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Ways of Harmonising Polish Competition Law with the Competition Law of the EU

by

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Abstract

This article discusses the harmonisation of laws within the EU focusing on the specific ways of achieving an approximation of the Polish legal system with European competition law. It identifies and gives an overview of three specific ways of harmonising national laws with EU antitrust provisions: (1) spontaneous (or bottom-up) harmonisation; (2) judicial harmonisation and; (3) legislative harmonisation by means of EU Directives. With respect to the last category, particular attention is drawn to the legislative competences of the EU, allowing it to harmonise antitrust issues either on the basis of Articles 103 and 114 TFUE, or perhaps even on the basis of Article 82 TFEU.

Résumé

Le présent article explique la notion d'harmonisation du droit dans l'UE et se concentre sur les moyens particuliers de réalisation du rapprochement du droit polonais au droit de la concurrence de l'UE. Il identifie et offre un aperçu des

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trois façons de l'harmonisation du droit national avec le droit antitrust de l'UE: (1) l'harmonisation spontanée (ou bottom-up); (2) l'harmonisation juridique et (3) l'harmonisation législative par voie de directives. Dans ce dernier cas, une attention particulière est accordée aux compétences législatives de l'UE, ce qui lui permet d'harmoniser les questions du droit de la concurrence de l'UE, soit sur la base des articles 103 et 114 du TFUE, soit même, peut-être, sur la base de l'article 82 TFUE.

Classifications and key words: harmonisation, spontaneous harmonisation, judicial harmonisation, convergence of competition law regimes in the European Union

I. Introduction

In the European Union, the notion of "harmonisation" refers to a hypothesis of long-term, coordinated legislative activity in various Member States, leading to the alignment of legal provisions governing certain issues in the States concerned[1]. Traditionally, European competition law[2] does not use secondary law instruments designed for harmonisation that imply further implementation by national legislators[3]. The majority of secondary law adopted in the antitrust field consists of EU Regulations which are directly applicable and only exceptionally require additional legislative activities by the Member States (such as the creation of a specific legal solution or institution)[4]. A double picture tends to emerge therefore: on the one side, EU law is applied in Member States provided the scrutinised anticompetitive practice may affect EU trade together with the national rules. On the other side, only the "usual" domestic competition rules are applied in all other situations (the so-called purely internal situations).

The scope of the application of both the TFEU and of secondary antitrust legislation depends on the scale of the practice concerned. Purely internal

[1] W. Czapliński, "Harmonizacja prawa we Wspólnocie Europejskiej i zbliżanie ustawodawstwa polskiego do prawa wspólnotowego" (2004) 4 *Europejski Przegląd Prawa* 11 and f.; K. Kowalik-Bańczyk, "Komentarz do art. 114 TFUE", [in:] A. Wróbel, K. Kowalik-Bańczyk, M. Szwarc-Kuczer (eds.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, vol. II, Warszawa 2012, p. 537–546 and the literature cited therein.

[2] The notions of competition law and antitrust law will be used interchangeably in this text. The text does not cover the issues of mergers or state aid regulations within EU Law.

[3] M. Drahos, *Convergence of Competition Laws and Policies in the European Community*, Hague – London – Boston 2001, p. 210.

[4] For instance, Article 35 of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25 (Regulation 1/2003).

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situations, where no effect on EU trade is visible, are not covered by European norms[5]. Legal acts that traditionally require harmonisation, such as EU Directives, had not been used in the realm of EU competition law so far. This approach left Member States with a certain degree of freedom as to the way in which they regulate competition issues. In this context, the Polish legal system had initially been developing in a different manner to those of the older Member States. Between 1994–2004, Poland was subject to extensive harmonisation requirements which also included its competition law. These were based on Article 68 of the Association Agreement which is, of course, no longer applicable since Poland's EU accession on 1st May 2004[6]. As such, Polish competition law was subject to major harmonisation in the pre-accession period, but not afterwards.

There is currently no legal requirement for a classic form of harmonisation of competition law in Poland. However, a general lack of legislative harmonisation does not mean that Polish antitrust provisions have not been subject to any harmonisation since 2004. To the contrary, Polish competition law is influenced by two still on-going forms of harmonisation: first, to so-called **bottom-up or spontaneous harmonisation**, whereby EU solutions are copied into the national legal system, mainly with respect to substantive antitrust provisions[7]. Second, there is a certain degree of **accidental harmonisation**, appearing as a response to the answers given by the EU judicature to preliminary questions posed by the courts of individual Member States, including Polish ones, on the basis of Article 267 TFEU. These judgments refer both to procedural as well as substantive law questions. The accidental harmonisation that occurs in such cases can thus also be referred to as "**judicial harmonisation**"[8]. Both spontaneous and judicial harmonisation constitute an indirect form

[5] D. Miąsik, "Sprawa wspólnotowa przed sądem krajowym" (2008) 9 *Europejski Przegląd Sądowy* 16–22; Z. Jurczyk, "Koncepcja wpływu na handel między państwami członkowskimi - kryterium stosowania wspólnotowego prawa konkurencji (cz. I)" (2007) 4 *Prawo i podatki Unii Europejskiej w praktyce* 40–46; K. Kowalik-Bańczyk, "Pojęcie wpływu na handel w decyzjach Prezesa UOKiK", (2010) 5 *Europejski Przegląd Sądowy* 34–42.

[6] For a broad analysis of the history and the present state of Polish Antitrust Regulation cf M. Błachucki, *Polish Competition Law – Commentary, Case Law and Texts*, Warszawa 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257719&download=yes (30.03.2014). Cf also D. Miąsik, "Rozwój polskiego prawa konkurencji i prawa antymonopolowego", [in:] M. Kępiński (ed.), *Prawo konkurencji. System Prawa Prywatnego, tom 15*, Warszawa 2014, p. 19–40.

[7] It has been exhaustively described by D. Miąsik, "Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts" (2010) 3(3) *YARS* 11.

[8] L. Parret, *Side effects of the modernisation of EU Competition law. Modernisation as a challenge to the enforcement system of EU competition law and EU law in general*, Nijmegen 2011, p. 166.

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of harmonisation[9], which should be differentiated from classic, legislative harmonisation which is based on the introduction of new, similar legal solutions in various Member States.

There is also a new trend to be observed, implying a possible use of direct harmonisation to both EU and national antitrust provisions. The European Commission adopted in 2013 a proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[10]. The proposal is designed to partly harmonise certain substantive and procedural issues of national competition laws. The Draft Directive is the first example of an effort being taken by the EU to harmonise domestic antitrust provisions, rather than leave a broad margin of discretion to the Member States. The existence of this proposal suggests that the usual pattern of EU legislative activity in the field of competition law might undergo a change. The planned Directive should optimise the possibilities of both public and private enforcement of competition law. Primarily however, the proposal represents a direct response to jurisprudential developments concerning, among other things, access to the antitrust file in cases where private damages actions are filed with national courts.

This new jurisprudence, mostly *Pfleiderer*[11] and its aftermath (mainly *Donau Chemie*[12]), leaves EU Member States with an excessively broad margin of discretion. As a result, the application of the above judgments could lead to a divergent enforcement practice in various Member States, or even in various courts of a single Member State. This might generate conflicts between judicial harmonisation introduced by the Court of Justice of the European Union (CJEU) and the European Commission's general vision of how private enforcement of EU competition law should be developed. A question appears therefore whether the introduction of convergence between national competition systems is really within the powers of the European Commission. Perhaps, instead, it should stay in the hands of national legislators, which might refer to spontaneous harmonisation as they please. The present article should give an overview of the three identified manners of harmonising national

[9] L. Parret, "Judicial Protection after Modernisation of Competition Law" (2005) 32(4) *Legal Issues of Economic Integration* 343.

[10] COM(2013) 404 final, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF (30.03.2014).

[11] Judgment of CJ of 14 June 2011, C-360/09 *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-05161.

[12] Judgment of CJ of 6 June 2013, C-356/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, not yet published, available at: www.curia.eu (30.03.2014).

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antitrust provisions with EU competition rules: (1) spontaneous (bottom-up) harmonisation; (2) judicial harmonisation and; (3) legislative harmonisation by means of EU Directives. In this last case, particular attention should be drawn to the competences of the EU, allowing it to harmonise issues related to antitrust proceedings – either on the basis of Articles 103 and 114 TFEU, or even perhaps on the basis of Article 82 TFEU.

II. Spontaneous harmonisation

It should be said at the outset that the Polish legislator is free from almost any obligations to align purely internal antitrust provisions to those of the EU. This realisation is true except for some specific provisions contained in certain EU Regulations which require Member States to take some specific legislative actions in order to either implement or supplement the Regulations. Despite this general lack of a duty for legal harmonisation, there is certainly a strong influence of EU law on national legislation. One of the reasons for this *de facto* influence is that treating differently situations with an EU element (where an anticompetitive practice might affect EU trade[13]) and those without it might lead to discrimination (differential treatment of similar situations). Some legislators impose thus on their National Competition Authorities (NCAs) an obligation to interpret the entirety of domestic antitrust provisions in accordance with EU law (this is the case in Italy and the United Kingdom, but not in Poland)[14]. Convergence between national competition systems is not an object of interest for the EU itself[15]. The issue is, however, of growing interest to some of the Member States, both those with a long antitrust tradition as well as those that have introduced certain of their competition law solutions (such as merger control) only following the EU example[16]. Already in the 1990ties, Professor Hanns Ullrich was wondering if Member States are in fact entirely free in the structuring of their competition law systems. Perhaps they are doomed to only follow EU solutions? He then indicated that lack of harmonisation might lead to reverse discrimination and thought that both the

[13] For instance: judgment of the Warsaw Appeal Court of 28 October 2011, http://orzeczenia.ms.gov.pl/details/TFUE/154500000003003_VI_ACa_000447_2011_Uz_2011-10-28_001 (30.03.2014).

[14] A. Heinemann, "Remedies in Antitrust Law", [in:] T.M.J. Möllers, A. Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge 2007, p. 423–424.

[15] M. Drahos, *Convergence of Competition Laws…*, p. 210.

[16] H. Ullrich, "Harmonisation within the European Union" (1996) 3 *European Competition Law Review* 178.

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principle of primacy and the principle of equality[17] require avoiding a situation where diverging legal solutions are applied to different undertakings with respect to the same behaviour[18]. However, pure harmonisation of the content of competition rules would not necessarily guarantee their uniform application throughout various States either. Paradoxically, such an approach might do more harm than good to the convergence of European competition law[19].

Substantive antitrust rules of various Member States are more or less mirroring EU competition law solutions. The approximation trend was historically not as pronounced with respect to procedural rules, but their convergence is now also growing[20]. Although each Member State retains its own antitrust procedure, „procedural diversity" is gradually diminishing thanks to a growing convergence of national legal solutions existing in individual Member States[21]. Incidentally, procedural convergence is mostly initiated by national legislators themselves.

As stressed by the doctrine, national competition laws undergo a spontaneous or soft harmonisation[22]. The entry into force of Regulation 1/2003 caused a trend to spontaneously approximate the procedural solutions used in cases

[17] L. Idot, "A Necessary Step Towards Common Procedural Standards of Implementation for Articles 81 and 82 EC without the Network", [in:] C.D. Ehlermann, I. Anatanasiu (eds.), *European Competition Law Annual 2002: Constructing the EU Network of Competition Autorities*, Oxford – Portland, Oregon 2004; J.H.J. Bourgeois, T. Baumé, "Decentralisation of EC Competition Law Enforcement and General Principles of Community Law", [in:] P. Demaret, I. Govaere, D. Hanf (eds.), *30 Years of European Legal Studies at the College of Europe. Liber Professorum 1973-74–2003-04*, Brussels 2005, p. 396.

[18] H. Ullrich, "Harmonisation within...", p. 180–181.

[19] *Ibid*, p. 184.

[20] Such convergence is a fact stated by the members of the ECN themselves, cf.: ECN Working Group on Cooperation Issues. Results of the questionnaire on the reform of Member States (MS) national competition laws after EC Regulation No. 1/2003, 22 May 2013, available at: *ec.europa.eu/competition/ecn/convergence_table_en.pdf* (30.03.2014).

[21] K. Dekeyser, M. Jaspers, "A New Era of ECN Cooperation. Achievements and Challenges with Special Focus on work in the Leniency Field" (2007) 30 (1) *World Competition* 12; J. Jowell, P. Birkinshaw, "English Report", as well as M. Boes, J. Stuyck, "Belgian Report", [in:] J. Schwarze (ed.), *Le droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Baden-Baden – Brussels 1996, respectively: p. 320–321 and p. 351; D.J. Gerber, "Globalisation, Europeanization and Competition Law: Locating Europe, Locating Poland", [in:] M. Krasnodębska-Tomkiel (ed.), *Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad*, Warszawa 2010, p. 440.

[22] The notion of "soft harmonisation" is used by: M. Krasnodębska-Tomkiel, "Perspektywy polityki konkurencji w Polsce – w 20. rocznicę powstania UOKiK", [in:] M. Krasnodębska-Tomkiel (ed.), *Zmiany w polityce konkurencji na przestrzeni ostatnich dwóch dekad*, Warszawa 2010, p. 535; H. Vedder, "Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law" (2004) 1(1) *Competition Law Review* 5.

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where Article 101 or 102 TFEU are applied[23]. Kris Dekeyser and Maria Jaspers call this a healthy „imitation process"[24], giving examples of eliminating national notification procedures for agreements or the introduction of similar sets of control powers as those possessed by the European Commission. Significant similarities can thus be found both in the rules of substantive competition law in Europe, as well as in procedural and structural ones[25]. This type of harmonisation is called spontaneous as it is not obligatory for Member States – it is merely a reaction to the development of the law of the European Union and the laws in other EU Member States. A strong encouragement for this type of harmonisation lies in Article 3(2) of Regulation 1/2003 which allows for the maintenance of more severe national substantive solutions than those existing in EU law[26].

Soft harmonisation might be perceived as the most realistic solution[27], and perhaps no other "superior" (top-down) harmonisation is really needed, as systems converge anyway. Most of the converging solutions have been adopted without any formal obligations being placed on Member States[28]. One of the important factors making such convergence possible lies in the large number of guidelines issued by the European Commission which supplement Regulation 1/2003 or other acts of substantive EU competition law. Those guidelines are frequently more than just a repetition or summary of the jurisprudence of the CJEU and the accumulated case law of the European Commission. They also often introduce new notions and new premises for the application of Article 101 & Article 102 TFEU[29]. Yet these guidelines are not only not legally binding, they do not even have to be published in the Official Journal of the

[23] E. Barbier de la Serre calls it "spontaneous convergence"; E. Barbier de la Serre, M. Lavedan, "Convergence and trends in the law and practice of interim measures ordered by competition authorities in Europe" (2011) 2 *Concurrences* 230. Cf also Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation No 1/2003, COM(2009)206 final, point 197.

[24] K. Dekeyser, M. Jaspers, "A New Era of ECN Cooperation...", p. 12.

[25] J. Goyder, A. Albors-Llorens, *Goyder's EC Competition Law*, 5th ed., Oxford 2009, p. 519, 634.

[26] F. Montag, A. Rosenfeld, "A Solution to the Problem: Reg 1/2003 and the modernization of competition procedure" (2003) *Zeitricht für Wettbewerbrecht* 125; L. Ortiz Blanco, K.J. Jörgens, [in:] L. Ortiz Blanco (ed.), *EC Competition Procedure*, 2nd ed., Oxford 2006, p. 45.

[27] J. Basedow, S.L. Pankoke, "General Report", [in:] J. Basedow (ed.), *Limits and Control of Competition with a View to International Harmonisation*, Hague – London – New York 2002, p. 59.

[28] J. Goyder, A. Albors-Llorens, *Goyder's EC Competition...*, p. 519.

[29] L. Parret, "Judicial Protection after Modernisation...", p. 347.

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European Union[30]. They are however a great source of inspiration for NCAs and are an important harmonisation tool for national antitrust regimes[31].

One of the best examples of such voluntary harmonisation lies in the solutions adopted by individual Member States as far as their leniency programmes are concerned[32]. Seeing as there was no political will to harmonise antitrust procedure on the EU level, spontaneous, bottom-up harmonisation occurred in this field instead[33]. It was encouraged by the Working Group acting within the European Competition Network (ECN), which set out the standards of soft harmonisation of national leniency programmes. They were then incorporated into the ECN Model Leniency Programme, first adopted by the representatives of the NCAs and the European Commission on 29 September 2006[34] and further revised in 2012[35].

The model programme formulates what standards should all ECN members have adopted in their own leniency programmes. Its purpose is mainly to harmonise this instrument within the European Union, but also to reduce problems of diverging levels of legal protection granted to undertakings that are party to antitrust proceedings[36]. Importantly, the model concerns horizontal agreements only. It clarifies questions surrounding communication issues between leniency applicants and the competition authority (possibility of informal contact, possibility to mark the date and hour of the application). It also provides for a "marker" mechanism, making it possible to reserve a place in the queue with a possibility to later supplement formal shortcomings of the

[30] Judgment of CJ of 12 May 2011, C-410/09 *Polska Telefonia Cyfrowa*, [2011] ECR I-03853. Cf. K. Kowalik-Bańczyk, "The Publication of the European Commission's Guidelines in an Official Language of a New Member State as a Condition for Their Application – Case Comment to the Order of the Polish Supreme Court of 3 September 2009 (Ref. No. Iii Sk 16/091) to Refer a Preliminary Question to the Court of Justice of the European Union (C-410/09 Polska Telefonia Cyfrowa Sp. z o.o. v President of the Electronic Communications Office) (2010) 3 *YARS* 306.

[31] L. Parret, "Judicial Protection after Modernisation... ", p. 347, 361.

[32] F. Cengiz, "Multi-Level Governance in Competition Policy: the European Competition Network" (2010) 5 *European Law Review* 670.

[33] M. Krasnodębska-Tomkiel, "Leniency jako instrument zwalczania karteli", [in:] B.T. Bieńkowska, D. Szafrański (eds.), *Problemy prawa polskiego i obcego w ujęciu historycznym, praktycznym i teoretycznym, część druga*, Warszawa 2009, p. 156.

[34] M. de Visser, *Network-Based Governance in EC Law. The Example of EC Competition and EC Communications Law*, Oxford – Portland, Oregon 2009, p. 232, 235–236; I. Van Bael, *Due Process in EU Competition Proceedings*, Hague – London – New York 2011, p. 260, 275.

[35] ECN Model Leniency Programme, available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (12.04.2014).

[36] C. Gauer, M. Jaspers, *ECN Model Leniency Programme – a first step towards a harmonised leniency Policy in the EU* (2007) 1 *CPN*.

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actual leniency motion[37]. The ECN Model Leniency Programme was a direct source of inspiration for the first Polish leniency scheme adopted in 2009[38].

The trend to harmonise, despite the lack of any legal obligations in this context, is clearly visible both in the current state of Polish competition law as well as in its ongoing reform process. As far as current rules are concerned, examples of clear convergence with Regulation 1/2003 can be said to cover: 1) the abolition of a notification system for agreements and the introduction of a legal exception system; 2) parallel application of EU and national competition law; 3) the NCA's competence to order interim measures; 4) the NCA's power to adopt commitment decisions; 5) the NCA's authority to seal business premises, books and records; 6) the NCA's power to inspect non-business premises (albeit only with the consent of the Court of Competition and Consumer Protection, issued upon the NCA's request); and 7) the NCA's competence to investigate specific economic sectors and specific types of agreements[39].

A reform of the existing Act on the Protection of Competition and Consumers of 16 February 2007 (hereafter: Competition Act 2007)[40] was proposed in 2012[41]. The reform in its final form enhances the Polish competition protection system, primarily increasing the efficiency of its enforcement[42]. It introduces: improvements to the Polish leniency program (by introducing leniency plus); changes to the merger control procedure (by introducing a two phase merger assessment); and new provisions on settlements (which did not exist in Poland beforehand). The Amendment modifies also current rules on inspections mainly with respect to existing problems linked with legal protection in dawn raids. Moreover, remedies and modifications to the current fining system are being introduced including new financial liability for individuals for their participation in agreements infringing Article 6 of the Polish Competition

[37] M. Krasnodębska-Tomkiel, "Leniency jako instrument zwalczania karteli...", p. 157.

[38] *Ibid*, p. 158–160.

[39] Broader details in: http://ec.europa.eu/competition/ecn/convergence_table_en.pdf (30.03.2014).

[40] O. J. No 50, item 331, with amendments.

[41] M. Krasnodębska-Tomkiel, "Czas na zmiany w polskim prawie antymonopolowym" (2012) 1 *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 7; available at: www.ikar.wz.uw.edu.pl (30.03.2014). The first considerations for the project of modification of the Act on Competition and Consumers Protection was presented on 15.05.2012, available at: http://legislacja.rcl.gov.pl/docs//1/43452/43453/43454/dokument34627.pdf?lastUpdateDay=23.01.13&lastUpdateHour=4%3A26&userLogged=false&date=%C5%9Broda%2C+23+styczne%C5%84+2013 (30.03.2014). After public consultations and various other draft projects, the final project was deposited by the Council of Ministers at the Polish Parliament on 9.7.2013. The second reading of the project took place on 19.02.2014.

[42] Reasons for the project proposal, 9.07.2013, p. 1, available at: http://uokik.gov.pl/projekty_aktow_prawnych.php#faq1826 (30.03.2014).

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Act 2007 & Article 101 TFEU (but not for abuse of dominance). Furthermore, a number of modifications are to be introduced in order to simplify current Polish antitrust procedure. As the amendment act is to become final, it can be said that the bottom-up or spontaneous harmonisation model is clearly winning the hearts of the Polish legislator.

Worth analysing in more detail in the context of spontaneous harmonisation is finally also the harmonisation of procedural solutions that are to be applied in purely internal situations[43]. According to the CJEU, there is no duty to refer to procedural *acquis* (such as, for instance, the right of defence) in purely internal situations. The CJEU stated clearly in *Maurin*[44] that if the facts under consideration fall outside the scope of what is now EU law, European judicature would not have "jurisdiction to determine whether the procedural rules applicable (…) amount to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings". Yet, as described by Dawid Miąsik, referral to EU solutions in purely internal situations occurs more and more often, but in a very selective manner[45]. This "accidental" practice of using EU law examples does not increase the feeling of legal security for undertakings. For this reason, some authors argue that in cases where EU and Polish substantive laws are identical, there should also be a unification (or convergence) of their procedural rules. Maciej Bernatt is of the opinion that EU procedural standards should be applied not only in cases where the Polish NCA applies Article 101 or 102 TFEU, but in all of its antitrust proceedings[46]. This position has not yet been confirmed in practice.

Referring to the question of an identical interpretation of identical notions (occurring both in EU and Polish law), the Polish Supreme Court stated that even in cases where the norms are identical, EU competition law might be used as a "source of intellectual inspiration, an example of legal reasoning or understanding of some judicial institutions, and might be useful in the interpretation of Polish law provisions" in purely internal situations. However, that uniform interpretation is not binding or obligatory[47]. By contrast, in 2008

[43] D. Miąsik, "Sprawa wspólnotowa przed sądem krajowym" (2008) 9 *Europejski Przegląd Sądowy* 16–22.

[44] Judgment of ECJ of 13 June 1996, C-144/95 *Maurin*, [1996] ECR I-2909, points 12–13.

[45] D. Miąsik, "Solvents to the Rescue – a Historical Outline...", p. 25.

[46] M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 331; B. Turno, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2010, p. 982.

[47] Judgment of the Supreme Court of 9 August 2006, III SK 6/06, OSNP 2008, nr 1–2, poz. 25; judgment of the Supreme Court of 6 December 2007, III SK 16/07, OSNP 2009, nr 1–2, poz. 31; judgment of the Supreme Court of 3 September 2009, III SK 9/09, OSNP 2011, nr 11–12, poz. 168, described by: D. Miąsik, "Solvents to the Rescue – a Historical Outline...", p. 14.

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the Supreme Court confirmed a „factual harmonisation" of purely internal rules stating that national courts are obliged to fully consider the *acquis communautaire* when applying Polish legal provisions which are analogous to the rules of EU law[48]. This position would mean that there should be a clear and obligatory convergence in the standards applied in national law towards those applied in EU law. This realisation would be true regardless of the fact that the case might be a purely internal one, with no EU element at all. There is however no legal basis for such an obligation in EU law. Thus it is hard to argue that factual harmonisation should be binding on national courts and, even more so, for national administrative organs. However, for purely pragmatic reasons, harmonisation of procedural solutions should be advocated while identical substantive norms (EU and national ones) are being applied. It would be hard to imagine the creation and operation of two separate procedural regimes, depending on the norm applied.

III. Jurisprudential harmonisation

The decentralization of the application of EU competition law in 2004 caused a significant number of requests for preliminary rulings being submitted by national courts in antitrust matters. In light of this phenomenon, judicial harmonisation of national competition laws has became an important source of approximation for both substantive and procedural competition laws between Member States. By contrast, such harmonisation only used to occur accidentally and mostly with reference to a given EU law problem before 2004. National courts apply EU competition law where there might be an effect on trade between Member States – the juridical criteria that triggers the application of Article 101 or 102 TFEU[49] (even if the CJEU while answering preliminary questions does not verify if an effect on trade actually exists[50]). It

[48] Resolution of the Supreme Court of 23 July 2008, III CZP 52/08, OSNC 2009, nr 7–8, poz. 107; D. Miąsik, "Solvents to the Rescue – a Historical Outline...", p. 15; A. Jurkowska-Gomułka, "Glosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08. W stronę umocnienia prywatnoprawnego wdrażania zakazów praktyk ograniczających konkurencję" (2010) 5 *Europejski Przegląd Sądowy* 43; M. Sieradzka, "Glosa do uchwały SN z dnia 23 lipca 2008 r., III CZP 52/08", LEX/el., 2008.

[49] M. Tavassi, "Which role for National Courts in Competition Protection?", [in:] E.A. Raffaelli (ed.), *Antitrust between EC Law and National Law. Antitrust fra diritto nazionale e diritto comunitario*, Brussels – Milano 2005, p. 55–101; I. Van Bael, *Due Process...*, p. 378.

[50] Judgment of ECJ of 3 October 1986 in case 311/84 *Telemarketing CBM v CLT and IPB*, [1986] ECR 3261; judgment of ECJ of 13 July 2006 in case C-295/04 *Manfredi v. Lloyd Adriatico Assecurazioni*, [2006] ECR I-6619, points 26–27.

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is in such cases that national courts can submitted their preliminary questions to the CJEU on the basis of Article 267 TFEU[51].

The number of preliminary questions asked in this domain since May 2004 (entry into force of Regulation 1/2003) is quite large, but not thanks to Polish practice which is rather scarce with only one preliminary request lodged so far with respect to competition law[52]. The majority of preliminary questions concern substantive antitrust provisions[53], only a few relate to procedural issues[54]. Among those, only once did the CJEU directly order a Member State to change its law. In *VEBIC*[55], the CJEU stated that the analysed national provisions should be amended so as to guarantee the Belgian Competition Council (a special administrative court which holds the position of its NCA) the right to be heard in appeal proceedings against its own decisions (appeals to the judgments of the Council). So far, this is the only clear example of a case where the CJEU imposed upon a Member State the obligation to change its laws so as to fit Regulation 1/2003 (thus requiring it to harmonise its national legal solutions with those contained in Regulation 1/2003). In *Tele 2*[56], *Pfleiderer*[57] and *Toshiba*[58], the CJEU went only as far as to interpret the directly applicable provisions of Regulation 1/2003, highlighting the requirement that those provisions should be applied by national organs in a way guaranteeing their full effectiveness and the uniform application of EU competition law. However, as proven by the *VEBIC* case, judicial harmonisation is not

[51] Bellamy & Child, *European Community Law of Competition*, Oxford 2008, p. 1425.

[52] Judgment of CJ of 3 May 2011, C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele 2 Polska sp. z o.o. (Netia SA)*, [2011] ECR I-03055.

[53] A good example remains: judgment of ECJ of 9 September 2003, C-198/01 *CIF*, [2003] ECR I-8055.

[54] There are several judgments: judgment of CJ of 11 June 2009, C-429/07 *Inspecteur van de Belastingdienst v. X BV* (interpretation of Article 15 of Regulation 1/2003); judgment of CJ of 7 December 2010, C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* (interpretation of Article 35 of Regulation 1/2003); judgment of CJ of 3 May 2011, C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska sp. z o.o. (Netia S.A.)* (interpretation of Article 5 of Regulation 1/2003); judgment of CJ of 14 June 2011, C-360/09 *Pfleiderer AG v. Bundeskartellamt* (interpretation of Articles 11 and 12 of Regulation 1/2003); judgment of CJ of 14 February 2012, C-17/10 *Toshiba Corporation v. Úřad pro ochranu hospodářské soutěže* (interpretation of Article 11.6 of Regulation 1/2003).

[55] Judgment of CJ of 7 December 2010, C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, [2010] ECR I-12471.

[56] Judgment of CJ of 3 May 2011, C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele 2 Polska sp. z o.o. (Netia SA)*.

[57] Judgment of CJ of 14 June 2011, C-360/09 *Pfleiderer v. Bundeskartellamt*.

[58] Judgment of CJ of 14 February 2012, C-17/10 *Toshiba Corporation v. Úřad pro ochranu hospodářské soutěže.*

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impossible – while answering a preliminary question, the CJEU might provide directions that can only be met by the actions of a national legislator, rather than the judiciary.

IV. Legislative harmonisation

The harmonisation or approximation of legislation in EU Member States by way of issuing legal acts is aimed at the „disposal of competition infringements" (Ger. *Instrument zur Beseitigung von Verzerrungen des Wettbewerbs*). Since 1987, it is also aimed at the creation of the internal market[59]. Usually, the harmonisation process concerns the norms of substantive law and rarely interferes with the diverse procedural solutions that exist in individual Member States. That is, unless a specific competence norm provides for it, or it is necessary for the effective functioning of internal market solutions. Doubts can therefore be expressed if a legal basis exists at all for approximating competition law and competition procedures in EU Member States.

Article 103(1) TFEU, which constitutes the main legal basis for the EU to take actions in the competition law field, provides: "The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament". Further on, Article 103(2) TFEU gives an open list of reasons for which legislative steps might be taken by the EU[60]. However, by themselves, none of them seems to constitute a sufficient legal basis for the interference with national competition laws as such. Article 103(2)(e) TFEU is the only part of this provision that refers to national laws by saying that EU Regulations or Directives shall be designed in particular "to

[59] U. Everling, "Zur Funktion der Rechtsangleichung in der Europäischen Gemeinschaft – Vom Abbau der Verzerrungen zur Schaffung des Binnenmarktes", [in:] R. Capotorti, C.-D. Ehlermann, J. Frowein, F. Jacobs, R. Joliet, T. Koopmans, R. Kovar (eds.), *Du droit international au droit de l'intégration. Liber Amicorum Pierre Pescatore*, Baden-Baden 1987, p. 228, 237.

[60] The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments; (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other; (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102; (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph; e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

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determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article". This provision limits itself only to the possibility of regulating the relationship between two legal orders, the national and the European one. It was this very provision that was used as the legal basis for Regulation 1/2003.

Article 103 TFEU has so far only ever been used to issue Regulations – the above mentioned proposal of a Damages Directive refers to this provision as its partial legal basis only (alongside Article 114 TFEU). Seeing as the acts adopted on the basis of Article 103 TFEU have so far always been Regulations, they have not introduced harmonisation, but unification. For instance, the EU legislator refers in Regulation 1/2003 to national law or requires certain changes to be made in national law but only within a very limited scope – where national solutions are necessary but only the national legislator has the competence to act (such as in Article 35 Regulation 1/2003). The EU did not intend to impose any unified solutions on Member States by way of Regulation 1/2003 with respect to their national laws as such. It was the CJEU's interpretation of some of the specific provisions of Regulation 1/2003 that has brought about a rather unsteady hint for harmonisation. The best example for the lack of coherence in that context can be found in the *VEBIC* judgment which placed a duty on a Member State to restructure the competences of its NCA so as to make sure that it was guaranteed the right of defence in proceedings led against its decisions (sic!)[61].

Article 114 TFEU constitutes another provision that might be used as a possible legal basis for the harmonisation of national competition laws. It provides that the European Parliament and the Council shall adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States "which have as their object the establishment and functioning of the internal market". Protocol No. 27 on the Internal Market and Competition provides that the notion of "internal market" also covers competition rules. It is thus now possible to use this provision to harmonise competition rules, however only when it can be proven that legislative steps from the EU are necessary for the functioning of the internal market. It is questionable however if the harmonisation of national competitions laws might improve the functioning of the internal market, as the influence of different national legal systems on its functioning have up till recently been far from noticeable[62].

[61] The most striking example: judgment of CJ of 7 December 2010 in case C-439/08 *Vlaamse federatie van verenigingen van Brood – en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, [2010] ECR I-12471.

[62] M. Drahos, *Convergence of Competition Laws...*, p. 210.

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Worth considering is also Article 82 TFEU, which gives the EU the competences to introduce minimal harmonisation of criminal proceedings (Article 82(b) in particular)[63]. There is broad agreement that antitrust proceedings belong to that category, even though they do not concern the core of criminal law. However, they are rather "peripheral" to traditional criminal proceedings (especially seeing as antitrust proceedings are led in front of administrative bodies in 22 Member States), a fact that might act as the main argument against using Article 82 TFEU for any harmonisation measures undertaken in the antitrust field.

Using the above set of provisions as the legal basis for the harmonisation of national competition laws by means of EU Directives remained theoretical[64] until the aforementioned example of the proposal of the Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[65]. In June 2013, the European Commission issued a set of documents linked with its first initiative to use a Directive to harmonise national competition laws[66]. The Commission's initiative was a clear reaction to juridical developments (judicial harmonisation described above) – while *Pfleiderer* first implied a certain margin of discretion for national courts when it comes to granting access to leniency documents, *Donau Chemie* later implied that national courts are under the obligation to disapply domestic solutions on disclosure if the latter were to block the efficiency of private enforcement of competition law in a given Member State (in Austria in this case).

The legal basis chosen by the European Commission for the Damages Directive has a double foundation: both Article 103 and Article 114 TFEU.

[63] E. Cape, Z. Namoradze, R. Smith, T. Spronken, "Effective Criminal Defence and Fair Trial", [in:] E. Cape, Z. Namoradze, R. Smith, T. Spronken (eds.), *Effective Criminal Defence in Europe*, Antwerp – Oxford – Portland 2010, p. 12.

[64] This is not a new situation. Already in 1996 J. Schwarze was doubting the existence of any political will to harmonize administrative proceedings in the then European Communities: J. Schwarze, "Introduction", [in:] J. Schwarze (ed.), *Le droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Baden-Baden – Brussels 1996, p. 22.

[65] COM(2013) 404 final.

[66] The set of documents included: Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM(2013) 404, 11.6.2013; Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. C(2013) 3440, 11.6.2013; Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205, 11.6.2013; The proposal was accompanied by an Impact Assessment Report SWD(2013) 203 final, 11.6.2013.

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While it can be discussed whether this proposal does not overstretch the EU's regulatory ambitions, it seems that it might prove a necessary reaction to jurisprudential developments which caused legal uncertainty for both, those wishing to use private actions and those who apply for leniency in Europe. If the Directive is adopted, it will formulate a clear set of rules on access to leniency documents for third parties.

Still, choosing a double legal basis was caused by the dual aim of the actual Directive. Since it is meant to ensure comprehensive application of Articles 101 & 102 TFEU, reference to Article 103 TFEU is necessary. The Commission argues that if private enforcement was not to be accessible to everyone, this would have endangered the comprehensiveness of the application of EU competition rules and their practical implications. The introduction of EU rules on access to documents gathered by competition authorities should guarantee equal chances to all undertakings in the internal market. However, Article 103 TFEU would not be a sufficient legal basis for this Directive because the aim and content of the proposal extends beyond the limits of this TFEU provision. There are differences in national rules on private enforcement, including cases where Article 101 or 102 TFEU infractions are examined. This could lead to substantial differences and inequalities within the EU internal market. The main differences concern: (1) access to material gathered by competition authorities that could be used as evidence in private enforcement proceedings; (2) the possibilities of passing on; (3) the legal standing of infringement decisions issued by NCAs; (4) national rules on setting the damage for competition law infringements.

These variations lead to differentiated treatment throughout Europe and cause legal uncertainty as to the conditions under which those harmed by an antitrust infringement could proceed to claim their damages. Undertakings operating in different Member States might be facing a different level of risk linked with the possibility of private enforcement of competition law. This inequality might create a competitive disadvantage for those infringing Article 101 or 102 TFEU in a country with a legal system that is more advantageous for those harmed by antitrust infringements. The lack of coherence in the enforcement of the law might be a discouraging factor for the use of the freedom of establishment also. All these arguments made the use of Article 114 TFUE unavoidable. If the Directive is indeed adopted, it will bring about the first example of an imposed harmonisation of Polish antitrust rules since 2004.

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V. Conclusions

National competition laws, including the Polish antitrust system, have up till now avoided harmonisation manoeuvres imposed by the European Union. Nevertheless, there is a clear and deepening trend to converge national legal solutions, stemming first and foremost from the free will of national legislators (spontaneous harmonisation), who are imitating the solutions adopted by the European Commission in its practice or those formulated by the Council of the European Union in its Regulations. Direct application of EU competition law brings about an increasing number of CJEU judgments interpreting the norms of Regulation 1/2003 or other EU antitrust rules. Those preliminary rulings also cause a certain echo in the manner in which national competition rules are applied – indicating the way in which EU law is to be used, they usually also accidentally influence the application of analogous domestic provisions.

It is this judicial harmonisation that has led in 2013 to the first EU proposal of a Directive harmonising national provisions applicable to both EU cases and purely internal situations as far as private antitrust enforcement is concerned. This development, if successful, might change the current picture of competition law in the European Union – a landscape that has so far consisted of two separate parts – national laws and EU law. It might prove to be the first step on the road to further and much broader approximation of national competition laws – creating a precedence for the use of Article 103 TFEU (jointly with Article 114 TFEU) in a way overstepping its former construction.

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