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Convergence of Procedural Standards in the European Competition
Proceedings*Maciej Bernatt**

In the article I argue that there is a need for the greater convergence of European procedural standards applicable in competition proceedings before the European Commission and competition proceedings before the National Competition Authorities. In order to prove this I use three main arguments. To begin with, I show that the differences in procedural standards applicable in the case of these two proceedings exist and influence the level of protection of entities participating in these proceedings. In this respect, I conduct the analysis of the EU and Polish competition procedure and I conclude that Polish competition procedure offers a lower level of protection of procedural rights. Additionally, I observe that in the EU free circulation of evidence among the members of European Competition Network takes place despite the differences in procedures that are used when collecting this evidence. I analyse also critically the rules governing allocation of cases in the ECN. Next, I show that the applicability of Article 6 of the ECHR to both the proceedings before the European Commission and the proceedings before the NCAs require the recognition and observance of the similar procedural standards. I argue the introduction of such standards is indispensable as the competition proceedings concern criminal accusations in the sense of Article 6 of ECHR. Finally, I observe the recognition and observance of similar procedural standards in competition proceedings is the consequence of binding character of the EU Charter of Fundamental Rights. In the conclusions I discuss how a convergence of procedural standards may be achieved.

1. INTRODUCTION

The substantive rules of competition law are very similar at the level of EU Treaty regulations (Article 101-102 of the Treaty on the Functioning of the European Union,¹ hereinafter referred to as the “TFEU”) and in national laws of EU Member States. By contrast, within the EU there is a lack of common procedural standards in the competition proceedings. Different solutions are provided in the Council Regulation (EC) No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter referred to as the “Regulation

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¹ Official Journal C 83, 30.3.2010., p. 47.

1/2003”) regulating the proceedings before the European Commission and in national laws regulating the proceedings before the National Competition Authorities (hereinafter referred to as the “NCAs”). The latter are applicable also in cases when the NCAs carry out the proceedings under Article 101-102 TFEU.

In the article I argue that there is a need for the greater convergence of European procedural standards applicable in competition proceedings before the Commission and competition proceedings before the NCAs. This requires recognition and observance in these proceedings of the similar level of procedural standards when it comes to the right to be heard, the right of defence, and the right to judicial review. Namely, there is a need for a higher convergence of procedural standards; especially those concerning access to information regarding proceedings and to evidence collected, protection of privilege against self-incrimination, protection of legal professional privilege, access to oral hearing, the position of complainant in the proceedings, guarantees of the proportionality of inspections, and the scope of judicial control over competition proceedings. Thus, differently to the broadly discussed issue whether the competition proceedings before the Commission meet the requirements of Article 6 of the European Convention on Human Rights (hereinafter referred to as the “ECHR”), this article is focused on the question of whether it is advisable to introduce the similarly high level of procedural standards of competition proceedings in Europe.

I use three main arguments in order to prove the need for greater convergence in competition proceedings. To begin with, I will show the existence of the differences in procedural standards that are applicable in case of these two proceedings, and that they influence the level of protection of entities participating in these proceeding. In this respect I conduct the analysis of EU and Polish competition procedure.² From that analysis, I conclude that Polish competition procedure offers a lower level of protection of procedural rights. Additionally, I observe that in the EU free circulation of evidence among the members of the European Competition Network (network of cooperation among the Commission and the NCAs,³ hereinafter referred to also as the “ECN”) take place despite the differences in procedures that are used when collecting the evidence. I also note that the rules governing allocation of cases in the ECN are not clear. That may result in opening the proceedings in the Member State where the level of procedural standard is lower than the one that is expected by the undertaking concerned. It also brings lack of legal certainty as to the procedural rules applicable in a given case. Next, I show that the applicability of Article 6 ECHR to both the proceedings before the Commission, and the proceedings before the NCAs require the recognition and observance of the similar procedural standards. I argue that the introduction of such standards is indispensable as the competition proceedings concern criminal accusation in a sense of Article 6 ECHR. Such thesis is additionally

² This article shall not be deemed as a comparative study. The analysis is conducted on the basis of the EU and Polish procedural system. Other jurisdictions are not analysed specifically. However, Polish competition law may be seen as exemplary for new EU Member States – post-communist countries that built their system of competition law in the 90s as a part of their free-market-economy reforms.

³ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/28, 27.04.2004.

strengthened in the light of accession of the EU to the ECHR. I claim that accession should bring about appreciation of importance of procedural standards in competition proceedings. Finally, I observe that the recognition and observance of similar procedural standards in competition proceedings is the consequence of binding character of the EU Charter of Fundamental Rights⁴ (hereinafter referred to as the “CFR”). Its provisions, including Article 47 and 48, are applicable not only to the proceedings carried out by the Commission but also to the proceedings carried by the NCAs under Article 101-102 TFEU. Thus, Article 47 and 48 CFR must be respected on both EU and national competition proceedings which implies similar level of protection of procedural rights in these proceedings. In this context I also observe that the principle of procedural autonomy should not be perceived as an obstacle in approximation of procedural standards in competition proceedings. The conclusions of the article provide proposals of how a convergence of procedural standards may be achieved. Three possible ways are discussed. The first way is the increase of the level of protection in case of national competition procedures to the EU level by legislative actions and jurisprudence in the EU Member States (i.e. statutory and judicial convergence on national level). Next, the changes may be brought in consequence of EU courts jurisprudence (i.e. judicial convergence on EU level). Finally, legislative actions on EU level may - possibly - be undertaken (i.e. statutory convergence on EU level).

2. LEGAL FRAMEWORK OF ENFORCEMENT OF COMPETITION LAW IN EUROPE

Article 101-102 TFEU prohibits practices restricting competition on the EU internal market. According to Article 101 TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible with the internal market. Additionally, Article 102 TFEU prohibits as incompatible with the internal market any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it insofar as it may affect trade between Member States. Similar prohibition is provided in Polish competition law. The Act of 16 February 2007 on the Protection of Competition and Consumers⁵ (hereinafter referred to as the “Competition Act”) prohibits both agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market (Article 6) and the abuse of a dominant position in the relevant market by one or more undertakings (Article 9). Polish substantive competition rules are factually harmonized with the EU rules.⁶ This

⁴ Charter of Fundamental Rights of the European Union, OJ C 83 of 30.3.2010, p. 389.

⁵ Journal of Laws No 50, item 331 as amended.

⁶ Approximation of Polish competition rules and EU ones is a consequence of EU-membership negotiation process. Article 68 and 69 of the European Agreement establishing association between the Republic of Poland and European Communities and their Member States, Brussels 16 December 1991 (Journal of Laws 1994 No. 11, item 38) obliged Poland to approximate its competition rules.

is said to result from the ‘genetic’ bond between them.⁷ Practices restricting competition are banned in a corresponding way in all EU member countries as a result of so called spontaneous harmonisation of competition substantive rules in Europe.⁸

As to the legal basis of the decisions of the competition authorities of EU Member States concerning practices restricting competition, it is characteristic that these decisions can be based not only on national laws but also on Articles 101-102 TFEU. It is obligatory for the NCAs to apply these provisions where the practices restricting competition concerned affect trade between Member States (see Article 3(1) of the Regulation 1/2003). This means that the application of EU competition law has been decentralised since the coming into force of the Regulation 1/2003. The Polish competition authority (President of the Office of Competition and Consumers Protection, hereinafter referred to as the “CCP President”) conducts proceedings and issues decision based on Article 101-102 TFEU.⁹

The similarity of the provisions of substantive law of EU and national laws and the right of both the European Commission and the NCAs to apply Article 101-102 TFEU does not correspond to the way these provisions of substantive law are enforced. The enforcement system of competition law (institutions, procedures and sanctions) is regulated separately by national laws of the EU Member States (when it comes to proceedings before the NCAs) and separately by EU law (when it comes to proceedings before the Commission). Specifically, EU law does not provide any rules that would harmonise the procedural standards applicable in case of competition proceedings.¹⁰

As to the procedural matters, Regulation 1/2003 prescribes only rules regarding allocation of cases among NCAs and the Commission (Article 13), rules concerning the cooperation among NCAs and the Commission as well as among NCAs themselves (Article 11-12). Article 35 regulates the obligation of the Member State to designate a competition authority responsible for effective implementation of Article 101-102 TFEU. Additionally, Article 5 of the Regulation 1/2003 contains the list of decisions that can be issued on the basis of Article 101-102 TFEU. The Court of Justice of the EU (hereinafter referred to as “ECJ”) has specified that Article 5 contains an exhaustive list of decisions that the NCA is entitled to issue. It precludes the application by the NCA of a rule of national law which would require terminating the competition

⁷ 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) Yearbook of Antitrust and Regulatory Studies 14-15.

⁸ Vedder, ‘Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law’ (2004) 1(1) *CompLRev* 5-10.

⁹ See among others the CCP President decisions (published at www.uokik.gov.pl) of: 29 December 2006, DOK-166/06; 20 December 2007, DOK-98/07; 29 August 2008, DAR-15/2006; 29 August 2009, DOK-6/2008; 8 December 2009, DOK-7/2009; 24 August 2010, DOK-7/2010; 23 November 2011, DOK-8/2011; 13 April 2012, DOK-1/2012. See more in: Józwiak, *Europejska Sieć Konkurencji – model: struktura i współpraca oraz kompetencje decyzyjne członków*, Warszawa, Urząd Ochrony Konkurencji i Konsumentów, 2011, pp. 17-21, This is also a common practice of other NCAs, see ECN statistics available at: <http://ec.europa.eu/competition/ecn/statistics.html>.

¹⁰ Andreangeli, *EU Competition Enforcement and Human Rights*, Northampton, Edward Elgar, 2008, p. 195.

proceedings by a decision stating that there has been no breach of Article 102 TFEU.¹¹ In other words, the NCA is not entitled to issue a non-infringement decision in respect to Article 102 TFEU (and *per analogiam* to Article 101 TFEU).

When NCA is applying Articles 101-102 TFEU, all other procedural issues are governed by the provisions of national law. It is a general rule stemming from the principle of procedural autonomy of EU Member States.¹² This includes the provisions of national law regulating the extent of procedural rights of the undertaking during competition proceedings. The above analysis shows that it is possible to distinguish three types of situations:

1. The Commission applies Article 101-102 TFEU under the procedural framework prescribed in the EU law (most importantly the Regulation 1/2003;¹³ i.e., a centralised EU competition proceedings);
2. The NCA (e.g. the CCP President) applies Article 101-102 TFEU (and usually¹⁴ in parallel substantive rules of national competition law) under the procedural framework prescribed in national law (i.e., a decentralized EU competition proceedings);
3. The NCA (e.g. the CCP President) applies substantive rules of national competition law under the procedural framework prescribed in national law.

This specification shows that in the European model of enforcement of competition law, a different procedure is used, although the same rules of substantive laws are applied (case 1 v case 2 above) or that different procedures are applied although the substantive rules of competition law of EU Member States and of the EU itself are highly similar (case 3).

Additionally, Article 12(1) of the Regulation 1/2003 gives the Commission and NCAs - for the purpose of applying Articles 101-102 TFEU - the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Thus, in centralised (case 1) and decentralised competition proceedings (case 2), the Commission and the NCAs may use evidence that was collected by other NCA by means of national procedure. When it comes to Polish procedure, the CCP

¹¹ Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o.*, not yet reported, available at www.curia.eu, paragraph 35.

¹² Procedural autonomy is a concept that implies that in case of lack of EU procedural regulations the Member States possess a competence to legislate national procedural regulations under which EU law is enforced.

¹³ However, see also Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123/18, 27.04.2004; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 Official Journal, OJ C 325/07, 22.12.2005; Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/06, 20.10.2011.

¹⁴ In Italy and Luxembourg Articles 101-102 TFEU are applied exclusively to cases falling within their scope, see Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003 of 29 April 2009, COM(2009) 206 final, paragraph 158.

President is also entitled to use as evidence information transmitted by other NCA where it applies only to national law (case 3).¹⁵

3. PROCEDURAL DIFFERENCES IN COMPETITION PROCEEDINGS – THE CASE OF POLAND

The argument for introduction of similar procedural standards in competition proceedings is based in this section on the identification of differences in procedural standards in the EU competition procedure (applied in case of centralised competition proceedings) and a national competition procedure (applied in case of decentralised and strictly national competition proceedings). In the latter aspect the Polish competition procedure serves as an example.

For the following analysis it is important to understand the complicated nature of Polish competition procedure. The main factor that characterises this procedure is its regulation by different legal acts – not only by the Competition Act but also by the Code of Administrative Procedure,¹⁶ the Code of Civil Procedure¹⁷ and the Code of Criminal Procedure.¹⁸ Competition proceedings take place firstly before the CCP President, single-person administrative body (not a collective one as the Commission) with limited independence (the CCP President may be dismissed at any time by the Prime Minister). Similarly to the Commission, the CCP President holds a function of raising the charges, conducting proceedings, delivering the decision and imposing the sanctions.¹⁹ This deficiency is not healed by the internal organisation of Polish competition authority as it leaves no room for the division of above-mentioned functions - usually the same case handlers are responsible for investigation, running the

¹⁵ The interpretation of Article 73(5) of the Competition Act suggest this – see M. Bernatt, ‘Commentary to Article 73’ in Skoczny, Jurkowska, Miąsik (eds.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa, CH Beck, 2009, paragraph 26.

¹⁶ Procedural issues not regulated specifically in the Competition Act are subject to the provisions of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Law 2000, No 98, item 1071 with amendments). Based on this referral, the general principles of administrative procedure (i.e. legalism and the principle of the objective truth, the obligation to provide information to the parties, the principle of active participation by a party in the administrative proceedings) are binding in the proceedings before the CCP President.

¹⁷ The Code of Civil Procedure (Act of 17 November 1964, Journal of Law 1964, No 43, item 296 with amendments), not the Code of Administrative Procedure, regulates *per analogiam* the hearing of evidence before the CCP President in matters not regulated in the Competition Act. This poses doubts whether the specific provisions of the Code of Administrative Procedure (especially Articles 75-81) that transpose general principles of administrative procedure into concrete rules and regulate the hearing of evidence in administrative proceedings are applicable in the proceedings before the CCP President.

¹⁸ Provisions of the Code of Criminal Procedure (Act of 6 June 1997, Journal of Laws No. 89, item 555, with amendments) are applicable *per analogiam* to searches run by the CCP President (see Article 105c(4) of the Competition Act).

¹⁹ Proceedings before the CCP President are described generally in the Competition Act. They can take the form of explanatory or competition proceedings. The latter are officially called antimonopoly proceedings and are of two types: antimonopoly proceedings in cases of practices restricting competition, and antimonopoly proceedings in cases of concentration.

whole proceedings and preparing the final draft of the decision.²⁰ Appeals against decisions of the CCP President are dealt with by the Court of Competition and Consumer Protection (hereinafter referred to as the “CCP Court”). The CCP Court is a first-instance, civil court (not administrative one) and is entitled to change in its judgement the decision of the CCP President.

What distinguishes Polish competition procedure from the EU one is that the undertakings are informed only generally about the charges of anticompetitive conduct raised against them. Decisions on the commencement of competition proceedings do not contain a thorough, detailed justification in this respect. They lack a detailed description of the facts and evidence that allegedly give basis for the charge and a description of the legal assumptions made concerning the application of the facts to the relevant legal provisions. The parties to the proceedings are not informed neither about the length of the presumed violation nor the identity of those that participated in the alleged infringement.²¹ For example, in one of the decisions the CCP President pointed out that the charges were formulated precisely because they reflected the exact wording of the legal provisions.²² In another decision the CCP President dismissed without specific explanation the complaint of one of the parties that the charges in the case were formulated in an unclear and imprecise fashion, which limited the right of defence.²³ It was stated only that the complaint was ill-founded inasmuch as the party demonstrated, in its written statement filed in the course of the proceedings that it understood the charges raised. The lack of detailed justification of the charges raised exist also in the proceedings in which Articles 101-102 TFEU made up the legal basis of the decision by the CCP President.²⁴

The standard in the centralised competition proceedings is much higher. In the proceedings before the Commission parties receive a statement of objections. It contains a full factual and legal description of the presumed infringement as well as the preliminary calculation of the fine.²⁵ The statement of objections has to include also a section on fines, where preliminary calculation of the fine is given.²⁶

²⁰ See more: Bernatt, Skoczny, ‘Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany?’ in Gronkiewicz-Waltz, Jaroszyński (eds.) *Europeizacja publicznego prawa gospodarczego*, Warszawa, C.H. Beck, 2011, pp 4-5.

²¹ Kolasiński, ‘Influence of the General Principles of Community Law on Polish Antitrust Procedure’, (2010) 3(3) Yearbook of Antitrust and Regulatory Studies 38.

²² See the CCP President decision of 8 December 2009, DOK-7/2009, www.uokik.gov.pl.

²³ See the CCP President decision of 23 November 2011, DOK-8/2011, www.uokik.gov.pl, p. 95.

²⁴ See more Kolasiński, n 21, pp 38-43.

²⁵ See Article 10 of the Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. See the comment of Kerse, Khan, *EC Antitrust Procedure*, 5th Edition, London, Sweet & Maxwell, 2005, paragraph 4-020. See the cases: C-62/86 *AKZO v Commission*, [1991] ECR I-3359, paragraph 29; T-10/92 *Cimenteries CBR SA v Commission*, [1992] ECR II-571, paragraph 33; T-191/98 *Atlantic Container Line AB v Commission*, [2003] ECR II-3275, paragraphs 113 and 162.

²⁶ See the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraphs 84-85. Compare also: Almunia, ‘Fair process in EU competition enforcement’, European Competition Day, Budapest, 30 May 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/396&format=DOC&aged=0&language=EN&guiLanguage=en>

The Polish procedure also offers less protection in comparison to the EU law as regards access to information concerning what part of the case file is considered by the CCP President to contain evidence. In decisions establishing the infringement of competition law usually it is only stated that the parties have the right of access to the case file and the right to make use of it, and that the CCP President informed the parties about the closure of the evidentiary proceedings and about the parties' right to see the entire evidence collected in the proceedings and the right to express its final opinion before the proceedings are closed.²⁷ The resolution on the institution of competition proceedings does not refer to specific evidence that supports the charges of anticompetitive conduct. Also, the call for the parties to express their final opinion in the case after the termination of the proceedings does not point out what portions of collected data (especially documents) in the case file (which can contain massive amounts of information) are considered pertinent by the CCP President in the decision-making process. Even though the parties to the proceedings have access to the case file, they may have difficulties in identifying which part thereof is considered by the CCP President as proof of an infringement of competition law.²⁸

In the centralised competition proceedings parties know better what part of the case file is considered by the Commission to contain evidence. This is a consequence of the detailed information given in the statement of objections, and of the fact that the materials that the Commission believes confirm the anticompetitive conduct of the undertaking are already attached to the statement of objections.

Another feature that distinguishes centralised competition proceedings from Polish competition proceedings is the way the conflict between the right to be heard and protection of business secrets is resolved. Under the Article 69(1) of the Competition Act the CCP President is entitled to limit, where this is indispensable, the right of access to evidence contained in the case file, when rendering such evidence accessible would entail a risk that the business secret may be revealed. This provision read as interpreted in the jurisprudence²⁹ fails to stipulate clearly what the limits of the protection of confidential information are in situations when the right to be heard of other parties of antitrust proceedings is at stake. Thus in Polish procedure the balance between the protection of right to be heard and business secret is not struck properly in respect of access to evidence contained in the case file.³⁰ A similar problem exists when

²⁷ See the CCP President's decisions (published at www.uokik.gov.pl) of: 29 December 2006, DOK-166/06; 20 December 2007, DOK-98/07; 29 August 2008, DAR-15/2006; 29 August 2009, DOK-6/2008; 8 December 2009, DOK-7/2009; 23 November 2011, DOK-8/2011.

²⁸ M. Kolański underlines that access to the case file before the issuance of a decision does not constitute a sufficient guarantee of the right to a fair hearing. He notes that undertakings frequently review hundreds of pages of case files, without being aware of the relevance of the specific facts or evidence included or knowing how to identify the issues they should comment on, see Kolański, n 21, p. 38.

²⁹ See the order of the CCP Court of 29 April 2003, XVII Amz 34/02, not reported and the order of the CCP Court of 21 June 2006, XVII Amz 13/06, not reported.

³⁰ See more in this respect 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) Yearbook of Antitrust and Regulatory Studies 53-70, available at: <http://ssrn.com/abstract=1874796>. See also Materna, 'Ograniczenie prawa wglądu do materiału dowodowego w postępowaniu przed Prezesem UOKiK', (2008) 4 Przegląd Prawa Handlowego 27-33.

it comes to access to the full body of evidence that supports the CCP President decision. Many parts of the justification of the decision (including the ones that can contain evidence) are not revealed to the parties because the CCP President claims they contain business secrets.³¹ Business secrets seem to be disproportionately protected and this brings about the risk of violations of the right to be heard of the parties to the proceedings.

In case of centralised competition proceedings, the Commission is not allowed to use (to the detriment of an undertaking party to the proceedings) the facts, circumstances or documents that it cannot, in its view, disclose. That is so because a disclosure refusal would adversely affect that entity's opportunity to effectively communicate its views on the truth or implications of those circumstances, on those documents or on the conclusions drawn from them by the Commission.³² The right of access to the case file should be designed so as to ensure the effective exercise of the right of defence.³³ Thus, the protection of confidential information in EU law (understood more broadly than business secrets in Polish competition procedure) is better balanced with the right to be heard under EU law.³⁴ The preamble to the Regulation 773/2004 explicitly states that where business secrets, or other confidential information, are necessary to prove an infringement, the Commission should assess whether the need to disclose each individual document is greater than the harm which might result from it.³⁵

As compared to the EU procedure, the Polish competition procedure is also characterised by more limited possibilities of direct contact with the decision maker. This is a consequence of the fact that in Poland the decision on whether to convene an oral hearing is discretionary; even in case of direct request of the party the CCP President is not obliged to organise an oral hearing (Article 60(1) of the Competition Act). Additionally, Polish legislation does not provide any legal grounds for informal meetings between the parties and the CCP President's representatives.

Contrary to this, in the case of centralised competition proceedings, parties are given broad possibilities to contact directly the Commission's representatives.³⁶ For example state-of-play meetings are organised. The oral hearing is obligatory when the party so requests (Article 12 of the Regulation 773/2004). When it comes to the organisation of the hearing it is notable that the institution of Hearing Officer, criticised to some extent

³¹ See more M. Bernatt, 'Can the right to be heard be respected without access to information about the proceedings? Deficiencies of national competition procedure' (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 105-108.

³² Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraph 14.

³³ Case C-51/92 P *Hercules Chemicals v Commission*, [1999] ECR I-4235, paragraph 76.

³⁴ See on that C.S. Kerse, N. Khan, n 25, paragraph 4-036.

³⁵ See point 14 of the preamble to the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27/04/2004, p. 18-24.

³⁶ See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, paragraph 60-70 and 106-108.

in the literature of EU law (as not sufficient for fully guaranteeing the right to be heard),³⁷ does not have its counterpart in Poland at all.

Further differences between Polish and EU procedures are related to the position of a complainant. Under current Polish legal framework its role in the competition proceedings is highly limited. It can only submit the complaint to the CCP President (Article 86 of the Competition Act). This complaint does not oblige the CCP President in any way to institute formal proceedings. What is more, even if the proceedings are started as a result of the complaint, the complainant has no right to participate in the proceedings - the status of the party is limited only to the undertaking against which charges have been raised (Article 88(1) of the Competition Act). Thus competitors or other entities possibly harmed by the activity of the undertaking that allegedly violated competition law may not participate in the proceedings.

The solutions of Polish competition procedure remain completely different to EU procedure, where the complainant is entitled to participate in the competition proceedings (i.e. the complainant has access to the case file as well as to an oral hearing)³⁸ as well as to appeal the final decision of the Commission under Article 263 TFEU. Additionally it may be noted that, especially in this respect, the competition procedures of the EU Member States are not uniform.³⁹ A call for approximation of EU rules when it comes to standing of complainants in decentralised competition proceedings has already been expressed.⁴⁰ It was noted that it would be useful to have clear indication of the acceptable grounds for a NCA to reject a complaint based on Articles 81-82 EC (now Articles 101-102 TFEU) when no other NCA intervenes and to impose judicial control on such decisions.⁴¹

In Polish competition proceedings there are no clear standards when it comes to the guarantees of the presumption of innocence and the privilege against self-incrimination. The latter is not regulated in Polish competition procedure at all despite the voices pointing the need for that.⁴² In consequence, in the specific case it can happen that

³⁷ See for example Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?' (2010) 1(7) *CompLRev* 153-156. For the critics expressed in the past see Levitt, 'Commission Hearings and the Role of the Hearing Officer: Suggestion for Reform' (1998) 6 *European Competition Law Review* 404-408.

³⁸ See Articles 5-9 of the Regulation no. 773/2004.

³⁹ Gauer, 'Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonization of National Procedures and Sanctions' in Ehlermann, Anastasiu (eds) *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Hart Publishing 2004, pp. 195-196. See more generally about the decision making process in respective European NCAs at: http://www.concurrences.com/nr_one_question.php?id_rubrique=524

⁴⁰ Idot, 'A Necessary Step Towards Common Procedural Standards of Implementation for Articles 81 and 82 EC Within the Network' in Ehlermann, Anastasiu (eds) *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Hart Publishing 2004, pp. 216-217.

⁴¹ *Ibid.*, p. 217.

⁴² Turno, 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości', (2009) 3 *Ruch Prawniczy Ekonomiczny i Społeczny* 45-48. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 190-191.

undertakings are forced to make a confession of violation of the competition law. Differently in the EU procedure privilege against self-incrimination is respected.⁴³

There is also no clear legal basis for the protection in Polish competition procedure of legal professional privilege (LPP).⁴⁴ In particular, it is impossible to answer the question whether the LPP is applicable only to legal advice provided by external lawyers or also by internal ones (employed by the company to which legal aid is provided). In the centralised competition proceedings, confidentiality of the communication between the undertaking and its external lawyers remain protected.⁴⁵ Lack of precise regulation of LPP characterises many jurisdictions in Europe.⁴⁶

Differences as to the level of guarantees of the proportionality of inspections may also be observed between Polish and centralised competition proceedings.⁴⁷ Most importantly inspection, also in its more intrusive form (a search), is incorrectly understood⁴⁸ - if the Competition Act is interpreted literally - to be admissible just because the CCP President is analysing the market structure and despite them not having any information whatsoever about any violation of law. Thus it is possible that so called fishing expeditions take place.⁴⁹ Also some doubts arise over the effectiveness of both prior and subsequent judicial control in case of disproportional inspections. It is also characteristic that simple inspection may be conducted during explanatory proceedings solely under the written authorisation handed in to the representatives of the inspected undertaking by the inspectors. The inspected undertaking is thus deprived of the right to contest before a court the legality and proportionality of such an informal decision authorising the control of its premises. Such situations take place despite the fact that companies are obliged to cooperate with the CCP President's

⁴³ See Case 374/87 *Orkem v Commission*, [1989] ECR 3283, paragraph 35. See also Cases C-238, 244–245, 247, 250, 251–251 and 254/99 *Limburgse Vinyl Maatschappij NV and others v Commission*, [2002] ECR I-8375. For ECHR standards see the ECtHR's judgement of 17 December 1996, *Saunders v United Kingdom*, no. 19187/91, paragraph 69.

⁴⁴ It is argued that in the competition proceedings the provisions of the Code of Criminal Procedure should *per analogiam* be applied when the question if given documents are protected by the LPP clause arise. See Bernatt, n 42, pp 232-234. Confirmation of such approach has its grounds in the order of the CCP Court of 4 April 2007 r., XVII Ama 8/06, not reported.

⁴⁵ See Cases: 155/79 *AM&S*, [1982] ECR 1575, paragraphs. 21-28; T-30/89 *Hilti*, [1990] ECR II-163, paragraphs. 13-16 and 18; T-125/03 and T-253/03 *Akzo and Akros*, [2007] ECR II-03523, paragraphs 80-86, 120-123; C-550/07P, *Akzo and Akros*, [2010] ECR I-8301, paragraphs 40-50. Specific procedure, so called 'the sealed enveloped procedure', may be applied in case of disagreement between the Commission's officials and undertakings whether given document or electronic communication shall be protected under LPP.

⁴⁶ See http://www.concurrences.com/nr_one_question.php3?id_rubrique=638

⁴⁷ For further information see my article dedicated to this issue – Bernatt, 'The powers of inspection of Polish competition authority. The question of proportionality' (2011) 4(5) Yearbook of Antitrust and Regulatory Studies 47-66.

⁴⁸ C. Banasiński, E. Piontek (eds), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa, Lexis Nexis 2000, pp. 869-870.

⁴⁹ This is however also criticised as a possibility in case of inspections run by the Commission under the Regulation 1/2003, see Andersson, Legnerfält, 'Dawn Raids in sector inquiries – fishing expeditions in disguise' (2008) 8(29) European Competition Law Review 442-445. Recently such possible Commission practice was rejected by the Court – see the judgment of 14 November 2012 in case T-135/09 *Nexans*, not yet reported, available at <http://curia.europa.eu/>, paragraphs 64-67.

inspectors during a control and cannot deny them access to premises. Entry denial or lack of cooperation can in fact cause the imposition of a fine of up to 50 000 000 Euro (Article 106(2)(3) of the Competition Act).⁵⁰ By contrast in EU law, a decision concerning an inspection issued under Article 20(4) Regulation 1/2003 (a decision that the undertaking must submit to) can be appealed to EU courts by the inspected undertaking.⁵¹

The way in which judicial control over the proceedings before the CCP President is exercised raises doubts from the point of view of the requirements of 'full jurisdiction' as provided by the standards of Article of 6 ECHR.⁵² The problem is however of different nature than in the case of EU procedure where the judicial control is criticised mainly because of lack of full review when it comes to the merits of the Commission decision.⁵³ In Poland, the court specialised in dealing with the appeals from the CCP President decision (the CCP Court), despite the legal basis for that contained in the Code of Civil Procedure, does not exercise - differently to EU courts - sufficient control with respect to procedural infringements over the proceedings before the CCP President.⁵⁴

Being entitled to change the decision (and not only to annul it) the CCP Court concentrates on the merits of a case. In jurisprudence it is accepted that the CCP Court - a first instance court entitled to decide the case on merits - is not obliged to refer in detail to the procedural objections raised in the appeal especially if the submitted irregularities are not likely to be of a kind that influences the CCP President decision on its merits.⁵⁵ Furthermore, the Supreme Court specified that procedural irregularities concerning evidence should not lead to the revocation of the CCP President decision provided that it is in line with the provisions of substantial law.⁵⁶ In consequence the

⁵⁰ A fine of 30.000.0000 was imposed on undertaking in the CCP President's decision of 4 November 2010, DOK-9/2010 for obstructing the CCP President's inspection. See also the decision of 24 February 2011, DOK-1/2011, www.uokik.gov.pl

⁵¹ See also Case 46/87 *Hoechst AG v Commission*, [1989] ECR 2859 paragraph 26. A complaint to EU courts does not suspend the inspection.

⁵² Generally see judgments: *Albert and Le Compte v Belgium* of 10 February 1983, no. 7299/75, 7496/76, paragraph 29; *Gautrin and others v France* of 20 May 1998, no. 21257/93, paragraph 57; *Frankowicz v Poland* of 16 December 2008, no. 53025/99, paragraph 60. Specifically for judicial control over administrative bodies see judgments: *Bendenoun v France* of 24 February 2004, no. 12547/86, paragraph 46; *Umlauf v Austria* of 23 October 1995, no. 15527/89, paragraphs 37-39; *Schmutzer v Austria* of 23 October 1995, no. 15523/89, paragraph 34; *Janosevic v Sweden* of 21 May 2003, no. 34619/97, paragraph 81. See also Drabek, 'A Fair Hearing Before EC Institutions' (2001) 4 *European Review of Private Law* 561; Lenaerts, Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', (1997) 34 *Common Market Law Review* 561-562.

⁵³ See Gerard, 'EU Antitrust Enforcement in 2025: "Why Wait? Full Appellate Jurisdiction, Now"', *CPI Antitrust Journal* (2010) 1, pp. 4-9 and Gerard, 'Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?' (2011) 36 *European Law Review* 478-479.

⁵⁴ In English see more on that in: Bernatt, 'The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgement of the Supreme Court of 19 August 2009 - Marquard Media Polska (No. III SK 5/09)', (2010) 3(3) *Yearbook of Antitrust and Regulatory Studies* 300-305, available at <http://ssrn.com/abstract=1874797>.

⁵⁵ The Supreme Court's judgement of 19 August 2009, III SK 5/09, Lex no. 548862.

⁵⁶ *Ibid.*

jurisprudence of Polish courts in competition cases suggests that the CCP Court does not exercise sufficient control over possible breach of procedural rules by the CCP President. Differently, EU courts are concentrated on possible procedural infringements during the proceedings before the Commission.⁵⁷

Right to effective judicial review may also be significantly limited in a given case due to the very short time limit for appealing the CCP President decision to the CCP Court. In Polish literature it is argued that the two-week time limit for that should be extended.⁵⁸ Taking into account the complicated character of competition cases as well as often limited knowledge of the parties about the details of the proceedings instigated against them by the CCP President,⁵⁹ the current regulation may disproportionately limit the right to judicial review. It also differs significantly from two-month period for appealing the Commission decision (see Article 263 TFEU) and similar or even more favourable regulations in other EU countries.⁶⁰

4. COOPERATION AMONG THE MEMBERS OF THE EUROPEAN COMPETITION NETWORK

The identified differences at the level of procedural standards between Polish and EU competition procedure may be considered exemplary. However, procedural discrepancies are also significant when it comes to competition procedures of other EU Member States. For example the existence of significant procedural differences has been shown in respect to legal professional privilege, privilege against self-incrimination and inviolability of home.⁶¹ In this respect it is important that lack of harmonization of competition procedures in Europe was evident while the Regulation 1/2003 was being drafted and perceived as a possible obstacle for effectiveness of European Competition Network (network of cooperation among the Commission and the NCAs).⁶² It was also noted that major differences in the way the same EC competition rules are enforced will be difficult to explain in the view of progressive integration of European markets.⁶³ The view was expressed that there would be no good reason why NCAs should follow separate procedures “in matters as fundamental as powers of search and seizure, rights of inspection, rights of defence”.⁶⁴ Even if the harmonisation of competition

⁵⁷ See Case T-44/90 *La Cinq SA v Commission*, [1992] ECR II-1, paragraph 86.

⁵⁸ Turno, ‘Termin na wniesienie odwołania od decyzji Prezesa UOKiK’ (2008) 6 *Przegląd Prawa Handlowego* 24-25. This actually may happen if the proposals of amendment of the Competition Act proposed in this respect by the CCP President are enacted in 2013 by the Polish Parliament (the proposal concerns the prolongation of the period for appealing the CCP President decision from 14 to 30 days).

⁵⁹ See Section 3 above.

⁶⁰ See http://www.concurrences.com/nr_one_question.php3?id_rubrique=650

⁶¹ See Brammer, *Co-operation between national competition agencies in the enforcement of EC Competition Law*, Oxford-Portland, Hart Publishing, 2009, pp 323 and 477.

⁶² See Gauer, n 39, pp 187-201.

⁶³ *Idot*, n 40, p 221.

⁶⁴ This the opinion of Kon as reported by Brammer. See Brammer, n 61, p 487.

procedures in the EU was not seen as a precondition for adoption of the Regulation 1/2003, it was said to be probably needed in the medium or long-term perspective.⁶⁵

Differences in procedural standards exist despite close cooperation of the NCAs and the Commission in frame of the European Competition Network. Where the first problem lies is the application of Article 12 of the Regulation 1/2003. Under this provision the NCAs and the Commission are entitled - for the purpose of applying Article 101-102 TFEU and national competition law⁶⁶ - to provide one another with and use in evidence any matter of fact or of law, including confidential information. As to the procedures regulating such exchange of information Article 12 of the Regulation 1/2003 specifies only that information exchanged shall only be used in evidence in respect of the subject-matter for which it was collected by the transmitting authority. Other procedural solutions refer only to the conditions under which sanctions may be imposed on natural persons. Article 12(3) of the Regulation 1/2003 specifies *inter alia* that information exchanged can only be used in evidence to impose sanctions on natural persons where 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. The Regulation 1/2003 lacks similar regulations as to the legal persons.

In consequence under Article 12 of the Regulation 1/2003 the evidence may be obtained by the receiving authority with the use of procedures applicable by transmitting authority that are characterised by lower procedural standards.⁶⁷ Such possibility is also clear in the light of the Commission Notice on cooperation within the Network of Competition Authorities. It provides that the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority.⁶⁸ Thus the procedural standards binding in the country of the receiving authority are not taken into account. It has been rightly pointed out that an unrestricted exchange of evidence and other information in the ECN may entail a loss of protection standards at the expense of the undertaking concerned.⁶⁹ The opinion was also expressed that it is possible that on the basis of the Regulation 1/2003, the NCA will obtain information that was collected in violation of the national law of this NCA.⁷⁰ Consequently it is correct to claim that the “free

⁶⁵ See Gauer, n 39, p 201.

⁶⁶ The exchange of information for the purpose of applying national competition law is possible where national competition law is applied in the same case in parallel to EU competition law and when this does not lead to a different outcome, see Article 12(2) of the Regulation 1/2003.

⁶⁷ Bernatt, n 42, pp 146-150; Brammer, n 61, p 323. Józwiak notes that the evidence collected under national procedural rules may be used by the Commission in central competition proceedings – Józwiak, n 9, p 27; see also the order of CCP President of 16 July 2008, DOK 2-400-14-07/BP, not reported, on the basis of which the information concerning the activities of Microsoft on Polish notebook market, were transmitted to the Commission with the conclusion that these activities might affect competition in the EU.

⁶⁸ See paragraph 27 of the Commission Notice on cooperation within the Network of Competition Authorities.

⁶⁹ Brammer, n 61, p 322 and 487. See also similar opinion of Andreangeli, n 10, p. 195;

⁷⁰ Kerse, Khan, n 25, p. 270.

circulation of evidence” among the ECN members under Article 12 of the Regulation 1/2003 requires the approximation of procedural standards.⁷¹

Lack of similar procedural standards may also be seen as a problematic issue when it comes to allocation of cases in the ECN. Article 11(6) of the Regulation 1/2003 provides that the initiation by the Commission of proceedings for the adoption of a decision under Articles 101-102 TFEU relieve the NCAs of their competence to apply these provisions.⁷² Thus the NCAs are not entitled to act when the Commission opens competition proceedings. However, similar rule does not exist under Article 14 of the Regulation 1/2003 when it comes to parallel proceedings run by two or more NCAs. It is possible that they will open the proceedings and even deliver two or more decisions in the same case.⁷³ In practice the exchange of information among ECN members and possibility to suspend proceedings (or reject a complaint) under Article 14(1) of the Regulation 1/2003 make such situation not very probable.⁷⁴ This guarantees in most cases the uniform application of Articles 101-102 TFEU in the EU. However, where the problem lies is lack of legal certainty of undertakings as to the procedure under which the proceedings against them will be opened⁷⁵ and in consequence what procedural standards of right of defence will apply.⁷⁶ The decision what competition authority will open the proceedings is taken informally in frame of the ECN.⁷⁷ The reasons of such decisions remain always unknown to the parties concerned

⁷¹ See also Brammer, n 61, p 322 and pp 486-490.

⁷² Additionally Article 11(6) of the Regulation 1/2003 provides that if a NCA is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority. It has however a clearly established right of initiating proceedings for the adoption of a decision, even where a national authority is already acting in the matter, see the Case T-339/04 *France Télécom SA*, [2007] ECR II-521, paragraph 80.

⁷³ It is also possible that at the preliminary stage the proceedings are run separately both by the Commission and the NCA. It was noted that “there is no provision (...) whereby the Commission is not authorised to carry out an inspection if a national competition authority is already dealing with the same matter”, see *France Télécom SA*, paragraph 80.

⁷⁴ The detailed rules governing the functioning of the ECN are contained in the ‘Joint statement of the Council and the Commission on the functioning of the network of competition authorities’, Brussels, 10 December 2002 (15435/02 ADD 1 RC 22); on the allocation of cases in ECN see more in: Brammer, n 61, pp. 149-161; Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych – w kierunku unifikacji standardów proceduralnych w UE*, Warszawa, Wolters Kluwer Polska, 2013, pp. 510-516.

⁷⁵ This results, amongst other things, in the factual obligation of filing – if an undertaking so decides – leniency applications in all EU Member Countries in which the given undertaking acts.

⁷⁶ For instance undertakings will not know whether the correspondence with the internal lawyers are protected or not under LPP clause - different rules applies in this respect in EU countries. On the problem with respect to due process see Blachucki, Józwiak, ‘Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights’, (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 159-165.

⁷⁷ Kowalik-Bańczyk criticizes also the fact that the documents produced as the result of consultation between NCA and the Commission (Article 11(5) of Regulation 1/2003), especially Commission observations remain secret to the parties what may adversely affect their right of defence – Kowalik-Bańczyk, n 74, pp 522-522.

(information exchange in the ECN is secret) what limits significantly the possibility of questioning before the court the accuracy of case allocation.⁷⁸

There is very few data concerning the application of Article 11(6) of the Regulation 1/2003 in case of Polish undertakings. After entry of Poland into the EU the Commission delivered one decision in which Polish undertakings was found to be a member of a cartel.⁷⁹ However, as this cartel had a European character it was not controversial that the Commission (and not the NCA) dealt with the case. The same observation is relevant in case of Commission decision addressed to European collecting societies managing the rights of music authors, including the Polish collecting society - *Związek Autorów i Kompozytorów Scenicznych (ZAIKS)*.⁸⁰ Also in the CCP President decisions based on Article 101-102 TFUE (in parallel with the corresponding provisions of Competition Act)⁸¹ the question of proper allocation of the case did not arise. In these decisions it is pointed out that the practices concerned might have affected the trade between Member States.⁸²

For the problem discussed in this section the most interesting is the Commission decision in which abuse of dominant position of Polish main telecom – *Telekomunikacja Polska (TP)* was established.⁸³ Territory of whole Poland was considered to be a relevant market in this case. One might have doubts why in such situation it was for the Commission and not for the CCP President to run the proceedings. This is because the *Joint statement of the Council and the Commission on the functioning of the network of competition authorities* provides that “the Commission will be particularly well placed to deal with a case if more than three Member States are substantially affected by an agreement or practice”.⁸⁴ However, on the other hand Commission explained that the adoption of

⁷⁸ Brammer underlines that the allocation process provided by ECN does not meet the criteria of predictability and transparency as well as is not subject to judicial review, Brammer, n 61, p 229.

⁷⁹ See the Commission decision concerning butadiene rubber (BR) and emulsion styrene butadiene rubber (ESBR) cartel - Decision COM (2006) 57—final of 29 November 2006, COMP/F/38.638, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf. The Commission decision was annulled in respect to Polish undertaking – Trade Stomil on evidential basis, see the case T-53/07 *Trade Stomil*, not yet reported, available at www.curia.eu. The other decision, concerning Polish Ocean Lines, was delivered before Poland become an EU Member and before Regulation 1/2003 entered into force. Thus it is not relevant here. See Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1) followed by case T-191/98 *Atlantic Container Line AB and others*, [2003] ECR II-3275.

⁸⁰ Commission decision of 16 July 2008, COMP/C2/38.698 (*CISAC*). ZAIKS appealed this decision (Case T-398/08 is pending).

⁸¹ See among others the CCP President decisions of: 29 December 2006, DOK-166/06; 20 December 2007, DOK-98/07; 29 August 2008, DAR-15/2006; 29 August 2009, DOK-6/2008; 8 December 2009, DOK-7/2009; 24 August 2010, DOK-7/2010; 23 November 2011, DOK-8/2011; 13 April 2012, DOK-1/2012.

⁸² See for example decision DOK-8/2011, point IV, pp. 42-49 where influence of the practice on trade between Member States is discussed in detail.

⁸³ See the Commission Decision C (2011) 4378 final of 22 June 2011; the action against this decision is pending (Case T-486/11).

⁸⁴ See ‘Joint statement of the Council and the Commission on the functioning of the network of competition authorities’, para 18.

the decision is required by Community interest,⁸⁵ what is also a ground (even if a vague one) to conduct the proceedings by the Commission and not the NCA.⁸⁶ In this case also the procedural standards governing the Commission inspection in the seat of TP in September 2008 may seem not to be completely clear. In this case it could be discussed whether the Commission should obtain an authorization of the CCP Court to conduct this inspection. However, this might not necessarily be well-founded as there is no proof that TP opposed the Commission's inspection.⁸⁷ Still, differences in procedural standards applicable in case of centralized and decentralized proceedings may be the reason of the controversies when it comes to procedural standards that govern Commission inspections under Regulation 1/2003.

5. APPLICABILITY OF ARTICLE 6 OF THE ECHR AS THE ARGUMENT FOR CONVERGENCE

In this section the applicability of Article 6 ECHR to both the proceedings before the Commission and the proceedings before the NCAs is taken as an argument for the recognition and observance of the similar procedural standards in these proceedings.

The importance of the right to a fair trial for competition proceedings - the fundamental right stemming from Article 6 ECHR and the right fully applicable in case of undertakings⁸⁸ - is broadly analysed in European legal discourse. The discussions have been focused on the question of accordance of the rules of EU competition procedures (centralised proceedings before the Commission and subsequently the EU courts) with the ECHR standards.⁸⁹ The attention has been especially given to the

⁸⁵ See paragraph 131 of the Commission decision C (2011) 4378.

⁸⁶ See 'Joint statement of the Council and the Commission on the functioning of the network of competition authorities', paragraph 18. As to the application of Article 102 TFEU in this case the Commission pointed that abusive conduct affected trade between Member States because it affected the market structure by raising barriers to entry to telecommunications operators in Poland (see paragraph 887 of the decision).

⁸⁷ See in this respect Article 20(6) - 20(7) of Regulation 1/2003. It is known that Commission's officials were assisted by the representatives of the CCP President. In this case TP filed to General Court a complaint against the Commission decision authorizing this inspection. However, later it was withdrawn. See the order in case T-533/08 *Telekomunikacja Polska*, available at www.curia.eu.

⁸⁸ Article 6 of the ECHR is fully applicable in the realm of business activity and thus may be invoked not only by natural persons but also legal ones. This is confirmed by significant amount of ECtHR judgements in which the ECtHR assessed whether Article 6 of ECHR was violated in case of national proceedings involving applicant companies. See for example for the principle of equality of arms – the judgement of 27 October 1993 in case *Dombo Bebeer v the Netherlands*, no. 14448/88; for lack of fairness of the proceedings see the judgement of 21 June 2010 in case *Diya 97 v Ukraine*, no. 19164/04; for limitation of access to court see the judgement of 10 January 2006 in case *Teltronic-CATV v Poland*, no. 48140/99; for lack of adequate time for preparation of the defence see the judgement of 20 September 2011 in case *OAO Neftyanaya Kompaniya Yukos v Russia*, no. 14902/04; for the lengthiness of proceedings and extent of non-pecuniary damages see the judgement of 6 April 2000 in case *Comingersoll v Portugal*, no. 35382/97. As to the application of Article 8 of the ECHR to business premises see the judgement of 16 December 1992 in case *Niemietz v Germany*, no. 13710/88 and the judgement of 16 April 2002 in case *Societe Colas Est pręzeciwko Franji*, no. 37971/97. On the extent of application of the ECHR to companies see generally M. Emberland, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, New York, Oxford University Press, 2006.

⁸⁹ See for example: Slater, Thomas, Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?', (2004) 8 *The Global Competition Law Centre Working Papers Series – GCLC Working Paper 7–16*, <http://www.coleurop.be/file/content/gclc/>

question whether the combination by the Commission of the function of prosecutor and the judge and the limited jurisdiction of the EU Courts meets the requirements of Article 6(1) ECHR. The judgement of the ECtHR in case *Menarini v Italy*⁹⁰ has also been commented on in the context of centralised competition proceedings.⁹¹

The discussion has not dealt so intensively with the issue that Article 6 ECHR is the point of reference not only for centralised competition proceedings but also for decentralised ones and last but not least for national competition proceedings.

When it comes to centralised competition proceedings, the obligation to build the system of enforcement of competition law in accordance with the Article 6 of ECHR derives from Article 6(3) TEU under which fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU law. In the realm of competition law the importance of Article 6 ECHR has been confirmed by the EU courts.⁹² What is more, the ECtHR has also accepted that the protection of fundamental rights by EU law can be considered to be “equivalent” to that of the ECHR system.⁹³ Thus it is justified to expect from the EU a level of protection of procedural rights in the centralized competition proceedings that is equivalent to the standards of Article 6 ECHR. As to the decentralised and national competition proceedings all the EU Member States are parties to the ECHR. So their domestic procedures must be built and applied in conformity with Article 6 ECHR.⁹⁴ Differently to centralised competition proceedings, decentralised and purely national competition proceedings fall under direct scrutiny of ECtHR. In case of decentralised competition such thesis is confirmed by the fact that in the decentralised competition proceedings national procedure is used and national substantive competition rules are the basis of the decision (in parallel with UE ones). Thus undertakings may file a complaint against the ECHR Contracting Party from which given NCA originates complaining about the violation of Article 6 ECHR. The

documents/GCLC%20WP%2004-08.pdf; Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 1 World Competition 12–19, <http://ssrn.com/abstract=1492736>; Killick, Berghe, ‘This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in’, (2010) 6(2) CompLRev 264–271; Forrester, ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’, (2009) 34 European Law Review 827–831. See more Merola, Waelbroeck (eds.), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, Brussels, Bruylant, 2010.

⁹⁰ ECtHR judgement of 27 September 2011, no. 43509/08.

⁹¹ A. Italianer, the Director General of DG Competition noted in October 2011 that ECtHR judgement in case of *Menarini v Italy* confirms “the legitimacy of administrative systems, a model followed by many competition agencies. It also corroborates the case law of the European Court of Justice which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial”, see Italianer, ‘Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer’, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf, p. 3.

⁹² For example the protection of the presumption of innocence in competition proceedings has been seen by EU courts as obligatory in the light of Article 6(2) of the ECHR, see Case C-199/92 P *Hüls v Commission*, [1999] ECR I-4287, paragraph 149-150; Case C-235/95 P *Montecatini v Commission*, [1999] ECR I-4539, paragraph 175-176; and Case T-279/02 *Degussa v Commission*, [2006] ECR II-897, paragraph 115.

⁹³ The ECtHR judgement of 30 June 2005 in case *Bosphorus v. Ireland*, no. 45036/98, paragraph 155-156 and 165.

⁹⁴ This is the obvious consequence of the wording of Article 1 of the ECHR.

case *Menarini v Italy* proves that they can actually succeed in bringing the case before the ECtHR. Thus its judgements may be of big significance for the domestic procedural framework under which national and EU competition law is enforced. The jurisprudence of the ECtHR may also confirm the existence of inconsistencies between different national procedural frameworks in the future.

In consequence it is justified to claim that Article 6 ECHR “shines” in three directions - all three distinguished types of proceedings: centralised (case 1), decentralised (case 2) and national (case 3)⁹⁵ (being interconnected with each other because of the same substantial law - case 1 and 2 and procedural law - case 2 and 3 used) must meet requirements of Article 6 ECHR. Because of this it is justified to claim that the procedures that are applicable in each of these three cases should reflect similar procedural standards. Thus significant discrepancies between the procedure that is applied in case 2-3 and the procedure that is applicable in case 1 are unfounded. Consequently, the approximation of the procedural standards applicable in all these three situations is needed so as to ensure that they all comply with the requirements of Article 6 ECHR.

The claim that both EU and national competition procedure must meet the requirements of Article 6 ECHR and so follow similar procedural standards is confirmed by the fact that it is fully applicable to competition proceedings concerning practice restricting competition⁹⁶ under its criminal head even if at first stage these proceedings are of administrative and not of judicial character.⁹⁷ This implies broad procedural guarantees including the one described in Article 6(2) and 6(3) associated with presumption of innocence (e.g. privilege against self-incrimination)⁹⁸ and right of defence.⁹⁹ In case of proceedings concerning practices restricting competition regulated by EU or national procedural provisions the *Engel* conditions are met¹⁰⁰ and so Article

⁹⁵ See Section 2 of this paper.

⁹⁶ This paper does not deal with the proceedings concerning concentration.

⁹⁷ See *Menarini v Italy*, n 90, paragraphs 38-44.

⁹⁸ The principle of presumption of innocence is referred to competition proceedings also in case of EU jurisprudence, see Case C-199/92 P *Hüls v Commission*, [1999] ECR I-4287, paragraphs 149–150; Case C-235/95 P *Montecatini v Commission*, [1999] ECR I-4539, paragraphs 175–176; and Case T-279/02 *Degussa v Commission*, [2006] ECR II-897, paragraph 115.

⁹⁹ For the list of procedural rights that are pertinent in competition proceedings see for example Scordamaglia, ‘Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees’, (2010) 7(1) *CompLRev* 11-13.

¹⁰⁰ Although practices restricting competition are classified as administrative and not criminal, the general and abstract character of the prohibition as well the deterrent, repressive, severe and stigmatising character of fines (not compensatory one) decides about criminal character (in the sense of ECHR) of the proceedings concerning these practices. See *Menarini v Italy*, paragraphs 38-44 when it comes to Italian law. For understanding of the Engel criteria see the ECtHR judgement of 8 June 1976 in case *Engel and others v the Netherlands*, no. 5100/71, paragraph 82 and the ECtHR judgement of 21 February 1984 in case *Öztürk v Germany*, no. 8544/79, paragraph 50. Criminal character of antitrust proceedings before Commission is accepted, see the opinion of AG Sharpston of 10 February 2011 in case C-272/09 P, *KME Germany AG*, paragraph 64 (her opinion is limited to the heaviest infringement of EU competition law); opinion of AG Léger of 3 February 1988 in Case C-185/95 P, *Baustablgewebe v Commission*, [1998] ECR I-8417, paragraph 31. See also: Slater, Thomas, Waelbroeck, n 89, pp 7-16; Wils, n 89, pp 18–19. In Polish literature Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Warszawa, Centrum

6 applies to this proceedings under its criminal head. This seems undisputed after classification as criminal of Italian competition proceedings in *Menarini v Italy*. However, this judgement may be also seen as support for those arguing on the basis of the ECtHR's judgement in *Jussila v Finland* that in case of competition proceedings Article 6 does not apply under the criminal head with its full stringency.¹⁰¹ This implies that it is acceptable to have an administrative body and not a court in the meaning of Article of 6 ECHR deciding the case in the first instance.¹⁰² In my opinion this question may still remain open as the case *Menarini v Italy* concerned the question of full judicial control over the administrative phase of competition proceedings and not exactly the question of independence and impartiality of the body responsible for delivering decisions in competition cases in first instance.¹⁰³ It is also important that ECtHR pointed out that the differences between administrative procedure and typical criminal procedure do not discharge the ECHR contracting parties from providing all guarantees of Article 6 ECHR prescribed under its criminal head.¹⁰⁴

From the perspective of procedural framework this can be interpreted in a way supporting the view that in principle all the procedural requirements of Article 6 ECHR must be met in case of competition proceedings even if the proceedings are conducted in the first phase before the administrative body and not a court. In other words although application of these guarantees is different to traditional criminal cases¹⁰⁵ (administrative body and not a prosecutor or a court is the enforcer) the guarantees such as right to be heard and right of defence (as defined in the broad jurisprudence of the ECtHR) must be provided for. This supports the argument for the approximation

Europejskie Natolin, 2010, http://www.natolin.edu.pl/pdf/zeszyty/Natolin_Zeszyty_39.pdf, pp. 98-114. For analogous conclusion when it comes to Polish competition law see Bernatt, 'Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku (na tle art. 6 EKPC)', (2012) 791(1) Państwo i Prawo 55-58; see also Blachnio-Parzych, 'The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of 'Criminal Charge' in the Jurisprudence of the European Court of Human Rights', (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 35-55.

¹⁰¹ Wils, n 89, pp 15-19.

¹⁰² See however the ECtHR judgement of 11 June 2009 in case *Dubus S.A. v France*, no. 5242/04, paragraph 58–60.

¹⁰³ The ECtHR without any detailed analysis pointed that "Le respect de l'article 6 de la Convention n'exclut donc pas que dans une procédure de nature administrative, une «peine» soit imposée d'abord par une autorité administrative" (paragraph 59). The approach of the ECtHR in case *Menarini v Italy* as to the acceptance for more limited guarantees in case of competition proceedings (as not strictly criminal ones) may be criticised as significantly different to the tax case assessed in *Jussila v Finland*. It is important that practices restricting competition cannot be seen as minor offences (in this respect see *Öztürk v Germany*, paragraph 56), they involve heavy fines which main function is to deter and sanction the misconduct. What is more the stigmatising character of the competition proceedings and fines must be borne in mind (compare arguments used in case Case T-474/04 *Pergan v Commission*, [2007] ECR I-7723, paragraphs 78–81). Additionally competition cases - contrary to tax cases - are not numerous.

¹⁰⁴ The ECtHR stated that "a nature d'une procédure administrative peut différer, sous plusieurs aspects, de la nature d'une procédure pénale au sens strict du terme. Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l'article 6, elles peuvent néanmoins influencer les modalités de leur application" (paragraph 62).

¹⁰⁵ *Menarini v Italy*, paragraph 62 in fine.

of the procedural standards applicable in case of competition proceedings in the EU in a way that all of them fully meet the requirements of Article 6 ECHR.

This thesis is additionally strengthened in the light of accession of the EU to the ECHR - the importance of Article 6 ECHR for centralised competition proceedings will grow even more in case of future EU's accession to the ECHR.¹⁰⁶ In its consequence the enforcement of EU law by the EU institutions (in this case the Commission and the EU courts) will fall under the direct scrutiny of the ECtHR.¹⁰⁷ This development will influence the position of undertakings participating in the centralised competition proceedings.¹⁰⁸ In consequence of the accession they will be granted a right to question before the ECtHR identified in their cases differences in the level of protection provided under the ECHR and in the centralised competition proceedings. It is also argued that the cooperation between the Commission's and the NCAs within the ECN will become amenable to review by the ECtHR.¹⁰⁹ Thus future ECtHR's judgments delivered in the individual cases may force the EU not only to change current practice but also to introduce such reforms of procedural framework that will factually raise the level of protection of fundamental rights in the competition proceedings at least to the minimum expected by the ECtHR under Article 6 ECHR. The ECtHR jurisprudence has brought already changes to the legal systems of the Members of the Council of Europe.¹¹⁰ Such situation derives from the fact that the ECHR establishes not only prohibitions (of not to violate fundamental rights) but also positive obligations. The ECHR contracting parties must build the legal system in a way that guarantees that in this system rights and liberties enshrined in the ECHR (including a right to a fair trial and a right of defence) are observed.¹¹¹

It was pointed above that decentralised and national competition proceedings are already under direct scrutiny of the ECHR. However, the accession of the EU to the

¹⁰⁶ See Article 6(2) TEU. On the relation between EU and Council of Europe fundamental rights' system see e.g. J.P. Costa, 'The Relationship between the European Convention on Human Rights and European Union Law - A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice', Lecture at KCL, 7th October 2008, http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf

¹⁰⁷ It is underlined that right now the lack of external supervision of EU's interpretation of fundamental rights enshrined in the ECHR creates difficulties for the uniform application and supremacy of EU law, thus reducing protection for undertakings, see Turno, Zawlocka-Turno, 'Legal professional privilege and privilege against self-incrimination in the EU Law of Competition after the Lisbon Treaty - Is there a need for a substantial change?', (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 203.

¹⁰⁸ Decentralised competition proceedings are already under direct scrutiny of the ECHR as the national procedure is used in such proceedings and national substantive competition rules are the basis of the decision (in parallel with UE ones).

¹⁰⁹ A. Andreangeli, n 10, p. 229; Turno, Zawlocka-Turno, n 107, p. 203.

¹¹⁰ As to the Article 6 ECHR these changes included, *inter alia*, the introduction of special laws dealing with lengthiness of judicial proceedings, see ECtHR judgements: of 26 October 2000 in case *Kudla v Poland*, no. 30210/96 and of 29 March 2006 in case *Scordino v Italy*, no. 36813/97.

¹¹¹ Turno and Zawlocka-Turno note that "the binding effect of the Charter and the EU's prospective accession to the Convention requires the EU Courts, Commission, and Member States to acknowledge that obligations related to fundamental rights are not only negative, but also positive in nature", Turno, Zawlocka-Turno, n 107, pp 203-204.

ECHR may not only improve centralized competition proceedings but also the decentralized and national ones. This may be a factual consequence of changes on the centralized level that will spill over the national procedures.¹¹² In all these three proceedings the same level of protection of fundamental right based on the Article 6 ECHR should be reflected, the approximation of the standards to the expected ECHR minimal level should cause similar changes in the national procedural frameworks under which the same or very similar substantive competition rules are enforced.

For these reasons I believe that accession of the EU to the ECHR should bring about appreciation of importance of procedural standards in competition proceedings and a raise of these standards at least to the minimal level deriving from Article 6 ECHR.

6. THE BINDING CHARACTER OF THE CHARTER OF FUNDAMENTAL RIGHTS AS A POINT FOR CONVERGENCE

The recognition and observance of similar procedural standards in competition proceedings shall be also be seen as a consequence of the binding character of the EU Charter of Fundamental Rights and its direct relation with the ECHR.

After entry into force of the Lisbon Treaty, the CFR has the value of primary law and is legally binding not only on EU institutions, bodies and agencies but also on Member States when they enforce EU law.¹¹³ It is clear, in light of Article 51(1) CFR, that NCAs when applying Articles 101-102 TFEU are fully bound by the provisions of the Charter. It is also important that in the light of Article 52(3) CFR the fundamental rights there provided must have the same meaning and scope as the same rights laid down in the ECHR. Importantly for the relation between EU law and the ECHR the latter remains only the minimum standard when it comes to the level of protection of fundamental rights under EU law - EU law may provide more extensive protection (Article 52(3) *in fine* of the CFR).¹¹⁴

Therefore the understanding and application of Article 47 and 48 CFR should be in conformity with standards established by the ECtHR on the basis of Article 6 of the ECHR. The right of defence provided in Article 48(2) CFR should be seen as applicable in case of competition proceedings because - correspondingly - this right is referred to in these proceedings under the criminal head of Article 6 ECHR.¹¹⁵ Because of that it can be argued that even if the jurisprudence of EU courts determining the

¹¹² Kowalik-Bańczyk, n 74, pp 564 and 582.

¹¹³ It is underlined that because of the entry into force of the Lisbon Treaty for the first time fundamental rights are “codified” in EU law and thus they gain a new strength *vis-à-vis* incompatible secondary EU law. What is more the CFR reduces the discretionary power of the ECJ in deciding what rights are fundamental and raises the level of protection for all fundamental rights by defining the ECHR as a minimum standard, see Turno, Zawlocka-Turno, n 107, pp 200-202 and the literature invoked there.

¹¹⁴ Kowalik-Bańczyk, n 100, pp 121-123; Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon', (2011) 7 European Constitutional Law Review 72–74.

¹¹⁵ Kowalik-Bańczyk, 'Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings' (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 223-225.

meaning of the right of defence (in the broad sense of EU law)¹¹⁶ has been built in the proceedings under Article 267 TFEU and not Article 263 TFEU (preliminary questions) it still establishes the source of procedural standards not only for centralised but also for decentralised competition proceedings.¹¹⁷ Similar interpretation seems correct in case of presumption of innocence (Article 48(1) CFR).

Also Article 47(2) CFR (and not only Article 41 CFR - right to good administration) is applicable to competition proceedings even if they are conducted in the first phase before the administrative body. It is clear in the light of ECtHR jurisprudence that the right to fair trial is not limited to judicial proceedings only. It is also applicable in case of administrative proceedings¹¹⁸ on the condition that they involve broadly understood civil rights and obligations¹¹⁹ or a criminal charge. It also requires full control of these proceedings by the court.¹²⁰ Consequently, similar interpretation of Article 47 CFR is advised.

Because of that it may be concluded that Article 47 and 48 CFR interpreted in light of the jurisprudence of the ECtHR under Article 6 ECHR shall be seen as a source in the search for similar procedural standards that should be provided in centralised and decentralised competition proceedings (case 1 and case 2 above).¹²¹

For strictly national competition proceedings (case 3 above), the jurisprudence of EU courts concerning the fundamental rights in competition proceedings as being in fact based (indirectly) on Article 6 ECHR, should be taken into consideration at least *per analogiam*. The fact that this jurisprudence concerns the standards of enforcement of very similar substantive law additionally supports such argument. When talking about Polish competition proceedings as an example of proceedings described in case 3 above, it is characteristic that both the Polish competition authority and courts often rely on the jurisprudence of EU courts when it comes to the application of substantive rules of competition law. Thus it is justified to argue that a similar approach may also be applied when it comes to procedural issues regulating the enforcement of these rules.¹²² Otherwise there is a risk that the mentioned state bodies will rely on principles

¹¹⁶ See more Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', (2006) 12 (2) European Public Law 225-250.

¹¹⁷ Kowalik-Bańczyk analyses that as a possible argument against the application of the *acquis* "right of defence" in decentralised competition proceedings, see Kowalik-Bańczyk, n 115, p 229. Different opinion in this respect was expressed in the context of Polish decentralised competition proceedings by Kolaśiński: Kolaśiński, n 21, pp 33-34. See also: Kowalik-Bańczyk, n 74, p 544.

¹¹⁸ The ECtHR analysed possible violation of Article 6 ECHR during domestic administrative proceedings for example in the judgement of 24 February 1994 in case *Bendenoun v France*, no. 12547/86, paragraph 52 and of 23 July 2002 in case *Janosevic v Sweden*, no. 34619/97, paragraph 90. See also the judgement of 22 November 1995 in case *Bryan v United Kingdom*, no. 19178/91, paragraph 46.

¹¹⁹ For example Article 6 ECHR is applicable under its civil head to concentration proceedings, see M. Bernatt, n 100, p. 59; Andreangeli, n 10, p 186.

¹²⁰ See Section 3 of this paper.

¹²¹ Andreangeli is of the opinion that the CFR can provide "the way forward to the establishment of a new 'due process' clause applicable to competition proceedings", Andreangeli, n 10, p 227.

¹²² However, the approach of Polish Supreme Court in this respect is not uniform. In the judgement of 9 August 2006, III SK 6/06, the Supreme Court stated that in case of purely national competition when

established in EU law opportunistically - only when they need to do so in order to support their arguments. It is underlined that a practice of such selective, haphazard application or non-application of European solutions does not enhance the legal security of undertakings.¹²³

The argument for convergence of procedural standards of enforcement of competition law in the EU based on the binding character of the CFR and obligation of its interpretation in the light of ECHR is also valid from the perspective of procedural autonomy of the EU Member States. Procedural autonomy is a concept that implies that unless the procedural issues are directly regulated in the EU primary or secondary law, the Member States possess a competence to legislate when it comes to national procedural regulations under which EU law is enforced.¹²⁴ In 1993 the ECJ expressed the view that “subject to the observance of Community law, and in particular its fundamental principles, it is therefore a matter for national law to define the appropriate procedural rules in order to guarantee the rights of the defence of the persons concerned. Such guarantees may differ from those which apply in Community proceedings”.¹²⁵ Nowadays in the light of binding character of the CFR and the fact that on the level of centralized, decentralized and national competition proceedings the guarantees of Article 6 ECHR must be provided for this judgement may not be interpreted as an argument for the admissibility of lower procedural standards (that do not meet the requirements of Article 6 ECHR and correspondingly Article 48 CFR) in case of national procedures regulating the enforcement of competition rules.¹²⁶ Such opinion does not preclude national procedures from providing higher standard of

substantial norms of Polish law are identical to EU one, the latter 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.” (cited by: D. Miąsik, n 7, p. 14) The same opinion was expressed in: judgment of the Supreme Court of 6 December 2007, III SK 16/07 and judgment of the Supreme Court of 3 September 2009, III SK 9/09. Kowalik-Bańczyk noted that on the other hand the Supreme Court recognised a ‘factual harmonisation’ of purely internal competition rules. It stated that the Polish courts are obliged to fully recognise the *acquis communautaire* in the application of analogous provisions of national law (Resolution of the Supreme Court of 23 July 2008, III CZP 52/08). The court pointed also out that if no effect on Community trade was established and thus the court was to apply domestic law only, a legal interpretation ‘which would eliminate substantial procedural divergences in the application of Community and national laws would be desirable’. Thus according to Kowalik-Bańczyk the Supreme Court seems to vacillate on the existence and scope of its potential obligation to apply EU norms to purely internal situations, see Kowalik-Bańczyk, n 115, p. 230.

¹²³ Kowalik-Bańczyk, n 115, p 230. Miąsik underlines selective approach of Polish courts to EU principles, Miąsik, n 7, pp 25-26. Kolański stated in this respect that references to Community jurisprudence and doctrine are made in the majority of Polish competition decisions based only on national competition law where it supports the approach taken by CCP President. He noted that, they contain no reference whatsoever to Community standards concerning the right of defence and called the CCP President for consistency in approach, see Kolański, n 21, p 49.

¹²⁴ For application of the concept in the competition proceedings see Case C-550/07 P *Akzo Nobel v the Commission*, [2010] ECR I-8301, paragraph 113. See also Case 60/92 *Otto*, [1993] ECR I-5683, paragraph 14; and Case C-242/95 *GT-Link*, [1997] ECR I-4449, paragraphs 23-24.

¹²⁵ Case 60/92 *Otto*, paragraph 14.

¹²⁶ What is more nowadays right of defence should be perceived as the fundamental principle of EU law itself stemming not only from the CFR but also constitutional traditions common to EU Member States and the ECHR, see Kowalik-Bańczyk, n 74, p 155.

protection of right of defence than this applicable in case of central competition proceedings.

The analysis of recent judgements of ECJ brings to a conclusion that EU courts may be ready to interfere with procedural standards applicable in case of decentralised competition proceedings and thus contribute to growing convergence of procedural standards. The judgment in case *Tele 2 Polska* provides the example of the judicial limitation of procedural autonomy as to the types of decisions the NCA (in this case the CCP President) is entitled to issue when applying Article 101-102 TFEU and thus it precludes the NCA from applying the provision of national law that otherwise is valid.¹²⁷ The judgement in the case *Pfleiderer* impose on national courts an obligation to take into account the effectiveness of EU competition law system when applying the provisions of national law under which the access to documents relating to a leniency procedure may be given to a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages.¹²⁸ The judgement in case *Toshiba* provides interpretation as to the possibility of applying provisions of national competition law. In the light of the judgment the NCA loses the power to conduct not only decentralised competition proceedings but also national one where the Commission opens a proceeding for the adoption of a decision in application of Chapter III of Regulation 1/2003.¹²⁹ The power of the NCA to conduct national competition proceedings is restored once the proceeding initiated by the Commission is

¹²⁷ The ECJ specified that Article 5 of Regulation 1/2003 contains an exhaustive list of decisions that the NCA is entitled to issue. It precludes the application by the NCA of a rule of national law which would require terminating the competition proceedings by a decision stating that there has been no breach of Article 102 TFEU - the NCA is not entitled to issue a non-infringement decision in respect to Article 102 TFEU, see Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o.*, not yet reported, available at www.curia.eu, paragraph 35. In consequence of this judgement Polish Supreme Court revoked the judgement of the Court of Appeal in Warsaw pointing that where on the basis of the information in the possession of the CCP President the conditions for prohibition described in Article 102 TFEU are not met he/she should decide directly on the basis of Article 5 sentence 3 of the Regulation 1/2003 that there are no grounds for action on his/her part, see the Supreme Court judgement of 8 May 2011, III SK 2/09, LEX no 1095948. In practice in such situation the CCP President used to discontinue the administrative proceedings on the basis of Article 105 of the Code of Administrative Procedure, see for example the decision of 8 December 2009, DOK-7/2009. Such practice cannot be maintained anymore in case of decentralised competition proceedings - the Regulation 1/2003 and not the Code of Administrative Procedure provides the legal basis of the decision when the conditions for prohibition described in Article 102 TFEU are not met.

¹²⁸ According to the ECJ it is for the courts of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law, see Case C-360/09, *Pfleiderer v Bundeskartellamt*, [2011] ECR I-000, paragraph 32. See also Jurkowska-Gomulka, 'Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia art. 101 ust. 1 Traktatu o funkcjonowaniu Unii Europejskiej (głosa do wyroku Trybunału Sprawiedliwości z dnia 14 czerwca 2011 r. w sprawie C-360/09 *Pfleiderer przeciwko Bundeskartellamt*)', (2012) 7 Europejski Przegląd Sądowy 39-46.

¹²⁹ Case C-17/10 *Toshiba Corporation and others*, not yet reported, available at www.curia.eu, paragraph 78. However, the opening by the Commission of a proceeding against a cartel under Chapter III of Regulation 1/2003 does not cause the NCA concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State during periods before the accession of the latter to the EU (see paragraph 91).

concluded.¹³⁰ The most characteristic is the judgement in the case *VEBIC* in which Article 35 of Regulation 1/2003 was interpreted by the ECJ as a mandate to organize the institutional operations of national competition authorities in order to guarantee the effectiveness of EU competition law and the observance of fundamental rights.¹³¹ On the basis of very technical Article 35 of Regulation 1/2003 the ECJ ordered in fact to change the procedural framework under which EU competition rules are enforced. Limited by the procedural autonomy the ECJ did not describe in detail how the procedural framework should look like. However, it pointed out what element such framework should in principle have - the ECJ expects from a Member State to build such a system of enforcement of EU competition law under which a national competition authority participates, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.¹³² It should be recalled that also outside the sphere of competition EU courts judgments brought a change of national procedures in respect to the level of protection of parties' procedural rights such as a right to court review and the duty to state reasons in the decision.¹³³

The above discussed ECJ judgments were based predominantly on the presumption that the effectiveness of EU competition law is an adequate reason for interference with a national procedural framework. Fundamental rights are however not less important as they make part of EU fundamental principles. Thus procedural autonomy should not be seen as an obstacle for such interpretation of national procedural standards to make them meet the requirements deriving from the ECHR and the CFR. In consequence both the jurisprudence of EU courts determining the procedural standards of right of defence in competition proceedings and the one of the ECtHR should be taken into consideration in the processes of enforcement of competition rules on the national level. At the same time domestic legislative actions aimed at amendment of national procedural framework should take into account this jurisprudence.

7. CONCLUSIONS

The differences in the procedural standards applicable in the case of centralized and national competition proceedings presented in point 3 of this paper on the basis of EU and Polish procedure show that there is a need for greater convergence of procedural standards applicable in case of proceedings before the Commission and the NCAs. Introduction of similar standards should concern, *inter alia*, such areas as: access to information about proceedings and to evidence collected, protection of privilege against self-incrimination, protection of legal professional privilege, access to oral hearing, the position of the complainant in the proceedings, guarantees of the

¹³⁰ *Idem*, paragraph 86.

¹³¹ Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakers, Ijsbereiders en Chocoladebewerker (VEBIC) VZW*, [2010] ECR I-12471, paragraph 63.

¹³² *Idem*, paragraphs 63-64.

¹³³ Case 222/84 *Johnston p. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, paragraph 18, 21; Case 222/86 *UNECTEF p. Heylens i in.*, [1987] ECR 4097, paragraph 15, 17. In this respect see also Kowalik-Bańczyk, n 74, p 534.

proportionality of inspections, and the scope of judicial control over competition proceedings.¹³⁴ This is also a truth if the lack of legal certainty when it comes to rules governing the allocation of cases and exchange of evidence in the ECN is taken into consideration. Article 6 ECHR and the jurisprudence of ECtHR as well as Article 47 and 48 CFR and the jurisprudence of EU courts are the relevant sources for building the convergence of the standards applicable in the case of centralised competition proceedings as well as decentralised and national ones.

The question that needs further, detailed examination is how to achieve the convergence of procedural standards applicable in competition proceedings. Three possible ways may be suggested in this respect.

Firstly, the greater convergence of procedural standards may be introduced by raising the level of national standards (in these Member States where like in Poland the standards are lower)¹³⁵ to the level of EU procedure applicable in case of centralised competition proceedings. Sometimes this may require the introduction of completely new regulations or practice. This is the case of Poland where, as shown in Section 3 of this paper, the level of protection of procedural rights is much lower than in the case of EU procedure and will remain so despite planned amendment of the Competition Act.¹³⁶ The introduction of positive changes may be achieved by legislative actions and jurisprudence in EU Member States (i.e. statutory and judicial convergence on the national level). For such a process to be effective, there is however a need for

¹³⁴ However, it would be wise to agree on similar procedural standards also when it comes to rules on sanctioning (in the light of Article 7 ECHR), full respect for *ne bis in idem* principle and proportionality of interference of NCAs into right of privacy of both legal and natural persons (Article 8 ECHR). As to the first two issues see the critical analysis of Scordamaglia - Scordamaglia, n 99, pp 35-50.

¹³⁵ In some of EU Member Countries the level of protection of procedural rights may be higher than in EU procedure. This however should not be deemed as an obstacle for considering EU procedure (on condition that it satisfies the requirements of Article 6 of the ECHR) as a source of procedural solutions that may be treated as the European minimum standard and provide good point of reference for national competition procedures. In case where national procedure offers a higher level of protection (e.g. the scope of protection of Legal professional privilege and privilege against self-incrimination is broader in case of UK law than in case of EU law) the question arises whether its application in decentralised competition proceedings poses a risk for effective and uniform application of EU competition rules (in this respect see Bourgeois, Baumé, 'Decentralisation of EC Competition Law Enforcement and General Principles of Community Law', College of Europe, (2004) 4 Research Papers in Law 16-17; Turno, Zawlocka-Turno, n 107, p 203; Kowalik-Bańczyk, n 74, p 542-545). Thus in some areas it may be argued that also the level of protection of procedural rights in the EU procedure should be raised to the higher level that exist in some of EU Member States in a way it will satisfy at least the procedural requirements deriving from Article 6 of the ECHR.

¹³⁶ The amendments to Competition Act proposed in 2012 by the CCP President deal only to a limited extent with current deficiencies concerning procedural fairness and undertakings rights. They are rather focused on raising the effectiveness of the CCP President. For example the introduction of settlements, leniency plus program and individual pecuniary liability of physical persons for violation of competition rules is proposed. When it comes to procedural rights of the parties the positive proposal concerns the prolongation of the period for appealing the CCP President decision from 14 to 30 days. During legislative works a proposal of detailed regulation of LPP in Polish procedure was abandoned. For the current proposals of amendments to the Competition Act see in Polish: <http://www.uokik.gov.pl/download.php?plik=12486>. See also Bernatt, Martyniszyn, 'The Polish Competition Authority submits a draft amendment to the Polish competition Act: revolution or fine-tuning?' February 2013, e-Competitions, N°50563, available at: <http://ssrn.com/abstract=2209523>.

encouragement and informal guidance on the side of Commission.¹³⁷ Collaboration in frame of the ECN should especially be used to build more convergent procedural framework under which the same or very similar law is enforced. Crucially, the procedural approximation should not be limited as it is right now only to the instruments responsible for the effectiveness of the proceedings¹³⁸ such as fines, leniency or inspection powers but also to the rights of parties in the competition proceedings. The accession process of the EU to the ECHR is a good moment for works in frame of ECN in order to approximate standards of competition procedures in EU Member States.

Second, the positive changes may be brought about in consequence of EU courts' jurisprudence (i.e. judicial convergence on EU level). The judgements listed above¹³⁹ suggest that the ECJ may be ready to intervene in order to determine the enforcement framework of EU competition rules on the level of Member States (in case of decentralised competition proceedings). Procedural autonomy should not be seen as an obstacle for that. Again in case of such judicial interventions EU Courts should have in mind not only the effectiveness of enforcement system but also the level of protection of fundamental rights.

Third, there is a need for further public discussion (also on the political level) whether the legislative actions on the EU level are possible to be undertaken under current TFEU regulations (i.e. statutory convergence on the EU level).¹⁴⁰ The opinion has been expressed that it is generally denied that the EU is entitled to impose a unique procedural framework for decentralised competition proceedings.¹⁴¹ If such conclusions are correct, it seems that the EU could still adopt soft law guidelines under which the solutions as to the minimal level of procedural standards to be introduced in case of decentralised competition proceedings would be suggested for EU Member States. In practice this would surely influence procedures applicable in case of purely national competition proceedings.¹⁴²

¹³⁷ In his speech in October 2011 DG Competition Director Alexander Italianer, while presenting new EU Best Practices for antitrust proceedings, noted in the name of Commission: "We hope that our experience will inspire other agencies to further work in improving transparency and accountability, which we can only encourage.", Italianer, n 91, p 8.

¹³⁸ See the Report on the functioning of Regulation 1/2003 of 29 April 2009, paragraph 201. See also Cseres, 'Comparing Laws in the Enforcement of EU and National Competition', (2010) 1(3) *European Journal of Legal Studies* 18-19.

¹³⁹ See Section 6 of this paper.

¹⁴⁰ See the wording of Article 114, Article 103(3)(e) and Article 352 of TFEU.

¹⁴¹ Kowalik-Bañczyk, n 115, p 229. Nazzini is of the opinion that 'spontaneous harmonization' may be more appropriate in the field of 'due process' than through binding measures because of the highly technical and context-specific nature of certain procedural requirements, see Nazzini, 'Some Reflections on the Dynamics of the Due Process Discourse in EC Competition Law', (2005) 1(2) *CompLRev* 30.

¹⁴² The Commission is not entitled to enact a law that would deal solely with procedures under which national competition law is enforced. However, the Commission's legislative actions addressed at approximation of procedural standards of EU centralised competition proceedings and decentralised competition proceedings will bring changes also when it comes to strictly domestic proceedings. Especially it is difficult to imagine in practice that different procedural standards will be used by NCAs when applying EU law and different in case of applying national law. Such a situation would be a direct proof that the higher procedural standards

originating from Article 6 of ECHR are applicable one time not the other. What is more such a situation could be seen as discrimination of undertakings involved in national competition vs. the undertakings participating in the decentralised competition proceedings. In the latter aspect see D. Miąsik, n 7, p 15.