

Kluwer Competition Law Blog

Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the “L.M. Doctrine” to Cooperation Between Competition Authorities (Sped-Pro, T-791/19)

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On 9 February 2022, the General Court handed down its judgment in the offbeat case *Sped-Pro* (T-791/19). Notably, the General Court ruled that before rejecting a complaint on the grounds that the competition authority of a Member State is “better placed”, the Commission must examine, in a concrete and precise manner, the indications provided by the complainant evidencing generalized and systemic deficiencies in the rule of law of that Member State. This way, the General Court applied to competition law the same principles from the field of judicial cooperation in criminal matters, in particular, by extending the scope of the exception to the principle of “mutual trust” that was developed in the *Aranyosi and Căldăraru - L. M.* case law.

Background

On 4 November 2016, Sped-Pro, a Polish operator in the freight sector, filed a complaint with the European Commission against PKP Cargo, a company controlled by the Polish State. Sped-Pro alleged that PKP Cargo had abused its dominant position on the market for rail freight in Poland by refusing to conclude a cooperation contract at market conditions. By decision of 12 August 2019 (AT.40459), the Commission rejected the complaint pursuant to Article 7(2) of [Regulation 773/2004](#), on the basis that the Polish competition authority was better placed to examine it according to the criteria set out in the [Notice on cooperation within the Network of Competition Authorities](#). On 15 November 2019, Sped-Pro filed an action for annulment of the Commission’s decision, arguing, *inter alia*, that the Commission was better placed to examine the complaint, given the systemic and generalized deficiencies in the rule of law in Poland, which affected the independence of the Polish competition authority and courts.

The EU’s Legal Fight Against the “Rule of Law Backsliding” in Poland

Over the same period, the EU took a series of legal actions against Poland to address its repeated attacks on the rule of law.

- In July 2017, the Commission launched the first infringement procedure regarding the Polish Law on Ordinary Courts on the grounds that its provisions on the retirement of judges undermined their independence and discriminated on the basis of gender, thus violating Articles 2 and 19(1) TEU, 47 CFREU and 157 TFEU (see [press release](#)). By judgment of 5 November 2019, the Court of Justice upheld the Commission's allegations (C-192/18), in line with the legal doctrine developed in the landmark case *Associação Sindical dos Juizes Portugueses* (C-64/16).
- In December 2017, the Commission issued a reasoned proposal under Article 7(1) TEU, indicating the existence of a “clear risk of a serious breach of the values referred to in Article 2 TEU” in Poland (see [press release](#)).
- In July 2018, the Commission launched the second infringement procedure regarding the Polish Law on the Supreme Court on the grounds that its provisions on the retirement of Supreme Court judges undermined their independence, thus violating Articles 2 and 19(1) TEU and 47 CFREU (see [press release](#)). By judgment of 24 June 2019, the Court of Justice upheld the Commission's allegations (C-619/18).
- In April 2019, the Commission launched the third infringement procedure regarding the new disciplinary regime for Polish judges on the grounds that it undermined their independence, thus violating Articles 2 and 19(1) TEU and 47 CFREU (see [press release](#)). By judgment of 15 July 2021, the Court of Justice upheld the Commission's allegations (C-791/19). In September 2021, the Commission sent a formal notice to Poland under Article 260(2) TFEU for failure to comply with the Court's ruling.
- In April 2020, the Commission launched the fourth infringement procedure regarding a series of legislative reforms of the Polish judicial system on the grounds that they undermined the independence of judges, thus violating Articles 2 and 19(1) TEU and 47 CFREU (see [press release](#)). The final judgment is pending (C-204/21), but the Court of Justice (i) imposed interim measures to suspend the effects of the reforms in July 2021 (see [here](#)) and (ii), on request by the Commission, imposed a €1 million daily penalty payment on Poland in October 2021 for non-compliance therewith (see [here](#)).
- In December 2021, the Commission launched the fifth infringement procedure against the (highly controversial) rulings of the Polish Constitutional Court of July and October 2021 (case K 3/21), which essentially found that Articles 1, 2, 4(3) and 19(1) TEU, as interpreted by the Court of Justice in the abovementioned cases, were incompatible with the Polish Constitution (see [press release](#); and debate at [EULL 2021 Symposium](#)).

These proceedings, together with a series of cases brought against Hungary and Romania, form part of the Commission's fight against the so-called “[rule of law backsliding](#)” in certain Eastern European Member States.

The General Court Extends the “L.M. Doctrine” to Cooperation Between Competition Authorities

Against this backdrop, Sped-Pro argued that the Commission's rejection to examine the complaint violated Articles 2 and 19 TEU and 47 CFREU, to the extent that, if the case were to be examined by the Polish authorities, it would entail a real risk of a violation of its fundamental rights, in line with the landmark judgment of the Court of Justice in *Minister for Justice and Equality* (so-called "*L.M.*", C-216/18 PPU) in the field of criminal cooperation.

As a brief reminder, in *L.M.*, the Court of Justice established, in essence, that the judicial authority of a Member State assessing the execution of a European arrest warrant must determine, specifically and precisely, whether there are substantial grounds to believe that, by surrendering the prosecuted person, there is a real risk, in view of his particular situation, of a breach of his fundamental right to a fair trial under Article 47 CFREU, on account of systemic or generalized deficiencies concerning the independence of the judiciary of the issuing Member State (in that case, also Poland) (*L.M.*, C-216/18 PPU, paras. 60 et seq). If risk cannot be discounted, the judicial authority must refrain from executing the European arrest warrant (*L.M.*, C-216/18 PPU, para. 78), thus following the path set by *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU). In other words, the Court of Justice provided an exception to the principle of "mutual recognition", which underpins the system of judicial cooperation in criminal matters and, in particular, the [Council Framework Decision on the European Arrest Warrant](#) (see recital 6 and Article 1(2)).

Poland argued, however, that the *L.M.* case law could not be applied to the present case because it concerned a field other than competition law (GC judgment, para. 75). But the General Court was not persuaded by this formalistic argument and found that the same principles could be applied analogically (GC judgment, para. 83). Indeed, as the General Court highlighted, the principle of mutual trust stems from the premise that the EU is a community of shared values (Article 2 TEU), and this is no less valid in the field of EU competition law (GC judgment, paras. 84-85). In this sense, the General Court found that Regulation 1/2003 (recitals 15, 21 and 28, together with Articles 4, 5, 11(1), 15 and 35(1)) and the Commission's [Notice on cooperation within the Network of Competition Authorities](#) (point 2), "establish a system of close cooperation between the competent authorities based on the principles of mutual recognition, mutual trust and loyal cooperation" (GC judgment, paras. 85 and 88, free translation). Furthermore, the General Court noted that Article 4 of [Directive 1/2019](#) (ECN+) provides that Member States shall guarantee the independence of national competition authorities, and recalled that, pursuant to the *Inter-Environnement Wallonie* case law (C-129/96, para. 45), Member States have the obligation to refrain from taking any measures that are liable to seriously compromise the result prescribed by the Directive before its transposition (GC judgment, para. 86). As a result, "the Commission is entitled to reject the complaint [...] on the condition that national authorities can safeguard, in a satisfactory manner, the complainant's right [to a fair trial under Article 47 CFREU]" (GC judgment, paras. 89 and 91, free translation).

In this light, the General Court examined whether the Commission had complied with the test set out in the *L.M.* case law and concluded that the Commission had failed to do so because it did not "assess, specifically and precisely, in the light of the specific concerns expressed by the applicant, whether there were serious and well-founded

reasons to believe that the applicant would face a real risk that its rights would be violated if the Polish authorities examined the case” (GC judgment, para. 104, free translation). In particular, Sped-Pro had drawn the Commission’s attention to several indications showing the lack of independence of the Polish authorities, including, *inter alia*, the fact that (i) PKP Cargo had close ties with and was controlled by the Polish State; (ii) the President of the Polish competition authority depended on the Polish Prime Minister, who could appoint and remove the former at any time; and (iii) the Polish competition authority had been demonstrably lenient towards PKP Cargo on multiple occasions (GC judgment, paras. 98-102). Nevertheless, the Commission simply stated that Sped-Pro’s allegations were “completely unfounded”, without providing any substantive assessment of the evidence presented (GC judgment, paras. 103-104). As a result, the General Court annulled the contested decision (GC judgment, para. 106).

Concluding Remarks: The Rule of Law Rules

Sped-Pro highlights the foundational nature of the values set out in Article 2 TEU and, in particular, shows the transversal significance of the rule-of-law considerations underpinning the recent case law of the Court of Justice, which have now, for the first time, also manifested in the field of EU competition law. This case is relevant because it shows the extent to which these (formerly) abstract values may become justiciable. It is therefore fair to predict that their effectiveness will be extended to other fields where EU and national authorities are called upon to cooperate in the spirit of “mutual trust”.

Moreover, the General Court’s judgment arrives at the peak of the EU’s efforts to fight the rule of law backsliding, as the Court of Justice, deliberating in Full Court, recently upheld the validity of the financial rule-of-law conditionality mechanism established by [Regulation 2092/2020](#) (*Poland v Parliament and Council*, C-157/21; *Hungary v Parliament and Council*, C-156/21; and [EULL 2022, A. Zemskova](#)). In these judgments, the Court of Justice firmly affirmed that “[t]he values contained in Article 2 TEU [...] define the very identity of the European Union as a common legal order”, and, as a result, “mutual trust is itself based [...] on the commitment of each Member State to comply with its obligations under EU law and to continue to comply [...] with the values contained in Article 2 TEU, [including] the rule of law” (*Poland v Parliament and Council*, C-157/21, paras. 142-147; *Hungary v Parliament and Council*, C-156/21, paras. 124-129).

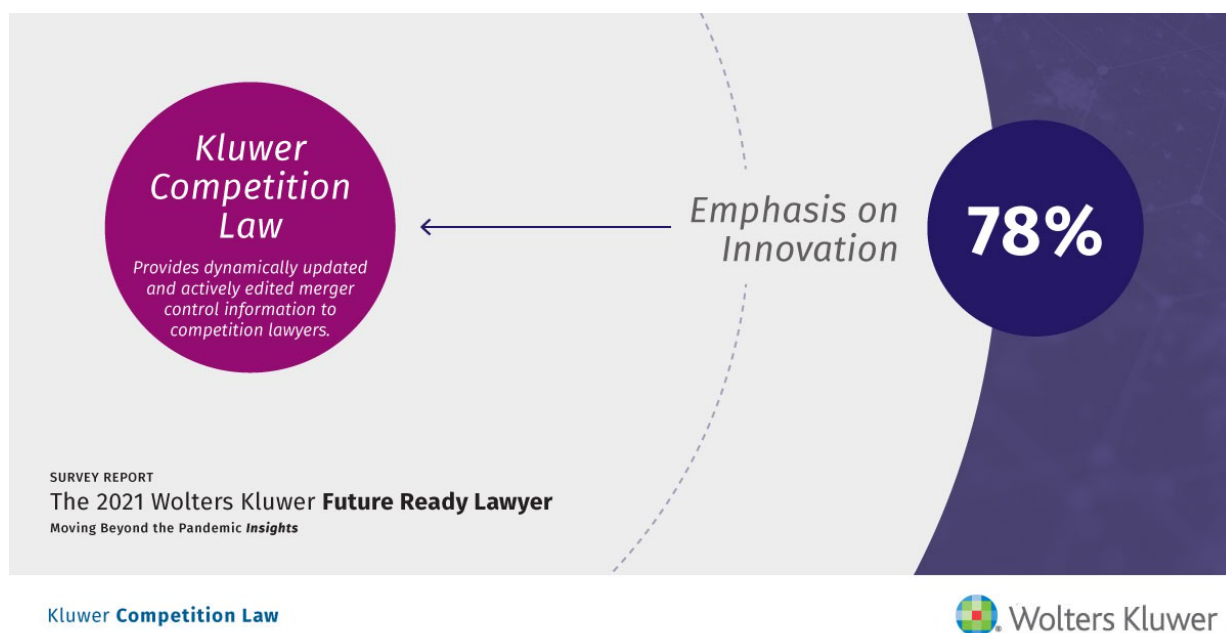
Lastly, from a more practical perspective, *Sped-Pro* evidences the importance for antitrust lawyers to venture beyond the narrow confines of Articles 101 and 102 TFEU, and view EU competition law as part of a rich and dynamic legal context, especially, in light of the continuous intertwining with other EU law fields and the growing importance of “unconventional” considerations (such as privacy, consumer protection, IP, labour and environmental issues) in competition assessments.

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