – ECN+.

Directive.[5] The selection of research materials was influenced that the guarantees for the independence of antitrust and telecommunications market regulation authorities has been regulated via the same type of legal act – a Directive. Furthermore, the fact that the ECN+ Directive and the EECC Directive were adopted on the same date, along with the enhanced independence guarantees in the final versions of these Directives compared to those that were previously in effect[6] (EECC) or originally proposed[7] (ECN+), suggests that the EU legislator aimed to establish a coherent framework for the independence of administrative authorities. Moreover, these authorities are obligated to cooperate closely, particularly in matters related to fining proceedings, when a violation may infringe both antitrust and telecommunications regulations, in order to adhere to the *ne bis in idem* principle.[8] A comparative analysis of the independence models regulated in both directives can therefore be conducted. The models will then be analysed in terms of the comprehensiveness and usefulness of the regulation. By providing examples of these solutions implemented in the Polish legal system, their applicability and whether the result expected by the EU legislator has been achieved can be assessed.

The issues covered in this research are analysed using formal-dogmatic and historical methods (to a limited extent). The formal-dogmatic method is used to analyse the content of relevant legal acts and provisions of European Union law. The legal scholarship and jurisprudence are also examined using formal-dogmatic methods, particularly to assess whether national law regulations – in this case, Polish law – are adequate and implement the objectives set by the EU legislator in the directives. The historical method was used to outline the evolution of regulating the independence of administrative authorities.

2. INDEPENDENCE OF ADMINISTRATIVE AUTHORITIES IN EU LAW

Secondary EU law does not establish a uniform definition of the independence of administrative authorities. The concept of independence itself does not exist as a separate conceptual category expressing a specific level of protection. The provisions on protecting personal data apply detailed regulations, while in the case of other authorities the EU legislator only regulates certain aspects of independence, as discussed in more detail below.

It should be noted here that independence is shaped by a set of legal guarantees intended to create the belief that a given entity operates autonomously. Legal scholars indicate that to achieve full independence, it is necessary to ensure that the authority is protected against the influence of both private and public entities.[9] The actions of

[5] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018, L 321, p. 36) – EECC.

[6] COM/2016/0590 final – 2016/0288 (COD).

[7] COM/2017/0142 final – 2017/063 (COD).

[8] Charter of Fundamentals Rights of the European Union (OJ 2016, C 202, pp. 389–405) – CFR.

[9] VAN DE GRONDEN, J. – DE VRIES, S. Independent competition authorities in the EU. *Utrecht Law Review*. 2006, Vol. 2, No. 1, p. 32; MATEUS, A. Why Should National Competition Authorities Be

both state authorities and lobbyists can be used to pressurise administrative authorities to pursue particular benefits or a coherent government policy.[10] Initially, EU legislation focussed mainly on ensuring independence from private entities, but as European integration develops this protection is also being extended to include independence from public entities.[11] The literature on the subject contains various divisions and classifications for the independence of public administration authorities. Organisational, financial, decision-making and internal management independence of a given authority have been indicated. These divisions are taken from specific EU regulations.[12] However, the EU legislator does not always provide guarantees relating to the above-mentioned divisions of independence. This categorisation is therefore illustrative, and was developed based on specific models of independence for authorities adopted under various acts of EU law.

However, what deserves special attention regarding judicial authorities is the division into external independence (including the lack of external pressure and interference in the authority's operations) and internal independence (manifested in impartiality towards the parties to the proceedings).[13] Ensuring the external and internal independence of national regulatory and antitrust authorities is particularly important when these authorities impose fines. This is required by the right to a fair trial in criminal cases, which fining proceedings conducted by antitrust and regulatory authorities are an example of under the meaning in the European Convention of Human Rights.[14] In its jurisprudence, the Court of Justice of the European Union (CJEU) has also repeatedly expressed its view on the criminal nature of fines imposed in administrative procedures.[15] This therefore suggests that under European law there is a need to provide entities punished in regulatory and competitive proceedings with the guarantees that they are entitled to in criminal cases, and that their rights should be decided by an authority whose internal and external independence is beyond doubt. The independence and impartiality of national administrative authorities must be ensured in order to uphold the right to good administration. This right is articulated in the Charter of Fundamental Rights of the EU (CFR) and is primarily directed at EU bodies. However, the CJEU has consistently

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Independent and How Should They Be Accountable? *European Competition Journal*. 2007, Vol. 3, No. 1, pp. 18–19.

10 WILS, W. Competition Authorities: Towards More Independence and Prioritization? – The European Commission's "ECN+" Proposal for a Directive to Empower the Competition Authorities of the Member States to Be More Effective Enforcers'. In: *SSRN* [online]. 26. 6. 2017 [cit. 2024-12-12]. Available at: http://ssrn.com/abstract=3000260.

11 CSERES, K. Integrate or Separate. Institutional Design for the Enforcement of Competition Law and Consumer Law. *Amsterdam Law School Legal Studies Research Paper*. 2013, No. 2013-03, p. 37.

12 MATERNA, G. Gwarancje niezależności organu ochrony konkurencji w dyrektywie ECN+ a status Prezesa UOKiK [Guarantees of the independence of the competition authority in the ECN+ Directive and the status of the President of the OCCP]. *Europejski Przegląd Sądowy* [European Judicial Review]. 2019, Vol. 10, pp. 20–21.

13 C-619/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:531, para. 73.

14 Convention for the Protection of Human Rights and Fundamentals Freedoms – ECHR.

15 E.g.: C-537/16, *Garlsson Real Estate SA et al. v. Commissione Nazionale per le Società e la Borsa (Consob)*, ECLI:EU:C:2018:193; C-596/16, *Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca*, ECLI:EU:C:2018:192; C-27/22, Volkswagen Group Italia and Volkswagen Aktiengesellschaft, ECLI:EU:C:2023:663.

maintained that national administrative authorities must adhere to the guarantees set forth by the general principle of the right to good administration when applying EU law. This principle corresponds – in terms of the guarantees that should be provided to entities against which proceedings are brought – to the law expressed in the CFR.[16] Furthermore, in the legal scholarship[17] and jurisprudence,[18] it is emphasised that the independence of administrative bodies is founded on the principle of the rule of law, as articulated in Article 2 of the Treaty on European Union.[19] Therefore, the enforcement of this principle is essential for safeguarding the fundamental rights of individuals against whom administrative proceedings are instituted.

The question arises as to whether the EU secondary law provisions regulating the independence of national regulatory and competition authorities effectively achieve their intended goals. To address this question, it is important to analyse both the EU regulations and how they are implemented into national law, using a relevant example that will be discussed below.

3. MODEL OF INDEPENDENCE OF THE ANTITRUST AUTHORITY IN THE ECN+ DIRECTIVE

Until the adoption of the ECN+ Directive, EU law did not include an obligation to guarantee the independence of antitrust authorities. This issue was left to the Member States to decide, raising only the obligation to ensure the full effectiveness of EU law.[20] However, the need to ensure the independence of antitrust authorities has been the subject of institutional debate within the EU. The result of this discourse was a joint resolution[21] of the heads of these institutions, expressing the need to provide guarantees of independence, impartiality and appropriate resources to antitrust authorities. In turn, the European Parliament enacted a resolution calling on Member States to nominate apolitical officeholders and provide them with appropriate financial and personal resources.[22] As a consequence, Member States undertook initiatives to implement

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16 E.g.: C-129/13 and C-130/13, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics BV v. Staatssecretaris van Financiën*, paras 28–29; C-17/74, *Transocean Marine Paint Association v. Commission of the European Communities*, ECLI:EU:C:1974:106; C-85/76, *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, ECLI:EU:C:1979:36.

17 BERNATT, M. Economic frontiers of the rule of law: Sped-Pro v. Commission. Case T-791/19, Sped-Pro v. Commission, judgment of the General Court (Tenth Chamber, Extended Composition) of 9 February 2022. *Common Market Law Review*. 2023, Vol. 1, p. 213.

18 T-791/19, *Sped-Pro S.A. v. European Commission*, ECLI:EU:T:2022:67.

19 Consolidated versions of the Treaty on European Union (OJ 2016, C 202, pp. 1–46) – hereinafter referred to as TEU.

20 C-439/08, *Vlaamse federatie van verenigingen van Brood – en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, ECLI:EU:C:2010:739, para. 57.

21 Resolution of the Meeting of Heads of the European Union competition authorities of 16 November 2010, Competition authorities in the European Union – the continued need for effective institutions. In: *European Commission: Competition Policy* [online]. 16. 11. 2010 [cit. 2024-12-20]. Available at: http://ec.europa.eu/competition/ecn/ncas.pdf.

22 Point 32 of the resolution of the European Parliament of 11 December 2013 on the annual report on EU *competition policy* [2013/2075(INI)] (OJ 2016, C 468, p. 106) – hereinafter referred to as resolution 2013/2075.

guarantees of independence, but they were not institutionalised or uniform.[23] Due to this fact, the European Commission has taken action to unify the model of independence for antitrust authorities, recognising that more effective enforcement of competition rules will be possible if the independence of antitrust authorities is ensured.[24]

The ECN+ Directive adopts a minimum standard to guarantee the independence of antitrust authorities. It is expressed in two aspects: external, which comes down to the lack of external interference in the authority's operations (Art. 4 ECN+ Directive), and internal, understood not in the classical sense as impartiality towards the parties to the proceedings, but as a guarantee of having appropriate resources to enable the effective application of Articles 101 and 102 TFEU[25] (Art. 5 ECN+ Directive). Although Article 4(1) indicates that the authorities should exercise their powers impartially, it does not introduce the obligation to separate the inquisitorial and adjudicative functions, which would guarantee that the National Regulatory Authority (NRA), when issuing a decision, is an independent (impartial) arbiter resolving a case that it has not previously conducted.

Attention should be paid to the wording of the provisions of the ECN+ Directive regarding the independence of the authority: there is a need *"to guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU"*. It follows from this that the Commission's aim was not to guarantee the independence of the authority in every situation in which it implements antitrust policy by applying EU law, but only when it applies Articles 101 and 102 TFEU. Such a narrow approach to the guarantee of independence seems unjustified, especially since the Commission has the means to ensure the consistency and legality of decisions issued by national antitrust authorities based on the Treaty, including by taking over any such proceedings.[26] However, this does not mean that the authority will not be independent when performing its tasks beyond applying Articles 101 and 102 TFEU. The focus on guaranteeing independence only within the above-mentioned scope could result in the ECN+ Directive not regulating all possible aspects of independence that could be regulated if this narrowing had not been introduced in the Directive. The EU legislator's action, as specified in the ECN+ Directive, pursues EU interests. However, it seems that this solution is insufficient, especially in a situation where this EU interest is pursued by the application of CR 1/2003.[27]

In Article 4(1) ECN+ Directive, the EU legislator imposes on Member States the obligation to ensure the functioning of antitrust authorities in such a way that they impartially fulfil their duties and aim at the uniform, effective application of Articles 101 and 102 TFEU. These authorities are not exempt from accountability to the Mem-

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[23] Commission Staff Working Document. Ten Years of Antitrust Enforcement under Regulation 1/2003, SWD(2014) 230/2, p. 6, para. 12.

[24] Proposal for a directive of the European Parliament and of The Council to strengthen the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final [online]. 22. 3. 2017, p. 3 [cit. 2024-12-20]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0142.

[25] Consolidated version of the Treaty on the Functioning of the European Union (OJ 2012, C 326, pp. 47–390) – TFEU.

[26] BŁACHUCKI, *c. d.*, p. 268.

[27] 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, p. 1) – further as CR 1/2003.

ber State, but any restrictions imposed on them should be proportionate and should not prejudice close cooperation within the European Competition Network. The provision is constructed to be highly imprecise, leaving Member States a wide range of decision-making leeway in implementing the purpose of the Directive. This may lead to not only variation in the guarantee of independence of authorities in different Member States, but also to abuses in the implementation process itself. As a result, instead of meeting the requirement of independence, Member States may make systemic changes that will result in the establishment of a politicised antitrust authority, justified by the need to implement the ECN+ Directive.

The criticised general clause contained in Article 4(1) ECN+ Directive is detailed below. Thus, the EU legislator raises the obligation to ensure apolitical independence from external influences, to not accept instructions (without prejudice to general state policies which, nonetheless, cannot concern sector research or a specific decision) and to refrain from actions that could cause a conflict of interests. This enumeration is not enumerative and again refers only to cases of applying Articles 101 and 102 TFEU. Once again, attention is drawn to the EU legislator's lack of precision and the wording of provisions based on general concepts that may be subject to broad interpretation (e.g., refraining from activities that could lead to a conflict of interests).

Furthermore, the provisions of the ECN+ Directive aim to guarantee stability in holding the office and the method of appointing the authority [Article 4(3) and (4)]. According to the Directive, dismissal from office is possible only when a person no longer meets the conditions necessary to perform their duties (previously defined in national regulations) or when they intentionally commit a crime. Selection, recruitment or appointment to a position should be carried out by clear, transparent procedures. Once again, we are dealing with vague phrases and a lack of specifics (e.g. no obligation to hold an authority for a term of office or to hold a competition was introduced). Interestingly, the wording of the provision shows that these guarantees are to apply to decision-makers in national administrative competition protection authorities. Although such a solution may seem to be a "step in the right direction" (a broad approach to entities covered by the guarantee of independence), it raises many doubts. First of all, the Directive does not specify how these decision-makers should be understood (who should be covered by this term), and a full analysis of it may lead to the conclusion that these provisions do not apply to the heads of authorities. This conclusion comes from the analysis of recital 18 of the preamble, which lists the heads of authorities and decision-makers separately. This lack of precision may therefore lead to a paradoxical situation in which officials authorised to take decisions on behalf of the authority will be guaranteed higher standards of independence in terms of appointment and dismissal than their boss at the head of the authority. This state of affairs may raise doubts as to whether decisions issued by the head of an authority (in a situation where they are covered by lower guarantees of independence) guarantee entities the same scope of protection of their rights as decisions issued by other officials authorised to take decisions.

Article 4(5) provides for the possibility for national competition protection authorities to determine priorities in the performance of tasks related to the application of Articles 101 and 102 TFEU. Authorities are also given the ability to reject formal com-

plaints if they do not consider them an enforcement priority. Although this power *per se* does not seem key in the context of guaranteeing the authority's independence, it may be important in circumstances where the authority prioritises the protection of a specific company or all companies with state treasury capital. Such action by the authority could lead to protected companies not being liable for violations of competition rules. It is reasonable to assert that when an authority prevents an objective resolution of an antimonopoly rules violation, its decision should be open to judicial review. This is necessary to apply Article 47 CFR and uphold the general principles of the right to defence and the right to good administration in administrative proceedings which could negatively affect the parties involved, e.g. by imposing financial penalties.[28] According to the case law of the CJEU, the guarantees established in Article 47 CFR must be upheld at every stage of the proceedings, including administrative stages. However, the core aspect of this right requires that appeals be considered by a court with full jurisdiction. Consequently, the absence of legal recourse to a court would constitute a violation of Article 47.

In the aspect of internal (organisational) independence, the ECN+ Directive emphasises organisational issues and ensuring the appropriate human, financial, technical and technological resources necessary to perform duties and the power needed to effectively implement Articles 101 and 102 TFEU. The EU legislator also introduced the obligation to ensure independence when using the authority's budget, to the extent related to the application of Articles 101 and 102 TFEU and cooperation within the ECN. The final element of the independence model is a report on the authority's activities to a government or parliamentary authority. This report should include appointments and dismissals of members of the decision-making authority as well as the resources allocated each year. This report should be made public. Also, the EU legislator did not introduce specific solutions, limiting itself to only outlining the aspects of independence which, in its opinion, are intended to serve the effective implementation of Articles 101 and 102 TFEU and cooperation within the ECN.

It should be noted here that the ECN+ Directive distinguishes between a national competition authority and a national administrative competition authority. Following the definitions set out in its Article 2, a national competition authority is one designated to apply Articles 101 and 102 TFEU. This term covers all authorities, both administrative and judicial, designated for this purpose. In turn, a national administrative competition authority is one designated by a Member State to perform all or some of the functions of a national competition authority. This distinction is important for this study because the EU legislator remains inconsistent in granting specific aspects of the guarantee of independence. Thus, the guarantees of adequate resources [Article 5(1–3) ECN+ Directive] refer to national competition authorities, while the remaining guarantees – impartiality and effectiveness in performing their duties, an apolitical stance and independence from external influences, not seeking instructions, refraining from situa-

[28] E.g.: C-537/16, *Garlsson Real Estate SA et al. v. Commissione Nazionale per le Società e la Borsa (Consob)*, ECLI:EU:C:2018:193; C-596/16, *Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca*, ECLI:EU:C:2018:192; C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, ECLI:EU:C:2023:663; C-322/81, *Michelin v. Commission*, ECLI:EU:C:1983:313.

tions that may give rise to a conflict of interest and guarantees regarding appointment, dismissal and reporting [Articles 4(1–4) and 5(4) ECN+ Directive] – refer to national administrative competition authorities.

The distinction used by the EU legislator, while it may be justified in terms of the obligations imposed on national competition authorities and national administrative competition authorities, does not seem valid in the case of regulating independence. It introduces a difference in the expected level of independence for national competition authorities and national administrative competition authorities. This is interesting because if the provisions on independence applied to national competition authorities, it would be clear that these guarantees should also be granted to national administrative competition authorities (this term is included in the concept of national competition authorities in the meaning of the ECN+ Directive). It is unknown what reasoning guided the EU legislator when choosing the independence guarantees that should be met by national competition authorities and national administrative competition authorities. There is neither logic nor reference to the characteristic features of administrative authorities' operations. Therefore, this is another example of the Directive being incomplete, which may result in shortcomings in its implementation. Consequently, the objective of the relevant provisions of the Directive – to harmonise the independence of national antitrust authorities across all EU Member States – will not be possible to achieve.

To summarise the above considerations, the independence model of the competition authority adopted in the ECN+ Directive focusses on the external aspect (perceiving the authority as independent from external influences) and the internal organisational aspect (referring to self-determination within the authority). It is, in fact, a set of guarantees of a rudimentary and sometimes inconsistent nature which do not create a unified concept. First of all, the reference of some independence guarantees to national competition authorities and others to national administrative competition authorities is incomprehensible. If the EU legislator has deemed it necessary to ensure the independence of authorities applying competition law, then all of these authorities (covered by the term "national competition authorities" under the ECN+ Directive) should meet at least the minimum guarantees provided for in the ECN+ Directive. Moreover, it also seems unjustified to limit the requirement to ensure the independence of the antitrust authority to only the application of Articles 101 and 102 TFEU and cooperation within the ECN. Of course, this can be explained by the purpose of the Directive itself, but in the face of many years of discussion on this subject, it was necessary to consider whether it was justified to regulate the independence of the authority in this directive, or whether another legal act should have been adopted to regulate independence in a comprehensive and non-restrictive manner.

The above-mentioned terminological inconsistency and the lack of solutions regarding independence (term of office of authorities or open competition) lead to the conclusion that the regulation is a set of solutions used in other acts of EU law, which do not create a uniform concept of the independence of antitrust authorities. Although this guarantee is certainly necessary, it seems doubtful whether the goal of a uniform level of independence for antitrust authorities in all Member States will be achieved through the Directive constructed in this way.

It should also be noted that the ECN+ Directive does not grant any powers to enforce the independence of the authority, raising the question of whether the ECN+ provisions can be considered directly effective in these circumstances. Legal scholars have derived the definition of direct effect, based on the assumption that it is the obligation of a court or other authority to apply a given provision of EU law as a norm that constitutes the basis for a decision in a given case or as a standard for assessing compliance with the law.[29] The premises for recognising a given standard as directly effective have been developed in the case law of the CJEU. The standard should be sufficiently precise and unconditional, and its application cannot depend on further actions of EU institutions or Member State authorities. The direct effectiveness of a directive's norms is possible when it has not been transposed into the national legal order within the appropriate time, or the transposition is incomplete or incorrect. However, such a possibility exists only in a vertical arrangement, an individual against the state, and never the other way round (the state cannot benefit from non-compliance with the law).[30] When applying the general considerations on these issues, it must be stated that there are no grounds to recognise the provisions of the ECN+ Directive as having a direct effect. Although the case in question involves a vertical arrangement – the authority (emanation of the Member State) and an economic entity – and there could be a demonstration of improper implementation (as discussed below), the provisions of the ECN+ Directive are not sufficiently clear or unconditional. Their general nature leads to the conclusion that they cannot be considered directly effective. As a consequence, entities against which proceedings are pending cannot invoke the ECN+ Directive or claim compensation for a breach of EU law by a Member State.

4. MODEL OF INDEPENDENCE FOR A TELECOMMUNICATIONS MARKET REGULATORY AUTHORITY IN THE EECC DIRECTIVE

In the case of regulating the telecommunications market – unlike in the field of competition protection – the provisions regarding the independence of NRA have been developed since the 1980s with subsequent market reviews. A crucial component in the development of a model for NRAs' independence was the establishment of the framework directive.[31] It extended the existing regulation on NRA independence by

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[29] PRECHAL, S. *Directives in EC Law*. Oxford: Oxford University Press, 2005, p. 241; PRECHAL, S. Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union. In: BARNARD, C. (ed.). *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, pp. 37–38; PRECHAL, S. Does Direct Effect Still Matter? *Common Market Law Review*. 2000, Vol. 37, No. 5, p. 1053; RUFFERT, M. Rights and Remedies in European Community Law: A Comparative View. *Common Market Law Review*. 1997, Vol. 34, No. 2, p.320.

[30] E.g.: C-122/17, *David Smith v. Patrick Meade and Others*, ECLI:EU:C:2018:631; C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, ECLI:EU:C:2018:871.

[31] Some of the regulations in this regard, in particular paragraphs 3 and 3a of Art. 3 were added to the original wording of the Directive by Directive 2009/140/EC of 25 November 2009 (OJ 2009 L 337, p. 37) amending the Framework Directive with effect from 19 December 2009.

providing that Member States are obliged to ensure that the authority performs its tasks impartially, promptly and transparently. Guarantees have also been provided to ensure adequate financing of the authority and employment policy, enabling NRAs to perform their assigned tasks. On a piecemeal basis – concerning *ex ante* regulation and the settlement of disputes regarding access or interconnection between undertakings providing electronic communications networks or services, or between an undertaking providing electronic communications networks or services and benefiting from the obligation to provide access or interconnection – a guarantee was established that there would be no obligation to accept and request instructions from other authorities, while maintaining the control rights of the Member States as regulated in their constitutional law. Provisions have also been introduced to ensure that authority holders (their deputies) may only be dismissed when they no longer meet the conditions required to perform their duties as specified in national law. The decision to dismiss an NRA (but not its deputies) should be made public, and its justification may be published upon the request of the authority holder. The Framework Directive also introduced the obligation to allocate a separate annual budget to an NRA, which is to be made public. Both financial and human resources are intended to ensure that the NRA actively participates in the work of BEREC.

Another major revision of the telecommunications market regulations was carried out in 2018. As a result, the European Electronic Communications Code was adopted. In the EECC Directive, guarantees were extended regarding the principle of non-instruction and exclusions were removed from the provision, so it seems justified to presume that the principle of non-instruction applies to all of an NRA's activities. This guarantee is expressed in the right to independently adopt internal procedures and manage office staff. Regulations on independence from regulated and public entities, guarantees regarding the dismissal of NRA deputies and the supervision of NRAs according to national constitutional law have been maintained. The clear reference to constitutional law suggests that the EU legislator requires limitations on the independence of NRAs to be regulated at the highest level of national law. In the EECC Directive, the guarantees of the authority's systemic independence have been extended by adopting a competitive method of appointing NRAs (deputies) and terms of office. The need to ensure continuity of the decision-making process within the authority was also indicated. Moreover, the procedure for dismissing an authority holder was additionally subject to the obligation to ensure substantive judicial review.

The regulation of NRAs' independence, as developed through subsequent telecommunications directives, indicates that the model of independence of the authority regulating the telecommunications market consists of two aspects – external and internal/organisational. The external aspect includes the independence of an NRA from other authorities and other entities (including regulated entities), as well as the principle of non-instruction. However, the authority may be permitted if it is provided for in national constitutional law. For the proper implementation of the external aspect of NRAs' independence, there must be a method for appointing and dismissing the authority holder (deputies), and the decision on dismissal must precisely define the reasons, be published and subject to judicial review (in terms of publishing decisions and judicial control, the

provision applies only to the NRA holder). In turn, the aspect of internal and organisational independence is expressed in the right to self-determination within the office, to adopt internal regulations and to organise the work of the office, including human resources and budget management. The EECC Directive also allow for control and supervision by Member States in this respect, if they are provided for under constitutional law. Regarding the apolitical nature of NRAs, it is worth noting that the EU legislator in Article 8 of the EECC Directive provides for the possibility for Member States to exercise supervision over the NRA. Article 9 of the EECC Directive provides that Member States may exercise both supervision and control in matters of financial autonomy and human resources management. This leads to the conclusion that the possible interference with the independence of the authority varies depending on whether it is an external aspect (only supervision) or an internal organisational aspect (supervision and control) of independence. The NRA independence model specified in the EECC Directive does not regulate the issue of the authority's internal independence, as defined by the ECHR. Although the EU legislator states in Article 6(2) that an NRA should exercise its powers impartially, this is not accompanied by guarantees ensuring the separation of adjudicative and inquisitorial functions.

It should also be noted that the EECC Directive does not grant entities any powers to enforce the independence of the authority. It is important to determine whether the provisions of the Directive can be invoked directly. As mentioned above, there is an exception in cases of a vertical relationship between entities, provided that it can be demonstrated that the Directive has not been properly implemented. However, the regulatory framework established in the EECC Directive, which employs vague language, indicates that its provisions may not be considered directly effective. (For more details on the direct effect of the Directive's provisions, please refer to the previous section.)

5. COMPARISON OF INDEPENDENCE MODELS UNDER THE ECN+ AND EECC DIRECTIVES

A comparative analysis of the models for NRA independence adopted under the ECN+ Directive and the EECC Directive reveals that they are largely similar to each other. The EU legislator provided a set of guarantees to be provided by the Member States. These guarantees are formal, meaning that the EU legislator, when creating formal guarantees of independence, assumes the goodwill of the Member States in implementing these directives. This assumption, most likely resulting from the principle of loyal cooperation (Article 4 of the Treaty on European Union),[32] is nonetheless quite optimistic, especially in the absence of mechanisms enabling the actual implementation of formal assumptions – or in the case of Member States ruled by populist governments. As a result, adopting formal guarantees of independence, even if properly implemented into the national legal order, does not necessarily lead to the authority's actual inde-

[32] Treaty on European Union – consolidated version (OJ 2012 C 326, pp. 13–46) – TEU.

pendence. Vice versa, the lack of formal guarantees does not necessarily mean that the authority is not effectively independent. The EU legislator did not explain why this form of independence regulation was adopted. However, it can be presumed that it would be impossible to reach a compromise on moral and ethical norms acceptable to all Member States, and that these should characterise the person(s) appointed as the authority holder and determine their actual independence.

The basic similarities of both models are expressed in the division into external guarantees (external perception of the authority as independent from the other authorities and private entities) and internal/organisational guarantees (self-determination within the office, including independent control over the budget, human resources management and internal regulations). Another common feature is the lack of regulations regarding the internal independence of the authority (in the sense of judicial independence). Although in both directives the EU legislator stated that authorities should exercise their powers impartially, it did not regulate guarantees for separating inquisitorial and adjudicatory functions. The provisions making up both models use vague terms and concepts with a broad meaning. They do not confer any rights on entities, and therefore cannot be considered directly effective. It is also worth noting that neither model is comprehensive, and that the independence guarantees adopted in them are rudimentary, which is why they do not create a coherent concept of the independence of authorities.

Of particular note among the differences is that the ECN+ model regulates the guarantees granted to national competition authorities and national administrative competition authorities differently, while the EECC model grants guarantees to national regulators. Although Article 6 EECC Directive also lists other regulatory authorities, the specific guarantees provided for in Articles 7–9 EECC Directive always apply to NRAs. However, while the provisions making up the ECN+ model grant guarantees to national administrative competition authorities, they do not cover national competition authorities (at least not in full, as this concept is broader than the national administrative competition authority). Moreover, these guarantees were extended in various ways to entities other than the authority holder (members of the collegial authority). The ECN+ model refers to the people who take the decision, while the EECC model directly indicates the deputies. It should also be noted that the EECC model applies to all duties performed by NRAs, while the ECN+ model is limited to the application of Articles 101 and 102 TFEU. In addition, the EECC model provides more guarantees than the ECN+ model. The latter does not set a term of office of the authority or the obligation to conduct an open competition for the position of the authority holder. The ECN+ model also does not provide for any guarantees that decisions on dismissal from office can be appealed (the provision applies to decision-makers – see above for more details). The only aspect in which the ECN+ model provides broader guarantees than the EECC model is the prevention of conflicts of interest.

The above considerations lead to the conclusion that the independence models in the ECN+ Directive and the EECC Directive, despite significant similarities, are not identical. While both are vague, the ECN+ model appears to be even less refined than the EECC model. Perhaps this is because the EECC model was shaped over the course

of subsequent market reviews and was expanded by the EU legislator to include further aspects. However, the postulate to create a uniform independence model for all authorities seems justified, or at least to adopt a set of minimal, clearly defined guarantees that should be met by all regulatory authorities, possibly extending it to include guarantees specific to a given market (regulatory area).

Another postulate that should be raised is the need to regulate mechanisms for enforcing the independence of authorities during administrative proceedings, because without such mechanisms the actual implementation of the independence guarantee may remain theoretical. It is possible to consider the use of an institution known to court proceedings, i.e., exclusion from a case due to the authority's lack of independence. This could be applied by a court that meets the guarantees of independence. If the application is found to be justified and the authority is a single person, the case should be considered by a court. If the authority is collegial, the case should be examined without the member in question. If a lack of independence was demonstrated in relation to all members of the authority, the case should be heard by an independent court. The application of the above-mentioned institution would not raise any doubts if the models of independence of antitrust and regulatory authorities provided for guarantees of internal independence in the meaning of the ECHR. Therefore, the postulate of adding this guarantee to existing models, and in a form that enables direct application of the provisions establishing it, seems justified. This will enable entities against whom proceedings are pending to properly protect their rights.

6. FAILURE TO GUARANTEE THE INDEPENDENCE OF ANTITRUST AND TELECOMMUNICATIONS MARKET REGULATION AUTHORITIES IN NATIONAL LAW

The EU legislator intended the ECN+ and EECC models of independence discussed above to achieve an appropriate level of independence of antitrust and telecommunications market regulations authorities, from both regulated entities (companies under even partial state control as well as private companies) and public authorities. However, as shown above, both models are incomplete and based on vague phrasing, which means that the national regulations which formally implement the requirements of both models do not serve the goal of attaining the essential assurances of independence – and they even distort it. To support this thesis, cases of such action by the Polish legislature are discussed below. These provisions and legislative actions raise justified doubts about the EU itself, expressed in the judgment of the General Court and the infringement proceedings initiated by the European Commission.

6.1 PRESIDENT OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION[33]

Following the Polish Act on Competition and Consumer Protection (CCPA),[34] the President of the Office of Competition and Consumer Protection (OCCP) is the central government administration authority, supervised by the Prime Minister. The President of the OCCP is appointed by the Prime Minister from among the candidates selected by a team, which in turn is appointed by the Head of the Chancellery of the Prime Minister. This team should consist of at least three people whose knowledge and experience guarantee that the best candidates are selected. During the recruitment process, the candidates' professional experience, relevant knowledge and managerial competencies are assessed. These requirements, which are subject to assessment as part of the competition, are specified in the CCPA [Article 29(3)(a)]. From the point of view of the formal regulations of the ECN+ model, these provisions implement a clear, transparent procedure for appointing the authority [Article 4(4) ECN+ Directive]. However, the practical application of the provisions formulated in this way raises justified doubts. It should be noted that the procedure for appointing the team to evaluate candidates is not regulated, nor is there a procedure for questioning the competencies of its members. This means that the assessment of whether candidates for team members guarantee the selection of the best candidates is left to the discretion of the Head of the Chancellery of the Prime Minister. Moreover, the team may entrust the evaluation of candidates to a person who is not a member of the team but has the competence to perform such an evaluation (also undefined by law). Team members are obliged to keep secret any information about the candidates obtained during the competition procedure [Article 2(3)(f) CCPA]. This means that a candidate with questionable knowledge and competencies may be elected.[35] The CCPA also does not specify the criteria that the Prime Minister should follow when selecting a candidate. As a result, the Prime Minister exercises administrative discretion in this respect and may select a candidate who, in their opinion, is most suitable for this position, but who does not necessarily meet the statutory selection criteria at the highest level. Such a candidate may then be susceptible to influence from the Prime Minister, who will appoint them to the position.

Issues regarding the independence of the President of the OCCP were considered by the General Court. It heard a complaint filed by Sped-Pro against the European Commission's decision to reject a complaint against PKP Cargo, a Polish state-controlled

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[33] Similar concerns regarding the lack of independence have been expressed about the Hungarian Competition Authority, see: CSERES, K. Defending the Rule of Law Through EU Competition Law: The Case of Hungary. *Amsterdam Centre for European Law and Governance Research Paper*. 2024, Vol. 9, pp. 1–17.

[34] Act of 16 February 2007 on competition and consumer protection (English version) [online]. 17. 2. 2007 [cit. 2024-12-20]. Available at: https://www.konsument.gov.pl/wp-content/uploads/bart-baza-wiedzy-ochrona-kon-eng/zalacznik-3.pdf – attention this version does not contain all amendments to the law. The actual version is available only in the Polish language – Official Journal 2023 item 1689) – CCPA.

[35] MARTYNISZYN, M. – BERNATT, M. Implementing a Competition Law System: Three Decades of Poland Experience. *Journal of Antitrust Enforcement*. 2020, Vol. 8, No. 1, p. 175.

company, regarding the alleged abuse of a dominant position on the Polish market of rail freight services.[36] It should be clearly stated here that the General Court did not decide whether the President of the OCCP is independent. However, it pointed to a set of circumstances that should have prompted the European Commission to verify whether the case fell within the scope of application of Articles 101 and 102 TFEU are recognised by the independent authority. The basis for this position of the General Court was a dispute regarding the rule of law in Poland.[37] In the opinion of the General Court, indicated by Sped-Pro's set of circumstantial evidence – analysed together – indicated that there was a real threat of violating the rights of the complainant if its case was heard by the President of the OCCP. This circumstantial evidence concerned mainly 1) the state's control over PKP Cargo, 2) the dependence of the President of the OCCP on the executive power, 3) the fact that the parent company PKP Cargo was a founding member of the association promoting reform of the judicial system in Poland, 4) the liberal policy of the President of the OCCP towards PKP Cargo, 5) the objections of the Prosecutor General to the decisions issued by the President of the OCCP in the PKP Cargo case and 6) the inability of the competent national courts to verify irregularities in the OCCP President's actions due to their lack of independence. According to the European General Court, the Commission did not analyse the above circumstances and merely concluded that they were not supported by the evidence. In this way, the Commission failed to fulfil its obligation to conduct a two-stage analysis of the fundamental right to a fair trial, following the judgment in case C-216/18 PPU.[38]

In the context of this study, it is important that one of the circumstances underlying the invalidation of the Commission's decision was the President of the OCCP's dependence on the executive power. Of course, the General Court did not conclude that this indicates a lack of independence of the authority, but only that it should prompt the Commission to verify whether the case is being heard by the appropriate authority and whether the rights of regulated entities are violated. This means that the current form of dependence on the President of the OCCP at least raises justified doubts as to whether independence can be guaranteed, and therefore also the obligations arising from Articles 101 and 102 TFEU. This ruling should encourage the EU to assess the accuracy and effectiveness of the independence model established for the antitrust authority. Additionally, it should prompt the European Commission to examine whether the Polish government is properly fulfilling its obligations under the ECN+ Directive concerning the authority's independence.

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36 T-791/19, *Sped-Pro SA v. European Commission*, ECLI:EU:T:2022:67.

37 E.g.: C-508/19, *MF v. JM*, ECLI:EU:C:2022:201; C-558/18 and C-563/18, *City of Łowicz and the Prosecutor General*, ECLI:EU:C:2020:234, para. 44 and the case law cited therein; C-791/19, *European Commission v. Republic of Poland*, ECLI:EU:C:2021:596.

38 C-216/18 PPU, *LM*, ECLI:EU:C:2018:586.

An example of doubts regarding the proper implementation of the EECC Directive is the shortening of the term of the President of the Office of Electronic Communications (OEC). However, it should be mentioned here that the method of appointing the President of the OEC is largely analogous to that for appointing the President of the OCCP. Moreover, an amendment to the Polish Telecommunication Act[39] has removed the upper house of the Polish Parliament (the Senate) from the procedure for appointing the national regulatory authority. This change took place during the period designated for implementing the European Electronic Communications Code.[40]

The most striking example showing at least the Polish legislature's misunderstanding of the assumptions of the EECC model for NRA independence is the fact that it shortened the term of the President of the OEC in 2020 as part of the Covid Act. According to the regulation adopted in the Covid Act, the term of the President of the OEC may be shortened in the event of the death, resignation or illness excluding the performance of duties of the authority holder. None of these conditions occurred in 2020, and yet the legislature shortened the term of this authority. This was a result of an amendment introduced to the ongoing draft Covid Act, expressed in its Article 61. The justification for the draft Covid Act did not express the motives behind shortening the term of office of the President of the OEC. In the public space, all the changes made in the Telecommunication Act were justified by the need to implement the provisions of the EECC Directive. It should be emphasised here that the Polish legislature did not even follow the procedure it had adopted when shortening this term of office. The President of the OEC should have been dismissed by the Sejm at the request of the Prime Minister. This state of affairs can indeed be justified by the fact that there was no legal procedure enabling such action at the time. However, the lack of justification in the draft Covid Act, the timing of and procedure for introducing the amendment raise serious doubts as to the position and independence of the authority. Also, reorganising the operation of the office does not justify shortening the term of NRA presidents. This issue has already been dealt with by the CJEU, which in the judgment in *Ormaetxea Garai and Lorenzo Almendros*[41] stated that institutional reforms do not justify dismissing NRA presidents before the end of their terms unless rules are established that guarantee that such dismissal does not violate their impartiality and independence. In the case of the President of the OEC, this premise of the inviolability of independence and impartiality was not fulfilled. The term of the NRA was shortened under the same legal act that introduced the institution in question, and for a reason that was not provided for in the act. Such action by the legislature significantly interferes with the external independence of the

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39 Telecommunications Act of 16 July 2004 (Consolidated text Journal of Laws of 12 October 2017) [online]. 12. 10. 2017 [cit. 2024-12-21]. Available at: https://www.uke.gov.pl/gfx/uke/userfiles/m-pietrzykowski/telecommunications_act_en.pdf. Actual version in the Polish language only: (OJ 2022, item 1648).

40 Act of 14 May 2020, amending certain acts regarding protective measures in connection with the spread of the SARS-CoV-2 virus (OJ of 2020, item 875, as amended) – hereinafter referred to as the Covid Act.

41 C-424/15, *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v. Administración del Estado,* ECLI:EU:C:2016:780.

authority. There is no justification for such action in the need to ensure compliance of national regulations with the EECC Directive. None of the provisions of the EECC Directive required the term of the NRA to be shortened in order to appoint this authority according to the competition procedure. Moreover, the EECC Directive pays special attention to ensuring the continuity of the decision-making process within the authority, and shortening the term of office in this case resulted in the auction for 5G frequencies being cancelled.[42] It not only undermined the independence of the authority, but also contributed to the violation of the principle of legal certainty and the principle of legally justified expectations of the auction participants. These undertakings could have had reasonable expectations towards the President of the OEC that the auction would be resolved substantively (i.e., they would or would not receive a reservation for the 5G frequency). Instead, the auction was ended formally, without a logical justification for such a state of affairs being provided.

The European Commission also expressed doubts about the independence of the President of the OEC in connection with the shortening of the term of office. In the Commission's opinion, the use of an extraordinary procedure to shorten the term of the NRA was a violation of EU law, including the requirement for an independent NRA. As a result of unsatisfactory explanations from the Polish government, the Commission initiated infringement proceedings against Poland, which resulted in a complaint being filed against Poland to the CJEU.[43]

7. NO NRA INDEPENDENCE – NOW WHAT?

The ECN+ Directive and the EECC Directive provide general and basic models of independence for authorities, which means that they cannot be regarded as directly effective. Consequently, the regulated entities cannot directly invoke these provisions. This raises an important question: What process should a regulated entity follow to challenge the perceived lack of independence of an administrative authority?

It should, of course, be noted here that the Commission has the competence to initiate infringement proceedings against a Member State, especially since they were obliged to implement both independence models. This method of conduct is beyond the scope of this study, as its purpose is to demonstrate the path of conduct available to regulated entities.

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[42] ZIELIŃSKA, U. Prezes UKE na tarczy? Nocna poprawka do Tarczy 3.0 i może się pakować [UKE CEO on the dial? An overnight amendment to Shield 3.0 and he can pack up]. In: *Rzeczpospolita* [The Republic] [online]. 30. 4. 2020 [cit. 2024-12-21]. Available at: https://cyfrowa.rp.pl/biznes-ludzie-startupy/art18080111-prezes-uke-na-tarczy-nocna-prawka-do-tarczy-3-0-i-moze-sie-pakowac.

[43] See: Cykl dotyczący postępowań w sprawie uchybienia zobowiązaniom, lipiec 2020 [July infringements package: key decisions]. In: *Komisja Europejska* [European Commission] [online]. 2020 [cit. 2024-12-18]. Available at: https://ec.europa.eu/commission/presscorner/detail/pl/INF_20_1212; Postępowania o uchybienie zobowiązaniom państwa członkowskiego: główne decyzje podjęte w lutym [February infringements package: key decisions]. In: *Komisja Europejska* [European Commission] [online]. 2021 [cit. 2024-12-18]. Available at: https://ec.europa.eu/commission/presscorner/detail/pl/inf_21_441.

Entities affected by a decision issued by a non-independent authority that negatively impacts their rights and obligations can first appeal the decision to a court, within the meaning of Article 47 CFR, based on the national appeal procedure.[44] This approach is the simplest, provided that the national appeal procedure complies with the requirements of the right to an effective remedy.

However, suppose national law requires that appeals against decisions from administrative authorities be reviewed by a body that does not qualify as a court under Article 47 CFR. In that case, EU law dictates that the national procedure should not be followed. Instead, the case should be referred to a court that meets the criteria established by the Charter.[45] This raises the question of which authority is responsible for implementing a procedure that departs from the application of national law to uphold the right to an effective remedy. The CJEU case law indicates that this should be an authority other than the one provided for in national law. This other authority should be a court within the meaning of EU law, to which the appeal was directed.[46] In practice, this means that the affected party would need to independently file an appeal with an authority deemed incompetent under national law. This authority, although not recognised in national law, must be a court under EU law and should then take over the case, refusing to apply the relevant national provisions. Such action by the party carries the risk of the appeal being rejected. It is also possible only if there is an authority in the Member State that is a court within the meaning of EU law.[47]

Based on the case law of the General Court,[48] it is possible – in the scope relating exclusively to antitrust law – to derive an additional path enabling the case to be examined by an independent body. A complaint may be submitted to the Commission under Article 7(2) in connection with Article 11(6) of CR 1/2003, under which the entity subjected to proceedings will be obliged to indicate that the national antitrust authority incorrectly applied Article 101 and/or 102 of the TFEU as a result of its lack of independence. An enterprise's complaint should be submitted to the Commission in the event of that a national authority refuses to initiate antitrust proceedings. This applies even if the authority has not officially issued a decision, but is not taking any steps to initiate proceedings. This action is permissible if national remedies have been ineffective or

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44 DRABEK, L. A Fair Hearing Before EC Institutions. *European Review of Private Law*. 2001, Vol. 4, p. 561; LENAERTS, K. – VANHAMME, J. Procedural Rights of Private Parties in the Community Administrative Process. *Common Market Law Review*. 1997, Vol. 34, No. 3, pp. 561–562; LAVRIJSSEN, S. – DE VISSER, M. Independent Administrative Authorities and the Standard of Judicial Review. *Utrecht Law Review*. 2006, Vol. 1, pp. 111–113. See also: T-156/94, *Siderúrgica Aristrain Madrid SL v. Commission of the European Communities*, ECLI:EU:T:1999:53, para. 115; Judgments of the European Court of Human Rights: *Bendenoun v. France*, No. 284, para. 46; *Umlauft v. Austria*, Series A, No. 328-B, paras 37–39; *Schmautzer v. Austria*, No. 15523/89, para. 34; *Janosevic v. Sweden*, Reports of judgments and decisions 2002-VII, para. 81.

45 C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, para. 72; C-585/18, *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 165.

46 C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, and Mobilkom Austria AG.*, ECLI:EU:C:2003:297, para. 42; C-15/04, *Koppensteiner GmbH v. Bundesimmobiliengesellschaft GmbH*, ECLI:EU:C:2005:345, para. 32.

47 C718/21, *Krajowa Rada Sądownictwa*, ECLI:EU:C:2023:1015 and the case law cited therein.

48 T-791/19, *Sped-Pro S.A. v. European Commission*, ECLI:EU:T:2022:67.

impossible, such as when there is no court available according to EU law. In these circumstances, especially in the context of adopting the ECN+ Directive, the Commission should examine whether the case is being examined by the competent authority and whether the rights of regulated entities arising from Article 47 CFR, including those regarding guarantees, would be violated if the case were heard by a national authority. For this purpose, the Commission should apply the two-stage test constructed by the CJEU in case C-216/18. The risk in this course of action is that if the effects of the infringements alleged in the complaint to the Commission are essentially limited to the territory of one Member State and if the complainant has initiated proceedings before the competent courts or administrative authorities of that Member State relating to those infringements, the Commission has the right to reject the complaint because of the lack of Union interest. However, the condition for rejecting a complaint is that the rights of the complainant are sufficiently protected by the national authorities. Therefore, before rejecting a complaint on the grounds of lack of Union interest, the Commission must satisfy itself that the national authorities will be able to sufficiently protect the rights of the complainant.[49] If the Commission finds that the complainant's rights may be at risk, it should consider the case on its merits, under Article 7(1) CR 1/2003.

The above-proposed procedures prioritise having the case reviewed by an independent authority. However, a key question arises: If a decision is issued by an administrative authority that is not independent, and this decision is not verified by another independent authority, is it permissible to file a claim for damages against a Member State for a breach of EU law? Initially, this seems impossible because the conditions established in the *Francovich* case[50] for the direct effect of a directive are not satisfied. In these circumstances, it is justified to use a framework that allows for invoking a violation of the fundamental right under Article 47 CFR, or the general principle of the right to good administration, which ensures an impartial and fair resolution of the case.[51] The literature on the subject and jurisprudence do not provide for any restrictions regarding the EU provisions that may constitute a basis for claiming damages. Moreover, the CJEU itself indicates that liability for damages applies in every case of a Member State violating EU law, regardless of the nature of the authority whose action or omission constitutes the violation.[52] Therefore, if the entity demonstrates that the violation of law was significant in the circumstances of a given case and there was a causal relationship between the violation and the damages suffered, the conditions for applying a claim for damages are met.

The above-mentioned paths of conduct are adaptable and can be used by regulated entities in all Member States. They are based on the obligation to provide an effective remedy within the meaning of Article 47 CFR, a procedure proposed by the Grand Court, or an already existing compensation procedure in which the directly effective

[49] E.g.: T-458/04, *Au Lys de France v Commission*, ECLI:EU:T:2007:195, para. 83 and the case-law cited; T-273/09, *Associazione "Giùlemanidallajuve" v. Commission*, ECLI:EU:T:2012:129, point 68 and the case-law cited.

[50] C-6/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, ECLI:EU:C:1991:428.

[51] T-193/04, *Hans Martin Tillack v. Commission*, ECLI:EU:T:2006:292.

[52] C-46/93 and C-48/93, *Brasserie cases du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI: ECLI:EU:C:1996:79, para. 32.

provisions of EU law apply. However, this does not prevent the lack of independence of an authority being challenged through other national procedures, if such options are available under the law of the Member State in question. The most likely scenario for this challenge is through a procedure that contests the validity of a decision because it was issued by an authority lacking the necessary independence, provided that national law includes appropriate provisions for such a challenge.

8. CONCLUSION

The conclusion of this study is that, notwithstanding the efforts of the European Union legislator to establish a minimum framework of formal safeguards for the independence of national antitrust and regulatory authorities, the independence models proposed in the ECN+ Directive and the EECC Directive lack clarity and consistency. Consequently, they may yield outcomes that diverge from the intended objectives.

The European Union legislator has not established a standardised model of independence that would apply to all administrative authorities subject to the harmonisation of regulations. Each model consists of a set of guarantees, which are not uniform even in such key areas as the term of office of an authority, the procedure for appointing and dismissing authorities or the requirement of apoliticality. These discrepancies cannot be explained by the specific functioning of a given authority.

The observed inconsistencies in regulating independence models, coupled with the previously referenced fragmented and generalised nature of the regulation, significantly impede the realisation of the objectives established by the EU legislator. In certain instances, this may render these objectives unattainable or distorted at the national level. Furthermore, as demonstrated, the approach employed for regulating the two independence models restricts the direct efficiency of the provisions establishing these models. This limitation arises primarily from the fact that it does not confer any rights upon the entities subject to regulation. As a result, the affected parties must take additional measures, such as challenging the decision in court under Article 47 CFR. They may also consider exploring new options (e.g., filing a complaint with the European Commission) or adapting existing approaches (e.g., submitting a claim for damages). These steps are necessary for regulated entities to enforce their right to have proceedings conducted against them by an independent authority.

In conclusion, it is correct to assume that antitrust and regulatory proceedings, including those involving fines, should be conducted by independent authorities. Unfortunately, the provisions of EU law adopted so far in this matter, including in particular the ECN+ and EECC independence models, do not ensure the accomplishment of the intended objective. It is therefore necessary for the EU legislator to analyse the solutions adopted thus far, taking into account how they are implemented in the Member States, and to develop a coherent, specific and applicable model of the independence of authorities. It should consist of a set of guarantees that are uniform for all authorities, with possible detailed regulations that take into account the specificity of a given market (although this does not seem necessary). First of all, the EU legislator should provide

a mechanism for verifying the independence of authorities (under national or EU law, e.g., a complaint to the Commission, using the path proposed by the Grand Court). Only such an independence model will provide regulated entities with an appropriate scope of protection of their rights, including the right to an effective remedy.

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