

## Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights

by

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### *Abstract*

This article concentrates on the exchange of information and evidence between competition authorities. The issue is analyzed from the perspective of both antitrust and merger cases. The level, scope and intensity of cooperation between competition authorities differs in respect to these two kinds of cases and, to an extent, the

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applicable legal framework varies as well. Our analysis is based on EU law, national legislation, and relevant case law, with attention also given to other sources of law such as bilateral and multilateral agreements, best practices, recommendations etc. In addition the problem of exchange of information is examined through the prism of the Polish Competition Act. Regulation 1/2003 and the ECN, created upon its provisions, provide detailed rules applicable for the exchange of evidence and information between competition authorities in antitrust cases at the European level. With respect to mergers, the provisions of Regulation 139/2004 do not have the same high degree of influence, hence considerable attention is given to soft law acts, such as recommendations of OECD and ICN, or best practices and informal agreements adopted by national competition authorities.

### *Résumé*

L'intégration progressive des économies nationales et la mise en place de corporations internationales font que l'activité de tels acteurs peut regarder un nombre important de pays. En particulier, l'activité des corporations transnationales est susceptible d'impacter l'état de la concurrence sur de nombreux marchés nationaux. Cette situation apparaît tant en cas de pratiques anticoncurrentielles que de concentrations d'entreprises. En réponse à ce phénomène, les autorités nationales de concurrence élargissent progressivement leur coopération et des autorités supranationales compétentes pour la concurrence sont mises en place. L'article et l'exposé visent à faire le point sur les fondements juridiques de l'échange d'informations et d'éléments de preuve entre les autorités de concurrence dans les affaires de concurrence. L'analyse portera essentiellement sur les textes de droit communautaires et polonais. Ont été présentées, dans la mesure du nécessaire, d'autres sources du droit qui s'appliquent : accords internationaux, accords entre les autorités, bonnes pratiques et recommandations. L'échange d'informations et d'éléments de preuve peut éveiller des craintes relatives à l'étendue de la protection juridique suffisante des entreprises concernées par les données transférées. Des doutes spécifiques portent sur l'échange d'éléments de preuve dans les affaires relatives aux pratiques restreignant la concurrence. Malgré le cadre législatif et institutionnel existant pour cet échange, des questions se posent de savoir si les entreprises sont conscientes de l'échange, quelle est l'étendue de la protection des secrets commerciaux et de la confidentialité de la correspondance client – mandataire professionnel, dans quel but les informations sont transférées et quelles sont les restrictions de traitement de l'information. Quant au contrôle des concentrations, l'échange d'informations et d'éléments de preuve concerne d'abord l'information publiquement accessible. De plus, c'est à un degré beaucoup plus sensible qu'il repose sur une coopération volontaire entre les entreprises engagées dans la transaction. En revanche, le transfert d'informations et d'éléments de preuve fournis par des tiers est toujours susceptible de controverses.

**Classifications and key words:** exchange of information; exchange of evidence; international cooperation; ECN; ICN; ECA; NCAs; waivers; due process; Regulation 1/2003.

## I. Introduction

The increasing integration of national economies has brought about the emergence of ever more transnational undertakings (multinationals), the operations of which by definition have effects in many different countries. The activities of such multinationals particularly influence the level of competition on the various national markets. Both (i) anticompetitive practices and (ii) mergers and acquisitions are of relevance in this respect. The competition authorities of various jurisdictions are aware that an adequate reaction to this new situation requires a joint effort and ever tightened cooperation between them. Accordingly, more and more competition authorities are gradually enlarging their scope of cooperation and creating new international bodies, organizations, and networks dealing with competition law issues on the supranational level.

The basic prerequisite for any international cooperation in competition cases is the exchange of information and evidence between the national competition authorities. This lies at the centre of any efficient cooperation, and the level of its implementation may impede or enhance the activities of such authorities. However, even though the exchange of information and evidence between national competition authorities (NCAs) is crucial for international collaboration in competition cases, it also raises questions about the preservation of adequate protections of the procedural rights of the undertakings involved as parties. It should be noted that there are some differences between problems arising from the exchange of information in antitrust cases and in merger cases. This is the result of the particularities of methods of collection of evidence in these two types of competition cases. In antitrust cases, broad investigative methods are a primary source of evidence, whereas in merger cases information and evidence is produced by parties themselves, either voluntarily or upon formal request.<sup>1</sup> Therefore in antitrust cases several specific problems occur during the process of collecting evidence and these controversies determine, to a large extent, the scope and admissibility of evidence exchanges. In spite of the different legal and institutional frameworks at the European and national levels, issues such as undertakings' awareness of the exchanges taking place, protection of confidential information, legal professional privilege, and the means, goals and the limits of the exchange are at the heart of the debate throughout Europe, and Poland as well. In the case of merger control, the exchange of evidence and information mostly concerns data which is available to the public. In addition, more and more frequently the exchange is based on the voluntary involvement of the

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<sup>1</sup> It should be stressed that, from the formal legal point of view, in merger cases a competition authority may also use the same police-like investigative methods of evidence collection. In practice however, competition authorities hardly ever employ such methods during merger investigations.

undertakings concerned. Nonetheless, controversies and doubts are still raised regarding the exchange of information and evidence provided by third parties.

This article aims to provide answers about the extent of these doubts and controversies and clarify the issues involved. Moreover, it seeks to determine what appropriate measures are available in order to assure a level playing field, balancing the effective enforcement of competition law by different competition authorities on the one hand, and preservation of procedural safeguards for undertakings on the other.

There is no Polish administrative nor judicial case law directly concerning the subject of the exchange of information in merger and antitrust cases. Furthermore, Polish literature on the analyzed subject is very limited. This is an additional motive to present this interesting and still evolving issue. For this reason the analysis is based on EU and national legislation and relevant case law. Attention is given to other sources of law, such as bilateral and multilateral agreements, best practices, recommendations etc. The issue is tackled from the perspective of both antitrust and merger cases. Because the level, scope and intensity of cooperation differs in respect to these two kinds of enforcement practices, the applicable legal framework also varies to significant extent. In antitrust cases, Regulation 1/2003<sup>2</sup> and the European Competition Network (ECN) created on its provisions, as well as other EU instruments, provide detailed rules applicable to the exchange of evidence and information between competition authorities at the European level. With respect to mergers, the provisions of Regulation 139/2004<sup>3</sup> are not of such a comparably high degree of influence. Therefore, as regards mergers attention is given to international soft law acts, such as the recommendations of the OECD and ICN, or best practices and informal agreements adopted by NCAs. This article is thus divided into two main sections, devoted to information exchanges in merger and antitrust cases respectively.

## II. Exchange of information and evidence in merger cases

The significant growth of multi-jurisdictional mergers and national mergers with supranational effects confronts competition authorities with the problem of exchange of evidence and information in such cases. Depending on national barriers the actual scope of cooperation may differ in particular cases. Yet it

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<sup>2</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

<sup>3</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1.

is undeniable that such cooperation is necessary. Econometric analysis shows that in multi-jurisdictional mergers firms may secretly manipulate the accuracy of the data provided, relying on national differences in leniency towards the merger. In such situations extensive interagency cooperation in the decision making process modifies the firm's payoff structure, which induces it to provide more accurate and comprehensive data to each agency concerned<sup>4</sup>.

Three general issues will be discussed in this context. First, international agreements related to merger cooperation, both formal and informal, will be closely examined. This will provide a good basis for understanding how the international competition community perceives the problem, and what are commonly accepted solutions, recommendations, and best practices in this area. Second, the concept of waivers will be presented. Waivers are crucial for cooperation in merger cases since they serve as a basic and very flexible instrument of supranational cooperation in competition cases. Third, the issue will be scrutinized from the point of view of Polish antimonopoly and administrative law. This analysis will shed light on the extent to which the Polish legislator recognizes the trend toward growing cooperation in competition cases, and the legal grounds for such cooperation.

Those issues will be discussed through the prism of entrepreneurs' rights that might be affected by the information sharing between NCA's in merger cases. First, the exchange of information may have an adverse effect on the party right to protect its business secrets. This right is regulated in the Article 69-73 of the Polish Competition Act<sup>5</sup>. Second, this type of cooperation between NCA's may have an impact on the right of active participation of the party in the administrative proceedings. This right is foreseen in the Article 10 § 1 of Administrative Procedure Code<sup>6</sup>.

## 1. Information exchange in international soft law documents

There are various means of cooperation in merger cases. During the last decade one may observe that cooperation in merger control cases is flourishing. There are many initiatives and bodies devoted to competition and merger control matters, such as the Organization for Economic Cooperation

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<sup>4</sup> M.T. Martinez, 'Information-Sharing Between Competition Authorities: The Case of Competition Authorities: The Case of a Multinational Merger', available at [www.cepr.org/meets/wkcn/.../Troya-Martinez.pdf](http://www.cepr.org/meets/wkcn/.../Troya-Martinez.pdf), p. 23 and 24.

<sup>5</sup> Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws 2007 No. 50, item 337 (hereafter, Competition Act).

<sup>6</sup> Act of 14 June 1960 – Administrative Procedural Code, Journal of Laws of 2000, No. 98.1071, with further amendments.

and Development (OECD), International Competition Network (ICN), European Competition Authorities (ECA), Merger Working Group (MWG (EU)). While each of them has its own character and they differ in methods of cooperation, they all produce soft law documents. These documents serve as expressions of commonly accepted rules and provide an informal framework of cooperation in merger cases. Despite the non-binding character of the rules, they significantly influence the administrative practice of NCAs. Thus it is important to identify these rules and briefly analyze them.

### 1.1. ICN (International Competition Network)

The International Competition Network is a virtual network of cooperation between competition authorities. The ICN from the very beginning has been involved in encouraging and increasing international cooperation in merger cases. In one of the most important documents adopted by ICN in the merger control area, its Guiding Principles For Merger Notification and Review (hereafter, Guiding Principles)<sup>7</sup>, it is clearly stated in point 6 that ‘jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs’. However, such coordination must not infringe upon the protection of confidential information, thus ‘the merger review process should provide for the protection of confidential information’ (point 8). Guiding Principles expresses the most general rules that should influence the merger review system in each country. It is worth noting that this document highlights two of the most important factors central to the issue of information exchange. ICN’s Guiding Principles stresses the necessity of cooperation. However, such cooperation must not adversely affect companies’ rights, especially the right to protect business secrets.

Guiding Principles are followed by more specific and detailed rules – Recommended practices for merger notification procedures (hereafter, Recommended practices)<sup>8</sup>. It is interesting to observe that the consideration of confidentiality protection issues precedes the issue of interagency cooperation and information exchange. In our view, this sequence mirrors the axiology of international cooperation in merger cases. Recommended practices underlines the importance of confidentiality protection: ‘Business secrets and other confidential information received from merging parties and third parties in connection with the merger review process should be subject

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<sup>7</sup> Available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_1st\\_naples\\_2002/icnnpworkinggroupguiding.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icnnpworkinggroupguiding.pdf).

<sup>8</sup> Available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

to appropriate confidentiality protections' (point IX.A). Such protection is necessary to an effective method for collecting evidence and information during an investigation. In the absence of such a guarantee the prospect of potential disclosure may discourage parties from submitting all relevant information to, and fully cooperating with, the reviewing agency. However, confidentiality protection is not an absolute rule. The ICN clearly states that several exceptions may apply: 'Information may also be disclosed outside the competition agency for purposes of its merger review:

1. where authorized pursuant to international treaties, agreements, or protocols where reciprocal confidentiality protections are specified;
2. in response to requests for judicial assistance by other competition agencies pursuant to national legislation that authorizes such disclosure, provided that confidential treatment by the requesting agency is ensured;
3. with the submitting party's consent – for example, disclosure to other competition agencies pursuant to a waiver'.

In practice, exception number 3 plays the most important role. This results primarily from the fact that there are hardly any international agreements providing a legal basis for information exchange in merger cases. Furthermore, national legislators are also quite reluctant to create legal mechanisms for such cooperation.

ICN's Recommended practices encourages competition agencies 'to coordinate their review of mergers that may raise competitive issues of common concern' (point X.A). Such cooperation is especially important when a multinational merger may have adverse competitive effects. Interagency cooperation in merger cases may not violate applicable national laws and other legal instruments and doctrines (point X.B). For this reason it is always preferable to conclude in advance agreements between agencies, providing rules for their cooperation. It is very important for the efficiency of the merger procedure that the entrepreneurs themselves are actively engaged in the process. Therefore 'competition agencies should encourage and facilitate the merging parties' cooperation in the merger coordination process' (point X.D). In order to facilitate interagency cooperation in merger cases, merging parties may issue waivers. The ICN has produced a special document on this issue – Waivers of confidentiality in merger investigations<sup>9</sup>.

ICN documents underline the necessity of interagency cooperation in merger cases. However, due to their general nature and the fact that they are addressed to all ICN members (more than 100 jurisdictions), their practical applicability for information sharing on a wide-spread basis is limited<sup>10</sup>.

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<sup>9</sup> Available at <http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>. The issue of waivers is examined in some detail further in the article.

<sup>10</sup> With the exception of the ICN document on waivers.

## 1.2. ECA (European Competition Authorities)

European Competition Authorities is a virtual platform of cooperation and discussion between competition authorities from the European Economic Area (EEA)<sup>11</sup>. ECA is involved in merger control cooperation. In the area of merger control, it has adopted two important documents:

1. Principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EC Merger Regulation<sup>12</sup>.
2. The exchange of information between members on multi-jurisdictional mergers. Procedures guide<sup>13</sup>.

The second document plays a crucial role in administrative cooperation in particular, serving as a basis for exchanging information about notified multi-jurisdictional mergers. This was the first document that expressed commonly accepted rules on exchange of information in merger cases. And what is more important, the framework established by the ECA's Procedure guide has been functioning quite well.

According to Procedure guide, 'when an ECA authority is informed by the notifying parties to a merger that they have also notified or will be notifying the merger to other authorities within the ECA, the relevant official (the case officer or contact person) within that authority will, as soon as possible, send by e-mail an ECA Notice to the relevant officials in the other ECA authorities informing them of the fact of notification, and seeking the names of the relevant officials in those other ECA authorities. Recipients of the parties' notification will confirm its receipt to the relevant ECA officials'. The basic mechanism foreseen by the Guide is the ECA notice. Such notice consists of basic, publicly available information about the notified merger. Below is an example of an ECA notice sent out by the Polish competition authority.

The ECA notice identifies relevant officials in all concerned jurisdictions, which constitutes the first step in establishing efficient interagency cooperation in a given case. It enables them to keep each other informed, as appropriate, of the developments in the case. The ECA Procedure guide does not create any legal basis for exchange of anything other than publicly available information. Therefore, it may not serve as means to share confidential information. However, this does not preclude the relevant officials from exchanging views on the given merger and informing each other on important issues arising from the transaction and merger investigation.


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<sup>11</sup> The 15 Member States of the European Union, the European Commission, and of the EEA EFTA States and the EFTA Surveillance Authority.

<sup>12</sup> Available at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter\\_englisch/ECA\\_Principles.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/ECA_Principles.pdf).

<sup>13</sup> Available at [http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA\\_procedures\\_guide\\_post\\_Athens.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf).



<b>Notified transaction</b>	PSE Operator S.A/Lietuvos Energija AB/LitPol Link Sp. z o.o.
<b>Ultimate parent or group companies of undertakings concerned</b>	N/A
<b>Relevant economic sector(s) (and, where possible, relevant product market(s))</b>	Energy distribution
<b>Relevant geographic area(s) (and, where possible, relevant geographic market(s))</b>	National markets of Poland and Lithuania
<b>Date of notification</b>	03 June 2008
<b>Provisional deadline</b>	03 October 2008
<b>Relevant official(s): E-mail: Telephone:</b>	
<b>Other Member States concerned</b>	Lithuania

The ECA Procedure guide establishes a very flexible, easy-to-implement and not burdensome mechanism for exchanging information about multi-jurisdictional mergers. Information which is exchanged through the ECA notice system, being very basic, does not contain business secrets. These features are critical for its success. Furthermore, the Guide is open to any necessary changes. It clearly states that ‘this note may be developed further and expanded from time to time as the authorities’ experience of these arrangements develops’. Such a development did occur, resulting in creation of a Merger Working Group (MWG).

### 1.3. EU (European Union)

Cooperation between EU countries in merger cases is based on the legal framework established by the Regulation 139/2004. Although Regulation 139/2004 is a comprehensive and important act, it applies in principle to mergers with a community dimension or mergers that are to be referred to or from the Commission, hence, multi-jurisdictional mergers with a national dimension are in principle outside the application of this Regulation. Therefore, it is the Merger Working Group (MWG) which plays a pivotal role in enhancing interagency cooperation and exchange of information between NCAs. Even though MWG is a newly-established forum, it has already gained in importance as a platform for adopting best practices and enhancing day-to-day administrative cooperation between NCAs. It is also the first body on the EU level devoted solely to mergers<sup>14</sup>. In order to facilitate cooperation and

<sup>14</sup> The role of the ECN is often misunderstood, mistakenly treating it as a universal forum of cooperation in all competition cases at the EU level. In fact the ECN was established by Regulation 1/2003 and serves only for antitrust matters.

increase transparency of the process, members of the MWG have adopted the Best practices on cooperation between EU national competition authorities in merger review (hereafter, Best practices)<sup>15</sup>. Although Best practices is a non-binding document, members of the MWG have agreed to follow the practices described in their administrative procedures and practice.

According to MWG Best practices, closer cooperation and information exchange may be necessary when:

1. Parallel investigations raise jurisdictional issues.
2. Merger has an impact on competition in more than one Member State.
3. Remedies are necessary in more than one Member State.

In these cases it is important for each NCA concerned to send an ECA notice. This is the first important step in establishing interagency cooperation in the particular case and it involves the exchange of basic non-confidential case information after a notification in such a multi-jurisdictional merger case has been received. The next step depends on the initial evaluation of the case and the first results of the investigation. When it is necessary 'to facilitate cooperation, the NCAs concerned will aim to update the information contained in the ECA notice by informing the other NCAs about any decision to commence second phase proceedings/in-depth investigations, and any final decision, including a decision with remedies'. During this stage of cooperation, exchanges of information may be required.

Best practices pays special attention to the exchange of confidential information. It observes that 'it will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. Therefore, while a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality executed by merging parties can enable more effective communication between the NCAs concerned regarding evidence that is relevant to the investigation'. This means that Best practices foresees waivers of confidentiality as a basic prerequisite for the effective exchange of information between NCAs.

## 2. Waivers

As indicated in the ECA Procedural Guide and MWG Best practices, an exchange of information between NCAs might be necessary in investigations into multi-jurisdictional mergers. However, while the exchange of general information about the case is always possible and desirable, the exchange of confidential information depends on national laws. To resolve this problem

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<sup>15</sup> Available at [http://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf).

the ICN, ECA and MWG offer a good solution i.e. waiver of confidentiality. A waiver of confidentiality allows a competition authority to overcome confidentiality laws limiting the type of information that may be shared with another agency. As ICN observes, ‘the merging and other interested parties may conclude that it is in their interest to waive confidentiality protections because they believe this may increase the likelihood of consistent analyses and compatible enforcement decisions’. This observation is very important since it points out that waivers serve the interests of both the agencies and the merging parties. However, the proper functioning of a waiver system depends on several key elements.

First, waivers are voluntary in nature, hence a decision to waive confidentiality protection must be taken on a purely voluntary basis. No implicit consent should be permitted. Waivers, as an exception to confidentiality protection, should be interpreted strictly. It is important to note that waivers may be provided not only by the merging parties, but by third parties as well. Sometimes it is even more important to get waivers from third parties. The problem is that, contrary to merging parties, third parties do not necessarily have a direct interest in the outcome of the proceedings and therefore are more reluctant to give their consent to have their business secrets transmitted to a foreign competition authority.

Second, a waiver should clearly define its scope, i.e. the information it covers. It may cover all information contained in the files, or just specific pieces of information. As MWG states ‘the scope of the waiver to be provided may be adapted to the specific circumstances of the case, but it is essential that the waiver should fulfill the purpose of allowing for an effective information exchange between the NCAs concerned’.

Third, a waiver should specify its duration. It may indicate a specific date or identify some event as a termination date, i.e. the end of proceedings.

Fourth, a waiver may include conditions. For example, some parties may want to be notified by the sending agency before it shares the party’s information with a recipient agency. However, such conditions are hardly ever acceptable.

Fifth, a waiver should specify guarantees of confidentiality protection and limits for any further transmissions. The party giving a waiver may decide whether it limits jurisdictions to which information may be transferred or grants a waiver to all jurisdictions concerned. Such a decision may not be easy due to different national legislations and different levels of protection of information contained in administrative files (especially with respect to laws on access to public information). What is important to remember is that the transmitting agency is not in a position to guarantee that the recipient agency can and will maintain confidentiality over the information shared. Therefore

the risk is on the entrepreneur.<sup>16</sup> However, the commonly accepted rule is that confidential information exchanged on the basis of a waiver cannot be used for any purpose other than the review of the relevant merger.

### 3. Exchange of information in merger cases under Polish law

As can be seen from the discussed documents above, all of them encourage competition authorities to exchange information, leaving the decision as to the scope of such information-sharing to the national legislator. An analysis of the Polish Competition Act, allows for the conclusion that President of the Office of Competition and Consumer Protection (Poland's national competition agency, hereafter, the UOKiK, after the Polish acronym) may transmit to foreign NCAs only publicly available information. Under Polish law the UOKiK President has no legal basis for disclosure of documents containing business secrets to other foreign competition authorities. Article 31 of the Competition Act, which defines the tasks of the Polish competition authority, is crucial to such a conclusion. First, Article 31(5) states that the competition authority works with national and international bodies and organizations established to protect competition and consumers. Second, Article 31(6) declares that the UOKiK President fulfills the tasks and competences of a competition authority in a European Union Member State, as defined in Regulation 139/2004. However, neither the general declaration of Article 31(5) nor any provision of Regulation 139/2004 provides a clear legal basis for the transmission of confidential information. These provisions provide purely directional standards which should be detailed in the act. Unfortunately, the Competition Act does not have any provisions related to this issue.

The Competition Act is silent about waivers as well. Therefore the question arises whether they are admissible in Polish law. The answer is negative. The Competition Act obliges the antimonopoly authority to protect confidential information, even *ex officio*. Thus, in the absence of an express provision, even a party to the proceedings may not relieve the authority from this obligation. Moreover, there needs to be a clear provision on the nature, scope, and formulation of waivers in the Competition Act. Furthermore, there should also be a provision recognizing the fact that the Polish competition authority operates in an international context and that there should be a legal basis for cooperation and information sharing<sup>17</sup>. Last but not least, there are no

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<sup>16</sup> The risk should not be exaggerated however, since confidential information and business secrets are protected under national law in all Member States of the EU.

<sup>17</sup> M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012 (forthcoming).

additional guarantees available for those companies which would wish to waive their confidentiality in relation the Polish competition authority. Such guarantees should be included in the Competition Act.

In this context it may be asked whether it is possible to apply Article 14(31) of the Competition Act as a basis for information exchange. This provision establishes that one of the tasks of the UOKiK President is to implement international obligations in the Republic of Poland in the area of cooperation and exchange of information in matters of competition and consumer protection and state aid. However, Poland is not a party to any international agreement or convention on cooperation and exchange of information in competition and consumer protection matters which would provide the UOKiK with such a legal basis. Potentially, European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters<sup>18</sup> might apply. This Convention makes it possible to exchange evidence gathered in administrative proceedings between countries which are parties to the Convention. Competition cases are administrative matters within the meaning of Article 1 of the Convention, thus the mechanism provided in this act could be applied. However, Article 7(1)(b) of the Convention limits the possibility of transmission of ‘information held in confidence, which may not be disclosed’. Virtually every merger case which contains trade secrets would fall under this prohibition. Moreover, even these limited information and evidence exchange possibilities are still in the potential realm, because Poland has not yet signed the Convention and there is no piece of information that it may do so in the future<sup>19</sup>.

### III. Exchange of information and evidence in antitrust cases

The phenomena of internationalization of anticompetitive practices, and especially cartels, as well as the need for best practices sharing, has made cooperation in antitrust cases, and in particular exchange of information between different competition agencies, growing in importance. International co-operation between competition authorities takes place, in different forms, at the bilateral<sup>20</sup>,

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<sup>18</sup> CETS N°100.

<sup>19</sup> M. Błachucki, *‘Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy’* [w:] R. Stankiewicz (ed.), *Kierunki rozwoju prawa administracyjnego*, Warszawa 2011, pp. 19-20.

<sup>20</sup> See e.g.: Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ [1998] L 173.

regional<sup>21</sup>, or multilateral levels<sup>22</sup>. Multiple basis for such a cooperation and information exchange (soft law and hard law instruments, instruments specific to competition law matters and instruments of wider, general application)<sup>23</sup>, as well as tools of the exchange and types of international cooperation<sup>24</sup> create ‘a complex web of differing levels of possible engagements between authorities’<sup>25</sup>.

Exchange of information in antitrust cases, unlike in merger cases, is specifically provided for by the applicable rules of the European law. Therefore, this part of the article focuses mainly on the ECN members’ experience with respect to information sharing, only in a subsidiary manner touching upon the relevant soft law documents concerning information exchange in antitrust cases on the international level.

First chapter briefly discusses different sources of the main international soft-law provisions constituting a useful basis and practical *savoir-faire* of exchange of information in antitrust cases. Since the guidance for successful cooperation and specifically exchange of information by the competition authorities provided for by these instruments may influence formal exchange taking place within the European Competition Network, some references to the international soft-law instruments will be also included in the following chapter of this section.

Second chapter focuses on the legal basis, practical methods, and types of information exchanged within the European Competition Network. Subsequently, potential problems with respect to the requirements of due process of such an exchange are discussed. The provisions of the Polish act of competition and consumer protection on the information exchange constitute the counterparts of the specific provisions of Regulation 1/2003, therefore, they will be analyzed within the frames of these chapters.

The issue of exchange of information between the competition authorities in antitrust cases will be discussed through the prism of the entrepreneurs’ rights of defense that might be affected by the information sharing

These rights derive from national legislation and case law, as well as European and international legal instruments and case-law.

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<sup>21</sup> The most notorious example of such a cooperation being European Competition Network. See: chapter 2 herein.

<sup>22</sup> See: chapter 1 herein.

<sup>23</sup> For specific basis of different international levels of cooperation see: OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), paras. 35–81.

<sup>24</sup> See e.g.: The ICN’s 2007 *Co-operation between Competition Agencies in Cartel Investigations Report* summarising the Network members’ experiences of co-operation in cartel investigations

<sup>25</sup> OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), para. 34.

The exchange of information may have adverse effect on the parties' 'passive procedural rights', such as right to protection of confidential information – provided for by Article 69–73 of the Polish Competition Act. In this respect, especially business secrets as well as legal professional privilege (LPP) are concerned – upon Polish legislation, LPP being protected on the basis of the provisions of Article 225 of the Code of Criminal Procedure<sup>26</sup>. Similarly, exchange of information between competition authorities raises the issue of the adequate protection of the 'active procedural rights', such as right of active participation of the party in the proceedings, including right to be heard and access to files – foreseen by Article 10(1) of the Polish Code of Administrative Procedure.

Within the European Union, following the entry into force of the Treaty of Lisbon<sup>27</sup> the Charter of Fundamental Rights of the European Union<sup>28</sup>, based, in particular, on the fundamental rights and freedoms recognized by the European Convention on Human Rights and Fundamental Freedoms<sup>29</sup>, became legally binding on the EU institutions as well as national authorities applying EU law and thus could constitute the source of such rights of defense. Additionally, the ECHR which applies in the legal systems of all Members States and, based on the provisions of Article 6(2) of the Treaty on the European Union (TFEU)<sup>30</sup>, will be joined by the EU, could constitute a source of such procedural rights. Finally, the general principles derived from Article 6 TFEU could constitute a 'safety net' to be used for the protection of fundamental rights where no other instrument available is sufficient<sup>31</sup>. It is also stated that the case law of the Court of Justice of the European Union with respect to undertakings' fundamental procedural rights standards should be applicable in the proceedings before NCAs applying Articles 101 and 102 TFEU<sup>32</sup>.

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<sup>26</sup> Act of 4 August 1997 – Code of Criminal Procedure (Journal of Laws 1997 No. 89, item 555, as amended). The issue of applicability of the ECHR to competition cases is still a source of controversies. The authors of this article present opposite views on this subject. The same reservation applies to the next paragraph.

<sup>27</sup> OJ [2007] C 306.

<sup>28</sup> OJ [2010] C 83/1, p. 389.

<sup>29</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on the 4th of November, 1950 (Journal of Laws No. 61 of 1993, item 284, as amended), hereafter, ECHR.

<sup>30</sup> OJ [2010] C 83/1, p. 13.

<sup>31</sup> K. Kowalik-Bańczyk, *The issues of the protection of fundamental rights in EU competition proceedings*, Warszawa 2010, p. 118.

<sup>32</sup> See: W.P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, Oxford-Portland, Oregon 2008, pp. 19–20; A. Andreangeli, *EU Competition Enforcement EU Competition Enforcement and Human Rights*, Edward Elgar 2008, pp. 119–221.

## 1. Information exchange in international soft law documents

International soft law documents of a widespread use concerning exchange of information by the antitrust authorities, constituting ‘one of the main stimuli to greater co-operation between agencies’<sup>33</sup> are adopted by the Organization of Economic Cooperation and Development. As far as the entrepreneurs’ rights are concerned, these instruments mainly focus on the adequate protection of confidential information.

The most recent OECD 1995 Recommendation<sup>34</sup> on cooperation in competition matters sets forth the principles of notification, exchange of information and coordination of action, as well as consultation and conciliation between competition agencies dealing with anticompetitive practices affecting international trade. The document promotes exchange of information in competition law cases and recommends that the Member countries comply with each other’s requests to share information, i.e. ‘supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries (...) unless such co-operation or disclosure would be contrary to significant national interests’<sup>35</sup>. In the absence of specific agreements on cooperation between different competition authorities, the Recommendations themselves rather constitute basis for informal exchange of non-confidential type of information<sup>36</sup>.

Moreover, the OECD 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels<sup>37</sup> provides for international cooperation in hardcore cartel cases. As far as information sharing is concerned, it encourages sharing both non-confidential and confidential information and gathering, on a voluntary basis and when necessary through use of compulsory process, of both non-confidential and confidential information on behalf of a foreign authority<sup>38</sup>. Three reports on the implementation of the Recommendation have been submitted by the OECD’s Competition Committee’s to the OECD Council to date<sup>39</sup>. The

<sup>33</sup> International Competition Network, *Co-operation between...*, p. 6.

<sup>34</sup> OECD, Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (C(95)130/FINAL).

<sup>35</sup> OECD, Recommendation of the Council Concerning Co-operation..., p. 1.A.3.

<sup>36</sup> International Competition Network, *Co-operation between...*, p. 9–13.

<sup>37</sup> OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels C(98)35/FINAL.

<sup>38</sup> OECD, Recommendation of the Council Concerning Effective..., p. I.B.2.b.

<sup>39</sup> See: OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Third Report by the Competition Committee*, Paris2005; OECD, *Implementation of the Council Recommendation Concerning Effective Action against Hard Core*



last report highlighted the obstacles to exchange confidential information as an impediment to cartel investigations.

In the light of the above, in order to overcome some of the concerns over the exchange of confidential information, in 2005 the OECD adopted Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations<sup>40</sup>. Best Practices provide for the procedural safeguards for formal exchange of information, in particular they contain detailed provisions concerning confidentiality, use, and disclosure of the information in the requesting jurisdiction. In this respect, Best Practices specifically mention the legal professional privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher – that of the requesting or the requested jurisdiction – should be applied<sup>41</sup>. Similarly, upon the provisions of the Best Practices, ‘the requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals’<sup>42</sup>.

## 2. Exchange of information within the European Competition Network

### 2.1. Legal basis, practical methods, and types of information exchanged

The European Commission and the national competition authorities of the 27 Member States of the EU form the European Competition Network. The Network was created based on the provisions of the Regulation 1/2003, which entered into force on 1 May 2004 and constitutes the keystone of the modernization of the EU’s antitrust enforcement rules and procedures. The objective of Regulation 1/2003 is to ensure that Articles 101 and 102 of the TFEU<sup>43</sup> are applied in a consistent manner within the decentralized model of competition enforcement (by NCAs) throughout the EU. However, while the members of the Network apply the same substantive rules of the Treaty, they are coupled with national, or institution-specific, nonharmonised procedures. Accordingly, the goal of the ECN is to ensure both an efficient division of

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*Cartels: Second Report by the Competition Committee*, Paris 2003; *OECD Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee*, Paris 2000.

<sup>40</sup> OECD Competition Committee, *Best Practices for the Formal exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (2005).

<sup>41</sup> OECD Competition Committee, *Best Practices...*, p. II.C.1-2.

<sup>42</sup> OECD Competition Committee, *Best Practices...*, p. II.B.4.

<sup>43</sup> OJ [2010] C 83/1, p. 1.

work and handling of cases within the Network, as well as an effective and uniform application of EU competition rules.

From the institutional point of view, the ECN constitutes an innovative type of governance<sup>44</sup> by structurally independent competition authorities, mainly interconnected by the tasks assigned to them on the basis of the substantive rules<sup>45</sup>. Accordingly, the efficient functioning of the ECN relies on the effectiveness of the mechanisms of cooperation, both formal and informal, that the members of the Network employ<sup>46</sup>. Since the establishment of the ECN, this cooperation has surpassed the expectations of its creators and given a more 'structural impetus' to the enforcement of the EU competition rules<sup>47</sup>. Exchange of information between the members of the Network has proven to be the central pillar of this successful cooperation and the cornerstone of the whole modernization package.<sup>48</sup>

Depending on whether it is provided for by legal rules or not, as well as the channel through which it is exercised, the exchange of information within the European Competition Network may concern different types of data which largely falls within three categories<sup>49</sup>: (i) public information – information which is already in the public domain<sup>50</sup>; (ii) agency information – information

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<sup>44</sup> For more on the general characteristics of the types of network-based governance in the European Union see: M. De Visser, *Network-Based Governance in EC law: The Example of EC Competition and EC Communications Law*, Hart Publishing 2009.

<sup>45</sup> The ECN is not a legal entity, and has no seat nor specific organs. The structure of the ECN embodies a loose web of different fora, such as the annual meeting of *Directors General*, or the *ECN Plenary*, gathering of chiefs of the competition authorities or the highest officials responsible for ECN issues at the competition agencies, where the most important horizontal issues are discussed, and constantly evolving working groups. At present, examples of horizontal working groups include Cartels: Practice & Policy, Vertical Restraints, Competition Chief Economists, Cooperation Issues & Due Process, Forensic IT, Mergers as well as sectoral subgroups: Energy, Environment, Financial Services, Food, Pharmaceutical, Telecom, Transport. See: *ECN Brief — special issue*, p. 4, available at <http://ec.europa.eu/competition/ecn/brief/index.html>; S. Józwiak, *Europejska Sieć Konkurencji – model: struktura i współpraca oraz kompetencje decyzyjne członków*, Warszawa 2011, pp. 5–7.

<sup>46</sup> The general principle of close cooperation is provided for in Article 11 (1) of Regulation 1/2003.

<sup>47</sup> See: Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – *Report on the functioning of Regulation 1/2003 (COM(2009)206 final)*, SEC(2009) 574 final, 29.4.2009, hereafter also referred to as Commission Staff Working Paper), para. 183 and the references given therein.

<sup>48</sup> Commission Notice on Cooperation within the Network of Competition Authorities, OJ [2004] C 101/43, (hereafter also referred to as Network Notice), paragraphs 26–27; Commission Staff Working Paper, para. 242.

<sup>49</sup> The classification is based on: International Competition Network, *Co-operation between...*, p. 7 and pp. 20–21.

<sup>50</sup> Such as market reports, statistics, case-law, information difficult to access due to language constraints, etc.

which is not necessarily in the public domain, and has been generated within the agency itself, rather than provided by parties to the investigation<sup>51</sup>; (iii) information obtained from the parties to the proceedings (or the complaints)<sup>52</sup>.

Exchanges of information within the ECN may take place not only in the form of vertical exchanges between the national competition authorities and the European Commission, but it may also be undertaken amongst the NCAs themselves (horizontal exchanges).

However, it is worth noting that no particular procedure for the practical operation of the exchange of information is laid down in Regulation 1/2003, nor in any other EU legal act. Therefore, such cooperation normally takes place on the basis of a practical *modus operandi* which has emerged within the Network<sup>53</sup>.

This exchange of information within the ECN can take place at different phases of the procedures<sup>54</sup>: (i) at the pre-investigation phase, that is the phase before evidence-gathering, when the agencies typically exchange information regarding markets to be investigated or companies to be targeted; (ii) at the investigation phase, i.e. the phase during which evidence is gathered and analyzed, and the case built up, when the agencies may exchange information in order to co-ordinate investigatory measures (these could include the organization of inspections or dawn-raids); (iii) at the post-investigation phase, which concerns prosecution, adjudication and sanctioning, when agencies usually exchange evidence and other information which they have obtained during earlier stages of the proceedings, and when they engage in general discussions of the case<sup>55</sup>.

Most importantly, Article 12 of Regulation 1/2003 provides the ECN members with a general framework for the exchange and use of information within the Network at all phases of the proceedings. This Article thus constitutes a key element of the functioning of the Network, ensuring the free flow of information within the ECN<sup>56</sup>.

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<sup>51</sup> However, this type of information to some extent could be based on the materials supplied by the undertakings/parties to the proceedings.

<sup>52</sup> This class of material can be further divided into information collected by an agency *a priori* for its own purposes (be it on its own initiative or provided at the undertakings' initiative), and information obtained from the undertakings in the connection with a request for assistance in fact-finding addressed by another NCA.

<sup>53</sup> Accordingly it should be also noted that the exchange of information within the ECN takes place on several different levels and is exercised via several different channels, which largely depend on whether the particular type of exchange in question is *expressis verbis* provided for by the provisions of Regulation 1/2003, or whether e.g. an experience sharing is informal.

<sup>54</sup> This classification is based on: International Competition Network, *Co-operation between...*, p. 7 and pp. 20–21.

<sup>55</sup> It is of course possible that each of the two authorities, parties to the exchange, participates in the exchange at a different phase of its own proceedings.

<sup>56</sup> Network Notice, para. 26, A. Andreangeli, *EU Competition Enforcement...*, p. 191; S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC*

Article 12(1) empowers the Commission and the NCAs to provide one another with and use any matter of fact or of law, including confidential information, for the purpose of applying Article 101 and 102 TFEU. Thus, information received from another competition agency may be used as intelligence irrespective of its confidential nature, irrespective of the (criminal or administrative) nature of the proceedings, and irrespective of whether sanctions are imposed on individuals, provided that the exchange occurs for the purpose of applying Article 101 and 102<sup>57</sup>.

However, the placing of information in evidence is subject to additional conditions, which constitute exceptions from the general rule of free flow of information and are aimed at ensuring an adequate level of protection of the undertakings' procedural rights.<sup>58</sup> Information collected in one system can be submitted into evidence in another system only for the purpose of applying Article 101 or 102 of the Treaty (and the national law applied in parallel in the same case, if it does not lead to a different outcome) and in respect of the 'subject-matter' for which it was collected<sup>59</sup>. Moreover, Article 12(3) of Regulation 1/2003 contains special provisions for the placing into evidence of transferred information with the view of targeting individuals, making it possible only if the transmitting system also allows for fining individuals and provides for sanctions of a similar kind (e.g. financial, custodial or other; independently of the qualification of the sanctions or procedures at the national level as 'administrative' or 'criminal'), in which case it is presumed that the standards of rights of defence are sufficiently equivalent<sup>60</sup>. Where the types of sanctions on individuals are materially different under the transmitting and acquiring systems, information exchanged may only be placed into evidence if it has been collected by the transmitting authority in a way that respects the same level of protection of the rights of defence as provided for under the rules of the receiving authority. However, in this case information

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*Competition Law*, Oxford and Portland Oregon 2009, pp. 232–233. Article 12 of Regulation 1/2003 constituted e.g. basis for the exchange of information in the European Commission's *Flat glass* investigation – the case which 'demonstrated clearly the benefits of enhanced co-operation between the Commission and National Competition Authorities' (European Commission Press Release, *Antitrust: Commission Fines Flat Glass Producers € 486.9 million for Price Fixing Cartel*, IP/07/1781, 28 Nov. 2007). Similarly, Polish Office of Competition and Consumer Protection is making effective use of the powers conferred to it upon the provisions of the Article (see e.g.: [http://www.uokik.gov.pl/aktualnosci.php?news\\_id=459](http://www.uokik.gov.pl/aktualnosci.php?news_id=459)).

<sup>57</sup> Commission Staff Working Paper, para. 239.

<sup>58</sup> *Ibidem*.

<sup>59</sup> In this context, it needs to be stressed that the notion of 'subject-matter' as provided for by Article 12(2) seems of utmost importance for the possibility of transfer and use of information *as evidence*. See: judgment of the ECJ of 17 October 1987 in case 85/87 *Dow Benelux*, ECR [1989] 3137, recitals 17–20 and Network Notice, para. 28(b).

<sup>60</sup> Commission Staff Working Paper, para. 241.

collected in a jurisdiction that does not provide for sanctions involving physical custody cannot be used in evidence in another jurisdiction to impose custodial sanctions.

In line with the provisions of Article 12 of Regulation 1/2003, upon Article 73(1) and 73(2)(3) of the Polish Competition Act, information collected in the course of the proceedings by the UOKiK President may be used in the proceedings of the European Commission and competition authorities of the European Union Member States when such information is exchanged under Regulation 1/2003. Moreover, Article 73(5) of the Polish Competition Act provides that information received by the Polish NCA in the course of proceedings from a competition authority of a Member State of the European Union may be used in the course of the said proceedings under the terms upon which such information is provided by that authority, inclusive of not availing oneself of the information in order to impose any sanctions upon certain persons. This provision follows the principle of the mutual recognition of the standards of the Network members' procedural systems<sup>61</sup>. It could also be argued that this constitutes an exception to the general rule of procedural autonomy, as it obliges the Polish competition authority to obey certain procedural conditions or findings made by the transmitting authority. Moreover, it could be also be argued that the provision goes further than Article 12 of Regulation 1/2003 with respect to the types of proceedings within which information may be exchanged, as it seems to enable the exchange and use of information between the Polish competition authority and other members of the Network in proceedings based solely on national substantive rules<sup>62</sup>.

Moreover, as far as early, pre-investigation cooperation is concerned, there is an information obligation on new proceedings instituted under Article 101 or 102 of the Treaty. Article 11(3) of Regulation 1/2003 lays down an obligation for the national competition authorities to inform the Commission before, or without delay after, commencing the first formal investigative measures<sup>63</sup>. This information may also be made available to other NCAs. In practice, in most cases the information is made available both to the Commission and other members of the Network by providing a special notice in the European Competition Network's internal database. The purpose of this provision is to enable the prompt detection of parallel proceedings, prevent breach of the *ne*

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<sup>61</sup> See also subchapter 2 herein below.

<sup>62</sup> See: M. Bernatt, [in]: T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 1305–1306. See also: M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 149.

<sup>63</sup> For instance, in cartel cases involving dawn-raids or inspections this type of information would normally be provided immediately after the inspection.

*bis in idem* principle, and address possible case re-allocation issues at an early stage of the proceedings<sup>64</sup>.

At the investigation stage the Commission, before conducting an inspection, is obliged to inform the national competition authority or authorities of the Member State(s) in whose territory the inspection is foreseen [Article 20(3) of Regulation 1/2003]<sup>65</sup>. Similarly, for the purposes of fact-finding, according to the provisions of Article 22 of Regulation 1/2003 NCAs may carry out any inspection or other fact-finding measure in their own territory under their national law on behalf of a competition authority of another Member State. Such inspection is compulsory on behalf of the Commission if it so requests. The transfer and use of the information collected under Article 22 are carried out in accordance with Article 12 of Regulation 1/2003.

Moreover, at the post-investigative stage, information is exchanged about the possible outcomes of the cases dealt with by the competition authorities. According to the provisions of Article 11(4) of Regulation 1/2003, no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, an acceptance of commitments, or withdrawal of the benefit of a block exemption Regulation, the NCAs shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under the Treaty. In practice, designated representatives within a NCA (authorized disclosure officer – ADO)<sup>66</sup> normally provide the Commission with the case summary in English and the projected decision in all relevant national languages *via* secured e-mail. This information about the envisaged outcome of the case is also made available to other members of the ECN in a special ECN database<sup>67</sup>. This flow of information secures the uniform application of Articles 101 and 102 of the Treaty.

Finally, while each NCA remains responsible for the final outcome of its own proceedings, it is possible for the ECN members to coordinate the post-investigatory case-handling, especially where NCAs deal with cases in parallel actions<sup>68</sup>.

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<sup>64</sup> See: Network Notice, para. 17.

<sup>65</sup> In turn, officials of the NCA concerned enjoy certain right and hold duties of active assistance to the officials of the Commission during an inspection [Article 20(3–8) of Regulation 1/2003].

<sup>66</sup> See: DG Competition, *Stakeholder Report – National Competition Authorities*, August 2010, available at [http://ec.europa.eu/competition/publications/reports/ncas\\_en.pdf](http://ec.europa.eu/competition/publications/reports/ncas_en.pdf).

<sup>67</sup> S. Brammer, *Co-operation between National Competition Agencies...*, pp. 330–334.

<sup>68</sup> Network Notice, para. 13. International Competition Network, *Co-operation between...*, p. 21.

These general rules applicable for the exchange of information within the ECN are alerted by specific provision with respect to cases where a leniency application has been filed. Where a NCA deals with a case which has been initiated as a result of a leniency application, the information submitted by this NCA to the Network pursuant to Article 11 of Regulation 1/2003 cannot be used by other members of the Network as the basis for starting an investigation on their own behalf under the competition rules of the Treaty or, in the case of NCAs, under their national competition law<sup>69</sup>. Moreover, information voluntarily submitted by a leniency applicant can only be transmitted to another member of the Network pursuant to Article 12 of the Council Regulation with the consent of the applicant<sup>70</sup>. Once such consent was given, it may not be withdrawn. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority. Moreover, no such consent is required where the receiving authority commits in writing that the information transmitted to it will not be used to impose sanctions: (i) on the leniency applicant; (ii) on any other legal or natural person covered by the application made by the applicant under its leniency programme; (iii) on any employee or former employee of any of the (i) and (ii)<sup>71</sup>.

In addition to the above, independently of the stages of the investigations, there is a constant informal exchange of information as well as experience-sharing taking place within the ECN<sup>72</sup>. One tool of such an exchange that has emerged within the Network is comprised of so-called informal requests for information (RFIs), the number of which has grown significantly in recent years. Such exchanges concern public information or agency information *sensu stricto*, e.g. information related to the legislation in force, case law, or economic data. The aim of such exchanges is to enable the sharing of best practices within the ECN.

## 2.2. Potential problems with respect to the requirements of due process

In the decentralized model of enforcement of the substantive antitrust provisions of the TFEU provided for by Regulation 1/2003, the procedures, especially those governing companies' rights, have not been fully harmonized. Instead, Regulation 1/2003, as well as the Cooperation Notice, provide only

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<sup>69</sup> This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources. See: Network Notice, para. 39.

<sup>70</sup> Network Notice, para. 40.

<sup>71</sup> Network Notice, para. 41.

<sup>72</sup> By this is meant informal exchange of information in the sense of the exchange taking place outside of the framework of specific instruments of cooperation. See: International Competition Network, *Co-operation between...*, p. 7.

that general procedural safeguards for the parties to the proceedings be integrated into the mechanisms for cooperation between the members of the ECN. In this respect, as has already been underscored, Article 12 of Regulation 1/2003, regulating the terms and the conditions of exchange of evidence between the members of the ECN, is the central provision bringing about the efficient free flow of information within the Network. Consequently, it provides a basic procedural framework for use of the information exchanged by the Network members/parties to the exchange, and the basic procedural warranties afforded to the undertakings and individuals who are the subject of such exchanges.

Moreover, it needs to be stressed that the issue of the adequate minimum level of protection of the parties' fundamental rights with respect to the exchange of information within the ECN has recently lost much of its pertinence. This is due to the fact that a vast common set of sources of procedural safeguards applies throughout the entire EU, ensuring a minimum standard of protection of these rights<sup>73</sup>.

Nevertheless, the ECN, in the way it was conceived and currently functions, presupposes a – somewhat comfortable – assumption of 'sufficient equivalence' of the rights of defense enjoyed by undertakings in the various legal systems of its members<sup>74</sup>. Additionally, according to the principle of 'mutual recognition of national procedural rules'<sup>75</sup>, contained in paragraph 8 of the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities<sup>76</sup>, Member States accept that their

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<sup>73</sup> As it was already underlined, following the entry into force of the Treaty of Lisbon the Charter of Fundamental Rights of the European Union,) the European Convention on Human Rights and Fundamental Freedoms ECHR became legally binding on the EU institutions as well as national authorities applying EU law. Insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is the same as those laid down by the Convention, unless EU law provides more extensive protection. Moreover, the ECHR applies in the legal systems of all national competition authorities and, based on the provisions of Article 6 (2) of the Treaty on the European Union shall be joined by the EU. Finally, the general principles derived from Article 6 of the Treaty on the European Union could be used for the protection of fundamental rights. It is also stated that the case law of the Court of Justice of the European Union with respect to undertakings' fundamental procedural rights standards should be applicable in the proceedings before NCAs applying Articles 101 and 102 of the Treaty (see: considerations in the preliminary part to the Second section of the article here-above).

<sup>74</sup> Recital 16 of Regulation 1/2003. See: A. Andreangeli, *EU Competition Enforcement...*, p. 189.

<sup>75</sup> See: A. Andreangeli, *EU Competition Enforcement...*, p. 201.

<sup>76</sup> Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities 15435/02 ADD 1, available at [http://ec.europa.eu/competition/ecn/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/ecn/joint_statement_en.pdf).



enforcement systems differ but nonetheless mutually recognize the standards of each other's system as a basis for cooperation. These rules underlie the principle that each NCA has full responsibility for ensuring due process in the cases it deals with<sup>77</sup>.

The debate concerning the equivalence of the standards of protection of the rights of defense within the EU becomes even more heated as the cooperation amongst the members of the European Competition Network grows and tightens in practice. The debate thus concerns possible divergences in the levels of protection of the individuals' and undertakings' rights provided for by different legal regimes of the NCAs transmitting and receiving information within the ECN<sup>78</sup>.

In this context, the question arises whether indeed uniform due process can be maintained based on domestic rules, where different standards of protection exist with respect to the procedural rights of the parties to the proceedings<sup>79</sup>. These doubts relate to three basic aspects of the transfer of information: (i) the terms and conditions of the exchange itself,<sup>80</sup> (ii) the collection of the information to be transmitted, and finally (iii) use of the information received. In this respect, the procedural safeguards concern both the parties' 'active' participation in the proceedings (such as access to files or right to be heard), as well as their 'passive' procedural rights (such as right not to incriminate oneself, right to protection of confidential information and especially business secrets and legal professional privilege, as well as right to privacy). As far as the discrepancies between national regimes with respect to the collection and subsequent use of evidence are concerned, the most important examples of such differences typically relate to the standard of the undertakings' and

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<sup>77</sup> Network Notice, para. 4.

<sup>78</sup> See for example: K. Kowalik-Bańczyk, *The issues of the protection...*; W.P.J. Wils, *Efficiency and Justice...*; C. Smits, D. Waelbroeck, 'Le droit de concurrence et les droits fondamentaux', [in:] M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union européenne*, Bruxelles 2006, p. 138; C. Gauer, *Due process in the Face of Divergent National Procedures and Sanctions*, paper presented at the IBA conference, March 9–11 2005 *Antitrust reform in Europe: A year in practice papers*, available at <http://www.ibanet.org>; W.P.J. Wils, *The EU Network of Competition Authorities the European Convention of Human Rights and the Charter of Fundamental Rights of the EU*, EUI 2002.

<sup>79</sup> However, it needs to be underlined that situations triggering such doubts with respect to fundamental rights as a rule occur only in rare cases where divergences in national procedures translate into two standards of protection out of which the lower one, i.e. that of the authority transmitting information, would necessarily have to be equal to (or higher than) the applicable ECN minimum standard, and the other one, i.e. that of the authority receiving information – would have to be higher than the ECN minimum standard and the standard of the transmitting authority. Similarly, a different scope of investigatory powers could raise due process related doubts (see: examples below).

<sup>80</sup> See also subchapter 1 herein above.

individuals' rights during inspections/searches, or dawn-raids. Upon paragraph 27 of the Network Notice the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. Accordingly, upon the 'country of origin' principle, it is for the transmitting authority carrying out specific fact-finding measure to decide, upon its national rules, which information may be collected and thus subsequently transmitted<sup>81</sup>. In this context, it is possible that evidence collected during an inspection performed in a jurisdiction providing for a lower standard of protection of the rights of defense and/or right to privacy, may be transmitted to an NCA which, under its own domestic rules, could not have gained access to such information<sup>82</sup>. Most prominently, a broad reading of Article 12 of Regulation 1/2003 could result in allowing for the transfer of information which under the national rules of the receiving authority would be covered by legal professional privilege<sup>83</sup>.

Another sensitive area of collection of the information by transmitting authority and subsequent use of the information by the receiving authority concerns the exchange of confidential information. Article 28(2) of Regulation 1/2003 provides for a minimum standard of protection of confidential information within the EU, stating that the Commission and the competition authorities of the Member States shall not disclose information acquired or exchanged by them which is covered by the obligation of professional secrecy. Similarly, upon the provisions of Article 71 of the Polish Competition Act, the Office employees are obliged to protect the business secrets<sup>84</sup> as well as any other secrets being liable to protection under the relevant separate provisions,

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<sup>81</sup> See: S. Brammer, *Co-operation between National Competition Agencies...*, pp. 283–286.

<sup>82</sup> For instance, while the investigatory powers concerning private premises are covered by the vast majority of national jurisdictions, some NCAs do not have the possibility to inspect non-business premises outside of assistance to the Commission in the context of Article 21 of Regulation 1/2003 (such as, for instance, competition agencies in Bulgaria, Denmark, Italy or Portugal). Similarly, under national jurisdictions there are different approaches towards lawyers' presence during the inspection, and discrepancies with respect to the power to ask questions and take statements during the inspections.

<sup>83</sup> Such would be the case, for instance, if information not covered by the LPP under the transmitting system, limiting the scope of the privilege to external legal counsel (as foreseen by the *Akzo* case-law, see: judgment of the Court of 14 September 2010 in case C-550/07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*) was collected and transferred to a jurisdiction where such information would normally be protected by LPP specifically covering, for example, in-house legal counsel (see: A. Andreangeli, *EU Competition Enforcement...*, pp. 202–206 ).

<sup>84</sup> According to the provisions of Article 4 (17) of the Competition Act, 'business secret' shall be understood as the 'entrepreneur's technical, technological, organisational or other information having commercial value, which is not disclosed to the public, to which the entrepreneur has taken the necessary steps to maintain confidentiality'.

of which they have become aware in the course of the proceedings. However, upon the ‘country of destination’ principle it is for the country receiving an information containing request of confidential treatment to decide whether the information will be treated as confidential<sup>85</sup>. Along the lines of the principle, it is argued that any assessment of the confidentiality claim made by the transmitting authority is not binding upon the receiving authority, except if it has been taken by the Commission<sup>86</sup>. It could also be argued that the information transmitted by the authority, upon national rules applying higher standard of protection of confidential information, to the authority applying lower standard of protection would not receive equivalent treatment<sup>87</sup>. In this respect, it is worth reminding, that the provisions of Article 73(5) of the Polish Competition Act, providing that information received by the Polish NCA may be used in the course of the proceedings under the terms upon which such information is provided by the transmitting authority, seem to reverse the country of destination principle, by making transmitting authority’s decision on the validity of confidentiality claim binding upon the Polish NCA. Mutual recognition of the confidentiality classification based on Article 28 of Regulation 1/2003 should become the ECN good practice.

Similarly, concerns are raised that, confidential information being exchanged will become accessible from the receiving jurisdiction, due to lack of harmonization of the procedures of access to files in competition cases<sup>88</sup>. The issue of such kind was recently dealt with by the Court of Justice of European Union in the *Pfleiderer* case where access to the leniency files was sought in the private enforcement proceedings before the national court<sup>89</sup>. The CJEU confirmed that it is for the national courts and tribunals, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

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<sup>85</sup> S. Brammer, *Co-operation between National Competition Agencies...*, pp. 277–282.

<sup>86</sup> S. Brammer, *Co-operation between National Competition Agencies...*, p. 278; C. Gauer, *Due process...*, p. 18.

<sup>87</sup> However, it needs to be underlined that situations triggering such doubts as to the protection of procedural rights as a rule occur only in rare cases where divergences in national procedures translate into two standards of protection out of which the lower one, i.e. that of the authority receiving information, would necessarily have to be equal to (or higher than) the applicable ECN minimum standard, and the other one, i.e. that of the authority transmitting information – would have to be higher than the ECN minimum standard and the standard of the receiving authority.

<sup>88</sup> OECD, Competition Committee, Background Note by H. Jennings, *Improving International Co-operation in Cartel Investigations* (DAF/COMP/GF(2012)6), para. 95.

<sup>89</sup> Judgment of the European Court of Justice of 14 June 2011 C-360/09 *Pfleiderer AG v Bundeskartellamt*, not yet reported.

Moreover, it could be argued that the terms and conditions of the exchanges of information within the ECN could jeopardize due process. Regulation 1/2003 contains no obligation to inform the targeted undertakings about the transfer of the information. As long as the information is not being placed into evidence by the receiving authority (in which case the parties to the proceedings would normally have the right of access to files, and thus access to the information exchanged, while not necessarily being aware from where the evidence originated), the undertakings may remain unaware of the exchange taking place and of the information exchanged. In addition, there is no transparency with respect to how in practice the exchange is performed. Moreover, although Article 28 of Regulation 1/2003 extends the uniform EU concept of professional secrecy to all NCAs, it could nonetheless be argued that the 'country of destination' principle, coupled with the lack of transparency accompanying the exchange of information, brings about legal uncertainty and may in practice render any procedure dealing with a request for confidential treatment unduly lengthy and complicated<sup>90</sup>.

Many recommendations have been put forward to overcome the potential problems concerning the protection of procedural rights resulting from the discrepancies between the national jurisdictions of the competition authorities, i.e. parties to the exchange of information.

In this respect, following the OECD's *Best practices for the formal exchange of information between competition authorities in hard core cartel investigations*, acceptance of whichever level of protection of the undertakings' rights is higher could be promoted<sup>91</sup>.

It is also argued that the decision concerning the transmission of information should be challengeable in order to guarantee due process within the ECN and to ensure a level playing field by balancing the effective enforcement of the antitrust rules and the protection of the rights of defense of investigated entities<sup>92</sup>.

Greater transparency of the internal rules governing exchanges of information, in accordance with the principle of participation, is yet another postulate aiming at ensuring that the *modus operandi* of the exchange elaborated within the ECN fully takes account of undertakings' procedural rights<sup>93</sup>.

However, such solutions seem either intermediate or impossible to adopt under the current wording of Regulation 1/2003, and some could considerably impair the effectiveness of investigations. Therefore, from a long

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<sup>90</sup> See: S. Brammer, *Co-operation between National Competition Agencies...*, pp. 279–282.

<sup>91</sup> OECD, *Best practices...*, See: chapter 1 here-above.

<sup>92</sup> A. Andreangeli, *EU Competition Enforcement...*, p. 223.

<sup>93</sup> M. De Visser, *Network-Based Governance...*, pp. 270–275.

term perspective, it seems that introducing general procedural changes to Regulation 1/2003 in order to achieve further standardization of the rights of defense would be the best remedy for addressing some of the potential problems with respect to due process that the current state of affairs may bring about<sup>94</sup>. In the meantime, it should be noted that such harmonization is being sought and implemented by the members of the ECN using the 'bottom up' model, whereby the NCAs themselves initiate proposals aimed at achieving some level of procedural convergence, despite the lack of binding EU rules imposing the same.

#### IV. Conclusions

Comparison of the regulation of information exchanges in antitrust and in merger cases leads to the conclusion that antitrust provisions are fairly well developed, serving as a basis for day-to-day administrative cooperation, whereas the merger provisions are still in their infancy period. Such a situation should not be surprising inasmuch as the merger provisions still remain the domain of national legislation, while antitrust provisions are beginning to form a common European competition legal order. As a consequence of this situation, distinct problems arise with respect to antitrust and merger cases. In merger cases the likelihood of infringement of entrepreneurs' rights is relatively small. As described earlier, in merger cases it is the entrepreneur who decides what confidential information will be disclosed and to whom. Non-confidential information is publicly available, so the transmission of such information will not, in principle, violate a company's rights. Antitrust cases, on the other hand, involve much more complex and far-reaching issues. Especially troublesome is the fact that, under a broad reading of Article 12 of Regulation 1/2003, national rules which are more protective of the rights of defense than the ECN standards could be vitiated in the course of information exchanges within the Network. As far as international soft-law instruments are concerned, they rather provide a guide for informal exchange of non-confidential information.

Cooperation between competition authorities in merger cases is growing with the increasing number of multi-jurisdictional mergers. A very worrying fact is that Polish legislation does not recognize the tendency of growing cooperation in merger cases and there are only rudimentary legal grounds for

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<sup>94</sup> Similarly, stakeholders in the context of the public consultation for the Commission's Report on the functioning of Regulation 1/2003 have also strongly urged the further harmonization of procedures within the ECN. See: Commission Staff Working Paper, para. 206.

such cooperation. The analysis undertaken leads to the conclusion that, under Polish law, the exchange of information in merger cases is limited to publicly available information. Confidential information may only be transmitted by the merging parties themselves directly to foreign NCAs. Therefore legislative changes in the Competition Act are needed in order to create a legal basis for the UOKiK President to transfer confidential information to other competition authorities with the consent of the entrepreneur concerned. Such consent must be given in a transparent manner, i.e. the entrepreneur should voluntarily and unambiguously (any ‘implicit’ means of expressing consent should be ruled out in advance) give its consent to the transfer of such information. Furthermore, the scope of the information provided under a waiver should be closely associated with the nature of the merger case. Finally, such waiver should specify the purpose for which the information is transferred and list any limits on further transmissions.

The ‘internationalization’ of cartels in recent years, crossing the boundaries of jurisdictions, together with the decentralization of the enforcement of Articles 101 and 102 of the TFEU, create a need for ever increasing cooperation and exchange of information on the international level and within the ECN.

Especially given the recent changes brought about by the Lisbon Treaty, it should be underscored that any fears of an ‘erosion of fundamental rights’ due to the information exchange within the network of competition authorities seem unwarranted<sup>95</sup>. Moreover, it should also be stressed that due to the limitations on the possible uses of the exchanged information provided for by Article 12 of Regulation 1/2003, a certain minimum standard of protection of the undertaking’s and individuals’ rights within the Network is further reinforced. Nonetheless, in spite of these common minimum standards, as well as procedural safeguards, the European legal framework for the exchange of information within the network of competition authorities lacks the requisite specific norms governing the use of evidence exchanged, and therefore neglects the consequences of the current lack of convergence of national procedural rules. Consequently, procedural harmonization with respect to the rights of defense, as well as increased transparency of the information exchanges within the ECN, should constitute long-term goals of the ECN.

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<sup>95</sup> See: W.P.J. Wils, *Efficiency and Justice...*, p. 22 and references given therein; C. Gauer, *Due process...*, pp. 13–14.

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