Equivalence of rights of defence in competition proceedings before the Commission and the Polish Competition Authority

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Abstract

It has been clear since the entry into force of Regulation 1/2003 that as a part of decentralized system National Competition Authorities (NCAs) will enforce EU competition rules in parallel with the Commission. However, in accordance with the principle of procedural autonomy, when enforcing EU competition law each authority follows its domestic procedures including rules regarding protection of the rights of defence of inspected undertakings. Regulation 1/2003 rests on the assumption that rights of defence offered by the Commission and NCAs are equivalently protected. The present paper verifies this assumption by performing an exemplary case study in which the level of the protection of rights of defence in proceedings before the Commission and Polish NCA is compared and analysed. The main findings reveal that when it comes to the privilege against self-incrimination and legal professional privilege in competition law proceedings, the Polish system provides for a lower standard of protection than the Commission. Therefore, this paper places the assumption of "equivalence" in a questionable position. Secondly, this paper provides four arguments claiming that there is a need of higher level of convergence of rights of defence than the one displayed in proceedings before the Commission and the Polish NCA. Analysis of the rules of the EU constitutional order as well as perspective of the inspected undertakings and internal market presents that indeed the Commission and NCAs should protect rights of defence equivalently. The consequence of the above findings leads to the preliminary remark that Poland and other systems that offer particularly low level of protection should increase such level and adopt solutions that are more in line with the Commission's approach.

List of abbreviations

CCP	Code of Criminal Procedure of Poland
CCPA	Competition and Consumer Protection Act of Poland
CJEU, the Court	The Court of Justice of the European Union
ECtHR	European Court of Human Rights
EU	European Union
LPP	Legal professional privilege
NCA	National Competition Authority
PASI	Privilege against self- incrimination
The Charter, CFR	Charter of Fundamental Rights
The Convention, ECHR	European Convention on Human Rights
UOKiK	Urzad Ochrony Konkurencji i Konsumenta
AFSJ	Area of Freedom, Security and Justice

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1. Introduction

The entry into force of the Regulation 1/2003[1] constitutes a breaking point in the enforcement of European competition law. It established decentralized system of enforcement under which Member States are obliged to apply European Union (hereafter, EU) competition rules whenever the anticompetitive conduct has effects on trade within the EU.[2] Deploying Member States with the power of applying EU competition rules significantly contributed to the reduction of anticompetitive behaviour. Notably, since 2003, national competition authorities (hereafter, NCAs) were the most effective enforcers, pursuing more cases that the Commission itself.[3] The importance of decentralized system, is thus undeniable. However, while this Regulation imposes an obligation on NCAs and the Commission to apply the same substantive rules, their enforcement is conducted in accordance with national procedures which vary accordingly.

One of the most important aspect of such procedures are rights of defence granted to the undertakings which take part in the competition law proceedings. The Court of Justice of the European Union (hereafter, CJEU or the Court) on numerous occasions underlined that in proceedings in which sanctions can be imposed, observance of rights of defence is of utmost importance.[4] In competition proceedings sanctions exist and are one of the highest available in the EU law.[5] Therefore, in such proceedings rights of defence should be duly protected. Within the area of rights of defence, two privileges deserve particular attention namely, privilege against self-incrimination (hereafter, PASI) and legal professional privilege (hereafter, LPP). Both privileges delimit the scope of evidence that competition authorities can collect during the investigation, and most importantly, both are applicable from the earliest moment of the proceedings.[6] However, as mentioned above, the divergences in national procedures exist and they also extend to the level of protection granted to the inspected undertakings. Consequently, the scope of PASI and LPP as well as level of protection they offer may differ depending on

[1] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, 4.2
[2] *ibid*, Art. 3(2)
[3]European Competition Network, 'Statistics on Aggregate Figures on Antitrust Cases' < http://ec.europa.eu/competition/ecn/statistics.html> accessed 5 April 2019
[4] Case C-511/06 P, *Archer Daniels Midland Co. v Commission* [2009] ECR I- 5843, para. 84
[5] Reg. 1/2003 (n 1), Art. 23
[6] Alison Jones & Brenda Surfin, *EU Competition Law: Text, Cases and Materials* (4th edn, Oxford University Press 2011), p. 1038

the authority which investigates the case. Surprisingly, the EU legislature has assumed that the NCAs and the Commission offer equivalent level of protection of rights of defence in competition law proceedings.[7] Furthermore, this assumption constitutes one of the core foundations on which Regulation rests.[8]

This paper aims to verify this assumption by identifying and critically analysing *the extent to which the Polish NCA guarantee the inspected undertakings a level of protection of PASI and LPP that is sufficiently equivalent to the one offered by the Commission?* Therefore, a twofold purpose of this paper is to first, compare whether the level of protection offered by the Polish NCA and the Commission, as an exemplary case study, is equivalent and secondly, assess whether such level of equivalence is sufficient in the light of rationale calling for the convergence of rights of defence.

The decision to juxtapose proceedings at the European level with the Polish system and use it as a case study is beneficial for several reasons. First, the central-eastern systems are often omitted in academic literature. Second, the Polish competition law procedure was recently subject to the interesting novelization. Third, the comparison of these two systems is expected to reveal certain differences which may render the assumption of equivalent protection questionable.

Section 2 describes the concept of rights of defence with a particular focus on PASI and LPP. In Section 3, the decentralized system under Regulation 1/2003 is presented, and the background against which the need of having equivalent procedural guarantees has developed, is explained. Next, Sections 4 and 5 describe scope of these privileges in the proceedings before the Commission and the Polish NCA, namely Urzad Ochrony Konkurencji i Konsumenta (hereafter, UOKiK). In that respect, Section 6 presents a comparative analysis of the approaches adopted by these authorities and answers the first part of the research question, namely whether the level of protection adopted by them is equivalent. Section 7 addresses the second part of the research question by considering whether the level of convergence of protection of the rights of defence, as presented in the aforementioned case study, can be deemed sufficient.

[7] Reg. 1/2003, Rec. 16; *see in* Lyubomir Talev, 'ECHR Implications in the EU Competition Enforcement' (Due Process and Innovation in EU Competition Law conference, Brussels, 2010 April), p. 30
[8] Arianna Andreangeli, *EU Competition Law Enforcement and Human Rights* (Edward Elgar Publishing Ltd 2008), p. 219

Consequently, this section presents four arguments calling for higher level of convergence than the one displayed in the proceedings before the Commission and the UOKiK. Respectively, Section 7.1. and 7.2. present that the binding nature of the Charter of Fundamental Rights (hereafter, the Charter or the CFR) as well as the applicability of the European Convention on Human Rights (hereafter, the Convention or the ECHR), should be perceived as arguments calling for stronger equivalence. Furthermore, Section 7.3. argues that such convergence is also desirable from the perspective of protection of fundamental rights of inspected undertakings. The final argument in Section 7.4 claims that further convergence of rights of defence is justifiable from the internal market perspective. Section 7.5. suggests that Poland should increase its level of protection of rights of defence and adopt solution similar to the one offered by the EU system. The last section offers concluding remarks.

2. The notion of rights of defence

To immerse into the level of protection offered by the Commission and the UOKiK, it is crucial to understand the notion of the rights of defence, their nature and place they occupy in the EU legal order.

In general terms, the rights of defence encompass a number of procedural guarantees that aim to safeguard the defendant in the course of proceedings.[9] The notion of rights of defence covers a wide array of elements such as right to know the allegations against an undertaking, right to be heard[10], legal professional privilege[11], privilege against self-incrimination[12], protection of confidential information[13], access to file[14], right to legal aid[15].

[9] Jeremie Jourdan, 'Competition Law and Fundamental Rights' (2018) 9 Journal of European Competition Law and Fundamental Rights 666, p. 667-668

[10] Case C-17/*74 Transocean Marine Paint v Commission of the European Communities* [1974] ECR 1063; Case C-85/*76 Hoffmann-La Roche v Commission of the European Communities* [1979] ECR 461; Case C- 136/79 *National Panasonic v Commission of the European Communities* [1980] ECR 2033, para. 21; Case-T-352/94 *Mooch Domsjo v Commission of the European Communities* [1998] ECR II-1989, paras. 63, 73-74

[11] Case C- 155/79 *AM&S Europe Limited v Commission of the European Communities* [1982] ECR 1575, para 27; Case- T-125/03 *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission of the European Communities* [2007] ECR II-3523

[12] Case C- 374/*87 Orkem v Commission of the European Communities* [1989] ECR 3283, paras 28–31; Case T-34/93 *Societe Generale v Commission of the European Communities* [1995] ECR II-545, paras 73–74

[13] Case C-407/04 P *Dalmine v Commission of the European Communities* [2007] ECR I-829, paras 46–48

[14] Case C-194/99 P *Thyssen Stahl v Commission of the European Communities* [2003] ECR I-10821, paras 30-31

[15] Case C -46/87 and 227/88 *Hoechst v Commission of the European Communities* [1989] ECR 2859, para 16;

When discussing the nature of the rights of defence it is useful to distinguish between pre- and post-Lisbon period, as the status of these rights vary considerably in that respect. Initially, the rights of defence originated from the Court's jurisprudence in which the CJEU has significantly contributed to its development, in particular by qualifying them as general principles of EU law.[16] In 2009, with the entry into force of Lisbon Treaty, the Charter was granted the same legal value as the Treaties under Art. 6(1) TEU and thus, became legally binding.[17] It was a crucial moment for the development of EU fundamental rights, including the rights of defence because they were formally laid down in a legally-enforceable source with the status of primary EU law.[18] Up until that moment, the rights of defence were only codified in the Convention[19] which although is binding upon Member States, still does not require EU Institutions to act in accordance with its rules, at least not until the moment when EU will officially accede to it.[20] However, as the findings of Section 7.1. proves below, the interpretation of ECHR rules has unique influence on the protection of fundamental rights in the EU legal order.

2.1. Privilege Against Self-Incrimination and Legal Professional Privilege

From the point of view of undertakings, a remarkably essential part of rights of defence is firstly, the privilege against self- incrimination which by its simplest means, gives the inspected undertaking a right to not testify against itself.[21] The second important component is protection of legal advice and confidential correspondence between the lawyer and its client, known as legal professional privilege.[22] The emphasis adds the opinion of Advocate General Slyn, who contend that *"a client should be able to speak freely, frankly and fully to his lawyer."*[23] The

[16] *Hoffmann-La Roche* (n 10), para 9; Case C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, paras 20–21; Jones & Surfin (n 6)
[17] Consolidated Version of the Treaty on European Union [2012] OJ C236/13, Art. 6(1)
[18] Charter of Fundamental Rights of the European Union [2012] OJ 326/02, Art. 48(2); Evelyne Ameye, 'The Interplay between Human Rights and Competition Law in the EU' (2004) 25 ECLR, p. 335; Irman Aslam & Michael Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5 The Competition Law Review 61, p. 64
[19] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 [1950], ETS 5, Art. 6
[20] Sophie Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement' Juridisk Publikation, no. 2/2014, p.333-336
[21] Dovydas Vitkauskas & Grigoriy Dikov, *Proteting the right to a fair trial under the European Convention on Human Rights*, (Council of Europe human rights handbooks, Council of Europe Strasbourg) 2012, p. 61
[22] Kim Suyong & Matthew Levitt, Legal Professional Privilege Under European Union Law – Navigating the Unresolved Questions Following the Akzo Judgment, Antitrust & Trade Regulation Report, 99 ATRR 565, 11/05/2010, p. 1
[23] Case 155/79 *AM&S v Commission* [1982] EU:CL1982:157, Opinion of AG Sir Gordon Slyn, p.1654

protection of both privileges is recognized under Art. 48(2) of the Charter as well as under Art. 6 ECHR.[24]

In competition law proceedings, both privileges are to be seen as a limitation of the investigative powers enjoyed by competition authorities.[25] The extent to which the investigative powers of competition authorities can be limited depends on the scope of PASI and LPP in the legal regime at hand. In other words, the broader the scope conferred on these privileges in a particular system, the smaller the amount of evidence that competition authorities can collect and use against undertaking in its decision- making. As will be presented, procedurally speaking, differences exist and, therefore, the level of protection for the inspected undertakings can vary considerably.

3. Decentralized system under Regulation 1/2003

As already mentioned, the Regulation 1/2003 imposes on NCAs obligation to apply EU competition rules whenever the anticompetitive conduct has effect on intra-EU trade.[26]

Besides the obligation imposed on NCAs, Regulation 1/2003 encompasses a comprehensive set of procedural rules that must be abided in competition law proceedings. These rules, however are mostly addressed to the Commission and do not bind NCAs. On the contrary, whenever Member States act in the ambit of Art. 3(2) of Regulation 1/2003, they remain free to apply their own procedural rules. To say, however, that Regulation is completely silent on the procedural matters for the NCAs would be a fallacy. As an illustration, Art. 5 incorporates the catalogue of decisions which NCAs can reach when applying EU competition rules and Art. 12 provides for the rules governing the exchange of information between competition authorities.[27] Nonetheless, none of these provisions addresses the standard of rights of defence available for the inspected undertakings. Noteworthy, these articles have been given some

[24] Kulevska (n 20); *Saunders v United Kingdom* App no 19187/91 (ECtHR, 1996); *Akzo Nobel* (n 11)
[25] European Commission, 'Commission Staff Working Document – Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues' (2014) Brussles SWD 231/2<http://ec.europa.eu/competition/antitrust/swd_2014_231_en.pdf > accessed 20 February 2019, p. 14; Wouter Wils, 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition 567, p. 574
[26] Reg. 1/2003 (n 1), Art. 3(2)
[27] Reg. 1/2003 (n 1), Arts. 5 and 12

clarification in the CJEU's jurisprudence. Most importantly, *Pfeiderere* case was interpreted as meaning that when Member States apply EU competition rules, they are allowed to retain their procedural standards even if it would result in a different level of protection for the undertakings.[28]

When the Commission was the only enforcer of Arts. 101 and 102 TFEU, the different national procedures were not considered to be an issue. Yet, the implementation of Regulation 1/2003 importantly changed the rules of the game, in particular, by allowing more than one authority to deal with the same case. In general, cases ideally should be dealt with by only one authority, however, the rules allow for parallel proceedings if several conditions are met.[29] That in turn means that one case can be inspected by several competition authorities following various procedural guarantees. For example, participants of the same cartel which covers territory of few Member States may be subject to different rights of defence depending on the scope of these rights which particular NCAs provide for. As Section 7.3. describes below, this can have negative consequences on the legitimate expectations and other fundamental rights of inspected undertakings.

However, problems may arise not only in the course of parallel proceedings but also when the case is dealt with by only one authority. The reason for this is that even when only one authority is dealing with a case, it still may need to cooperate with other authorities to effectively resolve the infringement concern. As presented below in Sections 7.2 and 7.3, the rules governing this cooperation can lead to various negative consequences. In particular, the fundamental rights of inspected undertakings can be threatened and the enforcement of competition rules can be endangered. At this point, however, it is sufficient to note that the developments in the enforcement regime that introduction of Regulation 1/2003 triggered have raised much debate, especially with relation to the lack of at least partial harmonisation of procedural guarantees.[30]

[28] Case C-360/09 *Pfleiderer AG v Budeskartellamt* [2011] ECR I-05161, para 32; *see also* Krystyna Kowalik-Banczyk, 'Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings' (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 216, p. 222

[29] Commission Notice 2004/C 101/03 on cooperation within the Network of Competition Authorities [2004] OJ C 101, paras 5-8

[30] Kowalik-Banczyk, 'Procedural Autonomy' (n 28), p. 222; Arianna Andreangeli, 'The Impact of the Modernization Regulation on the Guarantees of Due Process in Competition Proceedings (2006) 31 European Law Review, p. 342

4. Proceedings before the Commission

Determination of the scope of PASI and LPP in both legal systems is a prerequisite to diligent comparison and identification of possible divergences that these systems provide for. Subsequently, such comparison is essential for addressing the question to what extent the level of protection of rights of defence before the Commission and UOKiK is equivalent.

In *Bosphorus* case the European Court of Human Rights (hereafter, ECtHR) compared the standard of protection of fundamental rights offered by the Commission and the ECHR and considered that the EU offers equivalent protection to the one enshrined in the ECHR. To reach that conclusion, the ECtHR established that equivalent protection of fundamental rights entails a comparable, and not identical, protection offered by two systems.[31] Although this case concerned relationship between ECHR and the EU, and not the one between the Commission and Member States, it nonetheless provides for an important legal definition of "equivalent protection." Therefore, for the purpose of comparing protection offered by the Commission and the UOKiK and verifying whether the assumption of "equivalence" under Regulation 1/2003 is true, this legal definition will be adopted. To speak of equivalent protection of PASI and LPP in proceedings before the UOKiK and the Commission, the rules existing in these two systems must be comparable.

4.1. Privilege Against Self-Incrimination

Regulation 1/2003 does not contain a provision which explicitly refers to PASI available to the undertakings under investigation. Nonetheless, the drafters of the regulation clearly acknowledged the importance of it as one of the recitals spells out that *"undertakings cannot be forced to admit that they have committed an infringement, but they are obliged to answer factual questions and to provide documents, even if this information may be used to establish against them the existence of an infringement*."[32] This statement calls for some clarification regarding the ambit of the privilege. Since PASI is a judicial concept, it is not surprising that its breadth has been demarcated by the case law, the most fundamental being *Orkem*

[31] *Bosphorus Hava v. Ireland* App no 45036/98 (ECtHR, 30 June 2005)
[32] Reg.1/2003, Rec. 23

judgement.[33] In *Orkem,* the inspected undertaking relied on the PASI as a defence for its refusal to answer questions to the Commission's request for information.[34] Several points of the judgement must be analysed to fully understand the scope of PASI at the EU level.

First, the CJEU clearly opposed recognition of the full right to remain silent in competition law proceedings.[35] The Court's view can be linked to twofold reasoning. First, there is longstanding issue of whether competition law proceedings should be perceived as being of criminal or administrative nature.[36] The CJEU stated in *Orkem*[37] that because the proceedings conducted at EU level are essentially administrative, there is no place for the full right to remain silent which is traditionally reserved for the criminal charges.[38] Second, the CJEU ruled in *Orkem* four years before the ECtHR decided in a similar case that PASI indeed lies at the heart of the concept of fair trial under Art. 6 ECHR.[39] According to Michalek, the CJEU's hesitant approach towards absolute recognition of right to remain silent in competition law proceedings is shaped by the fact that at the time of *Orkem* ruling the Charter did not exist and Art. 6 ECHR was not yet subject to extensive interpretation.[40]

Second, although the CJEU did not recognize the fully-fledged right to remain silent, it partially limited the investigative powers of the Commission by ruling that undertakings are obliged to provide the Commission only with pre-existing documents and factual information.[41] This means that when undertakings are in the possession of existing documents or factual information about the circumstances of the case, and subsequently, the Commission issues request for information under Art. 18 Regulation 1/2003, there is an obligation to disclose this information even if that would lead to self- incrimination.[42] However, this also means that inspected undertakings can invoke PASI and refuse to cooperate whenever they are asked questions regarding the aim of the conduct under investigation.

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[33] *Orkem* (n 12)
[34] The Commission can issue request for information pursuant to Reg.1/2003, Art. 18
[35] Marta Michalek, *Right to Defence in EU Competition Law: The Case of Inspections* (University of Warsaw Faculty of Management Press 2015), p. 286-288
[36] From its earliest case law the CJEU was reluctant to recognize the competition proceedings as being criminal, for example in Joint cases 209 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125, para 81
[37] *See in* Nicholas Khan & Christopher Kerse, *EU Antitrust Procedure* (6th edn, Sweet& Maxwell 2012), p. 122
[38] It must be remembered, however, that the debate on whether EU competition proceedings should be qualified as administrative or criminal in nature is not self-evident
[39] *Funke v France* App no 10828/84 (ECtHR, 25 February 1993)
[40] Michalek (n 35), p. 288-289
[41] *Orkem* (n 12), para 37
[42] Kulevska (n 20), p. 352-353

Third, the burden of proof lies on the side of the Commission and should not be shifted onto the undertakings concerned. The CJEU underlined in *Orkem* that undertakings cannot be forced to provide the Commission *"with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."* [43] In other words, the burden of proving anticompetitive conduct lies on the Commission and the inspected undertakings should not provide the Commission with information leading to the admission of infringement.[44]

Lastly, *Orkem* judgement underlined that PASI applies from the earliest stage of preliminary investigation including the moment when the Commission issues request for information or conducts search of premises.[45] The concept of PASI is indeed the most important at the beginning of the investigation because at this stage, the evidence is collected and the case is being prepared by the authorities.

4.2. Legal Professional Privilege

Regulation 1/2003 is silent on the scope of the LPP and there is no provision or recital that explicitly refers to it. Yet, some authors interpret Art. 28 relating to professional secrecy as being closely linked to the LPP.[46] This provision, however, does not provide for any guidance as to the potential boundaries of this privilege, especially taking into account the fact that under EU system LPP and professional secrecy are two different concepts.[47] Therefore, alike in case of PASI, the main source of information in this regard is the CJEU's jurisprudence which although was established under previous regime[48], remains valid today.[49]

The landmark ruling which extensively demarcated the scope of LPP in the context of EU competition law proceedings is the *A.M.&S.* judgement.[50]

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[43] *Orkem* (n 12), para 37
[44] Andreangeli, *EU Competition Law Enforcement and Human Rights* (n 8), p. 133; Michalek (n 35), p. 288-290
[45] *See also* Joined Cases C 97–99/87 *Dow Chemical Ibérica* [1989] ECR 3165, para 12; Case C 85/87 *Dow Benelux v Commission* [1989] ECR 3137, para 26; *Hoechst* (n 15)
[46] Michalek (n 35), p. 250
[47] *ibid*
[48] The case law that was ruled upon when Regulation 17/62, a predecessor of Regulation 1/2003, was in force
[49] Richard Wish & David Bailey, *Competition Law* (9th edn, Oxford University Press 2018), p. 279
[50] *AM&S* (n 11)

As in the case of PASI, the CJEU confirmed the importance of the rights of defence and underlined that the LPP must always be observed from the earliest inquiry stage.[51] This means that this privilege can be invoked when the Commission issues request for information or conducts the search of the premises.[52] Moreover, the CJEU concluded that the protection encompasses communication exchanged before the Commission has initiated the proceedings under the condition that such communication concerns the subject matter of the investigation in question.[53]

When recognizing the scope of the LPP, the CJEU made a clear distinction between firstly, external and in-house lawyer and secondly, EU[54] and third-country lawyer.[55] Accordingly, only the legal advice received from an external lawyer who is a member of the Bar of the Law Society in a EU Member State is protected by the LPP.[56] The protection is not granted, however, to the documents containing legal advice from in-house lawyer regardless of whether he is member of a Bar Association.[57] Likewise, the communication between undertaking and lawyer who is qualified in a third country is excluded from the scope of the LPP. The rationale behind such differentiation is linked mostly with the concept of independence, which was defined as *"the absence of an employment relationship between the lawyer and her/his client*."[58] From the point of view of the EU Courts neither in-house nor third-country lawyers are sufficiently independent especially compared to the degree of independence ensured by external lawyer or lawyer being member of Bar Association within the EU territory.[59]

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[51] Bartosz Turno & Agata Zawlocka- Turno, 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EU Competition Law after the Lisbon Treaty: Is It Time for a Substantial Change?' (2012) 5(6) Yearbook of Antitrust and Regulatory Studies 194, p. 195; Firstly, it was ruled in *Hoechst* (n 15)

[52] Wish & Bailey (n 49), p. 280

[53] *AM&S* (n 11), para 23

[54] Officially, also communication with lawyers from EEA is protected by the LPP

[55] F. Enrique Gonzalez- Diaz & Paul Stuart, 'Legal professional privilege under EU law: current issues' (2017) 3 Competition Law & Policy Debate 56; Eric Gippini- Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance' (2005) 28 Fordham International Law Journal 967

[56] Michalek (n 35), p. 251-252

[57] Gavin Murphy, 'Is it time to rebrand legal professional privilege in EC competition law? An update look' (2009) 35(3) Commonwealth Law Bulletin <https://doi.org/10.1080/03050710903112974> accessed 23 November 2018, p. 443; *AM&S* (n 11), para 45

[58] Andreangeli, *EU Competition Law Enforcement and Human Rights* (n 8), p. 119

[59] Justina Nasutaviciene, 'The Right to Confidentiality of Communications Between a Lawyer and a Client During Investigations of EU Competition Law Violations: The Aspect of The Status of a Lawyer' [2013] 20(1) Institute of International and European Law 20(1) 39, p. 46; Case c-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* [2010] ECR I-08301, Opinion of AG Kokott, paras 60–61

In a subsequent case law, the CJEU further developed the scope of LPP. For instance, in *Hilti* the General Court broadened the scope of LPP as to cover the summaries of external advice prepared by an undertaking.[60] Next, in *Akzo Nobel*, it was held that preparatory documents are also protected by the LPP provided that they were drawn up exclusively with the intention of seeking legal advice in the exercise of the rights of defence.[61] This extends to the situations where the documents were never sent to an external lawyer but merely created with the intention to do so.[62]

In the proceedings at the EU level, the burden of proof lies on the undertaking, which to benefit from the LPP, is firstly obliged to provide authorities with sufficiently convincing evidence of the confidential nature of the documents at hand.[63] In the case of a conflict between the Commission and inspected undertaking as to the application of LPP to the documents at hand, the EU system provides for a mechanism that further strengthens the protection of the LPP. Namely, the sealed envelope procedure obliges the Commission to put a copy of the document in such envelope and then refer the matter to General Court which will resolve the dispute.[64] In any event, the Commission is prevented from reading the documents placed in sealed envelope unless the General Court decides otherwise.[65] This is perceived as a very successful mechanism which allows the Commission to have overall control over the documents regarding potential infringement without breaching the LPP at the same time.[66]

5. Proceedings before the UOKiK

5.1. Privilege Against Self-Incrimination

In general terms, PASI is not clearly regulated under Polish system. This stems mostly from the fact that the Competition and Consumer Protection Act (hereafter, CCPA) is silent on that matter. It seems that the only reference to PASI occurs through the binding nature of

[60] Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, paras 16-18
[61] *Akzo Nobel* (n 11), paras 123, 127
[62] Michalek (n 35), p. 253
[63] *AM&S* (n 11), para 29
[64] *Akzo Nobel* (n 11), paras 83-85
[65] *ibid*, para 85; *AM&S* (n 11), para 32
[66] Michalek (n 35), p. 255

international or European rules. In proceedings before the UOKiK the privilege is derived from Art. 6(1) ECHR and jurisprudence of the CJEU.[67] Poland as a party to the Convention is bound by its rules which pursuant to Art. 91(1) of the Polish Constitution constitute inherent part of its domestic legal order. Although, the Supreme Court recognizes such binding force in its jurisprudence, it refers to Art. 6 ECHR itself rather than the breadth of privileges that follows from the interpretation of Art. 6.[68] Similarly, the CJEU's interpretation of rights of defence is rarely taken into account by the Polish courts.[69]

Accordingly, it appears that *prima facie* the UOKiK's power to request information and conduct searches of premises in the course of proceedings is absolute. So far, there are very few constraints which seem to somehow limit the investigative powers of the UOKiK.

First, UOKiK's request for information pursuant to Art. 50(2) of the CCPA is limited by formal requirements. The request for information must indicate the scope of such information, the purpose of the request and time limit for providing information. Also, the Supreme Court ruled that the UOKiK can only request information that is necessary and indispensable for the proceedings at hand.[70] However, ultimately it is up to the discretion of the authority to decide which information are necessary.[71] A possible implication of such discretion is that it can be used in flexible manner focusing rather on the effective enforcement of competition rules than on the due protection of the rights of defence of the inspected undertaking.

Second, some authors try to use the nature of competition proceedings in a way which enables analogous application of civil rules. In the Polish legal system, competition law proceedings are of administrative nature and therefore PASI is not available to the inspected undertakings.[72] This is because undertakings are allowed to refuse to cooperate with authorities during the

[67] Maciej Bernatt & Bartosz Turno, 'Zasada legal professional privilege w projekcie zmiany ustawy o ochronie konkurencji i konsumentów' (2013) 1(2) Internetowy Kwartalnik Antymonopolowy i Regulacyjny 18, p. 18-19
[68] Wyrok Sadu Najwyzszego z dnia 05.05.2006 sygn. Akt V KK 367/2005; Wyrok Sadu Najwyzszego z dnia 02.10.2006 sygn. Akt V KK 236/2006; Wyrok Sadu Najwyzszego z dnia 11.07.2006 sygn. Akt III KK 440/2005
[69] Maciej Bernatt, *Sprawiedliwosc Proceduralna w Postepowaniu przed Organem Ochrony Konkurencji* (WWZ 2011), p. 251
[70] Wyrok Sadu Najwyzszego z dnia 02.12.2008 sygn. Akt III SK 15/08; Wyrok Sadu Najwyzszego z dnia 12.12.2007 sygn. Akt VI Aca 1014/07
[71] Wyrok SOKiK z dnia 10.05.2007 sygn. Akt. XVII Ama 79/06; Wyrok SOKiK z dnia 11.08.2003 sygn. Akt. XVII Ama 130/02; Wyrok SOKiK z dnia 31.01.2008 sygn. Akt. XVII Ama 32/07
[72]Maciej Bernatt, Marco Botta and Alexandr Svetlicinii, 'The Right of Defence in the Decentralized System of EU Competition Law Enforcement. A Call for Harmonization from Central and Eastern Europe' (2018) 3(41) World Competiton 2, p. 20- 21

inspection only if such cooperation could lead to criminal liability.[73] Gronowski tries to repair the situation by pointing to various sources of civil procedure which would delimit the investigative powers of the UOKiK and create right resembling PASI.[74] Gronowski argues that the refusal to cooperate and provide documents can be invoked analogically by relying on Art. 261 of the Polish Code of Civil Procedure, but only if the inspection concerns entrepreneurs who are natural persons.[75] Such analogical interpretation means that the refusal to cooperate would be possible if complying with the request for information could expose the natural person, his relatives on criminal liability, disgrace or severe and direct injury.[76] The initial investigation of the jurisprudence in the realm of competition law suggests, however, that it is rather difficult to find a practical situation in which this provision could be used as a right of defence in the investigation before the UOKiK.

Whereas the above study presents narrow scope of PASI, recently the Supreme Court of Poland briefly noted that the representatives of UOKiK cannot ask questions that would force undertakings to provide incriminating testimonies.[77] One may argue that this could be perceived as move signalling potential change in the approach towards rights of defence. However, as Bernatt correctly comments on this development, in practice *"nothing otherwise suggest that companies could deny the UOKiK to reveal existing documents of incriminatory nature."*[78]

5.2. Legal Professional Privilege

Currently, the scope of the LPP in the competition proceedings in Poland can be considered to be inchoate. The LPP originates from Art. 6 ECHR and the obligations which follow thereof. Although the CCPA does not provide for the specific legal basis regulating LPP, it contains the provision which somehow relates to the confidentiality of the privileged documents.

Art. 105q (3) of the CCPA encompasses a list of provisions[79] of criminal proceedings that concern protection of privilege documents and that are applicable whenever authorities of UOKiK conduct search of undertaking's premises and items. Form that list, the most important

[73] CCPA, Art. 105d (2)
[74] Stanislaw Gronowski, *Ustawa Antymonopolowa. Komentarz* (C.H. Beck 1996)
[75] *ibid*, p. 338-339
[76] Bernatt, *Sprawiedliwosc Proceduralna* (n 69), p. 189-190
[77] Wyrok Sadu Najwyzszego z dnia 13.06.2017 sygn. Akt. III SK 43/16
[78] Bernatt, Botta & Svetlicinii (n 72), p. 21
[79] It refers to Arts. 180, 224§1, 225, 226 and 236 of the Code of Criminal Procedure

provision is Art. 225 of the Polish Code of Criminal Procedure (hereafter, the CCP), which establishes rules relating to the treatment of documents containing secret information which were found during the search of premises.[80] The reading of this provision juxtaposed with the line of thoughts of scholars allows to draw some remarks as to the scope of the LPP.[81]

Most importantly, Art. 225 CCP regulates matters related to the documents that are protected by the professional secrecy of lawyers. It must be kept in mind that the professional secrecy and LPP are two different mechanisms which respectively differ in scope. It is not without the reason that in some Member States, professional secrecy functions in parallel to LPP and is not interchangeable one with another.[82]

Next, Art. 105q (3) of the CCPA clearly states that reference to professional secrecy covered by Art. 225 CCP is only possible when the situation concerns the search of premises. This means that the CCPA does not provide for the possibility of invoking LPP in the earliest stage of preliminary investigation namely, when the authorities issue request for information.[83] Application of the current Polish regime can therefore lead to situations where undertakings would have to disclose documents containing its communication with the lawyer whenever the UOKiK would issue request for information. Taking into account that the LPP constitutes one of the most important defence rights limiting the investigative powers of the competition authority, its full power is revealed indeed in the early investigation stage. Moreover, such request is used more frequently than the search of premises or items.[84] Therefore, limiting the recourse to the LPP only to the instances where competition authority conducts search of premises constitutes a significant constraint to its scope and allows to understand why some scholars[85] argue that Polish system does not offer a genuine LPP but merely a national substitute of it.

Further, in the case of a dispute about whether the documents should be covered by LPP, the UOKiK's practice developed the envelope procedure that works similarly to the one applied by the Commission.[86] However, Art. 225(1) CCPA read in juxtaposition with Art. 225(3) CCP

[80] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 24-25
[81] *ibid*
[82] *ibid*, p. 23
[83] Polish Code of Criminal Procedure, Art. 225
[84] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 24
[85] *ibid*
[86] Wyrok Sadu Konkurencji z dnia 7.03.2017 sygn. Akt. XVII Ama 8/06

envisages that the fully-fledged envelope procedure (i.e. the one where disputed documents are transmitted to the court in sealed container and accessed by the court which decides whether the documents at stake are indeed subject of the protection) is only allowed where inspected undertaking, and not its lawyer, invokes professional secrecy. Following Bernatt and Turno, transmitting the disputed documents to the Competition Court in cases where the lawyer invokes the professional secrecy would run *contra legem* the existing rules.[87] In a situation where a lawyer invokes professional secrecy, the disputed documents has to be left without ascertaining its content or appearance.[88] Such regime could arguably has negative consequences on the effective enforcement of competition rules.[89] It would be possible, for example, to not disclose such documents to NCA, even if they would not qualify as protected by professional secrecy at the first place.

To sum up, the inspected undertakings have possibility to rely on LPP in instances where the UOKiK conducts search of premises or items. However, legal certainty is missing on whether the protection covers both, the communication between the undertaking and external or in-house lawyer, or only the former.[90] Also, the provisions of the criminal code to which the CCPA refers do not fully reflect the essence and benefits that stem from the classical form of the LPP.[91] Taking into account the above considerations, it is debatable whether the Polish mechanism of LPP can be interpreted in accordance with the standard of protection presented in *Akzo Nobel* judgement.[92]

5.3. Novelization of Procedure in Competition Cases

Interestingly, the competition procedure including the rules explained above is a result of the novelization which entered into force in January 2015. The regime that was in force beforehand characterized itself by inchoate, unregulated procedural guarantees and was subject to a criticism.[93] The main rationale behind the novelization was to not only increase the

[87] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 25
[88] Art. 225(3) Code of Criminal Procedure
[89] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 26
[90] *ibid*, p. 19-20
[91] *ibid*, p. 23
[92] *ibid*, p. 24-26
[93] *See* Bartosz Turno, 'Prawo do Odmowy Przekazania Informacji Sluzacej Wykryciu Naruszenia Regul Konkurencji w Orzecznictwie Europejskiego Trybunalu Sprawiedliwosci' (2009) 3 Ruch Prawniczy, Ekonomiczny I Socjologiczny 31, p. 44-48; Maciej Bernatt, 'Ustawa o Ochronie Konkurencji i Konsumentow – Potrzeba Nowelizacji. Perspektywa Sprawiedliwosci Proceduralnej' (2012) 1 Internetowy Kwartalnik

effectiveness of the enforcement of competition rules but also, to expand procedural guarantees of inspected undertakings, and in particular their rights of defence. [94] Many scholars and the Supreme Court of Poland perceived this novelization as an opportunity to improve the existing regime and underlined that Poland is under obligation to ensure high standard of protection of the rights of defence.[95] Similarly, the Polish legislature initially proposed significant changes that focused particularly on the PASI and LPP with the emphasis on the latter. Essentially, both privileges were to be regulated in the context of competition proceedings and introduced through new provisions of the CCPA.[96] The proposed changes initially aimed to entail a clear and coherent regulation of privileges including their scope. For example, initially the LPP was about to cover not only communication with external lawyers but also with in-house lawyers, thus going even beyond the level of protection offered at the EU level.[97] The proposed novelization also addressed the need of clarifying the envelope procedure and ensuring that LPP would apply throughout entire proceedings so it would be more in line with the Commission's approach.[98]

As the description in previous section shows, the new regime unquestionably departs from the proposed version. The evaluation of this novelization reveals that decision of the Polish legislature to make a reference to the provisions of the CCP instead of regulating the LPP on its own was influenced by numerous doubts reported by, among others, the Center for Antitrust and Regulatory Studies.[99] The UOKiK believes that the current solution is sufficient and that specific regulation is not needed especially taking into account that the Polish rules can be interpreted in the light of the standards set by the CJEU.[100] However, Bernatt and Turno considers that the above reasons were hardly convincing and instead of complete renouncement

Antymonopolowy i Regulacyjny 85; Anna Molston- Olszewska, 'Uprawnienia Organu Antymonopolowego do Zadania Przekazania przez Przedsiebiorce Informacji. Roznice Pomiedzy Rozwiazaniem Unijnym a Rozwiazaniem Polskim' (2015) CARS, p. 15-20; Turno & Zawlocka-Turno (n 51)

[94] This is derived from the working document which accompanied the adoption of new legislation and which subsequently is a form of justification and legitimation of the proposed changes; *see in* Maciej Bernatt, Bartosz Turno, 'O Potrzebie Doskonalenia Rozwiazan Procesowych w Znowelizowanej z Dniem 18 stycznia 2015 r. Ustawie o Ochronie Konkurencji i Konsumentow' (2015) 2 Internetowy Kwartalnik Antymonopolowy i Regulacyjny 75, p. 76

[95] Wyrok Sadu Najwyzszego z dnia 04.07.2012 sygn. Akt VI ACa 202/12; *see in* Maciej Bernatt, 'Ochrona konkurencji – sprawy z zakresu ochrony konkurencji sprawami karnymi w rozumieniu art. 6 Europejskiej Konwencji Praw Człowieka' (2012) 4(1) Internetowy Kwartalnik Antymonopolowy i Regulacyjny 112

[96] Bernatt, *Sprawiedliwosc Proceduralna* (n 69), p. 153-167

[97] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 19

[98] *ibid*, p. 20, 23

[99] UOKiK, 'Ocena Skutkow Regulacji' (Staff Working Documents) 9th July 2013

[100] UOKiK, 'Uzasadnienie do Projektu o Zmianie Ustawy o Ochronie Konkurencji I Konsumentow' (Staff Working Document) 9th July 2013

of the regulatory improvements, UOKiK should have revised the disputed matters of the proposal.[101]

The adopted amendments triggered a debate in the literature and many authors perceived that the novelization did not improve the existing issues.[102] Considering the above findings, it is hard to argue with such assessment. The novelized legislation did not address the reoccurring issues and rather constitutes the repetition of already functioning rules. Due to the lack of regulation and the necessity of application of criminal procedure provisions, the current solution can create numerous interpretative and practical problems. Therefore, regardless this novelization, there is still an urgent need for comprehensive, statuary regulation of the basic procedural guarantees of the inspected undertakings. The purpose of this section was to demonstrate that the Polish legislature had the opportunity to change its level of protection of rights of defence but, nevertheless, departed from it.

6. Comparative Analysis

The level of protection that the Commission grants to the inspected undertakings in the course of competition proceedings is different from that offered by the Polish system in a number of respects. The main divergence stems from the fact that the Polish competition system does not directly regulate the PASI nor the LPP. Moreover, as opposed to the proceedings before the Commission, where the system of rights of defence can be said to be clearly defined, the Polish solution leads to legal uncertainty and several obstacles for the inspected undertakings.

Taking PASI under consideration leads to the conclusion that the nature of the proceedings in Poland has strong impact on the availability of this privilege. The Polish system clearly distinguishes between criminal and administrative proceedings, and in the case of the latter the rights of defence have significantly narrower scope. Juxtaposing this with the proceedings before the Commission is intriguing because regardless the administrative nature, the EU system provides for much clearer and higher standard of protection of PASI. It must be kept in mind, that the EU system also does not recognize a full right to remain silent in competition law proceedings and this is indeed because of the administrative nature of the proceedings. The

[101] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 19
[102] *ibid*

administrative nature, however, did not preclude EU Institutions from adopting a comprehensive system with clear division between documents and statements that can benefit from PASI and those which cannot. The same cannot be said about Polish system, which in its reliance on administrative nature, failed to regulate this privilege. The Polish approach seems debatable especially taking into account that the EU regime proves that the nature of proceedings should not matter when the fundamental rights of defence are at stake. This stance was already confirmed by the CJEU when it held that *"in all proceedings in which sanctions (...) may be imposed, observance of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings."*[103] Also Jones and Surfin argued for such interpretation[104] and Kulevska even referred to the ECHR by stating that "*The rights enshrined in Article 6(1) ECHR are guaranteed regardless of the classification of the procedure"*[105].

The comparison of the LPP in these two systems leads to noticeable divergences. The Polish system lacks regulation on that matter and the LPP is granted only through a reference to the provisions of criminal proceedings. This makes it difficult to speak of fully-fledged LPP and, perhaps, it is more accurate to say that in the Polish system privileged documents are protected by the professional secrecy. This leads to problematic consequences and divergences with the procedures at EU level. While in the proceedings before the Commission the importance of LPP from the earliest investigative stage is clearly recognized, the Polish system allows inspected undertaking to rely on the LPP only when the search of the premises is conducted and thus, it does not limit the power of UOKiK to request information. Next, the sealed envelope procedure in Poland contrasts with the one at EU level because its full mechanism only applies when inspected undertaking, and not its lawyer, invokes it. Moreover, the scope of LPP at the EU level clearly delimits its scope and boundaries of application. In the Polish system, it is difficult to assess whether LPP covers communication with in-house or only external lawyer.

The main difference therefore is that in the CCPA the discussed privileges do not figure among its text, at least not in the context of competition proceedings. As a result, the scope of PASI or LPP can only be determined from reference to various provisions spread in the civil code,

[103] *Archer* (n 4), para 84; *see also Hoffmann-La Roche* (n 10)
[104] Jones & Surfin (n 6), p. 1038
[105] Kulevska (n 20), p. 346

jurisprudence and sometimes even criminal code.

The above comparison constitutes an important background to answering the first part of the research question on whether the rights of defence are equivalently protected in proceedings before the Commission and UOKiK. The application of *Bosphorous* "equivalence criteria" to the case at hand requires the mechanisms to be comparable in order to conclude that rights of defence are protected equivalently. However, taking into account the fact that Polish competition law system lacks regulation on rights of defence whereas the EU provides for extensive framework of protection specific to these rights, one can hardy argue that the level of protection before these systems is comparable. This comparison shapes the conclusion that protection of the rights of defence in these two systems reveals low level of convergence.

7. Rationales for further convergence

As the previous section proved, the rights of defence are not equivalently protected by the UOKiK and the Commission. This case study presents that the assumption on which Regulation 1/2003 rests is questionable in the sense that there are systems within the EU which interpret procedural guarantees differently. To address second part of the research question, namely whether the current level of convergence of rights of defence in the proceedings before the Commission and the UOKiK is sufficient, this section presents four arguments requiring stronger convergence in proceedings before NCAs and the Commission than the one presented in the case at hand.

First, the applicability of Art. 6 ECHR to the proceedings before the Commission as well as NCA is taken as an argument pushing for further convergence. Second argument refers to the binding character of the Charter and its relationship with Art. 6 ECHR as another point supporting convergence. The third argument shows that the protection of fundamental rights of undertakings requires at least partial convergence of rights of defence. Last, but not least, it is claimed that such equivalence is also needed to ensure proper functioning of internal market. It is important to underline, that the four arguments requiring convergence of procedural guarantees are not limited to the case of the Commission and Poland, they rather aim to present the need of convergence of procedural guarantees in proceedings before the Commission and any NCA.

The last part of this section argues that in the light of these four arguments, the level of protection offered by Poland is not sufficiently equivalent to the one at the EU level and consequently the UOKiK should increase such protection and adopt solutions that are more in line with the Commission's approach.

7.1. Applicability of Art. 6 ECHR to the Proceedings before the Commission and NCAs

Member States, including Poland, are parties to the Convention and hence whenever they enforce competition law in purely domestic or decentralized proceedings they are obliged to apply domestic procedures in accordance with Art. 6 ECHR.[106] As presented in Section 2, Art. 6 ECHR entails a concept of fair trial and both, PASI as well as LPP constitute inherent elements of this provision. Therefore, NCAs should apply rights of defence in accordance with the level of protection established in Art. 6 ECHR.

The situation, however, is a bit different when it comes to the proceedings before the Commission. As already expressed in Section 2, the Convention is not a direct source of EU law and theoretically it does not apply to the proceedings before the Commission. Consequently, "*the Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch those provisions do not as such form part of Community law*."[107]

However, saying that the fundamental rights of the EU legal order are completely detached from those covered by the ECHR would be incorrect. On the contrary, the EU legal system is interrelated to the provisions of the Convention in the realm of protection of fundamental rights in several respects. That interrelation allows to argue that the level of protection enshrined in the ECHR applies to not only the proceedings before NCAs but also those before the Commission and, thus, there should be equivalent protection in proceedings at national, decentralized and centralized level.

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[106] ECHR (n 19), Art. 1; The Constitution of the Republic of Poland of 2nd April 1997, as published in *Dziennik Ustaw* No. 78, Art. 91(1)

[107] Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501; *see also* Case T-347/94 *Mayr-Melnhof v. Commission* [1998] ECR II-1751, para 311

First, Art. 6(3) TEU stipulates that fundamental rights, as guaranteed by the Convention, form general principles of the EU law. Therefore, the rights of defence, which have status of general principles in the EU law, should be interpreted in accordance with the ECHR rules. That claim is confirmed by the *Huls, Montecatini* and *Degussa* judgements where the CJEU perceived the protection of privilege against self-incrimination in competition law proceedings as being compulsory in the light of Art. 6 ECHR.[108] Whereas some may argue that in the light of recent judgements such as *KME*, *Chalkor* and *Deutsche Bahn AG*[109] the Court is more reluctant to rely on the provisions of the Convention, this development can be explained by the entry into force of Lisbon Treaty which following Art. 6(1) TEU became legally binding instrument of primary EU law. Therefore, there was simply no need for the CJEU to refer anymore to the provisions of the ECHR especially while there was new instrument of primary law at its disposal.[110]

This leads to the second way in which EU legal system is interrelated to the provisions of the ECHR. Following Art. 52(3) of the Charter *"in so far as this Charter contains rights which correspond to rights guaranteed by the Convention (...), the meaning and scope of those rights shall be the same as those laid down by the said Convention."* In other words, if the Charter provides for fundamental rights which are also embodied in the ECHR, their protection shall correspond to the protection established in the Convention.[111] As demonstrated in Section 2, both PASI and LPP are covered by Art. 6 of the Convention and respectively by Art. 48(2) of the Charter. According to Kowalik Banczyk, Art. 48 constitutes one of the most specifically laid down provisions of the Charter and consequently it reflects the content of Art. 6 ECHR.[112] This in turn means that PASI and LPP as covered by the Charter correspond to the rights guaranteed by the Convention and following requirement of Art. 52(3) CFR they should be interpreted similarly.

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[108] Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paras 149-150; *see also* Case C-235/95 P *Montecatini v Commission* [1999] ECR I-4539, paras 175-176; Case T-279/02 *Degussa v Commission* [2006] ECR II-897, para 115

[109] Case C- 389/10 P *KME v Commission* [2011] ECLI:EU:C: 2011:816; Case 386/10 P *Chalkor v Commission* [2011] ECLI:EU:C: 2011:815; Case 582/13 P *Deutsche Bahn and Others v. Commission* [2015] ECLI:EU:C: 2015:404, paras 47-48

[110] Instead, the CJEU more frequently makes a reference to the provision of the Charter underlying that it is its prior source of law; *see in* Tamar Khuchua, 'Corporate Human Rights Protection in Competition Law Enforcement' (Master thesis, Lund University 2016), p. 20

[111] Krystyna Kowalik- Banczyk, *The Issue of the Protection of Fundamental Rights in the EU Competition Proceedings* (Centrum Europejskie Natolin, 2010) p. 121-122

[112] *ibid*, p. 121-123

In a nutshell, the wording of Art. 52(3) CFR and 6(3) TEU impose on the EU Institutions a requirement to interpret the system of enforcement of competition law in compliance with Art. 6 ECHR. Furthermore, as the ECtHR ruled in *Bosphorus,* protection of the rights of defence in the EU system is deemed to be equivalent to that of ECHR system.[113] Bernatt considers this judgement as a perfect confirmation of the applicability of Art. 6 ECHR to the competition proceedings before the Commission.[114] Therefore, because the EU system offers a similar level of protection to that of the ECHR, and Member States should officially adhere to the Convention, the rights of defence should be equivalently protected by both, the NCAs including UOKiK and the Commission.

Additionally, as Barnett points out, because Art. 6(2) TEU stipulates that the EU shall accede to the Convention, the importance of Art. 6 ECHR in the competition proceedings before the Commission will only grow on importance.[115] Although the future accession would, indeed, render Art. 6 ECHR formally binding on the EU Institutions and thus would qualify as ultimate source calling for convergence of rights of defence, it should be addressed with caution since the recent agreement for the accession has been deemed incompatible with the EU law.[116] For the reasons of protection of specific characteristics of the EU legal order as well as its autonomy, the future negotiations on the actual accession are expected to be difficult and lengthy.[117]

The above arguments prove that the level of protection enshrined in the ECHR applies to not only the proceedings before NCAs but also those before the Commission. Such applicability of Art. 6 ECHR to the proceedings before the Commission and NCAs constitute a common point of reference which if applied properly should lead to the conclusion that protection of rights of defence is indeed equivalent.

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[113] *Bosphorus* (n 31), paras 155-156, 165; However, this judgement shall be taken with the pinch of salt as there is a high debate on whether indeed the EU reflects standard of protection offered by the ECHR; *see for example in* James Killick & Pascal Berghe, 'This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in' (2010) 6 The Competition Law Review 259 p. 271-278; Turno & Zawlocka- Turno (n 51), p. 197

[114] Maciej Bernatt, 'Convergence of Procedural Standards in the European Competition Proceedings' (2012) 8 The Competition Law Review 255, p. 272

[115] *ibid*, p. 275

[116] Opinion 2/13 of the Court of 18 December 2014 [2014] ECLI:EU:C: 2014:1454

[117] Stefan Reitemeyer & Benedikt Pirker, 'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR- One Step Ahead and Two Steps Back' (*European Law Blog*, 31 March 2015) < http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/> accessed 8 June 2019

Following the *Bosphorus* judgement it can be assumed that EU comply with the standard of protection established in the ECHR. However, the scope of PASI in Poland, is much more limited than the one required by the ECtHR. This is because the ECtHR jurisprudence decided that PASI entails a full right to remain silent by stating that any statements obtained under coercion cannot be adduced to the proceedings.[118] Notably, the crucial *Saunders* judgement clarified that the practice of requesting self-incriminatory statements is not in line with the approach of the ECtHR.[119] Perhaps, the breadth of PASI under the Convention is accurately explained through statement that *"the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused(...)."*[120] This approach significantly differs from the one adopted in the Polish system where PASI is not fully recognized and investigative powers of the authorities are hardly limited.[121] Also, there is little point in comparing extensive LPP standard[122] provided by ECHR with the one in Polish system because, as explained before, the LPP in the context of the proceedings before UOKiK is not even regulated and that mere fact constitutes a sufficient argument that the Polish solution departs from the standard set by the ECtHR. As Section 7.5 presents below, the lack of compliance of Polish NCA with the standard established by the Convention can have severe consequences.

This analysis confirms that applicability of Art. 6 ECHR to both, proceedings before the NCAs and the Commission constitutes a significant call for the convergence of rights of defence.

7.2. Binding Nature of the Charter

The binding nature of the Charter and its relationship with the ECHR constitute another point requiring the rights of defence to be equivalently protected in domestic as well as EU competition law proceedings.

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[118] Michalek (n 35), p. 280-281; *John Murray v the United Kingdom* App no 18731/91 (ECtHR, 25 January 1996), para 45

[119] *Saunders* (n 24)

[120] *ibid*, para 74; *see also Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009)

[121] Bernatt, Botta & Svetlicinii (n 72), p. 21-22

[122] The ECtHR proved that the LPP is very important concept steaming not only from the notion of fair trial under Art. 6(1) ECHR but also Art. 8 related to privacy and that consequently, it can be limited only in exceptional circumstances; *see in* C. Leskinen, 'An Evaluation of the Rights of Defence During Antitrust Inspections In the Light of the Case Law of the ECTHR- Would the Accession of the European Union to the ECHR Bring About a Significant Change?' Working Paper IE Law School, WPLS10-04, Madrid, 2010, p. 28

Before the entry into force of Lisbon Treaty, the Charter was treated merely as a "source of knowledge" of the fundamental rights recognized in the EU legal system,[123] which underlined their importance.[124] However, the post- Lisbon recognition of Charter as a primary source of law changed the nature of obligations contained therein.[125] Following Art. 51(1) CFR the Charter is binding on the EU Institutions as well as on Member States whenever they act within the scope of EU law. According to Turno, Member State acts within the scope of EU law when it transposes, implements, applies or enforces the EU law.[126] The subject- matter of this paper perfectly illustrates the situation where Member States act within the scope of EU law by implementing and enforcing Arts. 101 and 102 TFEU in accordance with decentralized system of enforcement under Regulation 1/2003. That requires Member States acting in decentralized proceedings to apply the same standard of protection as the Commission.

The problematic question, is however, to what extent does Art. 48(2) CFR apply to competition proceedings.[127] As the scope of Art. 48(2) CFR is inspired by the Art. 6 ECHR it could imply that it is reserved only for "judicial" proceedings and because neither the Commission nor the NCAs are judicial bodies, Art. 48(2) CFR could not be enforceable in competition proceedings.[128] Building on this line of argumentation, it should be also noted that the wording of Art. 48(2) guarantees the rights of defence to *"anyone who has been charged."* Since "charge" is a word using mostly in the context of criminal proceedings, this could be interpreted as presupposing that rights of defence covered by Art. 48(2) CFR applies only to proceedings of criminal nature.

However, in the *Menarini* judgement, the CJEU established that, for the purpose of applying Art. 6 ECHR, the domestic competition proceedings are to be deemed "criminal" even if they concern the administrative part taking place before competition authority.[129] Kowalik- Banczyk interpreted this judgement as implying that Art. 6 ECHR applies to all stages of competition

[123] Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, para 38; Case C-432/05 *Unibet* [2007] ECR I-2271, para 37
[124] Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International et al. v. Commission* [2003] ECR II-1, para 122
[125] Towards a Uniform Standard of Protection of Fundamental Rights in Europe? (2017) 2 European Papers a Journal of Law and Integration < 10.15166/2499-8249/143> accessed 15 February 2019
[126] Turno & Zawlocka- Turno (n 51), p. 200-201
[127] Kowalik- Banczyk, *The Issue of the Protection of Fundamental Rights* (n 111), p.132-136
[128] Kowalik- Banczyk, 'Procedural Autonomy' (n 28), p. 223-225
[129] *ibid*

proceedings before both the Commission and NCAs acting within the ambit of EU competition rules.[130] What constitutes additional confirmation on the applicability of the Charter to the competition law proceedings is the wording of recital 37 of the Regulation 1/2003 which stipulates that Regulation 1/2003 formally recognizes the protection of fundamental rights as established in the Charter. Therefore, the binding nature of the Charter, which requires both the Commission and Member States to follow rights of defence, as covered by Art. 48(2), constitutes the argument requiring equivalent protection of rights of defence in centralized and decentralized competition law proceedings.

Unfortunately, as shown in Section 6, the standard that UOKiK offers concerning the protection of PASI and LPP departs significantly from the level of protection established at the EU level and required by the Charter. The claim in that respect is that as a result of binding character of the Charter, the NCAs must meet requirements set out by the Charter and follow equivalent procedural guarantees to the ones offered by the Commission. [131] That particularly applies to the situations in which Member States act within the ambit of Arts. 101 and 102 TFEU.

7.3. The Need for Equivalence from the Perspective of Inspected Undertakings

The further need of having convergent protection of rights of defence in competition law proceedings is accurately illustrated from the perspective of inspected undertakings.

The main rationale for the equivalence comes from the fact that inspected undertakings can be subject to various procedural guarantees depending on the standard of protection offered by the competition authority at stake.[132] Furthermore, because it is difficult to predict which authority will be dealing with the case, it is possible that the proceedings will be initiated by NCA in which territory the standard of protection is much lower than the one expected by the undertaking. [133]

A good illustration of how the protection of fundamental rights of undertakings can be negatively affected is a situation where competition authorities exchange information in

[130] *ibid*
[131] Bernatt, 'Convergence of Procedural Standards' (n 114), p. 276-278
[132] *ibid*
[133] Bernatt argues that the rules on allocation of cases in the ECN are not fully clear; *see in* Bernatt, 'Convergence of Procedural Standards' (n 114), p. 256

accordance with Art. 12 Regulation 1/2003. Whereas Art. 12 creates a legal basis for the exchange of information between competition authorities, it does not contain any rules governing the use of obtained evidence with regards to the legal persons.[134] In consequence, it can lead to the situations where *"the evidence may be obtained by the receiving authority with the use of procedures applicable by transmitting authority that are characterized by lower procedural standards."*[135] This is even confirmed by the Commission Notice which states that *"the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority."*[136] In other words, if the transmitting NCA collects evidence in accordance with its own procedural rules and further transmits it to the receiving NCA, such transfer will be deemed lawful if the evidence was collected merely in accordance with the domestic rules of transmitting NCA while the procedures of receiving NCA are not considered. For example, in the case study at hand, information obtained from the UOKiK (i.e. NCA which features low standard of protection) in the course of an inspection containing self-incriminatory elements may be used against inspected undertaking in a foreign legal system in which the receiving NCA does not have the competence to request such information at the first place.

Such multi-faceted system of enforcement raises particular concerns as to the legitimate expectations, transparency and the legal certainty of the rules applicable to the proceedings.[137] Storme further argues that inequalities of procedural guarantees can impair the right of fair access to justice, which international undertakings should not be deprived of, and that such access can only be achieved through at least partial harmonisation of procedural guarantees.[138]

Another argument that confirms the importance of the equivalent protection of rights of defence comes from the need of ensuring a proper balance between effective enforcement of competition rules and the respect of fundamental rights.[139] Such balance entails that the investigative powers of the competition authority should be mirrored by the sufficient standard

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[134] Art. 12(2) Reg. 1/2003 stipulates that the exchanged information shall be only used in relation with the subject-matter of the investigation and Art. 12(3) provides that such information can only be used as evidence to impose sanctions on natural person if the first authority respects the standard of protection of rights of defence of such person as established in the national rules of receiving authority

[135] Bernatt, 'Convergence of Procedural Standards' (n 114), p. 268-269

[136] Commission Notice (n 29), para 29

[137] Kati Cseres, 'Comparing Laws in the Enforcement of EU and National Comeptition Laws' (2010) 3(1) European Journal of Legal Studies < http://hdl.handle.net/11245/1.346242> accessed 19 February 2019, p. 27

[138] Marcel Storme, Approximation of Judiciary Law in the European Union (Nijhof 1994), p. 44-45

[139] Mauro Squitieri, 'The Use of Information in EU Competition Proceedings and the Protection of Individual Rights' (2011) 42 Georgetown Journal of International Law 449, p. 458

of protection of the rights of defence. Therefore, it is not unreasonable to suggest that if the powers of inspection in two systems are similar to each other, then the rights of defence should also be alike.

The comparison of the investigative powers that the Commission and UOKiK has at its disposal in the preliminary procedure are matching to a significant extent.[140] From the perspective of ensuring the above-mentioned balance, it would mean that UOKiK and any other NCA having similar investigative powers should adapt rights of defence and practices that are more in line with the standard of protection offered by the Commission. If such balance is not struck, however, then it can be perceived as a signal that the competition system is not properly structured[141] and risks therefore disproportionate and arbitrary intervention by competition authorities exercising their extensive investigative powers.[142] This can ultimately lead to many abuses, which would undermine the protection of fundamental rights of inspected undertaking, and as shown by Kulevska, the objective nature of the rule of law implies that undertakings should not be deprived of such fundamental protection.[143]

Therefore, the risk that legitimate expectations, legal certainty and transparency can be negatively affected, presents an argument indicating that the level of protection of rights of defence should be equivalent to ensure that undertakings are not deprived one of the most essential rights accorded to them by the rule of law.

7.4. The Need for Equivalence from the Internal Market Perspective

The last argument demonstrating the need for the equivalence between the level of protection of rights of defence before various competition authorities is that of proper functioning of the internal market.

Deploying NCAs with the obligation of applying EU competition rules pursued their uniform and consistent application and ultimately served the goal of ensuring effective enforcement of

[140] *See in* Bernatt, *Sprawiedliwosc Proceduralna* (n 69), p.191-227
[141] Bernatt, 'Ustawa o Ochronie Konkurencji i Konsumentow' (n 93), p. 86
[142] Michalek (n 35), p. 166, 370
[143] Kulevska (n 20), p. 342-343

competition law and fighting anticompetitive behaviour.[144] Indeed, enforcement of competition law and ensuring level playing field remains one of the most important pillars of the proper functioning of internal market.[145] Therefore, if the effectiveness of enforcement of competition rules could be proven to be at stake, then the matter of equivalence of rights of defence would automatically become a concern also from the internal market perspective. The issue also relates to the effective functioning of the European Competition Network which is a crucial network establishing rules in accordance with which various competition authorities cooperate, and thus it has a special role in enforcing competition rules.[146]

Particularly problematic seems to be the system of exchange of information under Art. 12 Regulation 1/2003. Such system has a negative impact on not only inspected undertakings but also the effective enforcement of competition rules. If evidence has been collected in a system that has an unreasonably high level of protection, or that in any other way limits the amount of evidence that can be collected and transmitted to an authority, which otherwise would be able to gather more extensive evidence in accordance with its procedural rules, then the proper enforcement of competition law is at stake. That especially concerns situations where competition authority will obtain information that was gathered in violation of the procedural law of that authority.[147]

Decentralized proceedings before UOKiK in which sealed envelope procedure applies constitute an example which perfectly illustrates situation that can lead to under-enforcement of EU competition rules and consequently, affect negatively proper functioning of the internal market. As explained in Sections 4.2 and 5.2, the sealed envelope procedure applies where there is a dispute on whether particular set of documents should be covered by the LPP. This procedure allows the competent court to review the documents at stake and, ultimately, decide whether they should be granted such protection and not be revealed to the competition authority. However, in proceedings before the UOKiK such documents can be only reviewed by the court if an undertaking, and not its lawyer, invokes the privilege. This is linked to the fact that Polish system does not fully distinguish between LPP and professional secrecy. That differs from the proceedings before the Commission where LPP is fully recognized as a separate concept and accordingly, disputed documents can in all circumstances be inspected by the General Court.

[144] Reg. 1/2003, Rec 8
[145] TEU (n 17), Art. 3(3)
[146] Cseres (n 137), p. 13
[147] Khan & Kerse (n 37), p. 270

Consequently, such disparity between rules allows for a situation where a subject matter which is not subject to LPP protection will never be revealed to the competition authorities. If UOKiK would be called to transfer the collected evidence to the Commission, then the latter would be provided with smaller amount of evidence than it would have had if the case was pursued in accordance with its own procedures. Accordingly, because the Commission could have insufficient evidence at its disposal to fine the anticompetitive behaviour, this could risk the under-enforcement of competition rules. Since the effective enforcement of competition rules ensures level playing field, the need of having more convergent rights of defence is justified in the light of proper functioning of the internal market.

Additionally, the problem of uniform and effective enforcement of EU competition law has been also presented by other authors. For instance, Brammer and Andreangeli indicated that such "free circulation" of evidence in accordance with Art. 12 stands in need of approximation of procedural guarantees.[148] Similarly, Idot called for the equivalence of procedural guarantees and noted that significant divergences in the way the exact same competition rules are enforced are extremely difficult to be explained in the light of ongoing integration of internal market.[149] Gauer adds that the lack of at least partial harmonisation of the procedures constituted an obstacle for the effectiveness of network cooperation already at the time when Regulation 1/2003 was drafted.[150] Although such harmonisation was not a precondition for the adoption of the Regulation, Gauer anticipated that it is likely to be needed in the long-term perspective.[151] Precisely, as the case of Poland shows, procedural guarantees can differ considerably from those offered at the EU level regardless the obligation of Member States to follow the standard of protection set by the Charter.[152] This, in turn, means that, nowadays, the need for such convergence is greater than in the past when it was still assumed that all NCAs would adhere to the standard of protection established at the EU level.

[148] Silke Brammer, Co-operation between National Competition Agencies in the Enforcement of EC Competition Law (Hart Publishing 2009), p. 322, 487; Andreangeli, *EU Competition Law Enforcement and Human Rights* (n 8), p. 195
[149] Laurence Idot, 'A Necessary Step Towards Common Procedural Standards of Implementation for Articles 81 and 82 EC Within the Network' in Anastasiu Ehlermann (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Hart Publishing 2004), p. 221
[150] Celine Gauer, 'Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions' in Anastasiu Ehlermann (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Hart Publishing 2004), p. 187-201
[151] *ibid*, p. 201
[152] *ibid*, p. 196-197

Lastly, it should be noted that the equivalence of rights of defence is arguably needed from the perspective of principle of mutual trust. The principle of mutual trust has been given a central role in the context of the Area of Freedom, Security and Justice (hereafter, AFSJ). This became evident after judgements such as *NS, Melloni* and more recently *Opinion 2/13* where the CJEU ruled that *"that principle requires, particularly with regard to the area of freedom, security and justice, each of the Member States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law."*[153]

It is interesting to consider whether the crucial role of mutual trust can be extended to the field of internal market. As Cambien argues, the principle of mutual trust plays equally important role in the internal market context as it does in the AFSJ because in both contexts it constitutes a precondition for mutual recognition.[154] Cambien rejects the idea that the principle of mutual trust is less problematic in the context of internal market than in the context of AFSJ and consequently argues that in the internal market aspect it concerns not only the product requirements but also more fundamental issues.[155] In that respect, Cambien claims, that the violation of fundamental rights as recognized in the Charter and the Convention are also prominent concern in the internal market context. This idea is confirmed by the internal market cases concerning the free movement of goods where for example, in *Omega Spiellhalen* the CJEU ruled that when implementing the EU law, all Member States shall observe and recognize protection of fundamental rights as required by EU law.[156] Consequently, it is not unreasonable to suggest that principle of mutual trust requiring Member States to adhere to the fundamental principles and in particular, rights of defence applies also to the sphere of competition law proceedings in the internal market context. Therefore, the lack of observance of protection required by the EU law by Poland can result in the breach of the principle of mutual trust and negatively affect the internal market.

The above considerations demonstrate the need for stronger convergence between the level of protection of rights of defence than the one displayed between the UOKiK and Commission.

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[153] Case C-411/10 and C-493/10 *N.S and Others* [2011] EU:C:2011:865, paras 78-80; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107, paras 37,63

[154] Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2(1) European Papers < doi: 10.15166/2499-8249/142 > accessed 8 June 2019, p. 107-115

[155] *ibid*, p. 111-112

[156] Case C-36/02 *Omega Spielhallen* [2004] ECR I-09609, paras. 54-73; *ibid*, p. 113-114

7.5. Final observations

The discussed four arguments claim that the level of protection of rights of defence should be equivalent in the proceedings before the Commission and the NCAs.

Moreover, the research of this paper allows to make a normative argument that in the light of these arguments, Poland and other systems offering such low level of protection are urged to increase such protection and adopt rules that are more in line with the Commission's approach. Technically speaking, the equivalence could also be achieved if the Commission would decrease its level of protection. This solution however, would be illogical as already the low level of protection established in Polish system is at risk of not complying with the standard of protection established by the Charter and the Convention. Moreover, increasing the standard of protection in Poland and adopting rules equivalent to those offered by the EU would automatically render Polish rules more in line with the level of protection required by the Charter and Convention. This is also encouraged by the scholars who stipulate that the protection of rights of defence offered by the Polish system is inappropriately lower than in the EU procedure and that placing the Polish system more in line with the Commission's approach can demand introduction of wholly new regulations.[157] Applying this statement to the situation at hand requires introduction of a comprehensive regulation of the PASI and LPP in the context of competition law proceedings in Poland. Turno and Bernatt perceives that such changes to the Polish system are simply indispensable and has to be addressed as soon as possible.[158] Furthermore, the amendment for the protection of the rights of defence in Poland could be perceived as proof that Member States are capable of voluntarily adopting standards of protection that are more in line with the protection at the EU level.[159]

If, however, Poland will maintain the current rules, it may risk violating the standard of protection required by the Charter or the Convention. The legal consequence of not complying with the standards set out by the Convention can result in the situation where undertaking will bring a case against Poland before the ECtHR for breaches of Art. 6 ECHR even in cases where

[157] Bernatt, 'Convergence of Procedural Standards' (n 114), p. 281
[158] Bernatt& Turno, 'O Potrzebie Doskonalenia' (n 94), p. 92
[159] Bernatt & Turno, 'Zasada legal professional privilege' (n 67), p. 30

the UOKiK would be acting in the ambit of Arts. 101 and 102 TFEU.[160] Similarly, Poland should more diligently take into consideration the EU standard of protection, especially in the light of the fact that the lack of compliance with the Charter can be invoked as a ground for annulment of Member States acts.[161] Supportive in that respect is *Fransson* ruling where the CJEU stated that *"national authorities remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised"*[162]. With regards to that, Kowalik -Banczyk argues that to preserve uniform application of EU rules the NCAs should adjust their domestic procedures to EU requirements concerning the legal protection of undertakings.[163] Otherwise, ignoring the Charter standards of protection can be perceived as a breach of the principle of sincere cooperation which entails obligation on the Member States to assure efficiency of EU norms to the greatest possible extent.[164]. Beyond the constitutional concerns, increasing the standard of protection of rights of defence in the Polish system is also desirable from the perspective of inspected undertakings and internal market concerns which otherwise may be negatively affected.

Therefore, the study of Section 7 answers the second part of the research question and proves that regardless the clear need of convergence, the standard of protection offered by the UOKiK is not sufficiently equivalent to the one established at the EU level.

8. Conclusion

The adoption of Regulation 1/2003 was accompanied by the assumption that the Commission and NCAs equivalently protect the rights of defence of inspected undertakings. This paper attempted to verify this assumption by analysing the extent to which the Polish NCA guarantee the inspected undertakings a level of protection of PASI and LPP that is sufficiently equivalent to the one offered by the Commission. The case study at hand compared these privileges in the

[160] Bernatt, 'Convergence of Procedural Standards' (n 114), p. 272–273; *see also Menarini v Italy* App no 43509/08 (ECtHR, 27 September 2011)
[161] Lucia Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27(1) Yearbook of European Law 65, p. 78
[162] Case C-617/10 *Aklagaren v Hans Akerberg Fransson* [2013] ECLI:EU:C: 2013:105
[163] Kowalik- Banczyk, *The Issue of the Protection of Fundamental Rights* (n 113), p.132–136
[164] TEU (n 17), Art. 4(3)

proceedings before the Commission and UOKiK to provide illustration on how the protection of rights of defence can differ within the EU territory.

A summary of the main findings demonstrated that the protection of PASI and LPP by the chosen authorities reveals low level of convergence. Whereas both authorities recognize the PASI and LPP in their legal systems, the scope of these privileges and level of protection granted to them is notably different. The level of protection developed by the CJEU's jurisprudence allows to conclude that the scope of both privileges in the proceedings before the Commission is clear and precise. Moreover, both privileges are recognized specifically in the context of competition law proceedings and both apply from the earliest inquiry stage, thus, respecting the fundamental rights of inspected undertaking. The mechanism which assist in competition law proceedings such as sealed envelope procedure is structured in a balanced way to enhance the effective enforcement of competition rules, as well as respect the broad logic and benefits steaming from the rights of defence. In contrast, the Polish mechanisms of PASI and LPP are not clearly regulated in the context of competition law proceedings. The Polish system offers some level of protection, but the inchoate nature of the provisions which refer to that protection makes it difficult to precisely define the breadth of these privileges. For instance, the scope of PASI is to be derived from the provision which regulates the UOKiK's power to request information. When it comes to the LPP, it is uncertain whether it covers communication with in-house lawyers. Also, the fact that the Polish LPP does not apply to the earliest preliminary proceedings is at odds with the Commission's approach. All these divergences illustrate that the level of protection given by the UOKiK is not equivalent to the Commission's approach.

The second part of this paper sought to determine the rationales for the equivalence to assess whether the current level of convergence of rights of defence is sufficient. A fourfold argument presented that there is a need for stronger convergence of procedural guarantees than the one displayed in proceedings before the Commission and Poland. Primarily, the constitutional framework of the EU law, and more specifically the binding force of the Charter as well as the applicability of Art. 6 ECHR to the centralized and decentralized proceedings call for further convergence. Also, the need of protection of fundamental rights of inspected undertakings including their legitimate expectations, legal certainty and transparency constitutes rationale for such equivalence. Lastly, the equivalent procedural guarantees would minimize the risk of

under-enforcement of competition rules and impediment of proper functioning of the internal market.

Although they are only exemplary, these findings put the assumption of equivalent protection in the questionable light. This study shows that the current situation is not sufficient and can be detrimental to both, inspected undertakings, effectiveness of competition authorities and more generally to the internal market as a whole, and should therefore be tackled in a mutually satisfactory manner. Although having equivalent rights of defence is desirable from various perspectives, further research should be done to investigate the way in which stronger equivalence should be achieved. The issue could be resolved by legislative or judicial harmonisation. However, taking into account the delicacy and nature of the procedural law, such a way of harmonisation would be highly challenging.[165]

Following the findings of this paper, it seems that the most feasible way of converging the rights of defence is through spontaneous harmonisation which entails action on the national level in which Member States voluntarily align national rules to the one offered in the EU system.[166] In the case at hand, it would mean that the UOKiK should increase its level of protection. This solution is in line with the constitutional framework which indeed calls NCAs to impose on fundamental rights protection equivalent to the EU approach. It would allow to bring rules more in line with the assumption of equivalence without formal means of harmonisation. Although it is true that EU competition rules have been source of inspiration for NCAs and resulted in voluntary convergence, it is equally true that other Member States have different approaches to this matter. The best example is the Polish legislature, which although recognized the need for rights of defence similar to those at the EU level, it missed the perfect opportunity to change its approach in the novelization procedure. For these reasons, despite the desirability of equivalence, the shift from purely national to harmonised procedural rules, including the rights of defence, can be expected to be cautious and in any case to still preserve a large role for national rules.

[165] For some preliminary remarks on the harmonization of procedures in competition law; *see in* Chris Townley, 'United in Diversity: why we need less (not more) uniformity in (national and EU) competition policy and enforcement in Europe' (*EU Law Enforcement*, 31 January 2019) < http://eulawenforcement.com/?p=1004> accessed 20 May 2019

[166] Krystyna Kowalik- Banczyk, 'Ways of Harmonising Polish Competition Law with the Competition Law of the EU' (2014) 7(9) Yearbook of Antitrust and Regulatory Studies 142, p. 145

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