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***Sped-Pro*: The Impact of Rule-of-Law Backsliding on the Enforcement of (EU) Competition Law**

Abstract: The *Sped-Pro* judgment concerns an action for annulment of an EU Commission decision rejecting a complaint alleging the abuse of a dominant position by the Polish state-owned railway company PKP Cargo. In this judgment, the General Court for the first time established a direct link between systematic deficiencies in the legal order of a Member State and the ability of its competition authority to investigate and take enforcement action under EU law. The General Court addressed issues of the rule of law as an element of effective competition law enforcement and the case allocation principles between the Commission and National Competition Authorities (NCAs) under the decentralised enforcement system of Regulation 1/2003. The General Court now requires the Commission to examine, when handling complaints, whether an NCA can actually enforce EU law effectively.

Keywords: case allocation, decentralised enforcement, independence, mutual trust, rule of law

Introduction

Sped-Pro, a Polish transportation company, filed a complaint with the European Commission in 2016 alleging that a state-owned railway company, PKP Cargo, had abused its dominant position in the market for rail transport services in Poland by refusing to enter into a cooperation agreement with the applicant. In 2019, the Commission rejected *Sped-Pro*'s complaint, claiming that the Polish competition author-

ity was better placed to investigate it.¹ According to the Commission, the alleged infringement was limited to the Polish market and the Polish competition authority had acquired detailed knowledge of the rail freight services market in Poland and of PKP Cargo's practices, through various investigations it had already conducted and decisions it had taken concerning that sector since 2004.²

Subsequently, *Sped-Pro* brought an action for annulment of the Commission's decision before the General Court. In support of its action, it raised three pleas in law: (1) inadequate reasoning of the contested decision and breach of its right to have its case heard within a reasonable time; (2) breach of the principle of the rule of law in Poland; and (3) manifest errors in the assessment of the Union's interest in further investigation of the complaint.³

On 9 February 2022, the General Court annulled the Commission's decision in its entirety. Although the General Court rejected the first plea (reasonable time and failure to state reasons) and the third plea (assessment of the Union's interest), the applicant's second plea was successful. According to the General Court, for the purposes of determining which competition authority is best placed to examine a complaint, the Commission had to take into account Poland's compliance with the requirements of the rule of law as a relevant factor. In this commentary, we limit our assessment to the main considerations of the General Court related to the second and third pleas raised by *Sped-Pro*. Moreover, we outline the legal implications of the current judgment for the further development of competition law and enforcement and the rule of law in the EU.

1. Case allocation and the assessment of Union interest

With its third plea, *Sped-Pro* claimed that the Commission made manifest errors in the contested decision in assessing the Union's interest and declining to further investigate the complaint. Hence, the Court was called on to interpret the jurisdictional mechanisms of case allocation, which govern the enforcement of competition law between the Commission and the Member States. The division of labour between National Competition Authorities (NCAs) and the Commission with regard to cases where an investigation is deemed necessary takes place within a framework of clear allocation principles, determining which authority is best placed to investigate a case and thus enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Such an allocation is based on a number of objective criteria, such as the direct, actual or likely effects of the agreement or conduct on competi-

1 Commission Decision No. 773/2004 on the case of AT.40459 (COM 12.08.2019), point 26.

2 Judgment of GC of 9 February 2022 on the case of *Sped-Pro S.A. v. European Commission*, T 791/19, point 42.

3 *Ibidem*, point 16.

tion and an authority's ability to gather factual evidence necessary to prove the infringement and to effectively bring the infringement to an end.⁴ Since *Automec II*, the EU courts have acknowledged that the Commission has broad discretion to reject complaints.⁵ The principles governing the Commission's discretion when it decides to pursue or disregard a case have been broadly construed and entitle the Commission to classify complaints according to different degrees of priority based on Union interest.

In the current case, the Commission argued that the Polish competition authority was more appropriate to investigate the complaint as the alleged infringement was limited to the Polish market and that authority had acquired detailed knowledge of the rail freight services market in Poland and of PKP Cargo's practices.⁶ In assessing the plea concerning the Union interest, the General Court conducted a detailed analysis of the Commission's administrative discretion in dealing with complaints, as defined by the EU courts' case law.⁷ According to this case law, Article 105(1) TFEU requires the Commission to oversee the application of Articles 101 and 102 TFEU and to define and implement the Union's competition policy. To perform this task properly, the Commission is allowed to prioritise the complaints brought before it.⁸ Not only can the Commission determine the order in which complaints are investigated, but it can also reject a complaint on the grounds of insufficient Union interest to pursue the investigation.⁹ However, the Commission's discretion is not unlimited, and it must carefully examine all factual and legal elements which complainants have informed it of.¹⁰ In the current case, the Court found that the Commission did not commit an error of assessment in finding that the Polish authority was more appropriate to investigate the complaint.¹¹

4 Commission Notice on Cooperation within the Network of Competition Authorities (O.J. C 101, 27.04.2004, p. 43) (Network Notice), point 8.

5 Judgment of GC of 18 September 1992 on the case of *Automec Srl v. Commission of the European Communities*, T 24/90 (*Automec II*), points 73–77.

6 Commission Decision..., *op. cit.*, point 26.

7 *Sped-Pro...*, *op. cit.*, points 38–41; *Automec II...*, *op. cit.*, points 73–77; judgment of GC of 16 May 2017 on the case of *Agria Polska sp. z o.o. and Others v. European Commission*, T 480/15, points 34–35; judgment of GC of 26 January 2005 on the case of *Laurent Piau v. Commission of the European Communities*, T 193/02, point 80.

8 Judgment of CJEU of 14 December 2000 on the case of *Masterfoods Ltd v. HB Ice Cream Ltd*, C 344/98, point 46; *Automec II...*, *op. cit.*, points 73–77.

9 *Agria Polska...*, *op. cit.*, points 61–65.

10 H.P. Nehl, *Principles of Administrative Procedure in EC Law*, Portland 1999; judgment of GC of 17 December 2014 on the case of *Si.mobil telekomunikacijske storitve d.d. v. European Commission*, T 201/11, point 81; judgment of GC of 30 May 2013 on the case of *Omnis Group Srl v. European Commission*, T 74/11, points 43–44.

11 *Sped-Pro...*, *op. cit.*, points 51–53.

2. Respect for the principle of the rule of law

In its second plea, the applicant submitted that the Commission had infringed its right to effective judicial protection, as guaranteed by Article 2 Treaty on European Union (TEU), in conjunction with Article 19(1)(2) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (Charter). The applicant claimed that the Commission was more appropriate to deal with its complaint, given the lack of independence of the Polish competition authority and of the national courts competent in the matter. In examining whether the Commission was indeed more appropriate to deal with the applicant's complaint and protect its rights as a complainant, the Court examined whether the Commission did consider deficiencies in the rule of law in Poland which could prevent it from rejecting the complaint. In its decision, the Commission applied by analogy the analysis of the *LM* judgment in the context of the implementation of European Arrest Warrant (EAW).¹²

The so-called *LM* test was originally developed by the Court of Justice in the context of the area of freedom, security and justice, and relates to the cooperation of national courts in criminal matters.¹³ The analysis is to ensure the right to a fair trial in the context of the execution of an EAW, and as a test, it consists of two stages.¹⁴ First, it should be examined whether there is a real risk of violating the right to a fair trial due to the lack of judicial independence in the Member State concerned as a result of structural or fundamental flaws in that state. Second, it must be assessed whether, in the light of the concrete circumstances of the case, the person concerned actually faces this real danger.¹⁵ In its decision, the Commission merely stated that the conditions of the second stage of the analysis in *LM* had not been satisfied in the present case, and did not take a position on whether the conditions of the first stage of the analysis had been satisfied.¹⁶

While recognising that there are clear differences between the circumstances of the above-mentioned jurisprudence in the area of freedom, security and justice and the circumstances underlying the present case, the Court found that a number of principled considerations justify the analogous application. In doing so, the Court

12 Judgment of CJEU of 25 July 2018 on the case of *LM*, C 216/18 PPU. The mutual recognition and execution of EAWs was always based on 'the high degree of trust and solidarity between the Member States' that national authorities would dutifully execute EU law. More simply put, the act of accession to the EU constitutes an act of recognition and acceptance of the values of the EU, and in equal measure a promise that these values will be respected whenever EU law is enforced; *ibidem*.

13 Presidency conclusions of the European Council of 15–16 October 1999 on the creation of an area of freedom, security and justice in the European Union (O.J. D/99, 15–16.10.1999, p. 14).

14 Judgment of CJEU of 5 April 2016 on the case of *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, C 404/15 and C 659/15 PPU (*Aranyosi*); *LM*..., *op. cit.*, point 33; judgment of CJEU of 25 July 2018 on the case of *ML*, C 220/18 PPU, point 117.

15 *Aranyosi*..., *op. cit.*, point 88.

16 *Sped-Pro*..., *op. cit.*, point 93.

first cited the fundamental principle of mutual trust laid down in Article 2 TEU. Respecting this principle means that ‘each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU’.¹⁷ This principle implies and justifies the Member States’ mutual trust that the other Member States, and in particular their courts, recognise those values, including that of the rule of law, which underpins the Union. Thus, the courts are also obliged to comply with Union law implementing those values.¹⁸

The General Court confirmed that compliance with the fundamental values of Article 2 TEU applies to the enforcement mechanisms of Articles 101 and 102 TFEU. Consequently, cooperation between the Commission, NCAs and national courts for the purposes of applying Articles 101 and 102 TFEU is based on the principles of mutual trust and loyal cooperation. By virtue of those principles, each of those authorities and courts must presume that all other authorities and courts respect both Union law, unless in exceptional circumstances, and, more specifically, the fundamental rights recognised by that law.¹⁹

In *Sped-Pro*, the Court concluded that respect for the requirements of the rule of law was a relevant factor that the Commission had to take into account when determining which competition authority was best placed to investigate the complaint.²⁰ According to the Court, the protection of the complainant’s rights and the Commission’s decision-making power are closely linked. Hence, this judgment demands that the Commission investigate whether its decision to reject complaints puts complainants at risk of being subjected to investigations by national authorities compromised by rule-of-law backsliding.²¹ It further demands that the Commission must take account of the additional condition of rule-of-law concerns when deciding on the rejection of complaints and the allocation of cases.²²

Although in the Court’s view the Commission was right to apply the two-pronged analysis set out in the *LM* judgment in the context of a competition proce-

17 Opinion 2/13 of CJEU of 18 December 2014 (Opinion pursuant to Article 218(11) TFEU), point 168.

18 Judgment of CJEU of 24 June 2019 on the case of *European Commission v. Republic of Poland*, C 619/18, points 42–43.

19 Exceptional circumstances, as defined by the Court of Justice, concern situations where an authority considers that there is a real risk that a data subject will receive treatment in another Member State which is contrary to his/her fundamental rights as protected by Union law.

20 *Sped-Pro...*, *op. cit.*, point 92.

21 Judgment of GC of 3 July 2007 on the case of *Au Lys de France SA v. Commission of the European Communities*, T 458/04, point 83.

22 The Commission had to take into account the rule of law in determining the most appropriate competition authority to investigate a complaint and before rejecting a complaint for lack of an EU interest, to ensure that the national authorities are in a position to adequately safeguard the complainant’s rights (*Sped-Pro...*, *op. cit.*, point 92).

ture, the Court considered that the manner in which the test was applied is contrary to Union law. During the administrative procedure, the applicant submitted a series of concrete indications which, taken as a whole, were capable of showing that there were serious and factual reasons to believe that it faced a real risk of its rights under Article 47 of the Charter being infringed if its case were investigated by the national authorities.²³

In the contested decision, the Commission did not further examine the applicant's evidence and essentially confined itself to finding that its arguments had not been proved. The Court thus concluded that the Commission did not examine the various indications put forward by the applicant in a concrete and precise manner and did not fulfil its duty to state reasons.²⁴

3. Implications

3.1. Mutual trust in competition law

The *Sped-Pro* judgment is of fundamental importance because it recognises that the principle of mutual trust is not absolute and that when there are fundamental rights at stake, this principle may be limited. Systemic deficiencies in the rule of law in a Member State can affect the capacity of its competition authority to enforce competition law effectively and thus properly protect a complainant's rights.²⁵ The judgment is significant because it openly questions whether a 'high degree of trust and solidarity' actually exists between the NCAs and the Commission and whether their cooperation can be based on mutual trust, mutual recognition and fair cooperation.²⁶ The answer might be that the 'high degree of trust and solidarity' does not and should not exist when there is a democratic deficit, more specifically considering the rule-of-law crisis in Poland or Hungary.²⁷ By referring to case law in the field of the Euro-

23 *Ibidem*, points 98–102. Those indications were based on (1) the state's control over PKP Cargo, (2) the executive's influence over the president of the Polish Competition Authority, (3) the fact that, according to the applicant, PKP Cargo's parent company was a member of an association whose aim was to defend and promote judicial reform in Poland, (4) the benevolent attitude of the Polish Competition Authority towards PKP Cargo, (5) the Prosecutor General's objections to that authority's decisions in relation to PKP Cargo, and (6) the fact that the national courts competent in the field of competition law cannot, because of their own lack of independence, conduct effective judicial review of the Polish Competition Authority's decisions.

24 *Ibidem*, point 104.

25 M. Malaga, Does the 'More Appropriate' Authority Need to Be Independent? Rule of Law Implications for Case Referrals with Respect of Concentrations, *Yearbook of Antitrust and Regulatory Studies* 2022, vol. 15, no. 25, pp. 109 and 117.

26 Judgment of CJEU of 3 May 2007 on the case of *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, C 303/05, point 57.

27 R.D. Kelemen, Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union, *'Government and Opposition'* 2017, vol. 52, no. 2, p. 211.

pean Arrest Warrant, the Court effectively created a new condition that ‘obliges the Commission, before rejecting a complaint for lack of EU interest, to satisfy itself that the national authorities are capable of adequately safeguarding the rights of the complainant.’²⁸ This means that the principle of mutual trust may be departed from in such ‘exceptional circumstances.’²⁹

The CJEU has since elaborated on the exceptional circumstances under which mutual trust can be suspended. The *LM* ruling cited in the present judgment was important, as it focused on the question of under what circumstances a judge’s lack of independence in issuing the EAW can empower the executing judge to suspend execution. In such a situation, the CJEU held that systemic or general deficiencies in judicial independence must be assessed as part of the right to a fair trial, with the Charter being the applicable standard of review. If such deficiencies can be sufficiently demonstrated, cooperation on EAW requests may be suspended.

As we have argued elsewhere, the protection of effective competition in EU law should be seen as an implementation of Article 2 TEU.³⁰ When states join the EU, they commit themselves to the EU’s legal order, which as a ‘constitutional charter’ explicitly includes undistorted competition as a part. Accordingly, accession countries commit themselves to the values of EU law as enshrined in Article 2 TEU and pledge to all other Member States to recognise and respect the values and objectives of the EU when enforcing competition law.³¹

But unlike the values of Article 2 TEU, which are seriously undermined by the EU’s limited powers to legislate and enforce those values (for example, the lack of enforcement of Article 7 TEU), competition law is an exclusive competence of the EU, with strong enforcement tools. This means, on the one hand, that EU competition law is a fundamental part of the EU legal order, implemented and enforced by all Member States, and that the protection of competitive markets is a shared value for all Member States. At the same time, competition law is equally threatened and

28 *Sped-Pro...*, *op. cit.*, point 90.

29 M. Kozak, J. Mainardi, Rights of Complainants before the European Commission: A Critical Analysis, *Journal of European Competition Law & Practice* 2023, vol. 14, no. 3, pp. 152 and 161.

30 K.J. Cseres, EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding, (in:) C. Colombo, M. Eliantonio, K. Wright (eds.), *The Evolving Governance of EU Competition Law in a Time of Disruptions: A Constitutional Perspective*, forthcoming, <https://ssrn.com/abstract=4032499> (accessed 29.03.2023).

31 Such an interpretation is consistent with the Court of Justice’s interpretation of EU law as an autonomous legal order, in its Opinion 2/13 on the Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The nature of EU law, which is primarily based on norms formulated at EU level but implemented by Member States, means that membership of the Union presupposes that ‘each member state shares with all other member states a set of common values on which the EU is founded, and recognises that they share these values with it, as provided for in Article 2 TEU’ (Opinion 2/13..., *op. cit.*, points 166–174).

undermined by the systematic erosion of the rule of law and democracy by certain Member States. Thus, even though the principle of mutual trust is of a constitutional nature, mutual trust cannot be blind trust.³²

The creation of decentralised enforcement was an important part of the idea of giving competition policy more democratic support in Europe.³³ However, by bringing decision-making closer to citizens, there was also a risk that Member States would push their own national interests within the EU enforcement framework. These concerns seem to have been fully realised in Poland today. In fact, no provisions currently oblige Poland to have an independent NCA. While Regulation 1/2003 has not specified any requirements for the independence of NCAs, Article 4 of the ECN+ Directive requires that NCAs are independent.³⁴ As directives must be implemented into national law by Member States, institutions and private parties can rely on the directive only after its implementation.³⁵ Poland has still not implemented the ECN+ Directive even though the deadline was 4 February 2021, over two years ago.³⁶ Accordingly, there is no formal source in national law demanding the independence of the Polish NCA. One solution to this problem, besides Poland implementing the directive, could be that the Commission deals with cases from Poland after reallocation.

However, the judgment also raises the question of whether the Commission could examine the same issues in other jurisdictions facing similar rule-of-law problems and reconsider its cautious approach in handling complaints. A notable case is Hungary, where the lack of effective enforcement of competition law, for example tolerating collusion between companies, is widely seen as one of the main threats to the integrity of public procurement procedures.³⁷ Corruption is deeply rooted in the

32 M. Kozak, J. Mainardi, Rights..., *op. cit.*, p. 160.

33 White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty Decentralization (Commission Programme No. 99/027, 28.04.1999), point 46.

34 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 (O.J. L 1, 16.12.2002, p. 1) (Regulation 1/2003); judgment of CJEU of 31 May 2005 on the case of *Synetairismos Farmakopoion Aitolias and Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline A EVE*, C 53/03, points 31–36; Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (O.J. L 11, 11.12.2018, p. 3) (ECN+ Directive), Article 4.

35 Judgment of CJEU of 26 February 1986 on the case of *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 152/84, point 48.

36 M. Urbańska, K. Sikora, Important Changes to the Competition and Consumer Protection Act Are on the Way, <https://cms-lawnow.com/en/ealerts/2023/02/important-changes-to-the-competition-and-consumer-protection-act-are-on-the-way> (22.02.2023).

37 European Commission, Recommendation for Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, <https://commission.europa.eu/system/files/2022-05/2022->

legal, political and economic governance of Hungary, making the application of the regulation on a conditionality regime for the protection of the Union budget, which expresses concerns about possible violations of rule-of-law principles, particularly clear.³⁸ At the same time, the competition authority is not sufficiently active in sectors with a high risk of collusion and has made few decisions. Could a complainant whose complaint has been rejected by the Hungarian competition authority turn to the Commission with his/her complaint and count on their investigation, which, before the complaint is rejected for lack of Union interest, must satisfy itself that the national authorities are able to properly protect the complainant's rights?

3.2. Case allocation and the protection of fundamental rights

As mentioned above, the principles of case allocation concerning the enforcement of Articles 101 and 102 TFEU are laid down in Regulation 1/2003, the Network Notice and the ECN+ Directive. A well-placed authority to deal with a case is one that is capable of gathering enough evidence and able to effectively end the infringement, and where the practice in question has effects on competition within its territory.³⁹ Several NCAs may take up a case unless the case concerns more than three Member States; then the Commission is the well-placed authority.⁴⁰ When an authority is not considered to be well placed, reallocation of cases is necessary for 'effective protection of competition and of Community interest'.⁴¹

The Commission is well placed to deal with a case where one or more agreements or practices, including networks of similar agreements or practices, affect competition in more than three Member States.⁴² Furthermore, the Commission is also best placed to deal with complaints where they are closely related to other Community provisions for which the Commission has exclusive competence or which can be more effectively applied by the Commission – hence, where the Union interest requires the Commission to adopt a decision in order to further develop EU competition policy to overcome emerging competition issues, or to ensure effective enforcement.⁴³ Accordingly, there are two grounds on which the Commission may choose

european-semester-csr-hungary_en.pdf (30.03.2023); K.J. Cseres, The Commission's Missed Opportunity to Reclaim Competition Law for the Rechtsstaat, <https://verfassungsblog.de/the-commissions-missed-opportunity-to-reclaim-competition-law-for-the-rechtsstaat/> (30.03.2023).

38 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (O.J. L 433 I, 22.12.2020, p. 1) (Conditionality Regulation). The Commission launched proceedings under the Conditionality Regulation against Hungary in April 2022; *op. cit.*, Article 1.

39 Network Notice..., *op. cit.*, point 8.

40 *Ibidem*, point 14.

41 *Ibidem*, points 6–7.

42 *Ibidem*, point 14.

43 *Ibidem*, point 15.

not to pursue a complaint: first, it may reject complaints for lack of Union interest; second, under Article 13 of Regulation 1/2003, it can also reject a complaint on the grounds that a Member State competition authority is dealing or has dealt with the case.⁴⁴

Since *Automec II*, the Commission has been granted broad discretion by the Court of Justice to prioritise and reject complaints. The Commission's discretion in deciding whether to pursue a case and the underlying principles are an important part of the effective enforcement of Articles 101 and 102 TFEU. Moreover, Article 4(5) Directive (EU) 2019/1 requires all Member States to grant their NCAs the power to set priorities when carrying out their duties for the purposes of Articles 101 and 102 TFEU. These authorities should also be able to reject complaints where they consider that they are not an enforcement priority. While the Directive fails to concretise the conditions for the prioritisation and rejection of complaints by NCAs, the latter do have (wide) discretionary freedom to determine which cases they pursue and which they reject. The criteria in Member States' national (administrative) law for NCAs to have the power to be able to reject complaints are not harmonised and remain very diverse. In Poland, for example, the NCA is not required to reject a complaint with a formal decision, and so complainants have no legal recourse to the courts that can review whether the NCA has correctly applied Articles 101 and 102 TFEU.⁴⁵

In the decentralised enforcement system, where the Commission and the NCAs share the enforcement of Articles 101 and 102 TFEU but act on the basis of different national procedural rules, the above situation is at odds with the objective of Regulation 1/2003, which seeks to achieve effective and uniform enforcement of those articles. However, can there be sufficiently effective and uniform enforcement of Articles 101 and 102, and can a sufficient level of protection of complainants' rights be ensured in an enforcement system where no minimum conditions exist to control the discretionary power of NCAs in rejecting complaints?

In a series of judgments in recent years, the EU courts have confirmed the Commission's wide discretion to prioritise and reject complaints in cases where another NCA is dealing or has already dealt with the same complaints.⁴⁶ However, the General Court adds a new condition in the present judgment: before rejecting a complaint for lack of Union interest, the Commission must guarantee that the national authorities are capable of adequately protecting the complainant's rights. Thus, the

44 B. Van Rompuy, *The European Commission's Handling of Non-Priority Antitrust Complaints: An Empirical Assessment*, 'World Competition' 2022, vol. 45, no. 2, pp. 265 and 268.

45 O. Brook, K.J. Cseres, *Policy Report: Priority Setting in EU and National Competition Law Enforcement*, p. 31, <https://ssrn.com/abstract=3930189> (30.03.2023).

46 *Automec II...*, *op. cit.*, points 73–77; *Agria Polska...*, *op. cit.*, points 34–35; *Laurent Piau...*, *op. cit.*, point 80.

decision of the General Court in the *Sped-Pro* judgment to take the complainant's rights into account limits not only the principle of mutual trust but also the Commission's discretionary powers.⁴⁷ Although the case law of the General Court has formulated this condition before,⁴⁸ this is the first time that the General Court has held that this case law referring broadly to 'national authorities' also applies to NCAs, in addition to the national courts competent in the matter.

With this ruling, the General Court appears to have updated its earlier ruling in *Si.Mobil* on whether the Commission must examine institutional shortcomings within an NCA when rejecting a complaint.⁴⁹ In this case, the General Court had to answer the question of whether the Commission could reject a complaint which another NCA had been dealing with and where institutional shortcomings at the NCA in question had been invoked as grounds for reallocating the case to the Commission.⁵⁰ The General Court rejected those arguments, holding that

the requirement to ensure the effective application of EU competition rules cannot, without calling into question the scope of Article 13 of Regulation No. 1/2003, have the effect of imposing an obligation on the Commission to verify [...] whether the competition authority concerned has the institutional, financial and technical means available to it to enable it to accomplish the task entrusted to it by that regulation⁵¹.

Indeed, as it has been a core EU matter for many years, the Commission has already pleaded for more independence for NCAs to improve the enforcement of EU competition law.⁵² In *Sped-Pro*, the Court formalised this obligation and seemed to suggest that the Commission should enforce its own demands by examining the status of NCAs more closely when allocating cases.

Current allocation principles in Regulation 1/2003 and the ECN+ Directive do not formulate obligations or guidelines for the Commission to examine the NCAs' independence and the status of the rule of law of Member States when allocating cases. The ECN+ Directive requires the independence of the Member States' competition authorities, and the Polish NCA lacks independence, as proven by the applicants in the *Sped-Pro* case; while Poland has not implemented this directive, the Commission is the only institution that can protect the right to a fair trial of Polish undertakings.

47 B. Van Rompuy, Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, *Sped-Pro v Commission*, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 6, pp. 413–414.

48 *LM...*, *op. cit.*, points 78–79.

49 *Si.mobil...*, *op. cit.*

50 *Ibidem*, point 46.

51 *Ibidem*, point 57.

52 Commission Staff Working Document, Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014SC0231&from=EN> (22.02.2023).

Conclusions

The *Sped-Pro* judgment introduced the exceptional circumstances of mutual trust and recognition from EAW case law to competition law. Alongside the judicial independence in *LM*, it added a new condition of rule of law to the exceptional circumstances. Hence, it opened the way for the exceptions to mutual trust to expand to broader fields of law, thus protecting a broader group of private parties from legal and political deficiencies in Member States. The pace and scope of constitutional re-engineering in Hungary and Poland and in competition law enforcement raises questions beyond the context of the present judgment. One such question is the constitutional position and role of competition authorities. As public enforcers, the Commission and national competition authorities have a fundamental role to ensure the effective enforcement of (EU) competition law across Europe. Article 4(3)(2) TFEU requires Member States to take all appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union. This also means that Member States must use their sovereign powers to enforce the Treaty's competition rules as effectively as possible.

However, with the present judgment, the General Court has also laid down an important new role for the Commission in the enforcement system of EU competition law. In future, the Commission will have to examine more thoroughly whether an NCA can act *de iure* and *de facto* independently from the executive in the Member State and whether there are independent courts that can review the competition authority's decision and adequately protect the rights of complainants.

REFERENCES

- Brook O., and Cseres K.J., Policy Report: Priority Setting in EU and National Competition Law Enforcement, <https://ssrn.com/abstract=3930189>.
- Commission Decision No. 773/2004 on the case of AT.40459 (COM 12.08.2019).
- Commission Notice on Cooperation within the Network of Competition Authorities (O.J. C 101, 27.04.2004, p. 43).
- Commission Staff Working Document, Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014SC0231&from=EN>.
- 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 (O.J. L 1, 16.12.2002, p. 1).
- Cseres K.J., The Commission's Missed Opportunity to Reclaim Competition Law for the Rechtsstaat, <https://verfassungsblog.de/the-commissions-missed-opportunity-to-reclaim-competition-law-for-the-rechtsstaat/>.
- Cseres K.J., EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding, (in:) Colombo C., Eliantonio M., Wright K. (eds.), *The Evolving Governance of EU Competition Law*

in a Time of Disruptions: A Constitutional Perspective, forthcoming, <https://ssrn.com/abstract=4032499>.

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (O.J. L 11, 11.12.2018, p. 3).

European Commission, Recommendation for Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, https://commission.europa.eu/system/files/2022-05/2022-european-semester-csr-hungary_en.pdf.

Judgment of CJEU of 26 February 1986 on the case of *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, 152/84.

Judgment of CJEU of 14 December 2000 on the case of *Masterfoods Ltd v. HB Ice Cream Ltd*, C 344/98.

Judgment of CJEU of 25 July 2018 on the case of *ML*, C 220/18 PPU.

Judgment of GC of 18 September 1992 on the case of *Automec Srl v. Commission of the European Communities*, T 24/90.

Judgment of GC of 3 July 2007 on the case of *Au Lys de France SA v. Commission of the European Communities*, T 458/04.

Judgment of GC of 26 January 2005 on the case of *Laurent Piau v. Commission of the European Communities*, T 193/02.

Judgment of CJEU of 31 May 2005 on the case of *Synetairismos Farmakopoion Aitolias and Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE*, C 53/03.

Judgment of CJEU of 3 May 2007 on the case of *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, C 303/05.

Judgment of CJEU of 5 April 2016 on the case of *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, C 404/15 and C 659/15 PPU.

Judgment of CJEU of 25 July 2018 on the case of *LM*, C 216/18 PPU.

Judgment of CJEU of 24 June 2019 on the case of *European Commission v. Republic of Poland*, C 619/18.

Judgment of GC of 17 December 2014 on the case of *Si.mobil telekomunikacijske storitve d.d. v. European Commission*, T 201/11.

Judgment of GC of 16 May 2017 on the case of *Agria Polska sp. z o.o. and Others v. European Commission*, T 480/15.

Judgment of GC of 30 May 2013 on the case of *Omnis Group Srl v. European Commission*, T 74/11.

Judgment of GC of 9 February 2022 on the case of *Sped-Pro S.A. v. European Commission*, T 791/19.

Kelemen R.D., Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union, 'Government and Opposition' 2017, vol. 52, no. 2.

Kozak M., Mainardi J., Rights of Complainants before the European Commission: A Critical Analysis, 'Journal of European Competition Law & Practice' 2023, vol. 14, no. 3.

- Malaga M., Does the 'More Appropriate' Authority Need to Be Independent? Rule of Law Implications for Case Referrals with Respect of Concentrations, 'Yearbook of Antitrust and Regulatory Studies' 2022, vol. 15, no. 25.
- Nehl H.P., Principles of Administrative Procedure in EC Law, Portland 1999.
- Opinion 2/13 of CJEU of 18 December 2014 (Opinion pursuant to Article 218(11) TFEU).
- Presidency conclusions of the European Council of 15–16 October 1999 on the creation of an area of freedom, security and justice in the European Union (O.J. D/99, 15–16.10.1999, p. 14).
- Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (O.J. L 433 I, 22.12.2020, p. 1).
- Urbańska M., Sikora K., Important Changes to the Competition and Consumer Protection Act Are on the Way, <https://cms-lawnow.com/en/ealerts/2023/02/important-changes-to-the-competition-and-consumer-protection-act-are-on-the-way>.
- Van Rompuy B., The European Commission's Handling of Non-Priority Antitrust Complaints: An Empirical Assessment, 'World Competition' 2022, vol. 45, no. 2.
- Van Rompuy B., Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, *Sped-Pro v Commission*, 'Journal of European Competition Law & Practice' 2022, vol. 13, no. 6.
- White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty Decentralization (Commission Programme No. 99/027, 28.04.1999).