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Rejection of Complaints: Lessons for National Competition Authorities on the Eve of the Implementation of ECN+ Directive

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Directive 2019/1 provides for a harmonisation of important procedural aspects related to the enforcement of competition law by National Competition Authorities. The power to set priorities, stipulated in art 4 of ECN+ Directive, is one of particular practical implications for both NCAs as well as undertakings concerned. This power allows NCAs to reject a complaint lodged by a complainant due to the lack of sufficient interests in pursuing an investigation. Such right is strongly intertwined with the procedural rights granted to complainants. While the current legal framework for setting priorities and safeguarding complainant's rights diverge significantly among Member States, a minimum legal standard should be guaranteed in order to ensure coherent model of applying EU competition law within European Competition Network. In order to protect and enhance the process of lodging complaints, such prioritisation has to be counterbalanced by rights granted to complainants and obligations imposed on the Institutions. In this regard, similar legal frameworks and established requirements should exist in national law as the obligations imposed on the Commission. In particular, NCAs and national legislators should learn lessons from the mistakes committed by the Commission which were verified by the European Courts. The importance of providing a proper statement of reasons and obligation not to omit relevant evidence shall be remember and properly implemented by NCAs. At the end of the day the goal is to cause that the rejection of complaint would not be a mere formality.

Key words: Complaint, complainant, EU interest, discretion, priorities, negative priorites, prioritisation, ECN+ Directive

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1. Introduction

Directive 2019/1 (hereinafter: ECN+ Directive)[1] provides for a harmonisation of important procedural aspects related to the

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective

enforcement of competition law by National Competition Authorities (hereinafter: NCAs). The power to set priorities, stipulated in Article 4 of ECN+ Directive, is one of particular practical implications for both NCAs as well as undertakings concerned. This power allows NCAs to *inter alia* reject a complaint lodged by a complainant due to the lack of sufficient interests in pursuing an investigation. Such right is strongly intertwined with the procedural rights granted to complainants. While the current legal framework for setting priorities and safeguarding complainant's rights diverge significantly among Member States, a minimum legal standard should be guaranteed in order to ensure coherent model of applying EU competition law within European Competition Network (hereinafter: ECN).[2] Taking into account that the European Commission (hereinafter: the Commission) has been rejecting complaints based on the notion of the lack of sufficient EU interests since at least 30 years and is obliged to guarantee relevant rights for complainants, its decision-making practice and the jurisprudence of the European Courts should serve as the model indicating minimum legal requirement applicable to each NCA. In order to properly depict this model it is of crucial importance to deprive it from some common misconceptions or restrictive interpretations and provide information based on legal acts and findings of the European Courts. The most important lesson for NCAs is that the rejection of complaints is not a mere formality. Despite being granted a discretion to set negative priorities, NCAs are obliged to meet certain legal requirements related mainly to rights granted to complainants. This lesson should be born in mind in the process of implementation and further application of the right to set priorities enshrined in ECN+ Directive.

2. *Prioritisation and ECN+ Directive*

The ability to set priorities constitutes one of the elements strengthening institutional independence[3]. Pursuant to the ability to establish its own priorities NCAs are granted an opportunity to pursue its own policy objectives. Two types of prioritisation are being distinguished[4]. The first type of prioritisation is a discretion to set positive priorities which allows NCAs to commence an *ex officio* investigations in the cases (related to particular sector or given practices) deliberately selected by NCAs. The increasing interests in pursuing investigations related to e-commerce and digital market both by the Commission[5] and by NCAs[6] might serve as an example of policy objective pursued by these Institutions. Moreover,

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enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, 3–33.

2 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, 43–53.

3 Wouter P.J. Wills, *Competition authorities: Towards more independence and prioritisation?*, 39, accessed May 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000260.

4 Wouter P.J. Wills, *Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust enforcement*, 7–10, accessed June 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759207.

5 See for example press release, *Antitrust: Commission opens investigation into Apple practices regarding Apple Pay*,accssed May 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.

6 Wouter P.J. Wills, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*,

positive priorities might also be stipulated in soft-law acts such as guidance on the enforcement priorities provided by the Commission.[7] The second and even more important type of prioritisation constitutes a right to set so called negative priorities. The ability to set negative priorities means that an Institution is entitled to reject a complaint for lack of priority interests[8]. It is strongly related to the management of the resources possessed by Institutions. The power to set negative priorities is of particular importance for the complaints due to the fact that it allows NCAs and vested with rights to set negative priorities[9]. The lack of competence to reject a complaint (*inter alia* by evoking lack of priority interests) explains why French NCA has been issuing the most decisions in the whole ECN.[10] These discrepancies in competences granted to NCAs have been indicated repeatedly before the adoption of ECN+ Directive. The need to vest NCAs with the ability to set priorities in the exercise of their task was emphasised in the recommendations issued in 2013 by the ECN[11]. Moreover, in the Commission's ten-year report on Regulation 1/2003[12] it was stressed out that

It is crucial to strike a proper balance between a discretionary right to reject a complaint for the lack of priority enforcement and safeguarding the rights of complainants.

the Commission to unload an administrative burden related to the process of investigating a complaint and without undue requirements reject a complaint evoking lack of priorities interests. The following sections of this article will dwell into the details related to this kind of prioritisation, in particular concerning the obligations of the Institutions and rights of complainants in the event of rejecting a complaint for lack of priority interests.

It shall be remember that before the adoption of ECN+ directive rights to set priorities diverged significantly among NCAs. Notably French NCA (fr. *Autorité de la concurrence*) and Spanish NCA (spa. *Comisión nacional de los mercados y la competencia*) were not not all NCAs have express powers to set their enforcement priorities, i.e. to choose which cases to investigate. One of the conclusions of this report concerned a necessity to ensure that all NCAs have a complete set of powers at their disposal including the right to set enforcement priorities.[13]

Against this background ECN+ Directive deals with the challenge related to differences in rights to set

accessed July 12, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424592.

7 Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, 7–20.

8 Wills, *Competition authorities*, 41.

9 Wouter P.J. Wills, *Independence of Competition Authorities: The Example of the EU and its Member States*, accessed June 13, 2020, http://ssrn.com/author=456087.

10 Wills, *Competition authorities*, 41.

11 *European Competition Network recommendation on the power to set priorities*, accessed July 13, 2020, https://ec.europa.eu/competition/ecn/recommendation_priority_09122013_en.pdf.

12 Communication from the Commission to the European Parliament and the Council—Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453 of 9 July 2014, accessed July 13, 2020, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52014DC0453.

13 Ibid., 34.

priorities among NCAs. According to the preamble to ECN+ Directive NCAs should be able to prioritise their proceedings for the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU)[14] to make effective use of their resources, and to allow them to focus on preventing and bringing anti-competitive behaviour that distorts competition in the internal market to an end. This goal is intended to be achieved by art. 4 (5) of ECN+ Directive. This provision provides NCAs with powers to set priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU. It therefore establishes a common right of NCAs to set positive priorities. What is more important it also provides a right to set negative priorities. According to this provision, to the extent that NCAs are obliged to consider formal complaints, NCAs shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This right is of utmost importance not only for NCAs but also and in particular for complainants. It is crucial to strike a proper balance between a discretionary right to reject a complaint for the lack of priority enforcement and safeguarding the rights of complainants. While the transposition of ECN+ Directive is still ongoing, it is worth indicating some relevant lessons for the rejection of complaints stemming from the experience of the Commission and the European Courts. The following analysis would be focused on the legal standards for the process of rejecting a complaint by the Commission for lack of enforcement priorities.

3. The legal framework in the European Union's competition law and the rights of complainants

A short presentation of the legal framework in the European Union's law related to rejection of complaints should be provided. The most relevant legal provisions from the perspective of a complaint are Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (hereinafter: Regulation 773/2004)[15] and Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter: Regulation 1/2003)[16]. Additional procedural guarantees for the proper implementation of the complainant's rights are stipulated in the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (hereinafter: Hearing Officer Decision).[17] There exist also soft-law acts which give some useful indications on the meaning of some relevant expressions and Institutions' attitude toward them. As far as the complainant is concerned, the Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (hereinafter: Notice)[18] is of significant importance. Of some, rather practical importance, also come Antitrust Manual of Procedures (hereinafter: Manual)[19] which contains a section on the rules governing the procedure of handling the complaints. Soft-law act although deprived from the binding force might even constitute a basis for considerations related to the compatibility of the final decision with EU law.[20]

14 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390.

15 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, April 27, 2004, 18–24.

16 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, January 4, 2003, 1–25.

17 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, October 20,2011, 29–37.

18 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, April 27, 2004, 65–77.

19 Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, accessed January 24, 2020, https://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

20 Advocate General M. G. Pitruzzell's opinion presented on 7 may 2020 r. in case C-132/19P, ECLI:EU:C:2020:355.

Legal framework presented above provides for rights of complainants. First and foremost there exist a right for concerned parties to lodge a complaint. Should there be no right to file a complaint, the whole process of rejecting a complaint would not exist. In both Regulation 773/2004 and Regulation 1/2003[21] this right is explicitly stipulated. Pursuant to the relevant provision any natural or legal person is entitled to lodge a complaint as long as it shows a legitimate interest, except for Member States, which are always considered to possess legitimate interest.[22] Once a complaint has been lodged, the exact scope of rights of complainant depends on the actions of the Commission. Should the Commission decide to take up an investigation and issue a statement of objections, a complainant will be entitled to obtain the non-confidential version of this document[23] and comment on it. The Commission shall take into account and consider the views expressed by the complainants.[24] Moreover, the complainant is granted under Regulation 773/2004 also the right to request to be provided with an opportunity to express their views at the oral hearing. Nevertheless, these rights are granted only to a particular group of complaints which complaints triggered an official investigation. More relevant for the topic of this article is the other group of rights—rights of complainants related to the rejection of complaint.

In this regard, according to the jurisprudence of the Courts of the European Union[25], two extremely important rights shall be distinguished. Firstly, the complainant has the right to be informed of the reasons for which the Commission intends to reject its complaint. Secondly, it has the right to submit observations concerning the reasons for rejecting the complaint. These rights are enshrined in the relevant acts.[26] As emphasised by the General Court, rights conferred to the complainant include the rights laid down in article 7 of Regulation 773/2004, which provides that, where the Commission takes the view that on the basis of the information in its possession, there are insufficient grounds for acting on the complaint, it is to inform the complainant of its reasons and set a date by which the latter may make known its views in writing. The complainant has the right to make its views known before the final adoption of the decision. Accordingly similar rejection procedure stipulated in national law of all Members States would be more than welcomed.

Abovementioned right to be informed simultaneously imposes certain obligation on the Commission. Once the complaint is lodged, the Commission is obliged to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States.[27] Nevertheless, it does not mean that there is an obligation to comment on each argument expressed in a complaint.[28] Pursuant to art. 190 TFEU the Commission as one of the European Union's Institutions is obliged to provide a statement of reasons appropriate to the measure. As far as rejection decision is concerned the Commission is obliged to state all the relevant facts and points of law[29] which are of decisive importance in the context of decision assessment concerning the rejection of complaint. Such statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Institution which adopted the measure in such a way as to enable the complainant to ascertain the reasons for the rejection decision.[30]

21 Art. 5 of Regulation 773/2004 and art. 7 Regulation 1/2003.

22 Art. 7 (2) of Regulation 1/2003.

23 Art. 6 of Regulation 773/2004.

24 Notice, par. 72.

25 Judgment of the Court of First Instance of 18 September 1992, case T-24/90 *Automec Srl* v *Commission of the European Communities*, ECLI:EU:T:1992:97, par. 72.

26 Judgement of the General Court of 12 May 2010, case T-432/05 *EMC Development AB* v European Commission, ECLI:EU:T:2010:189, par. 56.

27 Automec judgement, par. 79.

28 Judgement of the General Court of 26 September 2018, case T-574/14 *European Association of Euro-Pharmaceutical Companies (EAEPC)* v *European Commission*, ECLI:EU:T:2018:605, par. 142–143.

29 Judgment of the Court of 2 April 1998, case T-367/95 *Commission of the European Communities* v *Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)* and *Brink's France SARL*, ECLI:EU:C:1998:154, par. 63.

30 Judgment of the Court of First Instance of 16 December 1999, case T-198/98 *Micro Leader Business* v *Commission of the European Communities*, ECLI:EU:T:1999:341, par. 40.

The reasons stated by the Commission must be sufficiently precise and detailed to enable the General Court to review effectively the Commission's use of its discretion.[31] This obligation to provide appropriate statement of reasons shall be deemed as the most important element in the whole process of rejecting a complaint. The lessons concerning this matter are of utmost importance for all NCAs as well as national legislators designing a process of rejecting a complaint related to *inter alia* ability to set negative priorities.

For the record it is worth bearing in mind that the European Union's competition law system similarly to systems existing in some Member States[32] does not provide a right to obtain the decision concerning the existence or non-existence of the infringement pointed out in the complaint. Neither Regulation 773/2004 nor Regulation 1/2003 contains any provision imposing on the Commission any obligation to carry out an investigation. Moreover, the complainant is the only party obliged to provide evidence [33]. The Commission is not required to take into account facts which have not been brought to its notice by the complainant or which could have only been discovered by an investigation.[34]

4. *The lack of EU interest—negative prioritisation by the Commission*

Before explaining why the process of rejecting a complaint for lack of priority interest should not be regarded as a mere formality, the Commission's ability to set priorities shall be commented on. The Commission's ability to set negative priorities is reflected in its right to reject a complaint due to the lack of sufficient EU interest. It constitutes the most popular (and instigating the most controversies[35]) reason for rejecting a complaint. The notion was introduced in judgement of of the Court of First Instance in case T-24/90 (hereinafter: Automec judgement).[36] It is derived from the fact that the Commission is entrusted with public service tasks. The Commission is entitled to take all the measures necessary to perform the task, including setting priorities within the limits prescribed by the law.[37] According to article 3 TFEU establishing of the competition rules necessary for the functioning of the internal market is the exclusive competence of the European Union performed by the Commission. The Commission is entrusted with the task of performing competition policy and can set priorities within this domain. It stems from these considerations that the Commission is also entitled to apply different degrees of priority to the submitted cases. In other words, the Commission is entrusted with the task of ensuring the application of article 101 and article 102 TFEU and is responsible for defining and implementing EU competition policy and for that purpose has a discretion as to how it deals with complaints.[38] These criteria for assessing the existence of EU interest are not limited nor permanently established. The assessment depends on the circumstances of each individual case.[39] The Commission is entitled to give priority to a single criterion in assessing the EU interest established.[40] To emphasise the Commission's discretion it is worth remembering that even if the Commission is convinced

31 Judgment of the General Court of 21 January 2015, case T-355/13 *easyJet Airline Co. Ltd* v *European Commission*, ECLI:EU:T:2015:36, par. 70.

32 For example United Kingdom, W.P.J. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement…*, 24.

33 Judgment of the Court of 19 September 2013, case C-56/12 *European Federation of Ink and Ink Cartridge Manufacturers (EFIM)* v *European Commission*, ECLI:EU:C:2013:575, par. 71.

34 Judgment of the General Court of 30 September 2016, case T-70/15 *Trajektna luka Split d.d.* v *European Commission*, ECLI:EU:T:2016:592, par. 63.

35 Alfonso Lamadrid, *Wrapping up the week / Case T-427/08, CEAHR v Commission*, accessed January 25, 2020, https://chillingcompetition.com/2010/12/17/wrapping-up-the-week-case-t-42708-ceahr-v-commission/.

36 Judgment of the Court of First Instance of 18 September 1992, case T-24/90 *Automec Srl* v *Commission of the European Communities*, ECLI:EU:T:1992:97, par. 72.

37 Ibid., par. 77.

38 Judgment of the Court of First Instance of 26 January 2005, case T-193/02 *Laurent Piau* v *Commission of the European Communities*, ECLI:EU:T:2005:22, par. 80.

39 Judgment of the General Court of 11 January 2017, case T-699/14 Topps Europe Ltd v European Commission, ECLI:EU:T:2017:2, par.65.

40 Judgment of the Court of 19 September 2013, case C-56/12 European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v European Commission, ECLI:EU:C:2013:575, par. 85.

of the existence of the infringement of EU competition law, it might nevertheless reject the complaint based on the lack of EU interest.[41] Those statements create the impression that the Commission vested with the possibility to use such a blurrily constructed concept, possesses a discretionary power to loosely reject any complaints as far as the procedure stipulated in Regulation 773/2004 was fulfilled. Although the scope of discretionary power of the Commission is indeed very significant, it is not unlimited.[42]

tion to define priorities.[44] The discretion granted to the Commission does not allow it to reject some complaints claiming that certain situations are just in principle excluded from its interest, as far as the situations come under the task of competition policy entrusted to it by TFEU.[45] Each case has to be assessed individually. The Commission has to consider and attentively examine all of the legal and factual particulars presented in each submitted complaint.[46] After examining the particular set of circumstances and legal consideration

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The principal limitation is an aforementioned obligation to provide a statement of reasons. The Commission is not entitled to refer to the EU interest in the abstract. As stated in Automec judgment, it must set out the legal and factual considerations which led it to conclude that there was insufficient EU interest to justify an investigation into the case.[43] The statement of reasons provided in the rejection decision has to be sufficiently precise and detailed as to enable effective judicial review of the Commission's use of its discre-

contained in the complaint, the Commission has to perform a balancing test consisting of three premises:

1. the significance of the alleged infringement as regards the functioning of the internal market,
2. the probability of its being able to establish the existence of the infringement, and
3. the extent of the investigative measures required.[47]

41 Judgment of the Court of First Instance of 3 July 2007, case T-458/04 *Au Lys de France SA* v *Commission of the European Communities*, ECLI:EU:T:2007:195, par. 70.

42 Judgment of the Court of 4 March 1999, case C-119/97, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE* v *Commission of the European Communities and May Courier*, ECLI:EU:C:1999:116, par. 89.

43 Automec judgement, par. 85.

44 Judgment of the Court of 19 October 1995,case C-19/93 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV* v *Commission of the European Communities*, ECLI:EU:C:1995:339, par. 27.

45 Judgment of the Court of 4 March 1999, case C-119/97, Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission of the European Communities and May Courier, ECLI:EU:C:1999:116, par. 92.

46 Automec judgement, par. 86.

47 Judgment of the General Court of 11 January 2017, case T-699/14 Topps Europe Ltd v European Commission, ECLI:EU:T:2017:2, par. 64.

This balancing test consists of weighing up the significance of the alleged infringement against the probability of establishing its existence and the scope of investigative measures necessary to prove it. For each of these parts of the balancing test the Commission shall provide a statement of reasons. For each conclusion the Commission shall provide sufficient reasons as to allow the judicial review of its findings. Bearing in mind that neither the General Court nor the European Court of Justice is entitled to substantiate the assessment of the existence of EU interest[48], the statement of reasons and due examination of the evidence provided is of crucial importance. In this regard, the judicial review of the rejection decision based on the lack of EU interest is focused on whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or a misuse of powers.[49] The jurisprudence provides significant practical lessons for the Commission and all NCAs exercising their rights to reject a complaint for the reasons of enforcement priorities.

5. Three practical lessons stemming from the Commission's obligations and complainant's rights

5.1. The reasoning has to be sufficient and take into account relevant factors

In a milestone judgment[50] in the case T-427/08 (hereinafter: CEAHR judgement)[51] the practical importance of the reasoning provided by the Commission was emphasised.[52] The General Court scrutinised the definition of relevant market established by the Commission. The Courts of the European Union have only limited review of complex economic assessment provided by the Commission in order to define the relevant market.[53] Bearing this in mind, the General Court analysed whether the findings of the relevant market were based on materially correct facts and whether the Commission committed a manifest error of assessment. The General Court found that the Commission based its approach on the hypotheses which were contrary to the facts adduced.[54] According to the Court the Commission did not substantiate its findings with evidence.[55] Moreover, the Commission did not fulfil its obligation to examine carefully all of the evidence provided by the complainant.[56] The combination of these errors led to the conclusion that the Commission committed a manifest error of assessment in defining the relevant market.[57] The mere fact of committing an error in establishing the relevant market is not sufficient to annul the decision. The findings on the specific matter such as the relevant market has to affect the assessment of criteria on which the Commission based its conclusion that there is no sufficient EU interest. In CEAHR case the Commission based its assessment on the limited likelihood of the existence of infringements. The General Court concluded that the erroneous definition of the relevant market vitiated the conclusions concerning low probability that art. 101 or 102 TFUE were infringed.[58]

CEAHR judgement provides a very useful insight on the practical relevance of the Commission's obligations[59]. It stems from this judgement that the obligation to consider attentively all the matters of fact and law is not an illusory requirement. If the Commission omits the evidence which is contrary to its findings, it might commit a manifest error of assessment. In particular,

48 Ibid., par. 66.

49 Judgment of the General Court of 17 December 2014, case T-201/11 *Si.mobil telekomunikacijske storitve d.d.* v *European Commission*, ECLI:EU:T:2014:1096, par. 85.

50 Luis Ortiz Blanco, Konstantin Jörgens, "Important Developments in the Field of EU Competition Procedure," *Journal of European Competition Law and Practice*, vol. 2, iss. 6 (2011), 561.

51 Judgment of the General Court of 15 December 2010, case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR)* v *European Commission*, ECLI:EU:T:2010:517.

52 Ortiz Blanco, Jörgens, "Important Developments", 561.

53 Judgment of the Court of First Instance of 17 September 2007, case T-201/04 *Microsoft Corp.* v *Commission of the European Communities*, ECLI:EU:T:2007:289, par. 482.

54 CEAHR judgement, par. 89, 96 and 105.

55 Ibidem, par. 118.

56 Ibidem, par. 113.

57 Ibid., par. 120.

58 Ibid., par. 165.

59 Pepijin van Ginneken, "The CEAHR Judgement: Limited Discretion to Reject Complaints," *Journal of European Competition Law and Practice*, vol. 2 iss. 4 (2011), 348–350.

economic evidence provided by the complainant shall be taken into account. Although the Commission is not obliged to undertake any investigative measures and seek evidence of infringement on its own when argues against the arguments and evidence provided, it should present relevant counterevidence substantiating its findings. It is not sufficient to deny the facts and legal considerations rendered by the complainant. If the Commission pursues its different view, it has to substantiate it with evidence and relevant legal reasoning. Moreover, reasoning presented by the Commission has to be adequate and capable of properly substantiating the Commission's stance.

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5.2. The evidence cannot be simply overlooked

As stated above, the Commission is not required to take a stance on every fact or legal consideration brought to it by a complainant. It might happen that the Commission points out in rejection decision that the complainant did not present evidence on the existence of the alleged practice.[60] The conclusion that no evidence was furnished might be subject of the judicial review.[61] In this regard the difference between the conclusion that there is no evidence and the statement that the evidence is not sufficient should be drawn. The reasoning that there is no evidence cannot be based only on a mere statement. It is of particular importance when a complainant indeed provides some evidence even slightly hinting at the existence of infringement. The Commission cannot simply overlook and deem as having no relevance the evidence such as information concerning pricing policies.[62] In order to fulfil its obligation to examine attentively all the relevant facts, the Commission has to at least ascertain whether the information is substantiated and check whether the particular circumstances of the case point to a breach of EU competition law.[63] Even if the Commission is entitled to grant different probative value for the evidence adduced or express its view contrary to the arguments of the complainant, it is strictly obliged to take into account relevant evidence. According to the jurisprudence the obligation to attentively examine the facts and legal consideration is synonymous to an obligation to indeed examine the evidence provided and set the proper reasoning concerning them. It is forbidden to selectively take a stance on some facts and present conclusions without substantiation.

5.3. The significance of alleged infringement has to be indeed examined

The significance of alleged infringement is one of the criteria relevant for assessing the existence of EU interest. It seems to be highly difficult to challenge the conclusions concerning this criterion as it is rather opaque. However, the Commission's discretionary power to rely on this criterion is also not unlimited. The Commis-

60 Judgment of the Court of First Instance of 16 December 1999, case T-198/98 *Micro Leader Business* v *Commission of the European Communities*, ECLI:EU:T:1999:341, par. 30.

61 Ibidem, par. 32.

62 Ibid., par. 55.

63 Ibid., par. 57.

sion is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are.[64] While fulfilling this requirement following factor shall be taken into account: the duration and extent of the infringements complained of and their effects on that the competition situation in the European Union. It does not suffice to rely on the assessment the anticompetitive practice has ceased. It should be analysed whether the anticompetitive effects no longer continue. Moreover, the seriousness of the alleged infringement and the persistence of their consequences have to be examined[65]. In this regard, the importance of the recurring obligation to attentively examine all the relevant facts and consideration shall be raised once again. Once again it shall be emphasised that invoking a mere statement without providing proper analysis does not satisfy the Commission's requirements. Although the Commission is entitled to rely on the limited significance criterion, it is obliged to examine the abovementioned aspects of given practice. The assessment of these criteria and the facts taken into account shall be properly executed. In case of any of the criteria relevant for assessing the existence of sufficient EU interest, a manifest error of assessment or lack of substantiation might be raised by the complainant.

5.4. The interplay between the prioritisation on national and European level

According to art. 13 of Regulation 1/2003 the Commission may reject a complaint on the ground that NCA is dealing with the case. This provision is perceived by some authors[66] as granting a possibility to manage decentralized enforcement of competition law stemming from the ECN[67]. In respect to the topic of this article, the relevant question is whether a rejection of complaint by NCA for lack of priority interest amount to "dealing with the case" stipulated in aforementioned article. This question has been addressed in the jurisprudence. The General Court clarified that the meaning of the phrase "dealing with" or "dealt with" shall be interpreted broadly.[68] The outcome of the examination of NCA is of no relevance. As stipulated by the

However, the Commission's discretionary power to rely on the criterion of the significance of alleged infringement is not unlimited. The Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are.

64 Judgment of the Court of 4 March 1999, case C-119/97, *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE* v *Commission of the European Communities and May Courier*, ECLI:EU:C:1999:116, par. 94.

65 Ibid., par. 96.

66 David Viros, "Si.mobil Telekomunikacijske: the Rejection of Complaints as a Tool to Manage Decentralized Enforcement Within the ECN," *Journal of European Competition Law and Practice*, vol. 6 iss. 6 (2015), 415–417.

67 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, 43–53.

68 Judgment of the General Court of 21 January 2015, case T-355/13 *easyJet Airline Co. Ltd* v *European Commission*, ECLI:EU:T:2015:36, par. 26.

General Court the legislature has chosen not to limit the scope of article 13 of Regulation 1/2003 to cases of complaints which have already been the subject of a decision by another competition authority.[69] Even if NCA rejected a complaint on priority ground without performing any investigation, the Commission might invoke art. 13 of Regulation 1/2003. This finding is of particular importance in the light of ECN+ Directive's provisions providing for prioritisation rights for all NCAs. A complainant might not expect a second chance by lodging a complaint to the Commission if NCA decides to reject a complaint on priority grounds. In that respect it is even more important that NCAs draw conclusions from the presented lessons concerning the process of rejecting a complaint. For the record, the second criterion for applying art. 13 of Regulation 1/2003 should not be omitted. This provision applies only if the case brought to the Commission concerns the same agreements or practices which were subject to NCA's review. This condition is fulfilled if the complaint concerns the same alleged infringements on the same market within the same timeframe.[70]

6. Conclusions

ECN+ Directive vests NCAs with a power to set negative priority. This power provides for an opportunity to reject a complaint based on priority grounds. In order to protect and enhance the process of lodging complaints, such prioritisation has to be counterbalanced by rights granted to complainants and obligations imposed on the Institutions. In this regard, similar legal frameworks and established requirements should exist in national law as the obligations imposed on the Commission. In particular, NCAs and national legislators should learn lessons from the mistakes committed by the Commission which were verified by the European Courts. The importance of providing a proper statement of reasons and obligation not to omit relevant evidence shall be remember and properly implemented by NCAs. At the end of the day the goal is to cause that the rejection of complaint would not be a mere formality.

69 Ibid.

70 Judgment of the General Court of 17 December 2014, case T-201/11 Si.mobil telekomunikacijske storitve d.d. v European Commission, ECLI:EU:T:2014:1096, par. 73.

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