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► **To cite this version:**

Alexandra Mendoza, Paulina Korycinska-Rzadca. Harmonisation of National Leniency Programmes in the EU: Is This Mission Accomplished? Remarks on the Case of France and Poland Compared with Other EU Member States. *IIC: International Review of Intellectual Property and Competition Law*, 2022, 10.1007/s40319-022-01268-6 . hal-03930765

**HAL Id: hal-03930765**

**<https://hal.science/hal-03930765>**

Submitted on 4 May 2023

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# Harmonisation of National Leniency Programmes in the EU: Is This Mission Accomplished? Remarks on the Case of France and Poland Compared with Other EU Member States

Paulina Korycińska-Rządca · Alexandra Mendoza-Caminade

Accepted: 24 October 2022  
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**Abstract** The article critically discusses the requirements of the ECN+ Directive with regard to leniency programmes and whether the goal of this Directive – inter alia to eliminate discrepancies between national leniency programmes – has been achieved. The authors: (1) analyse in this respect the ECN+ Directive as well as the legal framework in EU Member States, focusing especially on France and Poland, but making reference also to selected other EU Member States, and (2) compare how these issues are regulated in those national legal orders to the standard required by the ECN+ Directive. The aim of this publication is to determine any potential differences in the approach taken by national legislators. The article also identifies certain shortcomings in the ECN+ Directive and national legal orders in the area under discussion and suggests amendments that could boost national leniency

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Sections 1, 3.3, 4.1.3, 4.2.3, 5.3, 6.1, 6.3, 7.1, 7.3, 8.1 and 8.3 were written by Paulina Korycińska-Rządca whilst Sections 2 and 9 were written jointly. Paulina Korycińska-Rządca acknowledges that this article was produced within the framework of the project “Enhancing Competition Enforcement by the Competition Authorities of the EU Member States: Institutional Design and Fining Powers in France and Poland” co-financed by the Polish National Agency for Academic Exchange (NAWA) under the PHC Polonium programme (project No. PPN/BFR/2019/1/00023/U/00001).

Sections 3.1, 3.2, 4.1.1, 4.1.2, 4.2.1, 4.2.2, 5.1, 5.2, 6.2, 7.2 and 8.2 were written by Alexandra Mendoza-Caminade whilst Sections 2 and 9 were written jointly. Alexandra Mendoza-Caminade acknowledges that this article was produced within the framework of the project “Enhancing Competition Enforcement by the Competition Authorities of the EU Member States: Institutional Design and Fining Powers in France and Poland” co-financed by the French Ministries of European and Foreign Affairs (MEAE) and of Higher Education, Research and Innovation (MESRI) and the Polish National Agency for Academic Exchange (NAWA) under the PHC Polonium programme.

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programmes. This research is based mainly on the dogmatic and comparative methods of analysis.

**Keywords** Leniency programmes · Competition law · Competition law enforcement · Directive (EU) 2019/1 · ECN+ Directive · Fines

## 1 Introduction

Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty,<sup>1</sup> which entered into force on 1 May 2004, ushered in a new – decentralised – system for the application of European Union (EU) competition rules (as of 1 December 2009 – Arts. 101 and 102 of the Treaty on the Functioning of the European Union<sup>2</sup>). This Regulation empowers and obliges the national competition authorities (NCAs) and the courts of EU Member States to also apply EU competition rules when they apply national competition law to agreements and practices that might affect trade between EU Member States. After ten years of enforcing Regulation 1/2003, the European Commission summarised that the change had considerably boosted enforcement of EU competition rules by the NCAs<sup>3</sup> but that, despite a substantial level of convergence in applying the rules, there was still some divergence.<sup>4</sup> While reflecting on the application of Regulation 1/2003, the role of leniency programmes was underlined, as these were considered to constitute an essential tool for enhancing effective enforcement against the most serious infringements.<sup>5</sup> However, it was stressed that, at EU level, there was no requirement to have a leniency programme. The Commission also noticed that the European Competition Network (ECN) had played an important role in harmonising national legal orders in the field of leniency, as the ECN Model Leniency Programme had resulted in the introduction of leniency programmes by almost all EU Member States (except for Malta, which was still in the process of adopting its first leniency programme).<sup>6</sup> Unfortunately, the voluntary convergence achieved through soft tools has not eliminated discrepancies between the EU Member States. Regarding the leniency programmes in force in the EU Member States, the Commission concluded that, although the level of convergence in the field of leniency was exemplary, the

<sup>1</sup> OJ 2003 L1, 4.1.2003, p. 1, hereinafter “Regulation 1/2003”.

<sup>2</sup> Consolidated version OJ 2012 C326, 26.10.2012. 1, hereinafter “TFEU”.

<sup>3</sup> Communication from the Commission to the European Parliament and to the Council “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM/2014/0453 final, para. 7. Hereinafter: Ten Years of Regulation Communication 1/2003.

<sup>4</sup> Ten Years of Regulation Communication 1/2003, para. 24.

<sup>5</sup> Ten Years of Regulation Communication 1/2003, para. 40.

<sup>6</sup> Commission Staff Working Document “Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues, [a]ccompanying the document Communication from the Commission to the European Parliament and to the Council “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, SWD/2014/0231 final, para. 80. Hereinafter “CSWD Enhancing Competition Enforcement”.

achievements made through soft law were not sufficient to eliminate those discrepancies that were rooted in national legal traditions.<sup>7</sup>

On 22 March 2017 the European Commission forwarded to the European Parliament and the Council a proposal for a Directive aimed at empowering the NCAs.<sup>8</sup> This proposal initiated an ordinary legislative procedure that finally resulted in the adoption of 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.<sup>9</sup>

The objective of the ECN+ Directive is to ensure that NCAs have the guaranteed independence, resources, and enforcement and fining powers necessary to enforce EU competition rules effectively.<sup>10</sup> A significant part of the ECN+ Directive was devoted to the harmonisation of national rules in the area of leniency programmes for secret cartels.<sup>11</sup> Already in the preamble of the ECN+ Directive it was strongly emphasised that leniency programmes played a crucial role in the effective execution of EU competition rules, as they constituted a key tool for detecting the most serious infringements of competition law, i.e. secret cartels.<sup>12</sup> Anyway, such a conclusion is consistent with the views presented in the competition law literature, where it is underlined that leniency programmes are the most effective tool for combatting agreements that restrict competition, especially secret cartels.<sup>13</sup> The Commission also remarked that the differences between national leniency programmes could give potential leniency applicants less incentive to apply for leniency (the consequence of which would be less effective enforcement of EU competition rules) as well as jeopardise the level playing field for undertakings operating in the internal market.<sup>14</sup> Therefore, it was stressed that there was a strong need to introduce detailed rules for national leniency programmes.<sup>15</sup> The EU Member States' obligations regarding leniency programmes for secret cartels are laid down in Chapter VI of the ECN+ Directive. The EU Member States were obliged to transpose the ECN+ Directive into national law by 4 February 2021.<sup>16</sup>

This article critically discusses the requirements of the ECN+ Directive with regard to leniency programmes and whether the goal of this Directive – *inter alia* to

<sup>7</sup> CSWD Enhancing Competition Enforcement, para. 86.

<sup>8</sup> Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM/2017/0142 final – 2017/063 (COD).

<sup>9</sup> OJ 2019 L11, 14.1.2019, pp. 3–33, hereinafter “ECN+ Directive” or “Directive”.

<sup>10</sup> See ECN+ Directive, Recital 3 of the preamble.

<sup>11</sup> The EU Member States' obligations regarding leniency programmes for secret cartels are laid down in Chapter VI of the ECN+ Directive.

<sup>12</sup> See ECN+ Directive, Recital 50 of the preamble.

<sup>13</sup> See, *inter alia*, Hammond (2004), p. 2; Jurkowska-Gomułka (2015), p. 69, Turno (2013), pp. 23–45 and pp. 291–304.

<sup>14</sup> See ECN+ Directive, Recitals 50 and 51 of the preamble.

<sup>15</sup> See, also, ECN+ Directive, Recital 11 of the preamble.

<sup>16</sup> ECN+ Directive, Art. 34(1).

eliminate discrepancies between national leniency programmes – has been achieved. For that purpose the authors: (1) analyse in this respect the ECN+ Directive as well as the legal framework in selected EU Member States, focusing especially on France and Poland, but making reference also to other EU Member States (i.e. Belgium, Croatia, Czech Republic, Germany, Italy, Portugal and Slovakia) and (2) compare how these issues are regulated in those national legal orders to the standard required by the ECN+ Directive. The authors decided to focus mainly on France and Poland because of the existing discrepancies between the competition law models adopted in those jurisdictions and the significant differences in practical usage of leniency programmes there. The Polish model of competition law borrows more from Germany, whereas the French model is based on Romano-Germanic law.<sup>17</sup> This could make it more likely that the national legislators in those EU Member States would adopt different approaches when designing leniency programmes and then adapt such approaches to the ECN+ Directive's requirements. At the same time, the aim is for French and Polish NCAs to apply the same substantive EU competition law rules. Therefore, those NCAs may – despite their differences – face (at least to a certain extent) similar problems with the effective enforcement of competition law. Another interesting factor is that France and Poland each have a totally different practical experience of leniency programmes: in France the leniency programme has since 2001 been a fundamental lever for detecting and destabilising cartels, whereas in Poland the rules governing leniency programmes have been in force since 2004 but very little practical use has been made of them for detecting cartels. That is why the approach taken by the French legislator could be a source of inspiration for other EU Member States, especially – but not only – for those who have not transposed the ECN+ Directive yet, including Poland.<sup>18</sup> In the authors' opinion, the choice of two EU Member States with different competition law models and different practical experiences of the solution under analysis presents an opportunity to find new ideas that could be implemented in order to boost EU competition law enforcement by the NCAs.

The aim of this publication is to determine any potential differences in the approach taken by national legislators. The article also identifies certain shortcomings in the ECN+ Directive and national legal orders in the area under discussion and suggests amendments that could boost national leniency programmes. This research is based mainly on the dogmatic method of analysing the provisions contained in the ECN+ Directive and national legal acts, as well as on the comparative method of analysis.

## 2 Transposition of the ECN+ Directive

The ECN+ Directive has been transposed into national law in the vast majority of EU Member States, including France. Some elements of the French leniency

<sup>17</sup> On the similarities and differences of the competition law models in France and in Poland, *see* Piszcz and Grynfogel (2022), pp. 1073–1074.

<sup>18</sup> *See* more in Sect. 2 of this paper.

programme have been modified, but its general principles, already based on EU law, remain unchanged. The transposition into French law of the ECN+ Directive took place in three steps.<sup>19</sup> First of all, Law No. 2020-1508 of 3 December 2020 relating to various provisions of the adaptation to EU law in economic and financial matters, known as the DDADUE law, empowered the government to transpose the Directive.<sup>20</sup> Then the provisions of the Directive concerning the regulatory field of the leniency procedure were transposed by Decree No. 2021-568 of 10 May 2021 relating to the procedure for total or partial exemption from financial penalties.<sup>21</sup> This decree amends and supplements the provisions of Art. L. 464-2 IV of the Commercial Code with regard to the provisions for application of the procedure. It essentially incorporates the system previously applicable in France, as derived from the procedural notice of the Competition Authority of 3 April 2015.

Finally, Ordinance No. 2021-649 of 26 May 2021 transposed into French law the legislative provisions of the Directive concerning the leniency procedure by creating three new articles, namely Arts. L. 464-10, L. 490-13 and L. 490-14, in the Commercial Code.<sup>22</sup> The result of these transposition steps is to enshrine in the legislation and regulations a leniency procedure that is broadly similar to the leniency programme previously implemented by the NCA. Indeed, the French law provided for in particular by the procedural notice of 3 April 2015 is the result of an evolution that has led it to comply with the ECN model programme on which the ECN+ Directive is based. The leniency procedure was introduced in France by the Law on New Economic Regulations of 15 May 2001 and the provisions can be found in the Commercial Code in Arts. L. 464-2 IV and R. 464-5. The procedure has been the subject of several procedural notices, the most recent of which is dated 3 April 2015. It is this set of notices that has just been reformed in order to incorporate developments from the ECN+ Directive.

While the transposition of the ECN+ Directive did not cause major changes in the French leniency procedure, as the latter was already in compliance with European law,<sup>23</sup> it did lead to the modification of several points, some of which are important in practice.<sup>24</sup>

Although the deadline for the transposition of the ECN+ Directive into national law expired on 4 February 2021, there are four EU Member States, including Poland (along with Estonia, Luxembourg and Slovenia),<sup>25</sup> that have still not informed the Commission about any measures brought into force to comply with the Directive. In Poland, work on the amendment act transposing the Directive has not been finished yet, being still in the preliminary stages (the Polish government is working on the text of the draft amendment act before it is forwarded to the parliament). The

<sup>19</sup> On the difficulties of this transposition: Choné-Grimaldi (2019), pp. 544–545.

<sup>20</sup> On the delay in transposing the ECN+ Directive: Claudel (2019b), p. 617.

<sup>21</sup> Bridier (2021).

<sup>22</sup> Delpech (2021).

<sup>23</sup> On increasing the NCA's powers: Redon (2021), p. 43.

<sup>24</sup> On the evolutionary nature of regulation: Bacache-Beauvalleta and Perrot (2017), p. 3.

<sup>25</sup> In accordance with information available at <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0001> (24.08.2022).

current Polish legal solution for the areas covered by the Directive indicates that there are discrepancies between the Polish leniency programme and the regime established by the ECN+ Directive that urgently require intervention by the legislator. The fact that not all EU Member States have transposed the Directive is undoubtedly one of the reasons for the existing discrepancies between national leniency programmes.

### 3 Scope of Leniency Programmes

#### 3.1 ECN+ Directive

The leniency procedure is the procedure by which an undertaking that reports a serious infringement of the competition rules to the NCA can request an exemption from the financial penalty incurred.<sup>26</sup> The new provisions are aimed at harmonising this procedure at European level.<sup>27</sup> The ECN+ Directive requires EU Member States to have leniency programmes available for their NCAs for the benefit of undertakings that have participated in secret cartels. Specifically, there is a need for a leniency process to grant immunity from fines to undertakings in return for disclosing their involvement in secret cartels.<sup>28</sup> Leniency programmes should also allow fines to be reduced when the undertaking does not meet the conditions for immunity (provided that it does meet the conditions required for reduction).<sup>29</sup> These programmes exist independently of those that may exist for offences other than secret cartels or involving individuals. Therefore, the Directive has left the EU Member States with the power of discretion over whether the national leniency programme should be limited only to the participants of secret cartels or should go further. The Directive gave most EU Member States (e.g. France, Spain, Belgium, Germany, Czech Republic and Portugal) an opportunity to extend the scope of their programmes, but others (like Poland) a chance to consider limiting the scope of theirs.

#### 3.2 France: Leniency Programme for Cartels

With regard to the scope of the leniency procedure and related practices in France, an undertaking that has concluded an illicit agreement with others may be totally or partially exempt from financial penalties if, by providing information that was not already in the possession of the NCA or the administration, it makes it possible to establish that a cartel exists and to identify its authors.<sup>30</sup>

The scope of leniency is strictly limited to cartels, as the French text refers only to the prohibition of cartels within anti-competitive practices. Indeed, Art. L. 464-2

<sup>26</sup> Lemaire et al. (2019), p. 144.

<sup>27</sup> Baudu (2019), p. 7.

<sup>28</sup> ECN+ Directive, Art. 17(1).

<sup>29</sup> ECN+ Directive, Art. 18(1).

<sup>30</sup> Commercial Code, Art. L. 464-2 IV.

IV of the Commercial Code provides that total or partial exemption from pecuniary sanctions may be granted to an undertaking that has, in conjunction with others, implemented a practice prohibited by the provisions of Art. L. 420-1, provided that the same undertaking, by providing information that the NCA or the administration did not previously have, has contributed to establishing that the prohibited practice exists and to identifying its perpetrators. However, although Art. L. 420-1 targets prohibited cartels, it also already provides a leniency procedure for offences other than just secret cartels: all cartels are covered by the leniency procedure. This means that the French legislator's approach with regard to scope has been the same as in, e.g. Greece, Croatia and Germany.<sup>31</sup>

An important contribution made by the transposition is the new immunity recognised for natural persons employed by the company that first files a leniency application. Thus, the effectiveness of the leniency procedure is further reinforced by the new incentive given to these natural persons. French law now allows them to qualify for immunity or reduced criminal penalties.<sup>32</sup>

### 3.3 Poland: Leniency Programme for All Competition-Restricting Agreements

Poland has in place a leniency programme that covers all competition-restricting agreements that infringe Art. 101 TFEU or its Polish equivalent, i.e. Art. 6(1) of the Law of 16 February 2007 on competition and consumer protection.<sup>33</sup> This means that it is not limited to cartels but applies also to other types of competition-restricting agreements, including vertical agreements.<sup>34</sup> The same approach was taken e.g. in Slovakia.<sup>35</sup> On the other hand, there are also EU Member States, e.g. Italy, where only participants of secret cartels may qualify for the programme.<sup>36</sup>

<sup>31</sup> Greek Act 3959/2011 (A' 93), Art. 29B; Croatian Act on the Protection of Market Competition (Zakon o zaštiti tržišnog natjecanja ("Narodne novine", br. 79/09. i 80/13.)), Art. 65(1); German Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Art. 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506), Sec. 81(h)(1).

<sup>32</sup> Commercial Code, Art. L 420-6-1.

<sup>33</sup> Consolidated text: Journal of Laws 2021, item 275, hereinafter "ACCP".

<sup>34</sup> Kulesza (2015), p. 87, indicates that, initially, this broad scope of the Polish leniency programme might have been a result of a misunderstanding of the notion "cartel" rather than a thoroughly considered decision to introduce a wider scope of infringements than in the EU leniency programme. This could explain why – despite this discrepancy – the explanatory notes attached to the draft Act on competition and consumer protection and amending certain other acts state that the proposed rules governing the leniency programme are analogous to those provided for in the Commission notice on immunity from fines and reduction of fines in cartel cases of 13 February 2002 (Explanatory notes to the draft Act amending the Act on competition and consumer protection and amending certain other acts (IV term of Sejm paper No. 2561), p. 4; Polish version available at: <http://orka.sejm.gov.pl/proc4.nsf/opisy/2561.htm> (24.08.2022); not available in English).

<sup>35</sup> Slovak Law of 11 May 2021 on the protection of economic competition and the amendment of certain laws (ZÁKON o ochrane hospodárskej súťaže a o zmene a doplnení niektorých zákonov, 187/2021 Z. z.), § 51(1).

<sup>36</sup> Italian Act of 10 October 1990 No. 287, containing rules for the protection of competition and the market, Art. 15<sup>bis</sup>(1).



Despite the programme's broad scope, the number of leniency applications submitted to the Polish NCA (the President of the Polish Office of Competition and Consumer Protection – UOKiK) is relatively low. In the years 2004–2020 there were only 90 leniency applications,<sup>37</sup> and the vast majority of leniency-related decisions did not concern cartels.<sup>38</sup> Moreover, even in those that did, the leniency applications did not play the primary role in detecting the cartels.<sup>39</sup>

The broader scope of the leniency programme is not contrary to the Directive. However, it has been criticised in the literature.<sup>40</sup> It has been said that the programme should be limited to cartels, hub-and-spoke agreements and certain types of vertical agreement.<sup>41</sup> Consequently, the transposition of this Directive was considered an excellent opportunity to do just that.<sup>42</sup> Nevertheless, the last version of the draft act amending the Law on competition and consumer protection and certain other acts (dated 6 September 2021)<sup>43</sup> does not provide for any changes in the scope of the programme. Therefore, it seems that, after the adoption of the act aimed at transposition of the ECN+ Directive in Poland, this *status quo* with regard to the scope of the programme will remain unchanged.

In Poland, the programme can be applied to undertakings (corporate entities and natural persons having the status of an undertaking) and to management staff.<sup>44</sup>

## 4 Conditions for Granting Immunity from or Reduction of Fines

### 4.1 Specific Conditions for Leniency

#### 4.1.1 ECN+ Directive

According to Art. 17(2) of the ECN+ Directive, immunity from fines should only be granted when the applicant fulfils all the general conditions laid down in Art. 19 of

<sup>37</sup> Data on the basis of reports on the UOKiK's activities in the years 2004–2020, available in Polish at: <https://www.uokik.gov.pl/publikacje.php?tag=1> (23.12.2021); English versions of the reports for years 2004 and 2007–2020 are available at: <https://www.uokik.gov.pl/publications.php> (accessed 23.12.2021).

<sup>38</sup> Jurkowska-Gomułka (2018), pp. 139–140; Martyniszyn and Bernatt (2020), p. 199.

<sup>39</sup> Martyniszyn and Bernatt (2020), p. 199.

<sup>40</sup> *Inter alia*: Turno (2013), pp. 460–465 and the literature indicated therein; Molski (2009), p. 71; Molski (2014), p. 1407; Sitarek (2014), p. 210. Alternatively: Soltysiński (2004), p. 41. It is worth noting that there was an opportunity to limit the scope of the programme long before the ECN+ Directive was adopted, as the Act of 10 June 2014 amending the Act on Competition and Consumer Protection and the Act on the Code of Civil Procedure (Journal of Laws of the Republic of Poland 2014 item 945) changed several solutions proposed in the Polish leniency programme. This Act, however, did not affect the scope of the programme. Scholars considered this a missed opportunity: Piszcz (2016), p. 214; Skoczny (2015), p. 170.

<sup>41</sup> Turno (2013), p. 461; Turno (2016), p. 1487; in favour only of cartels and hub-and-spoke: Molski (2014), p. 1408; Szot (2019), pp. 20–21.

<sup>42</sup> Szot (2019), p. 20.

<sup>43</sup> Available in Polish at: <https://legislacja.rcl.gov.pl/projekt/12342403/katalog/12757054#12757054> (accessed 24.08.2022). Not available in English. Hereinafter “2021 Draft Amendment Act”.

<sup>44</sup> See more in Sect. 8.3 of this paper.

the Directive.<sup>45</sup> The applicant must then disclose its participation in a secret cartel and be the first to submit evidence that “at the time the national competition authority receives the application, enables the national competition authority to carry out a targeted inspection in connection with the secret cartel, provided that the national competition authority did not yet have in its possession sufficient evidence to carry out such an inspection or had not already carried out such an inspection”; or that, “in the national competition authority’s view, is sufficient for it to find an infringement covered by the leniency programme, provided that the authority did not yet have in its possession sufficient evidence to find such an infringement and that no other undertaking previously qualified for immunity from fines under point (i) in relation to that secret cartel”.

To be eligible for immunity from sanctions, undertakings must not have coerced other undertakings to join or remain in a secret cartel.

The NCAs inform applicants whether or not conditional immunity from fines is granted and, if it is refused, applicants may request a reduction of fines.<sup>46</sup> Such a reduction can be granted only to an applicant that fulfils the general conditions stipulated in Art. 19 of the ECN+ Directive and that, after revealing its participation in a secret cartel, “submits evidence of the alleged secret cartel which represents added value for the purpose of proving an infringement covered by the leniency programme, relative to the evidence already in the national competition authority’s possession at the time of the application”. Furthermore, “if the applicant submits compelling evidence which the national competition authority uses to prove additional facts which lead to an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel, the national competition authority shall not take such additional facts into account when setting any fine to be imposed on the application for reduction of fines which provided this evidence”.

Unfortunately, the ECN+ Directive fails to indicate whether the NCA is obliged to grant leniency when the applicant fulfils all of the conditions.<sup>47</sup> As a result, it is left to the EU Member States’ discretion what approach to adopt in this regard. This inevitably leads to a certain level of divergence between national solutions.

#### *4.1.2 France: Specific Conditions that Comply with the ECN+ Directive*

The conditions for immunity or reduction of fines vary depending on whether or not an undertaking is the first to seek leniency and provide evidence. The list of cumulative conditions to be met in order to qualify for a total or partial exemption is specified in Art. R. 464-5-4 of the Commercial Code. The conditions that an undertaking must meet in order to obtain an exemption include actively cooperating with the NCA, as well as not destroying or falsifying documents.

Details of the information to be submitted are given in new Arts. R. 464-5-1 to R. 464-5-2 of the French Commercial Code, which specify the content that allows the

<sup>45</sup> See Sect. 4.2.1 of this paper.

<sup>46</sup> ECN+ Directive, Art. 18.

<sup>47</sup> Cf. Szot (2019), pp. 48–49.

undertaking to qualify for total or partial exemption, and any commitments made by the applicant. In addition, the rules relating to the value of the elements provided by the applicant have been modified.

To qualify for immunity,<sup>48</sup> an applicant must be the first to disclose information. This condition is a prerequisite for the two possible scenarios: in the first scenario, an applicant provides information that enables the Directorate-General for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) or the NCA to carry out targeted inspections in connection with the secret cartel, as well as seizure operations and searches in the context of criminal proceedings.<sup>49</sup> This condition is, however, subject to the fact that such operations have not already taken place or that the authorities were not already in possession of sufficient information to allow such an inspection to be carried out.<sup>50</sup>

In the second scenario, an applicant that is first to disclose information may also qualify for total exemption if the information is sufficient to allow the authorities to find such an infringement. However, if the information is already in the authorities' possession and another applicant already fulfils the conditions for total exemption, no exemption will be granted.<sup>51</sup> Thus, for an application to qualify for total exemption from sanctions, no other applicant must have already fulfilled the conditions.

In both scenarios, the applicant must not have taken steps to coerce other undertakings to join or remain in a secret cartel: otherwise, they cannot qualify for immunity from fines.<sup>52</sup> Undertakings other than the first applicant can qualify for a reduction of fines on the condition first of disclosing their participation in a secret cartel.<sup>53</sup> In addition to fulfilling the conditions laid down by Arts. R. 464-5-4 and L. 420-1 of the French Commercial Code, applicants must submit evidence that, in relation to the evidence already in the possession of the NCA or the DGCCRF at the time of the application, has significant added value for establishing the existence of the practice. A reduction of fines is conditional on an applicant's providing information that, compared with the information already held by the authorities, has significant added value for establishing the existence of the cartel.

In addition, the previous incentive system for disclosing information referred to in point 22 of the procedural notice of 3 April 2015 has been codified.<sup>54</sup> When an applicant is the first to provide decisive information that allows the authorities to establish additional facts, which lead to an increase in the financial penalties imposed on participants in the practice, the NCA does not take this increase into account when determining the extent of the fine imposed on the applicant that provided the information.<sup>55</sup> This mechanism, referred to as "leniency plus",

<sup>48</sup> Formerly called a Type 1 leniency request.

<sup>49</sup> On the NCA's powers in terms of visitation and seizure operations: Paroche and Verney (2019), p. 28.

<sup>50</sup> Bosco (2021), p. 35.

<sup>51</sup> Commercial Code, Art. R. 464-5-1.

<sup>52</sup> Commercial Code, Art. R. 464-5-1(II).

<sup>53</sup> Formerly called a Type 2 leniency request.

<sup>54</sup> Commercial Code, Art. R. 464-5-2(II).

<sup>55</sup> Commercial Code, Art. R. 464-5-2.

amounts to immunity from fines in return for revealing additional facts about a practice: already applied in French law, “leniency plus” was both codified at the time of the transposition and specified in the conditions. The “leniency plus” notion may for example, reveal that a practice has lasted longer without this extension being taken into account to increase the fine of the undertaking from which the information originated.

Finally, the procedural notice of 3 April 2015<sup>56</sup> provided that the NCA determines the level of exemption from fines that a company can claim, depending on how its request is ranked from the moment when the application is made and as a function of the value-added evidence provided: the reduction cannot in principle exceed 50% of the fine that would have been applied in the absence of leniency. To ensure legal certainty, the NCA had defined a range of fine reductions for requests for partial exemption, based on the filing rank of the application and the degree of significant added value of the evidence provided. Although the decree in question did not specify a range of fine reductions as a function of the filing rank of requests for reduction, such a range will feature in the new version of the NCA’s procedural notice.

#### 4.1.3 Poland: Specific Conditions not Fully Harmonised with the ECN+ Directive

The current Polish legal framework provides that the President of UOKiK grants immunity from fines to undertakings that have entered into a competition-restricting agreement where the undertakings concerned fulfil all of the conditions stipulated by the law. Indeed, if all the conditions are met, the UOKiK President is obliged to grant immunity from fines. However, the literature emphasises that the UOKiK President may exercise considerable discretion when assessing whether the conditions have been fulfilled.<sup>57</sup> A similar approach has been taken in, e.g., Slovakia,<sup>58</sup> and to some extent in Germany (where the participant that is first to submit evidence that allows the NCA to obtain a search warrant for the first time is guaranteed immunity from fines).<sup>59</sup> On the other hand, in Croatia, the NCA exercises discretion in this matter.<sup>60</sup>

In order to ensure compliance with the requirements of the ECN+ Directive in respect of the specific conditions for immunity from fines in Poland, a few amendments should have been introduced.

Firstly, with regard to Art. 17(2)(a) of the ECN+ Directive, some changes need to be made regarding the general conditions for leniency; these are discussed in detail in Section 4.2.3 of this paper.

<sup>56</sup> <https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/3-april-2015-revision-leniency-procedural-notice>; [https://www.autoritedelaconurrence.fr/sites/default/files/cpro\\_autorite\\_clemence\\_revise.pdf](https://www.autoritedelaconurrence.fr/sites/default/files/cpro_autorite_clemence_revise.pdf) (accessed 28.12.2021).

<sup>57</sup> Turno (2016), p. 1514; Szot (2019), p. 34.

<sup>58</sup> Slovak Law on the protection of economic competition and the amendment of certain laws, § 51(1).

<sup>59</sup> German Law against restraints on Competition, Sec. 81(k)(1).

<sup>60</sup> Croatian Law on the protection of market competition, Art. 65(1).

Secondly, the current Polish legal framework is already in line with Art. 17(2)(b) of the ECN+ Directive.<sup>61</sup> The 2021 Draft Amendment Act does not seem to propose any significant differences to the current solution in the area under discussion.<sup>62</sup>

Thirdly, the Polish legal framework requires several changes in view of Art. 17(2)(c) of the ECN+ Directive. First of all, amendments are needed in order to expressly indicate that applicants must submit certain categories of evidence. In other words, the obligation to grant immunity from fines on the sole basis that an applicant has provided the UOKiK President with information that makes it possible for the authorities to obtain the relevant evidence has to be deleted.<sup>63</sup> Unfortunately, the proposal for Art. 113b(1), point 2(a), of the ACCP contained in the 2021 Draft Amendment Act will not make the Polish solution comply with the ECN+ Directive because, according to the draft rules, immunity from fines will be granted also to an undertaking that is first to submit information that allows a request to be filed for consent to conduct a search.<sup>64</sup> Such a solution, if adopted, will be contrary to the ECN+ Directive. Moreover, there is a need to modify current legal provisions, in particular those stipulating that the evidence to be submitted to the UOKiK President must enable the latter to carry out a targeted inspection in connection with the infringement (not – as it is now – to institute antitrust proceedings) or – in the event that no other undertaking has previously qualified for immunity from fines submitted the abovementioned evidence – be sufficient, in the UOKiK President’s view, for finding an infringement covered by the leniency programme.<sup>65</sup> The proposal contained in the 2021 Draft Amendment Act in this regard will largely ensure compliance with the requirements.<sup>66</sup>

Fourthly, amendments to the Polish legal solution are required in view of Art. 17(3) of the ECN+ Directive. The Polish law currently provides that encouraging other undertakings to participate in an agreement is an obstacle to being granted immunity. Incidentally, the use of the notion of “not encouraging other undertakings” by the Polish legislator has been criticised in the literature.<sup>67</sup> The proposal contained in the 2021 Draft Amendment Act is intended to ensure compliance with this requirement of the ECN+ Directive, as draft Art. 113b(1), point 3, of the ACCP provides that one condition for being granted immunity from fines is that the applicant has not coerced other undertakings into entering or participating in the agreement.<sup>68</sup>

<sup>61</sup> ACCP, Art. 113(a)(2) points 1 and 8.

<sup>62</sup> In accordance with the proposed wording of Art. 113(b)(1) point 1 ACCP, one of the conditions for being granted immunity from fines is that an application for immunity from fines is submitted that contains all the minimum information required by the law (including data on participants). See proposal for Art. 113(b)(1) point 1 ACCP contained in the 2021 Draft Amendment Act.

<sup>63</sup> Szot (2019), p. 25.

<sup>64</sup> Proposal for Art. 113(b)(1) point 2(a) ACCP.

<sup>65</sup> Szot (2019), p. 24.

<sup>66</sup> Proposal for Art. 113(b)(1) point 2 ACCP.

<sup>67</sup> Piszcz (2015), p. 50; Turno (2016), p. 1519. See also: Korycińska-Rządca (2018), pp. 70–71 and the literature indicated therein.

<sup>68</sup> Proposal for Art. 113(b)(1) point 3 ACCP.

With regard to the conditions for a reduction of fines, the current Polish legal framework provides that, if an undertaking that has entered into a competition-restricting agreement does not fulfil all the requirements for immunity from fines, the UOKiK President may reduce any fine imposed on that undertaking where it does fulfil all of the relevant conditions stipulated by the law. The ACCP indicates quite precisely the level of possible fine reduction depending on the order in which the given undertaking meets the conditions for a reduction,<sup>69</sup> whereas the law in other EU Member States (e.g. France and Slovakia<sup>70</sup>) indicates – if at all – only the maximum level of fine reduction. Interestingly, the amount of a reduction in Germany is determined in particular on the basis of the usefulness of the information and evidence and the point in time at which the leniency applications are filed.<sup>71</sup> In order to ensure compliance with Art. 18(2)(a) of the ECN+ Directive, some changes regarding the general conditions for leniency are needed (and are discussed in detail in Section 4.2.3 of this paper). On the other hand, with regard to Art. 18(2)(b) and (c) of the ECN+ Directive, there is no need to introduce any significant changes, as the current legal framework – despite differences in the wording of legal provisions – is mostly in line with these provisions of the Directive.<sup>72</sup>

The 2021 Draft Amendment Act proposes a change in the wording of the conditions for a reduction of fines compared with the current provisions, to bring them more into line with the ECN+ Directive. However, it does not seem to introduce any significant differences in this regard.<sup>73</sup> Incidentally, the 2021 Draft Amendment Act proposes to retain the legal provisions that stipulate the level of fine reduction depending on the order in which the given undertaking meets the conditions for a reduction.<sup>74</sup> Despite the fact that the ECN+ Directive does not regulate this matter, the solution stipulating the level of reduction of fines more precisely is not to be deemed contrary to the Directive and may even be a good pattern to follow. It should also be noted that, in Poland, there is an additional option that is not provided for in the ECN+ Directive. It is referred to as the “leniency plus programme”. Despite having the same name, it differs significantly from the “leniency plus” regime provided for in France<sup>75</sup> – the Polish solution allows an additional reduction in the fines imposed on an undertaking that submitted a leniency application but failed to meet the conditions to be granted immunity from fines, provided that the undertaking also submits a leniency application regarding

<sup>69</sup> For the first undertaking, fines are reduced by 30–50%; for the second undertaking by 20–30%; and for other undertakings by a maximum of 20% – Art. 113(c)(2) ACCP.

<sup>70</sup> Slovak Law on the protection of economic competition and the amendment of certain some laws, § 51(2).

<sup>71</sup> German Law against restraints on competition, Sec. 81(2).

<sup>72</sup> Cf. Szot (2019), p. 29.

<sup>73</sup> Proposal for Art. 113(c)(1) ACCP.

<sup>74</sup> The fine imposed on the first undertaking to fulfil the conditions is to be reduced by 30–50%; on the second by 20–30%; and on the others by a maximum of 20%, according to the proposal for Art. 113(c)(3) ACCP.

<sup>75</sup> See remarks in Sect. 4.1.2

another competition-restricting agreement.<sup>76</sup> Unfortunately, the scope of this paper does not permit a thorough analysis of the issues connected to the “leniency plus programme” and its compliance with the ECN+ Directive. Therefore, they will not be discussed in this article.<sup>77</sup>

## 4.2 General Conditions for Leniency

### 4.2.1 ECN+ Directive

According to Art. 19 of the ECN+ Directive, three general conditions are required for undertakings to be granted immunity or a reduction of fines in the leniency procedure. These conditions are in addition to the special conditions set out in Arts. 17 and 18. The aim is for the undertaking concerned to end its involvement in the alleged secret cartel, to cooperate with the NCA and to refrain from any act that could be detrimental to the procedure.

First,<sup>78</sup> the applicant must immediately end its involvement in the cartel, “at the latest immediately following its leniency application”. There is an exception to this rule of principle: in practice, ceasing to participate may arouse the suspicion of other participants in the secret cartel. Also, to preserve the evidence and all the efficiency of the procedure, the applicant may maintain its involvement in the cartel if the NCA considers that its continued participation is necessary for preserving the integrity of its investigation. Second, the applicant has to cooperate with the NCA. Indeed, they must cooperate “genuinely, fully, on a continuous basis and expeditiously” throughout the duration of the procedure, which extends from the time of its application for leniency to the closure of the authority’s enforcement proceedings. Art. 19(b) of the Directive provides very precise details of this obligation to cooperate.

Finally, under the conditions required to qualify for immunity or a reduction of fines, the undertaking must not have destroyed, falsified or concealed evidence of the alleged secret cartel, or disclosed its intention to make a request, nor the content of that request. There is an exception for possible disclosure to other NCAs or NCAs in third countries.

### 4.2.2 France: General Conditions that Comply with the ECN+ Directive

In general, obtaining an exemption is subject to additional conditions. These appear in the Directive but were already included as such in French law. Thus, few changes

<sup>76</sup> The rules governing the leniency plus programme have been criticised in the literature. *See, inter alia*, Martyniszyn and Bernatt (2015), p. 11; Semeniuk and Syp (2013), pp. 33–41; Skoczny (2015), p. 172; Piszcz (2015), p. 52; Piszcz (2016), p. 216. *See, also*, Korycińska-Rządca (2018), pp. 76–77.

<sup>77</sup> On the remarks on the convergence of the leniency plus programme with the ECN+ Directive, *see* Sztot (2019), pp. 31–32, 49.

<sup>78</sup> ECN+ Directive, Art. 19(a).

were made by the transposition of the general conditions common to the two cases of total exemption and partial exemption.<sup>79</sup>

An applicant must end its involvement in the cartel: if this condition seems obvious, it is now expressly included in the text of the relevant decree, which was not previously the case.<sup>80</sup> It must end its involvement in the secret cartel at the latest immediately after its leniency application, except to the extent that the NCA would consider reasonably necessary to preserve the integrity of the investigation.

An applicant provides the NCA with genuine, total, permanent and rapid cooperation from the time of its application for leniency and throughout the enforcement proceedings: this implies in particular providing all the information without delay, as well as any additional information concerning the practice in question that comes into its possession or to which it may have access, including in particular a detailed description of the practice and its nature, the nature and use of the products, the territories in which this secret cartel is likely to have an effect, and an estimate of the duration of its implementation. Such evidence and information relating to the cartel are to be provided at all stages of the investigation. An applicant must also be at the NCA's disposal to respond quickly to any request from it aimed at helping to establish the facts of the practice in question. In particular, an applicant must make its current legal representatives and employees available and make reasonable efforts to do the same with its former legal representatives and employees. These people can then be questioned by the NCA as part of the leniency procedure.<sup>81</sup>

An applicant should refrain from destroying, falsifying or concealing relevant information and evidence relating to the practice in question and refrain from disclosing the fact of, or any content of, its leniency application before the NCA has issued objections. An applicant cannot question factual elements it has revealed relating to the materiality of the facts denounced or to the existence of the secret cartel. If it reconsiders its statements, it will be considered as infringing its duty to cooperate.

As part of the information to be provided to the NCA, an applicant must in particular provide its name and address, details of the circumstances that led to the submission of its request, the names of all other undertakings that participate or have participated in the cartel, the products and territories affected, and the nature and duration of the cartel, as well as information on any past or possible future leniency applications made to any other NCA concerning the practice in question.

#### 4.2.3 Poland: General Conditions not Fully Harmonised with the ECN+ Directive

The general conditions for leniency in Poland in principle meet the requirements of the ECN+ Directive. However, there are some solutions that require the legislator's intervention.

<sup>79</sup> Lacresse (2021), p. 28.

<sup>80</sup> Commercial Code, Art. R 464-5.

<sup>81</sup> Claudel (2021), p. 581.



With regard to the general condition stipulated in Art. 19(a) of the ECN+ Directive, the current wording of Art. 113(6) ACCP requires that an applicant that has not ended its involvement in the infringement before submission of an application, cease its participation immediately after such application is submitted. This rule does not provide the competition authority with an option to establish a different moment of ending involvement in the infringement. The 2021 Draft Amendment Act proposes changes in this regard to ensure compliance with the ECN+ Directive, as it grants the UOKiK President power to indicate certain permitted actions.<sup>82</sup> This rule will apply also to the procedure for the reduction of fines.<sup>83</sup>

With regard to the general condition stipulated in Art. 19(b) of the ECN+ Directive, the current wording of Art. 113(a)(5) ACCP obliges applicants to cooperate fully with the UOKiK President from the moment the leniency application is submitted. In order to fully transpose the ECN+ Directive as regards the scope of cooperation of an applicant with the NCA, the desired changes can be divided into several categories.

Firstly, it is recommended to introduce a rule that clearly expresses the moment when the obligation to cooperate expires.<sup>84</sup> In this regard, the 2021 Draft Amendment Act proposes to indicate that this obligation will last until the end of the proceedings in the case in which the application was submitted.<sup>85</sup> This amendment should ensure compliance with the ECN+ Directive.

Secondly, there is a need to introduce an obligation for applicants to provide the UOKiK President with information on any past or possible future leniency applications made to NCAs of third countries. The 2021 Draft Amendment Act provides for such a change.<sup>86</sup>

Thirdly, the ACCP does not so far explicitly oblige the applicants to remain at the UOKiK President's disposal to answer any request that may contribute to the establishment of facts. However, given the fact that the obligation to cooperate fully with the authority is laid down in the ACCP, and the specific obligations stipulated in this instrument constitute an open catalogue, the absence of such explicit regulation is not deemed to be contrary to the ECN+ Directive.<sup>87</sup> Nevertheless, the proposal contained in the 2021 Draft Amendment Act to explicitly regulate this duty<sup>88</sup> is to be seen as positive.<sup>89</sup>

<sup>82</sup> Proposal for Art. 113(a)(9) ACCP.

<sup>83</sup> Proposal for Art. 113(c)(1) point 5 requires that an applicant cease its participation in the agreement before applying for a reduction of fines or immediately after such application is submitted, whereas the proposal for Art. 113(c)(2) ACCP provides for the appropriate application of draft provision Art. 113(9) ACCP.

<sup>84</sup> Szot (2019), p. 33.

<sup>85</sup> Proposal for Art. 113(a)(8) and Art. 113(c)(1) point 3 ACCP.

<sup>86</sup> Proposal for Art. 113(a)(5) points 10–11 and Art. 113(c)(1) point 1 ACCP.

<sup>87</sup> Szot (2019), p. 34.

<sup>88</sup> Proposal for Art. 113(a)(8) point 3 and Art. 113(c)(1) point 3 ACCP.

<sup>89</sup> Cf. Szot (2019), p. 34.

Fourthly, regarding staff interviews, this obligation has so far been defined in a negative way (“shall not hinder”). Therefore, there is a need to introduce a change in the sense of expressing this duty in a positive way.<sup>90</sup> The 2021 Draft Amendment Act contains a proposal for a rule that obliges applicants both to enable the UOKiK President to collect explanations from directors, managers and other members of staff and to make reasonable efforts to enable explanations to be collected from former directors, managers and other members of staff.<sup>91</sup> This proposal will eliminate the discrepancy between the Polish law and the standard required by the ECN+ Directive.

Fifthly, disclosure of the fact that a leniency application has been submitted has so far always required the UOKiK President’s consent,<sup>92</sup> whereas the ECN+ Directive explicitly suggests that such consent is not required after the competition authority has issued objections.<sup>93</sup> Unfortunately, the proposed changes on this issue contained in the 2021 Draft Amendment Act fail to establish a moment when the obligation of obtaining the UOKiK President’s consent can be waived.<sup>94</sup>

With regard to the general condition expressed in Art. 19(c) of the ECN+ Directive, the current legal solution in Poland does not expressly oblige applicants not to destroy, falsify or conceal evidence when contemplating making an application for leniency. Similarly, there is no explicit obligation at this stage not to disclose the content of the contemplated leniency application. Until now, the obligations of an entity that is contemplating making a leniency application are limited to refraining from disclosing any intention to submit an application.<sup>95</sup> However, it should be obvious that if an undertaking is not allowed to disclose its intention to submit an application, nor can it disclose any content of that application. In accordance with the proposal contained in the 2021 Draft Amendment Act, the leniency application will not be accepted if the UOKiK President becomes aware that the entity, when contemplating making an application, interfered with the evidence or disclosed its intention of submitting an application (or the content thereof) to entities other than Commission or other NCA.<sup>96</sup> The draft legal provisions give rise to serious reservations. One may ask whether receipt by the UOKiK President of certain facts (not supported by any evidence) justifies a refusal to grant immunity from, or a reduction of, fines. Therefore, it should be recommended that the rules of the Draft Amendment Act be modified so that they do not leave any doubt as to the standard of proof of specific circumstances that would rule out qualifying for the leniency programme.

<sup>90</sup> Cf. Szot (2019), p. 34.

<sup>91</sup> Proposal for Art. 113(a)(8) point 2 and Art. 113(c)(1) point 3 ACCP.

<sup>92</sup> ACCP, Art. 113(a)(5) point 4.

<sup>93</sup> ECN+ Directive, Art. 19(b)(iv).

<sup>94</sup> Proposal for Art. 113(a)(8) point 5 and Art. 113(c)(1) point 3 ACCP.

<sup>95</sup> ACCP, Art. 113(a)(3).

<sup>96</sup> Proposal for Art. 113(a)(6) and Art. 113(c)(1) point 4 ACCP.

## 5 Form of Leniency Statements

### 5.1 ECN+ Directive

According to Art. 20 of the ECN+ Directive, although it must be possible for applications for leniency to be submitted in writing, national systems must also allow oral statements or any other means that ensure that applicants may not take possession, custody or control of the declarations thus presented. The NCA must acknowledge receipt of applications for leniency in writing, indicating the date and time of receipt. Applicants may use the official language, or one of the official languages, of the EU Member State of the NCA concerned or “another official language of the Union bilaterally agreed between the national competition authority and the applicant”. These new language rules are a sensitive point, e.g. for Belgium, where companies will be able to choose Dutch, French or even German for their leniency statements without having to obtain consent from the Belgian Competition Authority. Unfortunately, the ECN+ Directive failed to indicate one universal language that could be used by all applicants applying for leniency to any NCA; this constitutes a missed opportunity by the Directive.<sup>97</sup> Interestingly, in Germany, applications can be made also in English without having to obtain consent from the NCA. Nevertheless, this solution, which apparently favours foreigners, is deceptive, as the NCA may in any case demand that applicants provide a German translation without delay.<sup>98</sup>

### 5.2 France: New Method of Applying for Leniency

The leniency procedure has so far been subject to the NCA’s procedural notice of 3 April 2015, which will therefore need to be amended to incorporate the new terms from the ECN+ Directive. The changes for the new technicality applicable are specified by Decree No. 2021-568 of 10 May 2021.

A simplification to improve the efficiency of the procedure has already been made in French law: Law No. 2020-1508 of 3 December 2020 on various provisions for adapting to EU law removed the NCA’s leniency notice, which the Decree modifies. This deletion aims to simplify and speed up the procedure. This French specificity had previously made the procedure longer and more cumbersome.

Applications for leniency can now be presented according to new methods. Requests should be addressed to the DGCCRF, or to the General Rapporteur of the NCA. Applications may be presented orally, by registered letter with acknowledgment of receipt, through a secure electronic document exchange platform, or by “any other appropriate means provided by the administration or by the national competition authority”.<sup>99</sup>

<sup>97</sup> Szot (2019), pp. 47–48 and the literature indicated therein.

<sup>98</sup> German Law against restraints on competition, Sec. 81(i)(3).

<sup>99</sup> Commercial Code, Art. L. 464-5.

Following an application, an acknowledgment of receipt indicating the actual date and time of receipt is sent to the applicant.<sup>100</sup>

The Decree then provides the operating rules for a new secure electronic document exchange platform set up by the NCA. This is to facilitate exchanges by guaranteeing the security and confidentiality of procedures.

The legal framework for this new system, which enjoys equal treatment with the procedures for the paper version, is in the regulatory part of the Commercial Code.<sup>101</sup> The platform, called Hermès, is active, and its use is currently optional for the parties. Ultimately, the NCAs should make use of this digital platform mandatory. Indeed, the NCA touts many advantages of the Hermès platform, in particular in identifying undertakings and lawyers, respecting the integrity and confidentiality of documents and ensuring the traceability of dematerialised exchanges.

Among its advantages, the platform will be able to play a broader role in competition law well beyond the leniency procedure. It will be used for any exchange of electronic documents with the investigation services, both for the law relating to anti-competitive practices, as well as for merger law.<sup>102</sup>

Finally, in connection with the course of the procedure, new rules apply with regard to access to the “leniency file”, which is granted only to parties to the procedure.<sup>103</sup> Access to declarations and proposals is limited to the undertakings concerned, which can use these elements only to exercise their rights of defence within the framework of a procedure relating to an appeal lodged against a decision by the NCA.

The “leniency adviser” set up within the NCA in 2011 will have to continue his/her mission of providing information to companies and technical support to the NCA, and acting as a point of contact in the event of multiple requests.

### 5.3 Poland: Risk of Adopting Solutions Contrary to the ECN+ Directive

Regarding the form of leniency application submitted to the UOKiK President, the current legal solution is in principle in line with the standard required by the ECN+ Directive. The Regulation of the Council of Ministers of 23 December 2014 on the procedure pertinent to applications for immunity or reduction of fines<sup>104</sup> allows leniency applications to be submitted in writing or orally,<sup>105</sup> in person, or by post, e-mail or fax.<sup>106</sup> However, in the case of leniency statements that are faxed or

<sup>100</sup> Commercial Code, Art. R. 464-5.

<sup>101</sup> Commercial Code, Art. R. 430-2.

<sup>102</sup> French NCA (2021) “Hermès: a new document exchange tool”, Press Release, Published on 8 June 2021, available at: <https://www.autoritedelaconurrence.fr/en/press-release/hermes-new-document-exchange-tool> (accessed 28.12.2021).

<sup>103</sup> Commercial Code, Art. L. 464-10(I).

<sup>104</sup> Journal of Laws 2015, item 81, hereinafter: 2014 Procedural Regulation. This is an executive act (of a lower rank than the ACCP but issued on the basis of the authorisation contained in the ACCP) that establishes more precise procedural rules regarding leniency applications.

<sup>105</sup> 2014 Procedural Regulation, § 2(1).

<sup>106</sup> 2014 Procedural Regulation, § 2(2).

submitted digitally, without being encrypted with an electronic signature, the original or a certified copy of the statement has to be delivered to the authority within five working days following the initial fax or digital application.<sup>107</sup> Although the 2014 Procedural Regulation does not explicitly stipulate the form of summary application, it can be inferred from § 3(4) thereof that such applications may be submitted in writing or orally.<sup>108</sup> The Regulation does not give any clear directions as to the form that marker should take. The 2021 Draft Amendment Act assumes that the 2014 Procedural Regulation will remain in force only until the new regulation is issued (however, it will expire no later than six months following the date of entry into force of the Amendment Act).<sup>109</sup> At the same time, the 2021 Draft Amendment Act does not propose to add to the ACCP any legal provisions relating to the form of leniency statements.

The current solution ensures that the UOKiK President will confirm the date and time of filing of applications *ex officio*.<sup>110</sup> Despite the fact that the legal provisions are very laconic, the literature underlines that the UOKiK President is obliged to confirm the receipt of any leniency application (whether full, summary or marker).<sup>111</sup> The form that such confirmation should take is indicated only in the non-binding 2017 Polish Leniency Guidelines (confirmation in writing).<sup>112</sup> Despite the fact that the current rules governing confirmation of receipt of a leniency application in Poland do in principle meet the standard required by the ECN+ Directive (with the reservation that the written form of confirmation should be regulated in the binding law), the 2021 Draft Amendment Act proposes revising them. Unfortunately, the direction taken by these proposed changes raises serious concerns. Primarily, the 2021 Draft Amendment Act proposes that the rule regulating the obligation to confirm receipt of a leniency application apply only in the case of applications for immunity. This means that if the proposal contained in the 2021 Draft Amendment Act becomes binding law, the changes introduced will lead to the paradox that the instrument that was supposed to transpose the ECN+ Directive would replace rules that meet the required standard with ones that are not in line with it. Secondly, the 2021 Draft Amendment Act does not propose any legal provision stipulating the form of confirmation. Therefore, it is recommended that the proposed legal provisions amending the ACCP be modified to explicitly indicate that receipt of leniency applications should be made in writing.

With regard to the language of leniency statements, the possibility of submitting a leniency application in a language other than Polish is currently permitted only for summary applications. However, even this is a very poor solution. First of all, the

<sup>107</sup> 2014 Procedural Regulation, § 2(3)–(4).

<sup>108</sup> Szot (2019), p. 35.

<sup>109</sup> 2021 Draft Amendment Act, Art. 16.

<sup>110</sup> ACCP, Art.113(a)(4).

<sup>111</sup> Turno (2016), Commentary to Art. 113(a), point 9. On terminological concerns, *see*, further, Szot (2019), pp. 35–37.

<sup>112</sup> Guidelines of the UOKiK President on leniency programme. Procedure pertinent to applications for immunity from or reduction of fines – leniency applications, Warsaw May 2017, point 71. Available in Polish at: [https://www.uokik.gov.pl/wyjasnienia\\_i\\_wytyczne.php](https://www.uokik.gov.pl/wyjasnienia_i_wytyczne.php) (accessed 14.12.2021). Not available in English. Hereinafter “2017 Polish Leniency Guidelines”.

choice of languages is limited to only Polish and English. Secondly, if the applicant decides to submit the summary application in English, it must also provide the UOKiK President with a Polish version of it within 30 days following the initial application.<sup>113</sup> The legal provisions that are currently in force do not provide for the possibility of submitting leniency applications (other than summary applications) in any language other than Polish. Therefore, changes are needed in order to adapt Polish law to the requirements of the ECN+ Directive. The 2021 Draft Amendment Act does not include any proposal to regulate this issue in the ACCP.

## 6 Markers for Applications for Immunity from Fines

### 6.1 ECN+ Directive

The ECN+ Directive obliges EU Member States to have a procedure that enables undertakings wishing to apply for immunity from fines (and optionally also for a reduction of fines<sup>114</sup>) to reserve a place in the queue for leniency by submitting a marker for an application for leniency.<sup>115</sup> The marker constitutes a preliminary application in a shortened form<sup>116</sup> so that the undertaking can gather – within a period specified by the NCA – the necessary information and evidence in order to meet the relevant evidential threshold for leniency.<sup>117</sup> In some states such as Spain,<sup>118</sup> this system of markers is a novelty. If the information and evidence are provided by the applicant within the prescribed period, they will be deemed to have been submitted at the time of the initial request.<sup>119</sup> The approach taken by the EU legislator has led to the situation that, in some EU Member States, (e.g. Italy<sup>120</sup>) markers can be granted only to undertakings that wish to apply for immunity from fines, while other EU Member States (e.g. France, Poland and Germany<sup>121</sup>) offer this option to applicants wishing to apply for either immunity from or reduction of fines. The ECN+ Directive contains a catalogue of the basic information about the alleged secret cartel that should be provided in the marker, if available to the undertaking.<sup>122</sup>

<sup>113</sup> 2014 Procedural Regulation, § 3(3).

<sup>114</sup> ECN+ Directive, Art. 21(5). However, Turno rightly suggests that limiting the possibility of applying for a marker only to entities that wish to apply for immunity from fines could motivate infringers to come forward sooner (Turno 2016, Commentary to Art. 113(e); Cf. Szot 2019, p. 38).

<sup>115</sup> ECN+ Directive, Art. 21.

<sup>116</sup> Turno (2016), Commentary to Art. 113(e); Szot (2019), p. 37.

<sup>117</sup> ECN+ Directive, Art. 21(1).

<sup>118</sup> Maillo (2021), pp. 321–324.

<sup>119</sup> ECN+ Directive, Art. 21(3).

<sup>120</sup> Italian Law containing rules for the protection of competition and the market, Art. 15<sup>sexies</sup>(1).

<sup>121</sup> German Law against restraints on competition, Sec. 81(m).

<sup>122</sup> ECN+ Directive, Art. 21(2).

Analysis of the ECN+ Directive leads to the conclusion that there are at least two areas with regard to markers for leniency applications that the Directive fails to address.

The first significant deficiency of the Directive is that it fails to explicitly determine when, at the latest, an undertaking that has applied for a marker should cease the infringement in question. Turno is correct that the aim of the marker is to reserve the time necessary to perfect the full leniency application and not to allow the undertaking to continue the infringement.<sup>123</sup> However, Szot rightly points out that there may be situations in which immediately ceasing to participate in the agreement might constitute an obstacle to perfecting the marker or might have a negative impact on the integrity of the investigation.<sup>124</sup>

Another missed opportunity of this Directive is connected with the language of markers for leniency. Unfortunately, as with full leniency applications, the ECN+ Directive has not indicated one universal language that could be used by all applicants applying to an NCA for a marker. According to the ECN+ Directive, EU Member States are obliged to ensure that applicants submit markers for leniency in the official language, or one of the official languages, of the Member State of the NCA concerned, or in another official EU language bilaterally agreed between the NCA and the applicant.<sup>125</sup> This solution means that an undertaking that wishes to apply for a marker in a language other than the official language of the Member State of the NCA will first have to agree on this language with the NCA (with the uncertainty and potential delays that this entails) and then eventually have to accept the NCA's decision in this regard.<sup>126</sup> Again, Germany decided to allow applications for markers also in English, but the NCA may demand that applicants provide a German translation without delay.<sup>127</sup>

## 6.2 France: Marker as a Tool to Reserve a Place in the Queue for Immunity from, or Reduction of, Fines

The marker is a consistent requirement in French law for any application for leniency. Its purpose is to request that a place is fixed, in order of receipt, in order to qualify for immunity from, or reduction of, fines.<sup>128</sup> The marker notes the date and time of receipt of an undertaking's application for leniency. It aims to precisely guarantee the order of receipt of the application as well as the time limit for completing the application: the place is thus protected while the undertaking concerned completes the submission within the time allowed. According to the regulations, the allocation of a place, in order of receipt, in order to qualify for immunity from, or reduction of, fines can be requested under conditions laid down by Art. R. 464-5-3 of the Commercial Code. The place in order of receipt should be

<sup>123</sup> Turno (2016), Commentary to Art. 113(e).

<sup>124</sup> Szot (2019), p. 39.

<sup>125</sup> ECN+ Directive, Art. 21(4).

<sup>126</sup> Szot (2019), pp. 47–48 and the literature indicated therein.

<sup>127</sup> German Law against restraints on competition, Sec. 81(m)(2).

<sup>128</sup> Tercinet (2021), p. 46.

requested from the DGCCRF or the General Rapporteur of the NCA. The authorities set a deadline, the aim of which is to allow applicants to gather the necessary information, which will then be deemed to have been communicated on the date of receipt of the application.<sup>129</sup> The information that applicants must provide in connection with the practice in question is strictly the same as that mentioned in Art. 21(2) of the ECN+ Directive.

### 6.3 Polish NCA with no Discretion Whether to Grant a Marker or not

The current Polish legal framework allows undertakings to submit to the UOKiK President a marker that describes the infringement in shortened form and contains all the information listed as minimum for such applications (there is no disclaimer that the required data is to be indicated only if available to the applicant).<sup>130</sup> The marker can be used to reserve a place in the queue for both immunity from, and reduction of, fines. However, it is expressly indicated that markers may be applied for only by undertakings that do not have the necessary information or evidence to submit full leniency applications.<sup>131</sup> Undertakings that apply for markers are obliged to submit to the UOKiK President all the information and evidence specified by this authority. The UOKiK President does not have discretion whether to grant a place in a leniency queue or not.<sup>132</sup> Szot is right that this approach favours potential applicants because if they decide to apply for a marker instead of a full leniency application, the burden of assessing what information or evidence is indispensable for qualifying for the programme is shifted onto the NCA.<sup>133</sup>

In order to harmonise the Polish legal framework for markers, at least three amendments should have been introduced. Firstly, there is a need to allow the UOKiK President to exercise his/her own discretion on whether to grant a marker or not. Unfortunately, the 2021 Draft Amendment Act does not propose any significant change to the current solution.<sup>134</sup> Secondly, an amendment should have been introduced to the scope of information to be indicated in the application for a marker. In this respect, the catalogue of minimum information required needs to be expanded with the information on the basis for the concern which led to the request and on other leniency applications.<sup>135</sup> Moreover, there is a need to explicitly indicate that such information should be included only if available. The proposal contained in the 2021 Draft Amendment Act regarding the minimum content of

<sup>129</sup> Commercial Code, Art. R. 464-5-3.

<sup>130</sup> ACCP, Art. 113(e)(1).

<sup>131</sup> ACCP, Art. 113(e)(1).

<sup>132</sup> If the applicant submits all the information and evidence requested by the authority, its place in the leniency queue is to be granted. This solution is, however, not in line with the ECN+ Directive's requirements.

<sup>133</sup> Szot (2019), p. 38. She also adds that, in Poland, in the majority of leniency-related cases the applicants submit markers rather than full leniency applications.

<sup>134</sup> Proposal for Art. 113(e)(4) ACCP. In fact this proposal is a copy of Art. 21(3) of the ECN+ Directive.

<sup>135</sup> See ECN+ Directive, Art. 21(2)(b), (f).



application for markers is in line with the ECN+ Directive's requirements.<sup>136</sup> Thirdly, there is a need to introduce rules regarding the language version of markers.<sup>137</sup> Unfortunately, the 2021 Draft Amendment Act does not contain any proposal in this regard. Therefore, if this proposal is not subject to any modifications, full compliance with the ECN+ Directive will not be guaranteed.

The 2021 Draft Amendment Act proposes to leave untouched the current, broader, scope of the marker for leniency applications and does not intend to limit this tool in such a way that it can be used only to reserve a place in the queue for immunity from fines.

## 7 Summary Applications

### 7.1 ECN+ Directive

Instead of introducing a one-stop-shop system, the ECN+ Directive obliges EU Member States to ensure that the NCAs accept summary applications from applicants that have applied to the Commission for leniency (regardless of whether applications were for markers or full applications) in respect of the same alleged cartel, provided that the applications cover more than three EU Member States as affected territories.<sup>138</sup> The aim of the summary application is for the applicant to reserve a place in a “domestic” leniency queue (for the event that the Commission decides not to pursue the case) without having to submit a full leniency application to the NCA.

The EU Member States are obliged to ensure that, if their NCA receives a full leniency application within the period it has specified from an entity that has already submitted a summary application, this full leniency application will be deemed to have been submitted at the time of the summary application. However, the summary application must cover the same affected products and territories and the same cartel duration as the leniency application submitted to the Commission (including any updates thereof).<sup>139</sup>

The ECN+ Directive lays down the elements of a summary application that are similar to the requirements for a marker application.<sup>140</sup> The Directive presumes that, if the Commission receives a full application and the NCAs receive summary applications in relation to the same alleged cartel, the Commission will be the applicant's main interlocutor until it has been clarified whether the Commission intends to pursue the case in whole or in part. During this interim period, the Commission will keep the NCA informed – at the latter's request – about the state

<sup>136</sup> Proposal for Art. 113(e)(2) ACCP. Cf. Szot (2019), p. 38.

<sup>137</sup> ECN+ Directive, Art. 21(4).

<sup>138</sup> ECN+ Directive, Art. 22(1).

<sup>139</sup> ECN+ Directive, Art. 22(6).

<sup>140</sup> ECN+ Directive, Art. 22(2).

of play. During this period, the NCA may request specific clarification only regarding the minimum required content of the summary application.<sup>141</sup>

The ECN+ Directive obliges EU Member States to ensure that an NCA, after receiving a summary application, checks whether it has already received a summary or full application from another entity in relation to the same infringement. If it has not and if it considers the summary application to fulfil the requirements of Art. 22(2) of the ECN+ Directive, it must inform the applicant accordingly.

The Directive provides that an entity that has submitted a summary application should be given the opportunity to submit a full application to the NCA if the Commission informs the NCA that it does not intend to pursue a case. Submitting a full application to the NCA before such time is allowed only in exceptional circumstances (i.e. when strictly necessary for case delineation or case allocation). The full leniency application must then be submitted, at the latest, within a reasonable period stipulated by the NCA.<sup>142</sup>

The literature indicates that summary applications solve the problem of multijurisdictional cases only partially.<sup>143</sup> Szot rightly underlines that one of their serious deficiencies is that they do not provide the leniency applicant with protection across the EU, especially since the ECN+ Directive requires that the applicant constantly verify the scope of the summary application against the scope of the leniency application submitted to the Commission.<sup>144</sup> She also correctly emphasises that this system does not provide any protection to applicants who submit leniency applications in more than one EU Member State but not to the Commission – in such cases, an application for a marker solves the problem only partially.<sup>145</sup>

## 7.2 France: Summary Application Complies with the ECN+ Directive

In connection with the Commission's leniency procedure, French law has adopted the rather complex Art. 22,<sup>146</sup> which makes the Commission the main interlocutor and sets up a dialogue between the national authorities.

When an applicant has applied to the Commission for leniency, either for a marker or by submitting a full application, it may submit to the NCA a summary application concerning the same practice if this application refers to a secret cartel covering the territories of more than three EU Member States. This last condition is newly imposed by Art. R. 464-5-5 of the Commercial Code, which lays down the terms for this summary application and now requires that the prohibited practice cover the territories of more than three EU Member States, a condition that did not appear in the NCA's procedural notice. The NCA cannot ask for clarification on any elements other than those covered by the text.

<sup>141</sup> ECN+ Directive, Art. 22(3).

<sup>142</sup> ECN+ Directive, Art. 22(4).

<sup>143</sup> Cf. Król-Bogomilska (2012), p. 9; Król-Bogomilska (2018), p. 22; Szot (2019), p. 47.

<sup>144</sup> Szot (2019), p. 47.

<sup>145</sup> Szot (2019), p. 47.

<sup>146</sup> Claudel (2019a), p. 21.

In the event of a summary application, the NCA must check whether it has already received a summary or full application concerning the same practice from another applicant. If not, the NCA informs the applicant that its application has been accepted. The summary application is then subject to the same general rules of procedure as any application for leniency.

When the Commission has informed the NCA that it does not intend to pursue a case in whole or in part, applicants can submit full applications to the NCA concerned. Exceptionally, when it is strictly necessary for the delimitation of a case or for its attribution, the General Rapporteur may invite the applicant to submit a full application before the Commission has informed the Competition Authority that it does not intend to pursue the case in whole or in part.

To facilitate applications for leniency within the ECN, applicants are now allowed to choose the language of their application from among the official languages of the EU in agreement with the French authorities. Allowing a choice of language is logical since an application can also be transferred to another NCA for a leniency procedure. However, offering a choice of language may be criticised because the efficiency of the procedures undoubtedly presupposes the use of an universal language.

### 7.3 Poland: Rules of Summary Applications not Fully Compliant with the ECN+ Directive

Numerous changes need to be made to the current Polish legal framework with regard to summary applications to ensure compliance with the ECN+ Directive.

Firstly, there is a need to extend the range of entities that are entitled to submit summary applications so that this option is available not only to undertakings that have submitted an application to the Commission for immunity from fines (as is the case now<sup>147</sup>) but also to those that have applied to the Commission for a reduction of fines.<sup>148</sup> The 2021 Draft Amendment Act proposes an amendment to the ACCP in order to ensure compliance with the ECN+ Directive's requirement in this respect. Moreover, it proposes to expressly indicate that a summary application may be submitted even when the undertaking has applied to the Commission for a marker.<sup>149</sup> This is a welcome development because there is currently no explicit regulation of this option.<sup>150</sup>

Secondly, the legal provision that specifies the elements of the summary application with regard to information on other leniency applications<sup>151</sup> needs to be

<sup>147</sup> ACCP, Art. 113(f)(1).

<sup>148</sup> ECN+ Directive, Art. 22(1).

<sup>149</sup> Proposal for Art. 113(f)(1) and 113(f)(2) ACCP.

<sup>150</sup> Nevertheless, the literature assumes that an undertaking can file a summary application with the UOKiK President even after having applied to the Commission for a marker; *see* Turno (2016), p. 1539; Korycińska-Rządca (2018), p. 75.

<sup>151</sup> ECN+ Directive, Art. 22(2)(f).

changed, as it is currently limited to information on past or future leniency applications made in other EU Member States or with the Commission.<sup>152</sup> The 2021 Draft Amendment Act proposes to amend the catalogue of minimum required information to be provided in the summary application<sup>153</sup> to ensure compliance with the ECN+ Directive.

Thirdly, a rule needs to be adopted on the scope of information that may be requested by the UOKiK President before he/she requires the submission of a full application.<sup>154</sup> The 2021 Draft Amendment Act proposes to indicate in the ACCP that, before proceedings are initiated, the UOKiK President may request that the applicant provide additional explanations only for compulsory elements of the summary application.<sup>155</sup>

Fourthly, with regard to the requirements stipulated in Art. 22(4) of the ECN+ Directive, so far only the obligation of the UOKiK President to inform the applicant that was first to submit a summary application about the order in which the application was submitted is reflected in the binding law.<sup>156</sup> The 2021 Draft Amendment Act proposes to indicate in the ACCP that the UOKiK President should, after receiving a summary application, check whether a full application or summary application has already been received from another entity in relation to the same alleged agreement<sup>157</sup> and inform the applicant whether any other entity has submitted such an application and whether the summary application fulfils the statutory requirements.<sup>158</sup>

Fifthly, the requirement of Art. 22(5) of the ECN+ Directive has to be transposed into the binding law. The 2021 Draft Amendment Act proposes to indicate that the UOKiK President may request that the applicant submit a full application before the President has been notified by the Commission that it does not intend to pursue the case, but only where this is strictly necessary for case delineation or allocation.<sup>159</sup> It also proposes to state that, where proceedings are instigated regarding the agreement described in the summary application, the UOKiK President must call upon the undertaking to submit a full application for immunity from, or a reduction of, fines within the specified time limit.<sup>160</sup>

Lastly, there is a need to introduce a rule to the effect that a full leniency application submitted within the time limit specified by the UOKiK President will be deemed to have been submitted at the time of the summary application, provided that the requirements stipulated in Art. 22(6) of the ECN+ Directive are met. The

<sup>152</sup> ACCP, Art. 113(f)(3).

<sup>153</sup> Proposal for Art. 113(f)(3) ACCP.

<sup>154</sup> ECN+ Directive, Art. 22(3).

<sup>155</sup> Proposal for Art. 113(f)(4) ACCP.

<sup>156</sup> 2014 Procedural Regulation, § 3(1).

<sup>157</sup> Proposal for Art. 113(f)(5) ACCP.

<sup>158</sup> Proposal for Art. 113(f)(6) ACCP.

<sup>159</sup> Proposal for Art. 113(f)(7) ACCP.

<sup>160</sup> Proposal for Art 113(f)(8) ACCP.

2021 Draft Amendment Act proposes introducing a rule to ensure compliance of the Polish solution with the ECN+ Directive.<sup>161</sup>

## 8 Interplay Between Applications for Immunity from Fines and Sanctions on Natural Persons

### 8.1 ECN+ Directive

With regard to non-criminal sanctions, the ECN+ Directive requires the introduction of national rules that pursue predominantly the same objectives as those pursued by Art. 101 of the TFEU to ensure that the members of staff<sup>162</sup> of undertakings that apply to a competition authority for immunity from fines be fully protected from sanctions imposed in respect of their involvement in the secret cartel covered by the application for immunity from fines for violations of national laws. This would cover any sanctions that might be imposed in administrative and non-criminal judicial proceedings.<sup>163</sup> Such immunity from individual sanctions is granted provided that the following conditions are met cumulatively: (1) the undertaking that applied to the competition authority for immunity from fines disclosed its participation in a secret cartel and was the first to submit evidence sufficient to qualify for immunity from fines;<sup>164</sup> (2) the member of staff concerned cooperates actively with the competition authority that is pursuing the case; and (3) the undertaking's application for immunity from fines predates the time when the individual concerned was made aware by the NCA of the proceedings leading to the imposition of sanctions on him/her.<sup>165</sup>

Individuals will be protected from sanctions imposed in criminal proceedings under the same conditions as those for immunity from non-criminal sanctions, provided that the individuals concerned actively cooperate with the competent prosecuting authority.<sup>166</sup> Alternatively, the EU Member States may provide that the competent authorities choose not to impose a criminal sanction or to mitigate such sanction insofar as the contribution made by the individuals concerned to the detection and investigation of the secret cartel outweighs the interest in prosecuting and/or sanctioning those individuals. An EU Member State might choose this option in order to ensure conformity with the existing basic principles of their legal system.<sup>167</sup> This second solution has been criticised in the literature, as it may have a negative impact on the incentive to “come clean” in multijurisdictional cases.<sup>168</sup>

<sup>161</sup> Proposal for Art. 113(f)(9) ACCP.

<sup>162</sup> This covers current and former directors, managers and other members of staff.

<sup>163</sup> ECN+ Directive, Art. 23(1).

<sup>164</sup> *I.e.* that meets the requirements stipulated in Art. 17(2)(b)–(c) of the ECN+ Directive.

<sup>165</sup> ECN+ Directive, Art. 23(1).

<sup>166</sup> ECN+ Directive, Art. 23(2). In the event of lack of cooperation with the prosecuting authority, the latter may pursue the investigation.

<sup>167</sup> ECN+ Directive, Art. 23(3).

<sup>168</sup> Szot (2019), p. 49 and the literature indicated therein.

This has led to the situation where, e.g. in Croatia, the decision to initiate criminal proceedings is taken by the public prosecutor.<sup>169</sup> While most states have implemented this immunity from criminal sanctions, Germany<sup>170</sup> and Spain<sup>171</sup> have so far decided not to adopt it.

In order to ensure proper application of the rules where the competent sanctioning or prosecuting authority is in a different jurisdiction from the competition authority that is pursuing the case, the necessary contact between them must be ensured by the NCA for the jurisdiction of the competent sanctioning or prosecuting authority.<sup>172</sup>

## 8.2 French Novelty: Leniency Programme for Individuals within the Scope Required by the ECN+ Directive

This is the most important contribution of the transposition of the ECN+ Directive: the creation of criminal immunity for the management and staff of an applicant for immunity. While criminal sanctions may be imposed on natural persons who have played a personal and decisive role in a secret cartel, the latter may be exempted from fines and sanctions if their company has qualified for immunity from fines, and if they are actively cooperating with the NCA and not jeopardising the prosecution. This covers current or former directors, managers and other members of staff of applicants.

Specifically, according to new Art. L. 420-6-1 of the French Commercial Code, the criteria for active cooperation consist in being at the disposal of the investigation services and the NCA to answer any questions, to help to establish the facts; refraining from “destroying, falsifying or concealing relevant information or evidence” and providing “evidence capable of establishing the offence and identifying other perpetrators or accomplices”. The persons can qualify for immunity only if they were unaware of the proceedings relating to the secret cartel before being made aware of them by the competent authorities.

In addition, according to Art. L. 464-2 IV of the French Commercial Code, “when immunity from financial fines has been granted to a company or an association of companies in application of the procedure provided for in this [provision] IV and when the facts appear to justify the application of Art. L. 420-6, the Competition Authority shall inform the Public Prosecutor and send him the file, mentioning, where applicable, the natural persons who appear to be eligible for an exemption from penalty”.

In accordance with Art. 23 of the ECN+ Directive, the procedural notice already provides that leniency justifies not transferring to the public prosecutor’s office a file in which natural persons employed by the applicant could be prosecuted for fraud for participation in the cartel.

<sup>169</sup> Croatian Law on the protection of market competition, Art. 65(a)(3).

<sup>170</sup> Van Rompuy (2021), p. 215.

<sup>171</sup> Maillo (2021), p. 324.

<sup>172</sup> ECN+ Directive, Art. 23(4).

Immunity from fines and sanctions is subject to the active cooperation of these natural persons with the NCA and the Public Prosecutor's Office, which implies that the person remain at the disposal of the investigation services and the NCA to answer any question that may help establish the facts; that he/she refrain from destroying, falsifying or concealing relevant information or evidence; and that he/she provide evidence to establish the existence of the cartel and identify other perpetrators or accomplices.

### 8.3 Polish Leniency Programme for Individuals – Broader Scope than Required by the ECN+ Directive

With regard to the obligation to ensure that individuals are fully protected from non-criminal sanctions, the current Polish legal framework is mostly in line with the requirements of the ECN+ Directive because the leniency application also covers the undertaking's managers,<sup>173</sup> provided that the application includes all the information required and is accompanied by the evidence or information necessary to qualify for the programme.<sup>174</sup> Such protection is guaranteed in both cartel and non-cartel cases and regardless of whether the undertaking applies for immunity from, or a reduction of, fines. In this sense, the Polish solution is broader than the ECN+ Directive's requirements. However, owing to the minimum harmonisation approach, it does not need to be narrowed down.<sup>175</sup> In order to ensure full compliance with the Directive with regard to the protection of individuals from non-criminal sanctions, a requirement needs to be introduced to the effect that the undertaking's application for immunity from fines should predate the moment when the individuals were made aware by the UOKiK President of the proceedings leading to the imposition of sanctions. Unfortunately, the 2021 Draft Amendment Act does not propose to introduce such a condition.

The 2021 Draft Amendment Act does not propose to narrow down the subjective scope of the protection of individuals (i.e. protection will be guaranteed in both cartel and non-cartel cases) but it does propose to extend the objective scope further: according to the proposal, the undertaking's application will cover also undertakings (together with their managers) that exert a decisive influence on the first undertaking, undertakings (together with their managers) over which the first undertaking has a decisive influence, and managers of the undertaking applying for leniency.<sup>176</sup>

The 2021 Draft Amendment Act proposes to design the rules for granting immunity from, or a reduction of, non-criminal fines imposed upon managers along the lines of those currently stipulated in Art. 113j(2)–(3) of the ACCP, with one

<sup>173</sup> In Poland, a manager is subject to administrative liability for intentionally allowing the undertaking to infringe Art. 101(1)(a)–(e) TFEU or its Polish equivalent – see ACCP, Art. 6(a) and 106(a).

<sup>174</sup> Incidentally, it is worth noting that the Polish legal framework provides also for an option for managers to submit leniency applications to the UOKiK President (see: Piszcz 2015, pp. 50–51; Piszcz 2016, pp. 215–216; Korycińska-Rządca 2018, p. 76).

<sup>175</sup> Szot (2019), p. 43.

<sup>176</sup> Proposal for Art. 113(j)(1) ACCP.

difference – immunity from, or a reduction of, such fines may be granted where the undertaking has not qualified for the leniency programme as a result of having coerced (rather than just encouraged) other undertakings into participating in the infringement.<sup>177</sup>

With regard to the protection of individuals from sanctions of a criminal nature, the requirements of the ECN+ Directive have to be fully transposed.<sup>178</sup> While the Polish legal framework provides for criminal liability in the event of the bid-rigging of public tenders,<sup>179</sup> so far there have been no legal provisions directly linking the leniency programme with criminal liability.<sup>180</sup>

The 2021 Draft Amendment Act proposes to establish in the Penal Code (PPC) detailed rules stipulating the conditions under which the perpetrators of a bid-rigging offence will not be punished in the event that the undertaking on behalf of which they acted has submitted an application for immunity from fines. The rules will be defined separately for cases where the application was submitted to the UOKiK President<sup>181</sup> and for cases where it was submitted to the Commission or to the competent NCA of another EU Member State.<sup>182</sup>

Moreover, the 2021 Draft Amendment Act proposes to introduce into the PPC a legal provision authorising the court extraordinarily to mitigate the criminal punishment of perpetrators of a bid-rigging offence, or even refrain from punishment, in secret cartel cases where the perpetrators are actively cooperating with the UOKiK President and with law enforcement authorities in the course of criminal proceedings, but not all conditions for the discontinuation of criminal proceedings have been met or there is a lack of grounds for their initiation.<sup>183</sup>

In order to transpose the obligation stipulated in Art. 23(4) of the ECN+ Directive, the 2021 Draft Amendment Act proposes to add to the ACCP rules to authorise the UOKiK President to provide the prosecutor or court with the information necessary to establish whether there are grounds for discontinuing the criminal proceedings or a lack of grounds for initiating such proceedings, as well as rules on the extraordinary mitigation or withdrawal of punishment vis-à-vis the perpetrator. The proposal also contains a draft of a legal provision that authorises the UOKiK President to apply to the Commission or NCA of another EU Member State for the information necessary to establish whether there are grounds for discontinuing the criminal proceedings or a lack of grounds for their initiation.<sup>184</sup>

<sup>177</sup> Proposal for Art. 113(j)(2)–(3) ACCP.

<sup>178</sup> Materna (2018), p. 44; Szot (2019), p. 43.

<sup>179</sup> According to Art. 305 § 1 of the Law of 6 June 1997 – Penal Code (consolidated text: Journal of Laws 2021, item 2345, hereinafter: PPC) a person who, in order to gain financial benefits, frustrates or obstructs a public tender or enters into an agreement with another person acting to the detriment of the owner of a property or a person or institution for whom a tender is being made, is to be subject to imprisonment of up to three years. *See more:* Korycińska-Rządca (2017) and the literature indicated therein.

<sup>180</sup> Materna (2018), p. 44.

<sup>181</sup> Proposal for Art. 305(a) § 1 PPC.

<sup>182</sup> Proposal for Art. 305(a) § 2 PPC.

<sup>183</sup> Proposal for Art. 305(b) PPC.

<sup>184</sup> Proposal for Art. 114l(1) ACCP.



## 9 Conclusions

One of the aims of the ECN+ Directive was to harmonise national rules for leniency in order to eliminate discrepancies between EU Member States that might lead to legal uncertainty for potential applicants and, as a result, reduce the incentive for them to apply for leniency.<sup>185</sup> The Directive constituted an excellent opportunity to reduce the discrepancies between national laws.

The authors analysed the ECN+ Directive in relation to leniency programmes as well as the domestic legal frameworks governing leniency programmes in selected EU Member States, focusing especially on France and Poland. The analysis indicated that there are still discrepancies between the national leniency programmes. The reasons for this can be divided into two categories.

Firstly, regardless of the fact that the deadline for transposing the ECN+ Directive into national law expired on 4 February 2021, not all EU Member States have fulfilled the obligation to bring measures into force to comply with it. One EU Member State that has failed to transpose the Directive is Poland. In Poland the amendment act aimed at harmonising the national law has not been passed yet, and an analysis of the current legal solutions within the areas covered by the Directive indicates that there are discrepancies between the Polish leniency programme and the regime established by the ECN+ Directive. Most of the proposals contained in the 2021 Draft Amendment Act correspond with the ECN+ Directive and, if adopted, will ensure that the Polish solution complies with the requirements. However, there are also areas in which proposals are contrary to the Directive. Hopefully, these can still be modified during the legislative process. Furthermore, Estonia, Luxembourg and Slovenia have not yet informed the Commission of any measures brought into force.

Secondly, there are also differences as a result of shortcomings on the part of the EU legislator. For example, as the approach towards the scope of leniency programmes was not fully harmonised, there are EU Member States where the programme is limited to secret cartels (e.g. Italy), others where it applies to all cartels (e.g. France, Greece, Croatia and Germany) and yet others where it applies to all types of competition-restricting agreements (e.g. Poland and Slovakia). Another difference is that the Directive does not indicate whether the NCA is obliged to grant immunity from fines if the applicant fulfils all of the conditions. As a result, there are EU Member States where fulfilment of all the conditions stipulated by the law obliges the NCA to grant immunity from fines (e.g. Poland), others where the NCA can exercise its discretion (e.g. Croatia) and others with an option in between (Germany). Also, in the authors' opinion, the fact that the ECN+ Directive failed to introduce a one-stop-shop system is a serious deficiency. Other missed opportunities are, *inter alia*, failure to indicate a universal language that could be used by applicants submitting leniency statements to any NCA, failure to stipulate precise rules on the reduction of fines, and giving EU Member States the option of providing for discretion in granting immunity from or mitigating criminal sanctions for individuals. At the same time, research has proved that, in those areas where the

<sup>185</sup> ECN+ Directive, Recital 11 of the preamble.

ECN+ Directive has not given EU Member States options, the rules of the national leniency programmes are not significantly different (i.e. in those countries where the Directive has already been transposed). This leads to the conclusion that the complete removal of discrepancies between the national programmes of EU Member States will probably not be possible without further intervention by the EU legislature.

To conclude, leniency appears more than ever to be an indispensable instrument in addition to the other measures contained in the ECN+ Directive pending a genuine common culture of competition within the EU. Thanks to this new harmonisation of leniency regimes, it has been possible to reduce the discrepancies between national laws. However, it seems that not all opportunities to eliminate discrepancies have been taken. We will have to wait and see whether current national leniency programmes are (despite their existing differences) sufficiently similar to give potential applicants more incentive to apply for leniency and to increase the number of applications.

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