EU ANTITRUST: HOT TOPICS & NEXT STEPS

PROCEEDINGS OF THE INTERNATIONAL CONFERENCE HELD IN PRAGUE ON JANUARY 24–25, 2022

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Edited by

Václav Šmejkal

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EDITOR’S PREFACE:

How to measure the EU’s anti-trust temperature through one international conference

The organisers of the two-day international conference entitled EU Antitrust Hot Topics and Next Steps, held in January 2022 in Prague at the Faculty of Law of Charles University, had two ambitions from the outset. The first was to attract a wide range of international participants to Prague, led by European Commission Vice-President and Competition Commissioner Margrethe Vestager. The second was to develop a discussion that would offer those interested in competition policy and law high quality and interesting information, views, and ideas from the field.

Unfortunately, the pandemic COVID-19 interfered with the fulfilment of these ambitions. The conference had to be held in a hybrid format, and although the organisers were able to welcome Vice-President Vestager, many participants from other countries chose to participate only online, and many apologies for non-participation were received – for health reasons – on the first day of the conference. The discussion at the conference therefore undoubtedly suffered, as the interaction between participants at a distance and on-site wearing respirators could never be as lively and immediate as open face-to-face meetings usually allow. It is therefore all the more significant and valuable that the papers presented at the conference both directly and remotely can be published together in one volume. The confrontation of views can thus continue in a certain way and include those interested in the field who did not attend the conference. And it is clear from the composition and, of course, from the very content of the contributions published in the proceedings you are holding in your hands that the ambition to bring views and ideas to the debate on the present and future of EU antitrust has been largely successful. A cursory glance at the contents of the proceedings suggests that there is a lot to be learned about the „hot topics“ and „next steps“ of EU competition law and policy.

If we were to ask ourselves now what hot topics the EU competition policy and law is currently addressing or will address in its next steps (including in the semester in which the Czech Republic will hold the EU Council Presidency), the conference and its proceedings would offer the following order.

1. By far the largest number of contributions, at least 17 in these proceedings papers, are devoted to different perspectives to issues that could be summarized under the composite title Digitalization – BigTech – platforms – sharing of data and networks. The biggest hot topic is therefore the technological challenge that is changing not only business but also its legal framework, including competition law. The question of how far traditional concepts fit the new realities, how far they need to be reinterpreted, and how far they need

to be supplemented (especially by the ex-ante requirements addressed to the biggest players in the digital economy through specific regulations such as the EU Digital Markets Act) are common to many of the contributions in this proceedings.

The claim that such focused contributions keep a finger on the pulse of the times was confirmed by developments immediately after the conference: in February 2022, the European Commission adopted the Data Act proposal, an important step towards the creation of a single European market for data, based primarily on secure data sharing. This has unmissable competitive implications, as BigTechs will not be able to deny smaller and medium-sized competitors' access to the client data they acquire. Indeed, it is Big Data, and the importance of processing and sharing it for competition, that is the focus of a number of papers in the pages of this proceedings. Subsequently, in March 2023, the EU Council and the European Parliament reached agreement on the Digital Markets Act proposal, arguably the most important new regulation in terms of ensuring competition in the virtual digital economy. The new category of internet gatekeepers will apparently already be regulated from 1 January 2023 by an ex-ante applied regulation, prohibiting them from certain and in turn imposing on them certain desirable actions. The problems associated with this novelty, which will operate in parallel with the classic antitrust provisions of Articles 101 and 102 TFEU, are also given due attention in the proceedings.

The range of competition „hot topics" brought about by the digitalization of the economy and the economic power of its gatekeepers naturally also includes contributions of a more general focus (determination of dominance, mergers and acquisitions, or protection of consumer interests in the digital economy, etc.) or those dealing with the latest decisions in the „GAFA quartet" cases (Google, Apple, Facebook, Amazon), the study of the approach of other jurisdictions (China) and, of course, the competitive aspects of the development of the sharing economy, be it services (Uber) or their infrastructure (networks)...

2. Digitalisation issues therefore proved to be a priority topic of the conference. However, it cannot be described as the „dominant" topic, as the second place (represented by 6-8 papers) was shared by several other topics. Among them, sustainability, especially environmental but also social, thus also qualifies as an absolute hot topic. In her speech at the conference, Commissioner Vestager repeatedly stressed that the EU is developing competition rules for „the green and digital future" and that the most urgent aspect of the current renewal of rules will be to „build a greener European Economy". In her order of priorities, „green antitrust" was thus seemingly placed ahead of „digital antitrust", which

naturally raised questions as to how far the improvement of environmental protection should and can become a criterion for the application of the prohibition of Articles 101 and 102 TFEU.

The contributions in these proceedings papers even show a certain dissonance in the emphasis between the west and the east of the EU, as the conference participants from the „new member states“ were much more cautious or even sceptical about enriching the standard of higher efficiency producing consumer welfare with environmental (and also social) sustainability considerations. From a certain perspective, this is a continuation of the eternal debate on whether competition policy and law should be approached more holistically, whether these instruments should be more coherent with other policies pursuing key societal and integration objectives, or whether they should retain their proven and largely exclusive value-referential framework. The blurring of the values and objectives that competition law is supposed to pursue can undoubtedly lead to less legal certainty and less efficiency in the functioning of markets. On the other hand, the critical situation of climate change and social division in Western societies may be so urgent that competition policy and law should not shy away from direct involvement in addressing it. The conference did not, of course, resolve this issue, but its tone – as evidenced by the diverse mix of views in these proceedings – underlined the need for a balanced approach that does not dismiss either the existing virtues of anti-trust, based on the pursuit of greater efficiency that benefits consumers, or the need to get business to actively seek solutions to pressing problems of the society as a whole.

3. Of course, the evergreen topics of antitrust are also represented in this conference proceedings, which are a firm part of academic research and application practice regardless of current trends and pressing issues. More or less in the same number as the topic of sustainability, the reader will find in these proceedings papers devoted to the issues of competition law enforcement – its effectiveness and also the related protection of the fundamental rights of the parties and, in addition, to the issues of theory, if by theory we mean the definition of basic concepts such as the undertaking in competition law, the application of competition rules outside the field of traditional business (i.e., in the area of sport), or the comparison of EU and US approaches to competition law. It is a nice reminder that competition protection has both its very topical role ‚in the spotlight‘, contributing to solving the pressing problems of the moment, and at the same time its ongoing ‚nitty-gritty work‘ to keep markets competitive and open so that buyers can get the ‚best value for money‘ from them.

4. A certain sub-topic in the show of contributions is the lingering pandemic of COVID-19, whose impact on competition protection was directly addressed in two contributions. On the one hand, it is true that the competition rules did not need to be revised even at the time of the pandemic‘s greatest impact, only applied more sensitively and perhaps more generously; on the other hand, COVID-19 was latently present in several contributions as an accelerator of certain trends. The pandemic showed how dependent we are on the internet and its gatekeepers, so the texts on protecting competition in a digitized society were in reality also discussions on how to properly tame the giants whose influence on our lives we became fully aware of during COVID-19.

This order or division of the topics of the current competition protection is inevitably a bit haphazard and rough. Many of the papers in this collection would qualify for more than one group because their authors felt the need to comment on the connections between hot topics. Some of the papers, on the other hand, are more national and situational – they follow one competitive issue in one country or region and defy easy classification into one of the more broadly defined thematic groups. Nevertheless, as the conference organizer and editor of the proceedings, I believe that the snapshot of contemporary antitrust that the conference and these proceedings have managed to capture is correct in its broad outlines. Contemporary competition law is undoubtedly intertwined with the big issues of the time (which are digitalization, globalization, sustainability) on the one hand, and on the other, it is constantly addressing the problems inherent in every living branch of law (effective application, penetration of fundamental rights, addressing new legal issues, comparing and sharing best solutions). I hope that readers of the proceedings will agree that it is thus a sufficiently faithful snapshot of contemporary antitrust, even if it certainly does not fit everything into its cut-out.

For practical reasons, it was decided to keep the structure of the proceedings in line with the conference programme. Thus, it is not the division outlined above, which would be dominated by one large chapter accompanied by a peloton of smaller chapters. Just as the conference programme had to be balanced so that the individual panels remained comparable in time and space, so this volume has equally large chapters that bring together papers addressing a common (or at least similar) set of issues. This is an alternative thematic division to the one I have tried to suggest in this introduction, driven by the desire to ‚take the temperature of EU-antitrust‘ by looking at the thematic diversity of the collected conference papers. Within the individual blocks, the papers were arranged in alphabetical order according to the authors‘ names.

In conclusion, all the papers in this collection have been double reviewed and meet the standard requirements for academic publications of original research outputs.

Thanks for the support of the conference and these proceedings go to the Cooperatio program of Charles University – research area Law and to the generous supporters – Rowan Legal, Wolf Theiss and Skils law firms. Thanks also go to The Commission's Representation in the Czech Republic, to the Czech Office for the Protection of Competition, to all domestic and international reviewers and last but not least to Lukáš Svoboda and Charles Ross Bird for their help in editing the final text.

I wish all those interested in current competition law issues an informative read and hope for many more competition law conferences to help ‚take the current temperature of EU-antitrust'.

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KEYNOTE SPEAKERS

Building the green and digital future: the challenges for 2022

Margrethe Vestager
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Ladies and gentlemen,

It's a very great pleasure to be with you today in Prague - and especially to be here at Charles University.

In 1348, when this university was founded, Europe was in the grip of one of the worst pandemics in history. It was a dark, uncertain time – not the sort of time, you would have thought, when people would be thinking of the future. But the Emperor Charles IV was doing just that. He wanted to found a lasting home for learning and scholarship, here in his homeland. And almost seven hundred years later, I think it's fair to say that he succeeded.

And at the start of this new year, I think that story can be an inspiration to us all. It can remind us that, even in the most difficult times, you can still plant the seeds of better things, that will last a long time.

And now, at the start of 2022, we do find ourselves in difficult times. The pandemic is still with us – and the omicron variant has only made the future seem more uncertain. And a lot of other immediate challenges are demanding our attention – the crisis in Ukraine, for example, or the rise in energy prices.

But in spite of the many challenges we face, I feel optimistic when I look ahead to 2022. Because I know it's a year when we have the chance to set Europe on the path to a greener, more digital, more prosperous future.

The main responsibility for planting those seeds of the future will be for European industry– with the help of public authorities that support investment, and legislate to guide the change we need.

But the success of a crop isn't only about what you plant. Even the very best seeds won't yield their full potential unless the conditions are right – just the right amount of sun, just the right amount of rain. And by keeping competition working well in our economy, we can help to get those conditions right. We can support innovation, by keeping markets open so that companies of all sizes, from all over Europe, can bring in new ideas. We can help to keep supply chains secure and robust, by protecting a wide choice of business suppliers. And we can make sure there's room in our markets for the best, most efficient and innovative companies to succeed, and grow to compete with the best in the world.

So it's vital that we have the right competition rules for the green and digital future. We've already started the process of reviewing all our guidelines and rules, to make sure they're up to date. And in 2022, that process will accelerate. We'll have a series of new rules – and we'll also keep reviewing the effectiveness of our procedural tools, to make sure they're fit for the digital age. Because competitive markets are never something we can take for granted – and we need to make sure that we have the right tools to protect them effectively.

Those developments in competition policy will be part of a huge team effort, across Europe and beyond – an effort not just to rebuild our economy, but to renew it for the green and digital future. It will involve private business and public authorities in every part of our European democracy – EU institutions, national and regional governments, and especially, of course, the French and Czech governments that will, in turn, hold the Presidency of the Council this year. It will involve competition policy and effective enforcement, not just by the European Commission, but through the Office for the Protection of Competition here in Czechia, and the national competition authorities of the other EU countries.

Perhaps the most urgent aspect of that renewal will be to build a greener European economy. Last year, Europe already took a vital step forward, with binding commitments to make us climate neutral by 2050, and to cut our carbon emissions by at least 55% by 2030. And we're on track to make 2022 the year when those commitments take practical shape.

That will include the new rules we put forward last year in our "Fit for 55" package, which I hope the European Parliament and the Council will adopt in 2022 – giving us the tools we need to reach our emissions targets, in a way that spreads the cost fairly. It will also include the "EU taxonomy", which will help guide funding for the green transition, and give clarity to investors about the meaning of sustainability – in a way that recognises the fact that each country in Europe starts this transition from a different place.

This will also be the year when additional funding arrives that will support this green transition, as a large part of the 670 billion euros from our Recovery and Resilience Facility reaches national governments. Here in Czechia, for instance, more than 40% of that funding will go towards the green transition, renovating buildings to make them more energy efficient, and investing in lower-carbon transport.

With such a great need for public investment, it's essential that we have state aid rules in place that can help governments to make those investments in the most cost-effective way, and without harming competition in the process. And that's exactly what we now have. In a few days' time, our new rules on state aid for climate, environmental protection and energy will come into force. Those rules will vastly expand the range of projects that governments can use aid for, to cover all the goals of the European Green Deal. They'll make it possible for

governments to finance the full amount of greener investment as compared to a less green alternative - they'll also come with tighter conditions to preserve competition, and avoid companies getting more aid than they need.

Our antitrust rules also have a crucial role to play in helping to make our economy greener. After all, more competition means more pressure on companies to use resources carefully, and to meet the growing demand for greener products. But at the same time, it's important that those rules don't discourage companies from cooperating, when that can help to produce more sustainable products. That's why, in the new guidelines on horizontal agreements between competitors that we will adopt in 2022, we're planning to give more guidance about how companies can make sure these sustainability agreements are in line with the rules.

This green transition will also have to be matched by an equally fundamental digital transformation. And as public authorities, it's our job to get rid of the obstacles that can stop European industry from grasping these opportunities.

Last year, we put forward our vision for making the 2020s Europe's Digital Decade, which focuses on removing those obstacles – improving skills; bringing advanced infrastructure like 5G to all Europe's populated areas; securing reliable supplies of vital inputs like chips. And in 2022, those plans should bear fruit. I hope, for example, that the European Parliament and the Council will adopt our proposal for a Policy Programme to turn our goals for the Digital Decade into reality. And we'll propose a Chips Act, to help guarantee more reliable supplies of semiconductors for European industry – and to develop new markets for advanced European chip technologies.

Here too, we're backing up these decisions with a large amount of support for investment. Here in Czechia, for instance, more than a fifth of the money from the Recovery and Resilience Facility will go towards the digital transition – including nearly 600 million euros to improve digital skills, and another 650 million to help the digital transformation of the economy.

We're also adapting our state aid rules to help governments direct funding where it's needed to support the transition. Later this year, we plan to put new guidelines in place to help governments invest in bringing high-performance broadband to all Europeans, where the markets alone cannot deliver. This will involve support not just for fixed networks but also, in some cases, for mobile networks such as 5G.

We can also help European governments to guarantee a reliable supply of advanced chips for European industry. As we announced last year, we will make it possible to set up new chipmaking facilities that are the first of their kind in the EU – provided that aid is limited to what's really needed, and doesn't harm competition.

But supporting the digital transition isn't just about infrastructure. We also need markets that are open for innovation – markets that offer opportunities, not only to a few huge companies, but to businesses of all sizes, from all over Europe.

And I hope that in the year ahead, we'll take some big steps towards a more open digital world. The European Parliament and the Council are now deep in discussions of our proposal for a Digital Markets Act that will help keep our markets open for innovation, by stopping digital gatekeepers from misusing their enormous power.

We'll also move forward this year with a series of investigations that are looking at whether large digital platforms have been harming competition. That includes two cases where we've already issued Statements of Objections – one involving Apple, the other Amazon. It also includes a series of other investigations that are at an earlier stage, involving Google and Facebook – or Alphabet and Meta.

And just last week, we published the final report of our sector inquiry into the consumer Internet of Things. Some concerns were raised in the sector, like interoperability concerns, data accumulation or exclusivity practices. We are confident that the findings will contribute to our enforcement actions, regulatory efforts and also prompt firms to rethink certain practices.

In other words, 2022 will be a year full of opportunities to lay the foundations of a green and digital future. But it's European industry that will actually build that better future – and for that to happen, we need European business to be strong and financially secure.

The last two years have been incredibly tough for businesses in a whole range of different sectors. But we've avoided the sort of wave of bankruptcies that a downturn usually brings – thanks, in large part, to a huge commitment by European governments to helping solid companies stay in business. And the EU has helped to make that possible – not least, with our temporary framework of state aid rules.

Since we put that framework in place, in March 2020, we've taken more than 700 state aid decisions, approving a total of more than three trillion euros of state aid – including almost 34 billion here in Czechia.

But the time has come when European industry needs to prepare for the investments of the future. So 2022 will be the year when we phase out crisis support, and replace it with new possibilities for governments to invest in preparing industry for the future. So that, as public support fades out, private funding will fade in – and European industry won't fall into a gap between the two.

After almost two years of disruption and uncertainty, and a holiday season that we've spent under the shadow of omicron, signs of optimism can be a little hard to find. But Europe has faced difficult times before. And we've come through

those times, not just with our economy and society intact, but with new ways of doing things that have stood the test of time.
I can't say whether people in seven hundred years' time will look back at 2022 as the year when things changed for the better. But I do know that we have the opportunity this year to make a decisive shift towards a green and digital future. And I can't wait to get started.

Thank you.

Universal Competition Rules in a Globalised, Post-COVID and Green World: Will the Explosion of Exemptions and Protectionism Destroy Our Own Competitiveness?

Petr Mlsna

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As we all know; the whole world has been undergoing an extremely difficult period. The reduction in global economic growth caused by the pandemic and the measures needed to control it are resonating through disrupted supply chains in many sectors and a sudden rise in inflation which is manifested, in particular, by an extraordinary increase in the prices of energy and building materials.

For all competition authorities, this period has meant a certain slowdown in activity and, at least for a time. That was mainly a matter of on-site inspections, as it was not possible to carry them out in the usual way due to safety reasons. The Office for the Protection of Competition was no exception, although we did our best to minimise the impact of the pandemic on our procedures. We did our best and returned to dawn raids relatively quickly, compared to some other competition authorities. In particular, in late summer and in autumn, we conducted a record number of dawn raids in the overall history of the Office. Our goal was to help undertakings affected by the pandemic and to give them advice on what practices we are able to tolerate under given conditions. For this purpose, we published a number of press releases on our website and also offered the opportunity to consult on possibly anticompetitive practices. In general, however, it can be said that the regular decision-making activity of the Office has continued in a broadly standard mode even in constrained conditions.

In the past year, we have also launched a large-scale sector inquiry in the pharmaceutical sector, in which we are analysing the state of competition in the markets of the distribution of human prescription medicinal products and medicinal products covered by public health insurance. We also plan to focus on the competition aspects of direct distribution channels in this area. The investigation is intended to identify possible market dysfunctions in the given area and, in particular, to help formulate recommendations for the adoption of pro-competitive measures in the markets in question.

Since my appointment, have been aware that the economic downturn and inflation we are now experiencing will lead to an increase in anticompetitive behaviour. We must therefore accept that the age of prosperity is over. Some undertakings are struggling to survive, others are facing serious problems and

will tend to replace the fight against competitors with mutual agreements aimed towards the exclusion of competition. In this case, their businesses may survive, but it will be primarily at the expense of consumers and the economy as a whole.

In this context, it should be emphasized that competition authorities do not protect competition as a sui generis asset for businesses. They do not in any way guarantee undertakings the right to succeed, profit or survive in the market, but primarily and ultimately protect the consumers. This difficult period that we are going through is a great challenge for competition authorities, as they need to be even more active and attentive in their work. However, even the crisis cannot be an excuse for cartels.

I would also like to mention that the Office for the Protection of Competition also has the power to supervise public procurement in the Czech Republic. This is a unique advantage that we have over some other competition authorities, and we intend to continue to use this advantage in detecting bid rigging, that is, anticompetitive agreements between tenderers for contracts, particularly in the public sector. In the context of the worsening economic situation, we can expect increasing number of suppliers bidding for individual contracts and their temptation to substitute free competition with mutual agreement. I stress again, this will not be tolerated, as bid rigging agreements result in significant loss of public funds. In recent years, the Office has also succeeded in detecting resale price maintenance (RPM) agreements that result in money being lost not only for consumers but also for undertakings themselves. Unfortunately, in this context, we encounter a great deal of ignorance from the side of undertakings who do not consider these types of agreements to be serious and do not realise how harmful they are. At the end of 2021, we have fined almost CZK 97 million for these types of agreements (the first-instance decisions). A number of administrative proceedings are currently conducted for suspected RPM agreements and I can promise you that the Office will continue to be very active in this area also in the future, not only in terms of repression but also prevention. We are therefore planning to publish an information leaflet focusing specifically on the issue of prohibited vertical agreements.

This was a brief overview of the challenges we are currently facing, how the Office for the Protection of Competition is dealing with them, and also some of our future plans.

Let me now turn your attention to the topic of the conference, which has been very sensitive for competition authorities in recent years and will certainly be the subject of lively discussion also in the future. I am referring to the topic of the relationship between competition law and sustainability and/or Green Deal policy.

Long before the pandemic, climate change had already become a globally important topic in the public and political spheres. It is not surprising that

this issue also affects competition policy. Indeed, the role of competition law has become even more important as a result of increasing efforts to develop sustainable solutions to climate change-related problems.

Although discussions on climate change are currently overshadowed by the pandemic, it still remains a serious threat. This is why the European Commission has put the fight against climate change on its agenda and initiated the Green Deal for Europe, which aims to transform the European Union into a modern, competitive economy that will become 'carbon neutral' by 2050. However, this ambitious goal requires fundamental and extensive changes both at national and European level.

I am convinced that significant changes will also take place in competition law. We are already experiencing increased pressure for competition law to be more supportive towards sustainability initiatives. The growing awareness of climate change also has an impact on the approach to protecting consumer welfare, as it is broadening the criteria applied, particularly price, quality and innovation, to include environmental criteria that were previously considered non-economic and unquantifiable. It will therefore be necessary to take environmental criteria into account when assessing mergers, agreements and State aid as well.

On the one hand, I am of the opinion that competition law should indeed play a fundamental role in addressing these issues. However, on the other hand, I believe that undertakings themselves are aware of the extent and gravity of climate change, as well as other sustainability issues (e.g. working conditions, animal welfare, etc.), and are voluntarily introducing sustainable solutions to these problems without the legislature having to give them any incentive.

In this context, I have to mention the ongoing debate on whether, in the light of the Green Deal, free competition and free movement of people, goods and capital should give way to political or ideological agendas. In November, the European Commission issued a communication on how to promote competition issues, particularly in relation to the Green Deal and innovative technologies, which includes, above all, amendments to Article 101(3) of the Treaty on the Functioning of the European Union and, if applicable, to valid block exemptions.

In this context, it would mean, in particular, that certain market practices might not be considered to be an infringement of competition rules if they pursue a different objective, or pursue some other public interest, that outweighs free competition, in particular climate and environmental, in a spirit of the values pursued by the European Commission. It will be important to see how far these efforts go and what rules are set, as competition rules are EU-wide and the change thus affects competition authorities throughout the whole European Union.

In particular, it is important to reflect on the potential risks of over-emphasising environmental values over free competition and how changing competition rules

could contribute to sustainability – and whether the potential benefits truly outweigh them.

Competition authorities are undoubtedly obliged to react to all trends and changes related to climate change as well as technological developments. The most effective protection of competition for the benefit of consumers and society as a whole naturally requires the Office for the Protection of Competition to continuously adapt to such changes, modernise and cooperate both domestically and abroad. Only by doing so, can it contribute to the efficient allocation of products and services and, ultimately, to increased consumer welfare. However, in order to achieve these objectives, the competition authority must have clear priorities and a clear sense of what competition law is actually intended to protect.

Main idea of the green antitrust movement is that competition rules need to be revised if they stand in the way of undertakings contributing to a sustainable and climate-neutral economy. Undertakings claim that they want to take more social responsibility for a greener world – but undertakings acting alone will be disadvantaged, while in cooperation with competitors they will be able to switch to more sustainable production methods, where greener but more expensive solutions will not be made uncompetitive thanks to the Deal. There are therefore concerns from individual undertakings that without changes to competition rules, the undertakings may be restricted from taking joint sustainability initiatives due to fear of intervention by competition authorities. For this reason, proposals to introduce exemptions from prohibited agreements, to modify rules to prevent abuse of dominance and to change merger control are increasingly being put forward and discussed.

As I have already mentioned, at the end of the last year, the European Commission published its vision of the future direction of competition policy. In particular, it should contribute to the green transition by enabling undertakings to work together to promote green initiatives while preventing greenwashing that would harm consumers. The plan is to extend the exemption from the prohibition of Article 101(1) TFEU to agreements that restrict competition, provided that the benefits created for consumers compensate for the harm caused, particularly in terms of sustainability.

I think, one of the biggest risks of 'greener competition' is so called greenwashing, and in particular cartel greenwashing, which can manifest itself in two ways – either by the undertakings' behaviour not actually having a positive effect on sustainability, or by sustainability merely serving as a curtain for anticompetitive behaviour. We should bear in mind that the environmental narrative itself can in no way justify infringement of competition rules. In this context, therefore, I would like to support the European Commission's position, which is to take hard-line action against greenwashing. If there is the slightest suspicion that

cartel greenwashing might be behind good intentions, companies should be fairly punished.

Another risk I see is that undertakings who are allowed to coordinate their actions in the market will have an incentive to provide minimal sustainability benefits at the highest possible prices. It is reasonable to fear that if competition authorities are more accommodating and lenient, there is no guarantee that more sustainable products will be supplied to the market. Moreover, competition authorities will have to strictly require sufficient compensating sustainability benefits, scrutinise and assess these benefits and monitor individual agreements to ensure that sustainability is actually being met and that price increases do not exceed what is needed to cover the costs of the sustainability improvements. This whole process will require a lot of time and effort, at the expense of monitoring and enforcement in other competition areas. Moreover, the fact that undertakings agree on a more sustainable or more environmentally friendly solution means that they actually set a standard and therefore, largely reduce the possibility that they will continue, for example, to develop a similarly efficient solution at lower cost or an even more sustainable or environmentally friendly solution.

In the context of promoting cooperation between companies, and thus competition authorities' contribution to the green transition, it is also important to note the ongoing debate on whether Article 101(3) TFEU is appropriate for the promotion of anything else besides economic objectives, as over-inclusion of social and environmental interests in this Article may lead to confusion as to whether these objectives constitute an accessory condition or a separate ground for exemption. However, the European Commission is of the opinion that agreements aimed at sustainability could benefit from the exemption from the prohibition under Article 101(1) TFEU if the benefits they generate for consumers compensate for the harm they cause them. Such benefits may include, for example, the replacement of an unsustainable product by a sustainable one, thereby improving its durability or other characteristics and consequently its attractiveness to consumers. However, it is necessary to clarify how sustainability benefits should be considered when assessing the exemption under Article 101(3) TFEU and based on what criteria it can be concluded that such benefits can compensate consumers for the harm suffered. Nevertheless, for a certain amount of years, some European competition authorities have already been considering environmental benefits and assessing them with regards to cost-effectiveness requirements. An example is the decision of the Dutch Competition Authority in a case concerning the 'Chicken of Tomorrow' initiative, in which suppliers and supermarkets (sector-wide) committed to improve the welfare of chickens by implementing several environmental measures. Since the products then became more expensive and the parties to the agreement supplied 95 % of the chicken

meat in the market, the agreement clearly fell under the scope of Article 101(1) TFEU (and Dutch law as well). But the question as to whether the agreement could fall under the exemption under Article 101(3) TFEU then arose. In order to answer this question, the Authority for Consumers & Markets (ACM) carried out a study assessing the willingness of Dutch consumers to pay for certain sustainability measures.

Although this study showed that the consumers in question were to some extent willing to pay more for environmentally friendly products, the conclusion that those consumers would benefit from the agreement between the undertakings (thereby fulfilling the second condition of Article 101(3) TFEU) could only be reached when their willingness to pay actually exceeded the associated costs.

After a thorough analysis of the Chicken of Tomorrow agreements and requirements, the ACM found that the improvements offered by the initiative were limited: the chickens in question benefited from only a little more space and actually lived only a few days longer than the other standardly raised chickens. Moreover, these improvements were more expensive for consumers. The ACM therefore concluded that the agreements to remove ordinary chicken meat from supermarket shelves did not meet the criteria necessary for granting the exemption in question. In this context, I would also like to mention the opinion of the Dutch Competition Authority that competition policy plays only a modest role in achieving the world's sustainability goals, but that competition authorities could at least keep an open mind when dealing with private initiatives leading to agreements contributing to a more sustainable world.

The fundamental question that must be answered, is whether undertakings can be expected to produce more sustainably if they are allowed to cooperate in a cartel agreement rather than in a natural competitive environment. Assuming that consumers care about sustainability, it seems logical that undertakings would be interested in investing in a good image in order to attract more customers. Sustainability is a product attribute that consumers are increasingly interested in and therefore undertakings use it when competing with each other and in order to win over customers.

For example, many undertakings are now moving towards 'green' marketing in the area of eco-friendly solutions or organic products, which many customers welcome, as they have no problem paying extra for products and services that are sustainable and environmentally friendly, and, thus, bearing higher costs of undertakings caused by these solutions. On the other hand, when companies coordinate their sustainability efforts, this leads to a lower level of sustainability than in case of competition, and the benefits may not always outweigh the damage. Moreover, if undertakings coordinate their investments in sustainability, this allows them to coordinate product prices. It is therefore clear that the line between

justified, sustainable cooperation and an anticompetitive agreement is not always clearly defined and a detailed case-by-case assessment is always necessary.

In this context, it may also be mentioned that the EU State aid rules already serve as an effective tool in promoting and achieving environmental objectives. Given the long-term and capital-intensive nature of most environmental initiatives, a number of Member States have leaned towards State aid (e.g., the electric battery project, which involved an investment of € 3.2 billion).

In general, we can expect an increase in sustainable State aid in Europe in the context of the European Green Deal. This is also backed by the European Commission's plans, in particular the European Green Deal Investment Plan, which aims to mobilise at least € 1 trillion in sustainable investments over the next decade, creating a framework to facilitate private and public sector investment in sustainability. On the contrary, the provision of State aid to less environmentally friendly sectors and businesses (e.g. aviation and fossil fuel industries) is likely to be subject to stricter controls or even sustainability commitments in the future.

At the moment, it can be noted that European industrial sectors are slowly adapting to the EU's carbon reduction objectives but, in the future, there will be situations where companies will expect the European Commission and European competition authorities to take these environmental benefits into account when assessing competition cases.

Banks and other financial institutions will certainly play a key role in the transition to a green economy. They are the ones who decide which projects or companies get money to develop their business, and from this year onwards, under the new regulation, they will have to verify the environmental impact of projects and will also be obliged to report on how they consider data on these impacts. A survey of domestic banks' attitudes to climate protection, conducted last year, indicated that six of the eight largest banks in the Czech Republic are already refusing to lend money for investments in the coal industry. This trend will undoubtedly affect other areas in the future as well and even has the potential to affect the behaviour of some undertakings and competition in general.

Last year, the European Commission has already shown that it will not tolerate anticompetitive behaviour that could affect the development of sustainability by imposing fines on four German automotive companies for concluding a cartel agreement to restrict the development and introduction of emission control systems for passenger cars. According to the European Commission, these car manufacturers possessed technology used to reduce harmful emissions to a greater extent than what European Union policy stipulates. However, they had only used it to the extent required by law and had thus not applied its full potential. The European Commission has found such behaviour to be an infringement of EU competition rules, as it is essential for Europe to innovate the automotive industry

in the area of pollution, also with regard to meeting the Green Deal objective. This was the first sanction for anticompetitive technical development agreements imposed by the European Commission and we can expect that competition law will move in this direction in the future.

Competition law is therefore likely to play a certain role in the fight against climate change, whether it will be mergers, horizontal agreements or State aid. Competition authorities will thus face the challenge of balancing economic effects (higher prices for a certain group of consumers) with less quantifiable environmental effects (cleaner air for all) when assessing the impact of sustainability measures on consumer welfare. While environmental economics attempts to assign an economic value to environmental effects, the final results are not always satisfactory. Nevertheless, this area of concern will likely continue to evolve and new methodologies will be introduced in order to assign economic value to non-economic effects. However, I am still convinced that public law aspects such as environmental protection can only be applied within the framework of state-oriented provisions, and cannot be done in competition law within the framework of business-oriented provisions.

The European Commission's public consultation and the OECD round table on the relationship between sustainability and competition have shown the absence of a fundamental consensus among competition authorities at European Union level on the role of competition policy in promoting sustainability – some authorities are more or less sceptical on this issue, while others believe that competition can play a very important role.

However, my personal opinion is that we probably agree on the essentials, which is that traditional antitrust policy contributes to sustainability objectives by promoting competition, including competition in innovation, and that it does not stand in the way of the development of sustainability.

Conclusion

The irreplaceability of an effective competition in a market economy and its importance as one of the most significant public interests of any modern liberal state are undeniable.

I believe that it is an effective competition that is the main force that will make undertakings supply more sustainably produced goods – along with other desirable characteristics such as high quality of service, efficiency of production, low prices – and thus lead to a greener economy. Therefore, competition protection and environmental policy are not mutually contradictory, as sometimes misinterpreted, but there is a wide scope for finding common path in search for suitable solutions in favour of all these interests. I do believe that the current trend

of the gradually increasing number of consumers willing to pay more for more sustainable products will continue, thus encouraging undertakings to supply them in better quality and at a better price than its competitors.

It is therefore essential that the Office for the Protection of Competition is consistent in its protection, with clear priorities and objectives, as well as sufficient resources and independence. However, it should not be forgotten that, although the very fundamentals and principles of competition protection are flexible and yet well established by practice and case law, a significant change in them or the introduction of new competition law objectives could, in view of certain contemporary trends, lead to destabilisation and legal uncertainty.

At the same time, the role of the Office in the area of competition protection should not be limited to investigating anticompetitive conduct and reviewing concentrations within administrative proceedings, but it should also be active in the area of legislation and try to prevent the adoption of regulations that favour certain undertakings or create unjustified barriers to market entry. In addition to the already mentioned cooperation with other competition authorities, especially in the European Union, the Office should be active in all activities aimed at protecting competition. I can promise you that the Office under my leadership will be a transparent and open, striving to explain the principles and importance of competition to the public.

In conclusion, I would like to briefly mention that in the second half of this year, the Czech Republic will take the lead in the European Union. The Presidency of the Council of the EU represents a major challenge also for the Office and we are preparing thoroughly for it. Besides I am aware of the efforts of our French colleagues, it is possible that the Czech Presidency may be responsible for finalising both pending regulations–the Digital Markets Act and the regulation on subsidies distorting Internal market – together with representatives of the European Parliament, within the ordinary legislative procedure. However, even if the acts in question are already finalised, the Office is ready to actively participate in the Presidency, looking for other possible ways to further improve the effectiveness of competition protection. For example, towards increasing the liability of individuals for cartels or finding new effective ways of cartel detection.

How to ensure consumers get a fair share of the benefits of the digital economy?

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Abstract

This speech was delivered at the occasion of the conference "EU Antitrust: Hot Topics and Next Steps" organized by the Faculty of Law of Charles University in Prague on 24 January. This contribution provides the European consumers' perspective on the role of EU competition law and regulation in digital markets arguing that the EU normative goals embedded in the EU Treaties can provide a prism to assess emerging practices in digital markets that harm consumers beyond price outputs by restricting choice and limiting innovation. It also argues that regulation should complement competition law enforcement by targeting practices by digital companies in the position of gatekeepers as proposed in the upcoming Digital Markets Act (DMA).

Keywords: Consumers, Digitalisation, Competition Law, Consumer Protection, Digital Markets Act

JEL Classification: K10, K2, K21, K30, K40

1. Why are digital markets different?

Over the last decade, digitisation has had a profound impact on society as a whole and on the economy. While it is seen as a central driver for future prosperity and growth, it has also stimulated a shift in market dynamics and has raised societal concerns. Digital markets present several characteristics that differentiate them from more traditional sectors and industries.

First, one prominent characteristic of digital markets is the absence of monetary price for many of the products or services offered (Newman, 2015). The digital platforms that are active in the online or digital sectors are often multi-sided platforms that strive to attract customers on both sides, which leads them to offer zero-price services to consumers. This multi-sidedness combined with the absence of a monetary price – on the consumer side of the platform – generates particularly strong network effects, both direct and indirect. This situation may

help to maintain or even raise barriers to entry for rivals and ultimately limits the competitive pressure on the incumbent platform. This problem is compounded by the presence of "Big Data" which drives to a significant extent the innovation in the digital economy. Big Data has become an essential asset for big and small companies alike. The algorithms developed and constantly improved by digital platforms allows them to optimise the use of the data they collect and to identify with ever-better precision what consumers need and want. While product recommendations can help consumers and save them time and effort, overreliance on algorithms and Big Data can lead to demand estimation and price optimisation that would be detrimental to consumers. Ultimately, one can identify worrying trends where digital platforms can determine each consumer's willingness to pay and charge them the highest possible price while they remain unaware that another customer purchased the same product at a cheaper price. Here as well, one can identify worrying trends such as demand estimation and price optimisation and identification of biases to power exploitative practices.

Second, large online platforms have spent a lot of time and resources in developing a controlled ecosystem – or "walled garden" – where they are able to unilaterally set the rules and enforce them. These controlled ecosystems have come to play a significant role in the digital environment; companies rely on those ecosystems to offer their products and services, and consumers use them to access those products and services. However, because of the unilateral nature of walled gardens, consumers face asymmetric information regarding costs, benefits, and available of outside options. This is the crux of the Commission's argument in the *Android* (European Commission, 2018) and the *Google Shopping* case (European Court of Justice, 2021) where Google respectively attempted to hide rival search engines and rival online search comparison websites. Apple also tightly controls its ecosystem purportedly to the benefit of users' security and privacy, but with important negative effects on consumers and app developed as alleged by the Commission it is pending cases on music streaming services (European Commission, 2021) and Apple Pay (European Commission, 2020a). Users are often locked into one platform or provider or are subject to its control and possible use of manipulative techniques. Amazon has implemented a two-fold strategy based on "dark patterns" to entice consumers to become Amazon Prime members and to dissuade them from cancelling their Prime membership (Forbrukerrådet, 2020). These manipulatives techniques are the subject of a complaint launched by the Norwegian Consumer Council last year (Forbrukerrådet, 2021). The controller of such ecosystem might spend time and resources to ensure continued engagement on the part of the consumers since such engagement generates the data that constitutes profit-making activities of the platform. In addition, the controller may seek to combine together the data

generated by or collected through each of the products or services it provides inside its ecosystem – this is what Meta is trying to achieve by pooling together data from Facebook, Instagram, and WhatsApp – or even combing its own data with data from third parties.

Third, one can also identify in digital markets the increasing permeability between markets and society. This is because the capacity to monitor, target and manipulate users can impact important societal debates and democratic processes. Online tracking and behavioural manipulation can be used to distort the market for ideas, so as to influence citizens' attitudes towards elections and public debates beyond the remit of economic activities. As highlighted in 2019 by Margrethe Vestager, the Executive Vice-President of the European Commission, "it's important to take a broad view of how the power of platforms is affecting the basic values of our society – values like privacy, freedom, fairness. And if it turns out that those values are under threat, then we need to be ready to act" (Vestager, 2019). The dynamics of digital markets and the rise of tech giants are posing a risk to our society and democracy. The business models of these companies are affecting the way we behave not only as consumers, but also as citizens. One example is the proliferation of "fake new" on social media. While *prima facie* it does not appear to be a competition problem *strico sensu*, a more careful analysis reveals a different conclusion. Over the past decade, the market of ideas and information was fundamentally disrupted by the new business model implemented by these large digital platforms who make profits when consumers engage with content that is popular and attractive but misleading – sometimes referred to as "clickbait" – or outright fake. These business practices may not necessarily be a sign of malice or of influence from foreign political actors; they can generally be explained by the platform's pursuit of profits and disregard for negative externalities and impacts on society as a whole.

Multi-sided platforms, zero-price markets, network effects, controlled ecosystems, dark patterns, profit maximisation, all these features have together created a digital environment which may appear on the surface as thriving and dynamic, but below is characterised by increased concentration and increased market power. In this environment, the few major players can dictate the nature and pace of innovation, entry into the market, the expansion of services and the interface with consumers. Many digital or online markets have tipped in favour of the of the dominant platforms because of those characteristics.

2. When to intervene?

The market characteristics described above are in constant flux and therefore create a familiar dilemma for competition authorities within and without Europe. Should one trust and hope that market forces alone are sufficient to introduce

disruption and ensure dynamism, while ultimately safeguarding consumer interest; or should one take measured action, with the aim of protecting consumer welfare and well-being, and ensure the competitiveness of markets as well as the mitigation of negative externalities?

BEUC's report on competition in the digital era (BEUC, 2019) was a contribution to this important debate where we called for an informed evolution of enforcement priorities, enforcement capacity and substantive theories of harm. We stressed that it should be a careful evolution that respects the need to maintain investment and innovation incentives and allows the market to flourish. Nonetheless, it should be an evolution that acknowledges changing market realities, the need to move beyond narrow price-centric analysis, and the necessity to rapidly adapt. In the context of that evolution, competition authorities should clearly see beyond the smoke screens and delaying tactics deployed by the large digital platforms and should appreciate that in the dynamic environment in which those platforms operate, the failure to act in a timely manner could have essentially the same effect as not acting at all.

Therefore, we believe that the consumer welfare and wellbeing benchmarks, as well as other normative goals and values, provide a flexible instrument which can, first, address both price and non-price welfare effects on multiple and diverse groups of customers; second, target, in combination with data protection and consumer law, practices which exploit consumers through profiling, discrimination, use of asymmetric information and asymmetric bargaining powers; third, address attempts to distort the competitive landscape; and finally, to tackle exclusionary practices and target the intentional introduction of friction to distort competition.

When we consider the concept of consumer welfare, it is crucial to go beyond the mere aspect of price, consumers also benefit from competitive markets on the basis of choice, product we need to go beyond price: consumers benefit from competitive markets on the basis of choice, quality and innovation. All these criteria will become more important than ever in the digital economy. Nonetheless, when we start to consider and reflect on the scope of EU competition law, it is necessary to bear in mind that the latter is rooted into *sui generis* nature of the EU's political, social, and economic agenda. The legal regime governing the Union includes specific references to the Union's aims to promote, among other things, "the well-being of its peoples" and to ensure "an open market economy with free competition". These aims include "a fair playing field" in which consumers are protected (European Union, 2012). As then Commission President Juncker said in its 2016 State of the Union address, "This is the social side of competition law. And this is what Europe stands for" (Juncker, 2016). The diverse objectives of European competition law embody certain trade-offs echoing the different values of the union.

3. What approach for more effective intervention?

Governments and competition authorities alike may find it difficult to address these challenges. However gigantic they are, the fines imposed on companies such as Facebook or Google are clearly insufficient to rein those large digital behemoths. Over the years, these platforms have come to view antitrust fines as simply the cost of doing business and do not seem to be deterred by the prospect of a single-digit billion euro fine. In the meantime, these companies aim to continually expand and leverage their dominance from one market to another either through anti-competitive conduct – as in the Commission's *Android* and *Google Shopping* cases – or through mergers – as was the case with Google's acquisition of the wearable device maker Fitbit in 2020 (European Commission, 2020b). The underlying rationale for those anti-competitive practices or for the merger spree is both evident and logical: tech giants are in an inextricable race for consumers' data and their attention – both are a finite resource and a precious asset in the digital economy – and to dominate the next technological wave. Nonetheless, it is important but also necessary to set speed limits and define the rules in which this race should takes place. In that context, one should refrain from viewing government and competition authorities' intervention as a binary option where society either does nothing and let the market regulate itself, or to intervene to such an extent that fair and undistorted competition is hampered and innovation is stifled. Intervention should be conceived as a spectrum between those two extremes and should be required to steer technological innovation and progress towards what objectives that benefit consumers and society as whole at a European level.

As aforementioned, our proposal is not for a profound revolution of competition but rather for an evolution where there is ample room to strengthen and optimise enforcement of the current rules in digital markets. In our report (BEUC, 2019), the three main recommendations we made to competition authorities were that, first, authorities should not be afraid of experimenting and testing the boundaries of competition law. Only by doing this will they be able to clarify the scope of intervention of competition law, which is a legal discipline still in constant evolution. Second, authorities should not refrain from using the full extent of their powers to obtain the necessary behavioural or structural changes to restore competition in the market. Finally, while not discarding the fundamental of economics, it might be useful for one second to forget the "Econ 101 textbook" and think outside the box where competition law is just one of the many pieces in a legal jigsaw puzzle. Competition is merely one part of a system in which different legal, social and economic disciplines can complement each other.

One of the previous ancillary disciplines that is slowing moving to the centre stage in competition law enforcement is behavioural economics. We consider

that many of the insights derived from behavioural sciences will shed light on how certain practices can harm consumers and markets alike. As confirmed in the judgement of the General Court in the Google Shopping case (European Court of Justice, 2021), the way consumers behave matters. It is crucial that we consider and assess the implications for competition of how companies are manipulating consumers and taking advantage of their human cognitive biases in order to gain an anti-competitive advantage over their rivals.

We have so far praised competition law, but one should not forget that the latter cannot solve all and every societal problem by itself. First, it is not the role of competition authorities to take decisions that have a profound societal impact or that belong to democratically elected institutions. Antitrust enforcement is a case-specific tool, and it should remain like that way. Cases and decisions create precedents that can guide firms about their future conduct, but it should become a substitute for fully-fledged legislation with its *erga omnes* effect. Second, legislation should be considered to address specific behaviours or practices that society as a whole considers undesirable. The General Data Protection Regulation (GDPR) (European Parliament and Council of the European Union, 2016) illustrate this policy choice made by the elected representatives to sacrifice some efficiencies in favour of the protection of personal data and privacy as fundamental rights. Such important policy decision should be left to the legislature. Legislation may also have strong pro-competitive effects; such was the case with the Payment Services Directive 2 which promoted open banking (European Parliament and Council of the European Union, 2015), the Type Approval Regulation (European Parliament and Council of the European Union, 2018) on access to in-vehicle data for repair and maintenance, or the new pharmaceutical rules on stockpiling to allow earlier entry of generics in the market (European Parliament and Council of the European Union, 2019).

4. The (complementary) role of regulation

Against this background, a pertinent question is how to legislate or adapt existing legislation and enforce the law while creating predictability and legal certainty for companies while encouraging markets to generate positive externalities.

Europe is a frontrunner in thinking about the regulatory framework that is needed to tackle complex societal challenges. The GDPR is often cited as an example but there have been other extremely important developments in the fields of competition, consumer, and internal market law. Nonetheless, with the benefit of hindsight, one can identify two mistakes when considering regulation in the digital era. The first error was to have considered these areas of law in isolation, both at the level of law-making and enforcement. For example, due to the distribution of competences between the different DGs in the Commission

and the various Council and Parliament configurations, it has been difficult to ensure consistency between the different legal instruments to the point that the same practice or behaviour can be addressed by different laws. This raises the risk of competing legal regimes and amplifies discretionary enforcement, often leading to late enforcement or none at all. This problem may be exacerbated by the different priorities and appetites for intervention among the EU Member States.

The second mistake was to regulate the online world using the same legislative techniques we employed for the offline world. In debates about digital and online laws, one can often hear the adage "What is illegal offline, should be illegal online". In other words, what is allowed in the offline world should also be allowed one; however, this premise ignores the very characteristics that are intrinsic to the online and digital environments – such as significant network effects leading to monopolies – and which require laws to be tailored for such specificities. Those structural problems are then often compounded by behaviour which further limits competition and consumer power and choice.

In that context, the upcoming Digital Markets Act (DMA) (European Commission, 2020c) is a very promising, and much needed tool to regulate harmful behaviours and practices in digital markets because it provides for tailored solutions through asymmetrical legislation. In this regard, the DMA complements competition law enforcement by providing targeted solutions to specific issues raised by gatekeeper platforms regardless of whether they are dominant under the traditional competition law. As of February 2022, the European Parliament and the Council have started negotiations to find a compromise on the Commission's proposal. While the Commission's initial proposal constituted an already very good first draft, it is essential that the trilogues are used to improve both substantive and procedural parts of the DMA proposal. First, consumers (i.e. end users) should be given as much importance as business users in the DMA, and the interests of both should be safeguarded. Second, the DMA should explicitly prohibit gatekeepers from circumventing their obligations through the use of 'dark patterns' and other behavioural techniques and interface design to influence consumers' choices. Third, consumers – through consumer organisations such as BEUC and its members – should have the possibility to be heard in decision-making processes and market investigations under the DMA Finally, the DMA must foresee effective enforcement measures from the first infringement by a gatekeeper to ensure swift compliance by gatekeepers with their obligations.

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COMPETITION LAW AND DIGITAL MARKETS

Google, Antitrust, and Digital Market Act: Is There New Hope for the AdTech Market?

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Abstract

Google is one of the biggest players in the European Union's, even the world's, market regarding the search engines and other related digital services. As such, it is used by many entrepreneurs to offer their products and services in a targeted manner to the consumers, for online advertisement is regarded as one of the most powerful channels concerning e-commerce. Nonetheless, due to its monopolized status, Google tends to breach the EU's competition regulation on various levels. The European Commission had on different occasions concluded that Google had used its monopoly for its own benefits and against the competition regulation.

Google's reluctant approach towards the Union's antitrust regulation is one of the reasons why many demand clear and complex digital market regulation. The European Commission listened to such requests and submitted a proposal for the digital markets act.

The DMA is supposed to have a large effect on the significant market competitors aiming to regulate behaviors such as Google's. The potential of the DMA to combat the antitrust wrongdoing of Google has yet to be verified, however the possible impact can already be analyzed.

Keywords: ad tech, antitrust, digital market act, Google

JEL Classification: K210

1. Introduction

Regulation of the Digital Single Market is one of the challenges that comes alongside with the unstoppable development of the modern technologies. The aim of the regulation is (or at least should be) to build a "healthier and more competitive" Digital Single Market (Reyna, 2017, pp. 204–207). This especially means promoting regulation that encourages innovations and consumers' interests, such as free choice (Reyna, 2017, pp. 204–207). In order to fulfill such goals, it is especially crucial to address "gatekeepers", i.e., private companies through which

(or better, thanks to which) "information reaches internet users" in such a way that these companies control not only how the information flows, but, more importantly, can switch this flow on and off (Daly, 2017, p. 190). Ultimately, the gatekeepers form not only the unique gate but also a possible barrier between various entrepreneurs and the target costumer (Geradin [online], 2021.

The necessity to regulate the gatekeepers with *ex ante* regulation without further depending only on *ex post* competition regulation in the Articles 101 and 102 of the Treaty on the Functioning of the European Union is also well known to the Commission. Hence, on 15 December 2020, the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (the Digital Markets Act) (DMA) was submitted by the Commission (European Commission [online], 2020a). As is reasoned in the explanatory memorandum to the proposal, The Commission is highly concerned with the power and overall dominance of the gatekeepers in a way that they have "[M]ajor impact on, have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behavior vis- à-vis these business users." (European Commission [online], 2020a).

2. Problem Formulation and Methodology

In terms of gatekeepers, the main role belongs to, not surprisingly, Amazon, Apple, Facebook, Microsoft, and Google, and other big tech companies that are necessary for other entrepreneurs in order to promote and distribute their goods and services (Caiazzo, 2019, pp. 181-186). Google is currently holding 80–90 % market share on the general search market (Reyna, 2017, p. 206) and its activity establishes "the existence of barriers to expansion and entry, the infrequency of user multi-homing[,] and the existence of brand effects and the lack of countervailing buyer power", thus constituting a dominant position on such a market (European Commission [online], 2017b). This position allows Google to leverage into other markets related to the general search market, such as for example the comparison-shopping market (Reyna, 2017, p. 206). This ultimately leads to Google breaching EU competition laws on various occasions as is apparent from the proceedings that the European Commission is currently leading or has led against Google (Ellia, 2017, p. 470). On 2010, the Commission conducted an investigation due to Google misusing its shopping results search engine, Google Shopping, and had consequently decided that Google breached EU competition law, fining it € 2.42 billion as the largest fine in the decision history of the Commission (Ellia, 2017, p. 493). This Commission's decision was recently upheld by the General Court in its judgement T-612/17 from 10 November 2021 (and is with its 706 points notably long) (General Court

[online], 2021). In 2019, Google was fined €1.49 billion for "abusive practices in online advertising" in yet another investigation led by the Commission in this particular case due to the anticompetitive conduct on the market for online search advertising (European Commission [online], 2019a). As of 22 June 2021, the Commission has begun its most recent investigation against Google concerning the anticompetitive conduct of Google in the online advertising market under both the Article 101 and 102 of the Treaty on the Functioning of the European Union (European Commission [online], 2021).

All the abovementioned cases are connected by their affiliation to the ad tech market and as such, necessarily have similar features. Each of the investigations mentioned above are premised on a breach of (either exclusively or along with another Article of Treaty on the Functioning of the European Union) Article 102 of the Treaty on the Function of the European Union, which is ultimately the factual core of the regulation of the competition within the European Union.

This paper aims to answer the question, whether the submitted proposal of DMA is capable of efficient *ex ante* regulation of big tech companies, with special focus to Google. As for the methodology, the authors analyze the aforementioned investigations and if available, conclusions of such investigations and try to answer the question, whether the challenged behavior can be regulated in the more casuistic manner contained in the DMA and partially detached from the general anticompetitive (and fairly abstract and not exhaustive (Daly, 2017, p. 189) Article 102 of the Treaty on the Functioning of the European Union.

3.;Google and anticompetitive investigations

3.1 General Search

In 2010, the Commission responded to the request of many search services providers and opened an official in-depth investigation of possible anticompetitive conduct by Google. This conduct consisted in Google prioritizing their own shopping search results on the top of the general search and indexing the websites of other shopping search services (comparison search services) on the lower position, even on further pages of the search results, in a way that this could harm such competition (European Commission [online], 2010).

It is important to note that the investigation was concerning primarily Google's horizontal search services (Ellia, 2017, p. 470) (Horizontal search services are search service that provides answers (indexes relevant websites) on more general rather than specific queries. Vertical search services, on the other hand, are focused on more specific queries and provide more detailed information regarding the goods and services in the indexation results itself (e.g., price comparison, where to buy, costumer reviews etc.) – Google Search – and therefore the relevant

market was defined as the general search market (European Commission [online], 2017b). However, while indexing the results on Google Search, on the top of the indexation is the so called "OneBox" that lists the results of the indexations from the vertical search service – Google Shopping. At the same time, other vertical search service providers were placed below the results from OneBox and moreover their indexation on further search results seemed purposeful in order to disadvantage them on the comparison search market (Ellia, 2017, p. 472). By doing this Google was supposed to be using its dominant position in general search market in an anticompetitive way by leveraging the comparison-shopping market (Reyna, 2017, p. 250).

After seven long years of investigations, two European Commission's Statement of Objections (2015, 2016) and several unsuccessful attempts to come to an agreement between EC and Google, on 27 June 2017 EC adopted its final decision on this matter (European Commission [online], 2017a). Google was not successful with its defense based on the claim that the aforementioned behavior is competition on the merits (According to the report of Organization for Economic Co-Operation and Development, the competition on the merits means that "dominant enterprise" can lawfully engage in conduct that falls within the are circumscribed by that phrase, even if the consequence of that conduct is that rivals are forced to exit the market, or their entry or expansion is discouraged (OECD, 2006). More on the competition on the merits and when its implications also CJEU Decision from 27 March 2012, C-209/10 *Post Danmark A/S v. Konkurrenceradet, with intervener Forbuger-Kontakt a-s*, para. 25 and further.), neither with the attempt to point out that Amazon and eBay should be considered as competitors operating within the comparison-shopping market (Ellia, 2017, p. 472). The most significant difference is, according to Commission that the so-called merchant platforms such as eBay and Amazon do not offer simple comparison of prices and various products without the intention to buy such products exclusively on their website. By the means of this definition, the merchant platforms are most likely eligible to be indexed in the search results unlike the rival comparison shopping services.

The dominance of Google on the general search market was reasoned by the Commission by pointing out that Google has a 90 % share in each of the countries in EEA and thus creating barrier for other competitors to entry this market. This barrier exists, according to the Commission, simply because "the more consumers use a search engine, the more attractive it becomes to advertisers" (European Commission [online], 2017a, point 159).

Because of Google's dominant position on the general search market, it has a "special responsibility" (European Commission [online], 2017a, point 331). However, Google has abused its dominance on the general search market and therefore breached the special responsibility it has by leveraging into other

market consequently restricting competition on this other market (which is, of course, comparison shopping market) (European Commission [online], 2017a, point 334). As indicated above, Google restricted other competitors by two interconnected means:

Indexation of Google Search prioritize results of Google Shopping on the very top of the indexed results in OneBox;

Other comparison-shopping services are substantially demoted in the indexation results in a way that even Google's biggest competitor on comparison shopping market appears on average on page four of the results (Antitrust European Commission [online], 2017).

The Commission ultimately closed its investigation with the conclusion that the described anticompetitive conduct of Google had harmed both other comparison-shopping services by disadvantaging them on the relevant market and also the consumers by "depriving them of genuine choice and innovation" (Antitrust European Commission [online], 2017).

However, Google refused to accept the findings of the Commission's investigation and therefore filed an action against Commission on 13 October 2017. The General court, however, upheld the decision of the Commission by its decision T-612/17 from 10 November 2021 (General Court, 2021).

One of the General Court's foremost reasons was that there is a difference between the "refusal to supply" and "difference in treatment". According to General Court, the "refusal to supply" assumes unilateral active action from the competitors consisting of *explicit* refusal to gain access upon the request of the other competitor (Katsifis [online], 2021) the General Court argued that Google's conduct consisted mainly of internal discrimination on the general search service by leveraging other markets thanks to Google's dominant position on the general search market (General Court, 2021, para. 237). Moreover, the current case is based on the active conduct of Google preferencing its own comparison-shopping search service and thus establishing the difference in treatment (General Court, 2021, paras. 248-249). Therefore, the General Court concluded that the *Bronner* criteria (These criteria basically sets criteria on when is "self-preferencing" prohibited. The criteria in *Bronner* are rather strict) cannot be applied in the current case (General Court, 2021, paras. 248-249), leaving Google with little to no hope for any positive outcome. This conclusion of the General Court however means that the explicit refusal of access by the dominant competitor to other competitors can be more convenient than actually let them access the facilities but on less favorable terms (Katsifis [online], 2021).

As for the anticompetitive conduct itself, the General Court stated that the role of the Commission within the investigation is to prove that the investigated conduct is simple "*capable* of restricting competition" (General Court, 2021,

para. 439). Moreover, the Commission is not required to "to identify actual exclusionary effects" (General Court, 2021, para. 442). Finally, the Commission is not even obliged to "demonstrate that possible consequences of the elimination or restriction of competition actually manifested themselves" (General Court, 2021, para. 443), it suffices that the investigated conduct "is highly likely to have such consequences" (Ibidem).

Ultimately, the General Court concludes that by preferring its own comparison-shopping services within the results in general search, Google actually infringed Article 102 TFEU but only on the market for specialized search services. However, the General Court disagreed with the Commission on the findings that the infringement of Article 102 took place as well on the general search market (General Court, 2021, para. 703) .

3.2 Google AdSense

Following the case in 2010, The European Commission has decided to investigate Google's alleged antitrust behaviour once again, this time tackling unfair practices in online advertising (European Commission [online], 2019c). Google was accused of maintaining its dominant market position through imposing anti-competitive restrictions on third party websites. The infringement lasted for over 10 years, denying companies the possibility of fair market competition (European Commission [online], 2019a, paras. 2–5).

In the years 2006-2016, Google held the most power (above 70 %) in online search advertising intermediation market (Ibidem, para. 719), which constituted Google's dominant position alongside with the substantial investments necessary for entering the market (Ibidem, paras. 150–151), overwhelming effects of the strong network (such as Google's) (Ibidem, para 203) (by network effects it is meant that Google had strong position in most of the members states thus creating interlinked and cooperative network which is very challenging to compete with.), and the inability of the advertisers to compete with advertising intermediary giants such as Google – i.e., "the lack of countervailing buyer power" (Ibidem, para 273).

For the first time in 2006, Google included contract exclusivity clauses, requiring the publishers "to source all or most of their advertising requirements from Google" (Ibidem, para. 4). Google gradually added clauses such as "Premium-placement clauses Minimum Google Ads Clause" in 2009 and later the "Authorising Equivalent Ads Clause" (European Commission [online], 2019b). Premium placement clauses limited Google competitors' search adverts from the most visible and clicked spots in search result pages, hence demanding that publishers reserve the most profitable space on their search result pages for Google's adverts. Additionally, another clause required publishers to seek Google's written approval before making changes in the display of a rival

platform's adverts. This enabled Google to control the attractivity and reach of their rivals (European Commission [online], 2019b).

By the Exclusivity clause, Google consolidate its position while simultaneously preventing other competitors to access the market by prohibiting the clients to list other search ads than Google's. This, according to the Commission has led to, *inter alia*, to deterring possible innovations in the advertising technologies and, of course, harmed the consumers in the first place (European Commission [online], 2019a).

By the Premium Placement and Minimum Google Ads Clause, Google prevented competitors from using "the most prominent and therefore most profitable space on search results" (European Commission [online], 2019a) with the similar effect as already mentioned before. Google's clients had no other option than to use AdSearch for the most profitable positions in search results and in case they wanted to use only a limited number of search ads, all of them needed to be sourced by Google.

Finally, by Authorising Equivalent Ads Clause, clients of Google were obliged to ask Google for direct consent in case they actually wanted to implement any change whatsoever to the "display of competing search ads" (Ibidem, para. 15), having it the same effect as mentioned above (Ibidem, para. 25).

Ultimately, in neither of the above listed clauses, Google was not able to prove that it was "objectively justified" nor "that the exclusionary effect was outweigh by advantages in terms of efficiency gains that also benefit consumers" (Ibidem, paras. 17, 21, 26). As a result, Google was fined € 1.49 billion for infringement of Article 102 TFEU and Article 54 of the EEA Agreement. Google has consequently appealed against the Commission's decision which is now pending before the General Court (Murphy [online], 2019).

3.3 Google advertising

More recently, on 22 June 2021, the Commission announced a new investigation against Google's alleged anticompetitive conduct. Google might have violated the EU competition rules on the ad tech market by giving unallowed advantage to its own advertising technology which could consequently lead to the unfair discrimination of the advertising technology services (the ones who provide the technology used for advertising), advertisers (the ones whose intention is to advertise their goods and services), and publishers (entrepreneurs who are providing their domain / website for the advertisement using technologies of the advertising technology services) (European Commission [online], 2021).

Google's revenues are highly dependent on the so called "surveillance capitalism economy model" meaning that although the services provided by Google might not have monetary value for the users of the internet, Google earns money by

collecting and analyzing data about the internet users and either uses it for its own personalized advertising or sells the data to third parties for the similar purposes (Daly, 2017, p. 189). The advertising is also one of the reasons, why many internet services can be provided free – the revenues are dependent on the advertisement (European Commission [online], 2021). The Commission opened the investigation in this case because Google might have restricted access to collected data from other competitors and used the data only favoring its own advertisement technology services. Furthermore, Google might have restricted other competitors by making it mandatory for the advertisers to use technology provided solely by Google. Explicitly excluding the advertisement technologies provided by other competitors on various websites. Google also showed various other allegedly anticompetitive actions such as the announcement of a plan prohibiting cookies of third parties on Chrome (Google's web service).

The report on the opening of the investigation states that in case of confirming the afore described conduct, Google would breach Article 101 and Article 102 of the Treaty on the Functioning of the European Union which would include the *Google Search / Google Shopping* and *AdSense* case, yet another major *ex post* regulative attempt of the Commission to tackle the question what is allowed innovative conduct of big tech giant and what is harmful for the competition. Maybe it is time for some rather *ex ante* regulation to take place.

3.4 Is there anything in common?

All of three cases above concern operations of Google on so called (as will be explained below) core platform services. Google's role in the cases "gatekeeping" the access to the relevant market, to decide the faith of the portal between the end costumers and business customers. *Google Search* and *Google advertising* seem to have the anticompetitive approach to innovative technologies in common. In the first case, Google prioritized its shopping comparison services before the competition by listing the results within the general search results in so called "One Box", which is a rather innovative technology for the search services. However, the leveraging practice and abuse of the dominance of Google on the general search market were not compatible with the internal market. There is still little known about the third case, but it seems that Google, once again, used an innovative technology for its own advantage while at the same time harming both the other competition and end costumers.

In the *AdSense* case, Google abused its dominance in the market to force both the advertisers and publishers, by the contractual clauses, to strengthen its position by giving it anticompetitive advantage which consequently led to distortion of the relevant market.

The investigation of all three cases was (and in the *Google advertising* case still is) very challenging. It is the very nature of the digital market that in connection with the competition investigation proceedings leads to both very long and difficult scrutiny (Geradin [online], 2021). For the purpose of the competition investigation it is necessary to define 1) relevant market, which is two steps process assessing first the product market and second the geographical market (Sylwan, 2021, p. 14); 2) to determine the dominance of the investigated undertaking on the previously defined relevant market; 3) to make a case-by-case analysis whether the investigated conduct of the dominant undertaking has or is able to have negative effect on the competition; 4) to assess the consumer welfare test (Schweitzer, 2021, p. 6). The DMA aims to change that approach towards digital market, excluding explicitly the effect-based approach analyzed ad hock for each of the cases and implicitly the consumer welfare test (Schweitzer, 2021, p. 6). The DMA thus reacts on the challenges laid upon the anticompetitive investigation related to gatekeepers and core services in a way that it rather complements than replace the competition regulation (European Commission [online], 2020a, Recital 10).

4. General Markets Act

4.1 Introduction to revolutionary (?) regulation

As was mentioned at the very beginning of this paper, large platforms act as gatekeepers, creating a dependency on their services and access of business users making the gatekeepers the masters of the internet (which is, of course, the very definition of gatekeepers) (Geradin [online], 2022). The position of a gatekeeper might logically lead to unfair and anticompetitive behavior and a threat of negative impact on the contestability of the digital markets. In the end, gatekeeping leads to inefficiency in the market, which is typically demonstrated by "higher prices, lower quality, as well as less choice and innovation to the detriment of European customers" (European Commission [online], 2020a, p. 1). To prevent such a harmful behavior to both the competitors of gatekeepers as well as to the consumers, the Commission represented the DMA. The goal of the DMA is to *ex ante* regulate gatekeepers' influence (Anderson, Marinielo [online], 2021) and consequently to let the full potential of smaller platforms thrive in the era of big tech giants (Sylwan, 2021, p. 67).

The DMA proposal focuses on the regulation of "core platform services" (European Commission [online], 2020a, Article 1, Section 2). Core platform services being defined in the proposal in Article 2 Section 2, which includes exhausting list of what is meant by the "core platform services". Those include "(i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy),

(ii) online search engines, (iii) social networking, (iv) video sharing platform services, (v) number- independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services, and (viii) advertising services, including advertising networks, advertising exchanges, and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above." Core platform services are those, where the problems are the most noticeable and where a limited number of large platforms act as gatekeepers in between business users and end customers (Ibidem, Recital 17). However, not every provider of the core platform services is considered a gatekeeper and vice versa. The DMA contains both a quantitative and qualitative criteria the undertaking must met to be considered a gatekeeper.

The qualitative criteria are: 1) the operation of the undertaking has significant impact over the internal market, 2) it operates a core platform service that is an important gateway to the end customer, 3) the undertaking "enjoys an entrenched and durable position in its operations" (or it is foreseeable to have one in near future) (Ibidem, Article 3(1)). The quantitative criteria consider turnover, monthly active end users, and / or active business users, and finally, if the latter criteria were met in the each of the last three financial years (Ibidem, Article 3, Section 2). If the undertaking meets all the quantitative criteria, it informs the Commission which afterwards designates the undertaking as a gatekeeper (Ibidem, Article 3 §§ 3 and 4). If a company is identified as a gatekeeper it is obliged to follow the rules set further by the DMA, especially in Articles 5 through 13 of the DMA. The question is, though, whether the DMA sets sufficient rules to prevent Google from the conduct described above and therefore could potentially set borderlines that will help Google and other gatekeepers dominating other core services (Geradin [online], 2022) to modify their services to potentially avoid ether a competition investigation or investigation pursuant to the DMA.

4.2 Effect on Google

The regulation introduces clear rules that can be effectively pursued and, in case of breach, enforced by the regulatory bodies (Anderson, Marinielo [online], 2021). The most important obligations of the gatekeepers with regard to the functioning of the market are contained in the Articles 5 and 6 of the DMA. With regard to the *Google Shopping* case, the DMA regulates and prohibits such behavior of the gatekeeper that treats "(…) more favorably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of [a] third party and apply fair and non-discriminatory conditions to such ranking" ((European Commission [online], 2020a, Article 6 § 1(d).

The DMA also requires the gatekeepers to provide any third party online search engine providers with "access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper (…)" (European Commission [online], 2020a, Article 6 § 1(d). This particularly means that Google would be prohibited from prioritizing its own shopping comparison services before other providers without any assessment whether such behavior actually distorts the competition or whether such conduct could be hypothetically assessed as e.g., competition on merits. By the same token, Google is obliged to, upon their request, provide the other search engine providers, meaning competitors of Google, with relevant information on how the end consumers interact with their services, hence with the information that is necessary for the service providers to efficiently innovate their search engines.

As for the AdSense case, the DMA regulates all of the types of behavior that the Commission has found to be against the competition. First of all, the DMA requires the gatekeepers to "allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper" (European Commission [online], 2020a, Article 5 § 1(b), or the so called "Most Favoured Nation clause" (Sylwan, 2021, p. 58). Furthermore, Google shall "provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and each of the relevant advertising services provided by the gatekeeper" (European Commission [online], 2020a). These obligations basically exclude any implementation whatsoever of clauses with a similar or identical nature as already described in the Exclusivity Clause and Premium Placement and Minimum Google Ads Clause. Furthermore, according to the DMA, Google shall allow the business users to use other services without prior consent of Google (European Commission [online], 2020a, Article 6 § 1(c), (e), and (g).).

As for the *Google advertising* case, little is still known to assess whether the DMA effectively prevents such a behaviour, however, it can be certainly said that the DMA contains various obligations that are focused on the advertising market, such as already mentioned prohibition of prioritization (European Commission [online], 2020a, Article 5(b), (c), (e), and (f); Article 6 § 1(d)), mandatory information provision upon the request of other competitors (European Commission [online], 2020a, Article 6 § 1(g)), and obligation of effective portability of data generated through the activity of a business user of end user (European Commission [online], 2020a, Article 6(h)). All the above

mentions obligations and prohibitions are likely to have a significant impact on any advertising services provided by Google.

5. Conclusion

As is quite clear, the Commission's investigation on Google's (in some cases still) alleged anticompetitive behaviour on the digital market is far from being simple. The dynamic and self-evolving nature of competition law is almost uncontainable, the digital market is not particularly suitable for the scrutiny that always follows an alleged breach of anticompetitive rules (Sylwan, 2021, p. 52). In the *Google Shopping* case, the final decision (or is it) was delivered more than a decade (sic!) after the initiation of the investigation. Even though the competition regulation cannot be *per se* considered completely ineffective, it is obvious that another mechanism is necessary in order to prevent harmful behaviour of ad tech giants, or from another point of view it is necessary to define borderlines in which the big tech undertakings can implement their innovative products without breaching the rules regulating the digital market.

As is analysed above, the DMA contains *ex ante* regulation that impacts on the behaviour of Google that was already investigated and declared to be anticompetitive or is currently under scrutiny by Commission. Under the DMA, Google and other gatekeepers will have basic guidelines in order to modify their mechanisms and business practices.

Therefore, the DMA might have potential to both ease the rigid anticompetitive scrutiny by being the type regulation that evolves alongside the digital market (Andreson; Mariniello [online], 2021) and to also be the preventive (*ex ante*) regulation that is shall be considered as framework for the provision of services by big tech undertakings.

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Digital Markets Act: A Fair Framework for the Online World?

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Abstract

The proposed Digital Markets Act is an instrument complementing established EU and national competition laws. Its objective is to ensure a fair and competitive digital economy in the EU by regulating 'gatekeepers' (large online platforms under certain criteria) more flexibly and timely. This article analyses whether the current approach creates an appropriate instrument for achieving its objective. First, it deals with the question whether there is a need for a separate regulation. Second, the notion of a gatekeeper. The concept of 'gatekeepers' seems to be tailored to particular subjects that may not necessarily be dominant undertakings. This approach may help to tackle selected issues that current large online platforms face, but limiting some undertakings, regardless of their dominant position, may also distort competitive forces. Third, it deals with *ex ante* rules (in comparison to current *ex post* EU and national competition rules). *Ex ante* rules may, on the one hand, minimise the detrimental effects of anticompetitive practices. However, on the other hand, they may impose unnecessary limits where these practices would not cause future economic harm. Fourth, it deals with the limited role of national competition authorities in enforcing the Digital Markets Act. It is essential for the EU to have a coherent approach to achieve the enforcement of these rules effectively, but it seems unwise to completely omit national competition authorities, who have created successful decision-making practices in this area in recent years. Finally, its provisions dealing with access to data and its relationship with various regulations dealing with data. The lack of clarity may render these provisions ineffective.

Keywords: digital markets act, EU competition law, gatekeeper platforms, national competition authorities, digital innovation

JEL Classification: K210

1. Introduction

Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereinafter: 'proposed Digital Markets Act') as defined in the Explanatory Memorandum, aims to complement existing EU and national competition regulations. In essence, it is a sector-specific competition regulation (Petit N., 2021).

Its objective is to ensure a fair and competitive digital economy in the EU by regulating 'gatekeepers'. A gatekeeper is a provider of core platform services that has a significant impact on the internal market, operate a core platform service that serves as an important gateway for business users to reach end-users and enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future and meets the stated thresholds [article 3 (1, 2) of the proposed Digital Markets Act]. Even when the thresholds are not met, European Commission (hereinafter: 'Commission') may identify a subject as a gatekeeper [article 3 (6) of the proposed Digital Markets Act].

Gatekeepers are regulated to restrict the negative effects that their actions have on the digital sector. According to the Explanatory Memorandum of the proposed Digital Markets Act, gatekeepers "have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned". When a gatekeeper platform sets conditions with almost no competition, the lack of contestability and unfair practices, it may lead to a less efficient digital sector. Therefore, it may result in higher prices, lower quality, and fewer customer choices or inappropriate practices that involve unfair uses of customers' data and locking customers to a particular service with no options to switch to another (Digital Markets Act, Explanatory Memorandum).

The Digital Market Act aims to tackle these issues by setting complex rules applicable universally in the whole EU digital market. However, these proposed rules are "in an experimental stage – just as digital markets themselves" (Picht, P. G., 2021). The wording of the proposed Digital Market Act is unclear, along with its relationship with other regulations.

This paper deals with the following issues that the proposed Digital Markets Act face: the need for a separate regulation, the notion of a gatekeeper and its possible effect on competition, *ex ante* regulation and its comparison with the Electronic Communications Code, limited role of national competition authorities and provisions dealing with access to data and their relationship with various regulations.

2. Why a separate regulation?

The proposed Digital Markets Act is adopted to deal with issues that the current rules (mostly in the area of competition law) are unable to face properly. The current regulation's solutions take too much time or are not sufficient to solve complex issues.

For example, when the national/EU authorities intend to intervene in the competition law, they need to overcome several constraints. Under article 101 TFEU, there is a condition of explicit coordination, and under Article 102, of a dominant position. Moreover, EU competition law only prohibits the abuse of a dominant position, not dominance as such (*Europemballage Corporation and Continental Can Company v. Commission*, 6/72). The fact that an undertaking controls the business area does not create a reason for the intervention of the competition authorities, even when its actions seem to cause several issues (as already mentioned). Even when the conditions of explicit coordination or abuse of a dominant position are met, it may take years to achieve an enforceable decision since most undertakings seek the annulment of the decisions of the Commission or national competition authorities (Ibáñez Colomo, P., 2021).

There is a possibility of imposing interim measures during the proceedings, but it only constitutes provisional legal protection, and it is not possible to impose them universally. For example, with regard to interim measures before EU courts, a proposed measure aimed solely at protecting the interests of one of the parties is not permissible (Lenaerts K, 2014). Interim measures are adopted only where the following conditions are met: (i) there is a reasonably strong *prima facie* case establishing an infringement, (ii) there is a likelihood of serious and irreparable harm to the applicants unless the measures are ordered, and (iii) there is an urgent need for protective measures (*IMS Health v. Commission*, T-184/01 R). Therefore, interim measures allow us to react only in selected cases and cannot be considered a complex and suitable solution for the above-mentioned issues that the digital markets face.

The proposed Digital Markets Act allows one to intervene and react to the unwanted behaviours without the obligation to define relevant markets, demonstrating that the undertakings are dominant in these markets and simultaneously abuse their position or the condition of explicit coordination. The only condition to be met is that the undertaking is a gatekeeper, as defined in the proposed Digital Markets Act. Subsequently, all gatekeepers are obliged to refrain from several activities or act in a certain way that the proposed Digital Markets Act requires. This approach allows us to target unwanted behaviours faster and more efficiently.

However, the proposed Digital Markets Act is not intended to replace current competition rules. It also does not exclude the simultaneous application of competition regulation, even if they both deal with the same issues, such as

self-preferencing, limiting or refusing access to the collected data or limited interoperability. All these issues have been already addressed by current competition law, such as *Microsoft v. Commissio*n, T-201/04. The decision B6-22/16, *Facebook*, Bundeskartellamt.

It should also be noted that competition law, even though it has its limits, is an effective and appropriate tool for regulating the digital economy. Competition law can be applied across disciplines without any sectoral or technical limits. It is suitable for addressing changing technology and different relations between sectors of the economy (Joint position of European competition authorities, 2021). The nature of the competition law makes it a suitable accessory to the proposed Digital Markets Act. Even in future, it may be an inspiration for keeping the proposed Digital Markets Act up to date.

However, the relationship between the proposed Digital Markets Act and current competition rules stays unclear. The proposed Digital Markets Act states that it "aims at complementing the enforcement of [current] competition law; that rules are without prejudice to articles 101 and 102, […] and to national competition rules." But it further mentions that the application of the national competition rules "should not affect the obligations imposed on gatekeepers [under proposed Digital Markets Act] and its uniform and effective application in the internal market" (Recital 9, proposed Digital Markets Act). The governments of Germany, France and the Netherlands asked to clarify the relationship between the existing rules of EU and national competition law (Germany, France, and the Netherlands, 2021). They also suggest that the proposed rules pursue complementary goals to the existing rules, and they should "complement existing tools rather than weakening or substituting them". The joint proposal asks for coordination of content and the enforcement of the existing and proposed rules.

The joint proposal also mentions that the proposed Digital Markets Act should not undermine the national rules regulating digital markets. Different member states may have different objectives in regulating the digital economy and should have "a sufficient and clear leeway" for national rules.

Several member states are introducing national rules under competition law that regulate the behaviour of undertakings, similar to the concept of gatekeepers. For example, Germany included the provision on "the abusive conduct of undertakings of paramount significance for competition across markets" (Joint position of European competition authorities, 2021).

The Digital Markets Act allows the member states to act on their regulation. However, it should not be omitted that the gatekeepers operate on an EU-wide basis. A considerably different regulation within the EU digital market may lead to fragmentation. In this case, customers and small businesses that depend on gatekeepers may find themselves in an even less favourable situation since less

predictability, and higher compliance costs mean more barriers to the digital market in the EU.

Therefore, it can be concluded that there is a need for a sector-specific regulation for digital markets, but it is necessary to clear the relationship between the proposed Digital Markets Act and national competition regulations to determine when it is appropriate to apply these regulations. Further, this relationship should balance the possibility of member states to partially regulate different aspects of the digital economy and still maintain a consistent approach EU-wide.

3. The notion of a gatekeeper

As mentioned above, the proposed Digital Markets Act rules apply only to the undertakings that meet the definition of a gatekeeper, regardless of whether it holds a dominant market position (Article 3 of the proposed Digital Markets Act). Then, these rules may apply only to selected few competitors rather than most sector-specific regulations that apply to all subjects in specific areas.

In a situation where the gatekeeper does not hold a dominant position and its other competitors do not meet the definition of a gatekeeper, a gatekeeper undertaking finds itself in a much less favourable situation. Indeed, it should limit several of its activities, and the other competitors may use these activities as an advantage to gain more market control. Such application of rules of the proposed Digital Markets Act would not be fair and competitive, and it also may distort competitive forces.

The Commission may exempt a gatekeeper from specific obligations only on the grounds of (i) public morality, (ii) public health and (iii) public security (Article 9 of the proposed Digital Markets Act). Based on the above-mentioned example, it would be appropriate for these exceptions to include a case of a possible distortion of competition.

The notion of a gatekeeper should consider the competition more to prevent the unfair treatment of gatekeepers as selected undertakings and possible distortion of competition.

4. *Ex ante* regulation

The novelty in the proposed Digital Markets Act is *ex ante* rules. There are already *ex ante* rules in competition law in the Directive of the European Parliament and of the Council 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (hereinafter: 'European Electronic Communications Code').

However, there are significant differences between *ex ante* rules in the Electronic Communications Code and the proposed Digital Markets Act.

The main objective of the Electronic Communications Code is to promote competition in the provision of electronic communications networks and associated facilities [Article 3 [2B] Electronic Communications Code]. On the other hand, the main objective of the proposed Digital Markets Act is to ensure a fair and competitive digital economy, not competition *per se*. Therefore, the objective of the Digital Markets Act is wider and quite vague. It can be assumed that the fair and competitive digital economy should also include respecting competition rules, but this notion is too unclear to conclude that (Petit, N. 2021).

There are also differences in the practical implementation of the rules. The Electronic Communications Code enables the application of *ex ante* rules only when the intervention is necessary to maintain effective competition. The proposed Digital Markets Act rules apply regardless of the state of the competition when the undertaking is designated as a gatekeeper.

Additionally, there is a difference in the scope of the implementation of these rules. The Electronic Communications Code expressly states that the "regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis" [Article 68 (2) Electronic Communications Code].

The proposed Digital Markets Act is less strict in the scope of the implementation of its rules. Article 7(5) states that the Commission "shall ensure that the measures are effective in achieving the objectives of the relevant obligation and proportionate in the specific circumstances."

The condition in the Electronic Communications Code of choosing the least intrusive way is much stricter than the condition of effectiveness and proportionality. When the measure is effective and proportionate, it does not mean that it is also the least intrusive. There could be less intrusive measures, but the Commission does not need to consider them, when a more intrusive measure would meet the condition of effectiveness and proportionality.

Both wordings consider that the measures should achieve the objectives of the regulations, but the wording stated in the Electronic Communications Code seems to be more appropriate since it prefers measures that least interfere with the rights of subjects.

Thus, it can be concluded that the ex ante rules in the proposed Digital Markets Act are fundamentally different from the current *ex ante* competition regulation. *Ex ante* rules in the Electronic Communications Code are formulated per the current competition rules and seem to minimise the interference of the authorities to the rights of subjects. On the contrary, *ex ante* rules in the proposed Digital Markets Act (as mentioned in the previous section) are not formulated clearly, and the possible interferences of the authorities may be more intrusive.

However, there is no doubt that the proposed Digital Markets Act will have an impact on the state of competition. The unclear rules may cause the following issues on the state of the competition:

First, the unclear relationship between the competition law and the proposed Digital Markets Act causes difficulty in determining whether the behaviour that the proposed Digital Markets Act regulates in practice is problematic. However, the list of restricted behaviours (mostly stated in Article 5 and Article 6 of the proposed Digital Markets Act) is based on the decision-making practice of competition authorities (joint position of European competition authorities, 2021). Without a deeper competition law analysis, it cannot be determined whether a behaviour is in a particular situation problematic and has negative effects on the digital market. The proposed Digital Markets Act may unnecessarily limit some behaviours.

Second, the proposed Digital Markets Act is reversing the burden of proof. In the current competition regulation, the burden of proof is on the authorities to impose any obligations. The proposed Digital Markets Act not only sets out ex ante rules, but to suspend these obligations, gatekeepers should demonstrate "that compliance with that specific obligation would endanger, due to exceptional circumstances beyond the control of the gatekeeper, the economic viability of the operation of the gatekeeper in the Union, and only to the extent necessary to address such threat to its viability" (Article 8 of the proposed Digital Markets Act). It is also possible in Article 9 for the proposed Digital Markets Act to be exempted from specific obligations, and it needs to be initiated by the gatekeeper.

Such an approach increases the regulatory burden, and even the Commission has acknowledged that regulatory burdens are often a major obstacle to innovation (Pelkmans, Renda, 2014). The most appropriate solution would be to better target regulation to specific behaviours. That would ease the administrative burden that the gatekeepers would face when all obligations apply to all gatekeepers, regardless of their situation, until they prove the Commission otherwise.

Ex ante regulation may be a useful tool in regulating digital markets. However, it is necessary to clarify the relationship between the current competition rules and the proposed Digital Market Act to consider the possible distortion of competitive forces and lessen the administrative burden of gatekeepers by Commission initiatively considering specific situations.

5. Role of national competition authorities

Even though the proposed Digital Markets Act is based on the decision-making of national competition authorities, acknowledging their ability to tackle contemporary digital issues, the wording of the proposed Digital Markets Act does not provide them with any role in the enforcement of its rules.

Several national competition authorities dispose of a high level of expertise, even in digital markets, from the experiences in past proceedings. It seems quite inefficient to omit national competition authorities that created successful decision-making practices in this area in recent years.

The proposed Digital Markets Act would mean for the Commission new challenges. National competition authorities warned in their Joint paper that if only a limited number of gatekeepers were concerned by the proposed Digital Markets Act, it would be difficult for the Commission "to provide sufficient resources to enforce all the obligations and prohibitions referred to in the proposed Digital Markets Act, in each member state and at all times." National Competition Authorities also warn of the enforcement bottleneck and significant delays in enforcing these rules (Joint position of European competition authorities, 2021).

The solution would be to include national competition authorities in the proposed Digital Markets Act's enforcement.

Including national competition authorities in the proposed Digital Markets Act enforcement would also help to prevent possible conflicting decisions in national competition regulation and the proposed Digital Markets Act rules. National competition authorities would have experience in general competition and the proposed Digital Markets Act. In their decision-making, it would be easier to balance these regulations and make consistent decisions in both areas as they are (as mentioned above) complementary to each other.

On the other hand, such approach would mean a less coherent application of the proposed Digital Markets Act rules in the EU. However, this could be mitigated by a cooperation mechanism similar to the 'consistency mechanism' in Article 63 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (hereinafter: 'General Data Protection Regulation').

The proposed Digital Markets Act should engage national competition authorities in the enforcement of its rules to utilise their expertise, prevent enforcement bottleneck and ensure functioning decision-making EU wide.

6. Access to data

The core provisions of the proposed Digital Markets Act that would ensure the interoperability of the digital markets are the provisions concerning access to data.

Article 6(a) states that gatekeepers cannot use data generated by business users and their end-users on the platforms in competition with business users. Further, Article 6(h, i) states that gatekeepers need to provide effective portability and

continuous and real-time access to data generated through the activity of business users/end-users and third parties authorised by business users.

Article 6(i) also mentions that such access should be 'in line with Regulation EU 2016/679' (General Data Protection Regulation). However, the practical implementation remains unclear. Does it mean that subjects will be able to ask from the gatekeepers all personal data? Or, is the objective of a fair and competitive digital economy enough for continuous and real-time access to data? The answers to these questions probably vary depending on the specific situation, but the wording of these provisions is too unclear to make any assumptions concerning their application.

Data protection and competition regulation share the same objectives; they aim to protect the internal market, consumers and competition on merits (Wiedemann, K., 2021). In this case, it should not be a question of balancing conflicting rules but rather a question of how these rules may complement each other.

However, data processing is not only regulated in the General Data Protection Regulation. Data may be protected by intellectual property rights or represent trade secrets. Moreover, the application programming interfaces may be copyright protected. Even though there is no property right to data, several regulations protect data or protect the application programming interfaces that may prevent data accessibility (Lundqvist, B. 2021).

When we consider all these regulations, a gatekeeper will find a reason not to grant access to the data in most cases. The Commission should clarify whether the proposed Digital Markets Act creates an obligation for gatekeepers to grant access to data protected by intellectual property law or trade secrets to prevent this from happening. For example, it could be similar to how it is explained in the Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information in Article 1(6): "The right for the maker of a database […] shall not be exercised by public sector bodies in order to prevent the re-use of documents or to restrict re-use beyond the limits set by this Directive."

It would be appropriate if the relationship between General Data Protection Regulation and other regulations concerning data access would be clarified in the wording of the proposed Digital Markets Act. Indeed, the lack of clarity in this area may render the provisions that deal with access to data ineffective.

7. Conclusion

The proposed Digital Markets Act intends to ensure a fair and competitive digital economy in the EU by regulating 'gatekeepers'. There is a need for such a sector-specific regulation. However, since it is a novel type of regulation in the

area of digital markets, the relationship between the proposed Digital Markets Act and the current regulation that concerns the digital market should be laid more clearly and per the current rules.

The notion of a gatekeeper should be more in line with current competition rules to prevent the unfair treatment of selected gatekeepers.

Ex ante rules in the proposed Digital Markets should be formulated clearly, and the possible interferences of the authorities may be less intrusive. It is also necessary to clarify the relationship between the current competition rules and the proposed Digital Market Act and lessen the administrative burden of gatekeepers.

National competition authorities should be engaged more in the enforcement of the proposed Digital Markets Act to utilise their expertise, prevent enforcement bottleneck and ensure coherent decision-making EU wide.

To prevent inefficiency of several provisions concerning data access, the relationship between General Data Protection Regulation and other regulations needs to be clarified in the wording of the proposed Digital Markets Act.

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Dominant positions or dominant designs? Market power and innovation in European competition law

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Abstract

Although market power in platform-mediated markets seems to be ubiquitous, in some cases it may be short-lived due to innovation. A new undertaking fuelled by innovation can take away the market power of established undertakings. The theory of the industry life cycle and the concept of dominant design might help to understand when market power is a problem and when innovation may make market power short-lived. All industries follow a similar pattern, where the emergence of a dominant design is the key turning point, signifying when innovation is no longer a competitive constraint. It is this more dynamic theory that the Court and the Commission could use to both *nuance and inform* the market power assessment and the role of innovation used in abuse of dominance and merger control cases. These theories will not replace the market power assessment but it could support the current assessments of market power.

Keywords: dominant design, dominant position, innovation, online platforms, ecosystem.

JEL Classification: K210

1. Introduction

Innovation can disrupt the market power of online platforms quickly and unexpectedly, as can be seen by looking at the development of the mobile operating systems market. Symbian was a mobile operating system in the 2000s, consistently obtaining a market share between 40% and 60% (Linux Netbook, 2014). The position of Symbian suddenly changed in 2010, where it started the year with a market share of more than 40% but had to see Google's Android take over its market power. By early 2011, Google's Android obtained a market share of about 40% (Linux Netbook, 2014). What happened to ensure that Google was able to take over this market so quickly? With an innovative new mobile operating system, Google drastically changed the nature of mobile operating

systems by allowing third party app developers to develop for the mobile operating system (Markovic and others, 2018, p. 6). The mobile operating system became an online platform with its own ecosystem of app developers who adopted the new platform *en masse*.

Innovation brings an uncertainty to the market, which is especially prominent in markets where online platforms operate. In these innovative and uncertain platform-mediated markets new undertakings frequently enter and exit the market, as was also the case for the mobile operating market (*Google/DoubleClick*, para 335). At the same time platform-mediated markets seem to be a breeding ground for market power. Online platforms bring together groups of users that interact or innovate on top of the platform (Cusumano, 2019, p. 13). For example, Apple brings together app developers and iPhone users through its App store and iOS operating system, which allows for new ancillary products and services to be developed. The operating system is the core platform and the app developers and users compose the ecosystem or the periphery of the core platform (Moore, 1996; Cusumano, 2019, p. 13). As more users in an ecosystem connect to the core platform, the more valuable the core platform becomes. Once a platform reaches a critical mass of users, the market may "tip" in favour of the platform, giving the platform market power (Katz and Shapiro, 1994, p. 93; Crocioni, 2007, pp. 468–469). It seems that this happened to Google's Android in 2010, providing the operating system with a competitive edge over other operating systems in the market.

This quick rise to dominance coupled with the uncertainty caused by innovation poses a problem for traditional European competition law tools, which cannot take into account these suddenly changing conditions (Costa-Cabral, 2017, p. 8). European competition law is predominantly concerned with static efficiency, which can be defined as the best configuration of production factors at a certain point in time (Costa-Cabral, 2017, p. 8). Such a static analysis is also used to assess market power in European competition law, which is determined at the moment of an alleged abuse. Market power is legally defined by the concept of a dominant position, which is a position of economic strength that allows undertakings to behave independently from its competitors, customers, or consumers (*United Brands*, 1978, para 65; *Hoffman La Roche*, 1979, para 38; *Michelin*, 1983, para 30). This position of strength is determined by the competitive constraints on an undertaking, which can be the constraints imposed by actual competitors, future competitors, and countervailing buyer power (Guidelines 102 TFEU, para 12). Only potential competition considers a future change in the market, whereas the other competitive constraints focus on the current situation. As innovation as a competitive constraint brings a degree of uncertainty to the future market

development, it becomes difficult to predict whether there is a durable dominant position (Crocioni, 2007, p. 519)

In this article I will show how the market power assessment in European competition law currently is not fit to deal with the uncertainty that innovation brings in platform-mediated markets. I will discuss this in section 2. In economic theory, there has been a move from static theory to a dynamic theory of markets. It has been theorized that all markets follow a similar pattern of development, where innovation is initially a competitive constraint but stops constraining market power when a dominant design emerges. I will explore this theory and its relevance to online platforms in section 3. In section 4, I will show how this pattern of innovation and the concept of dominant design can inform market power assessments in European competition law. Section 5 then concludes by answering the question how the market power assessment in European competition law could change to deal with the uncertainty that innovation brings to the platform-mediated markets.

2. Market power and innovation in European competition law

In this section I will show that the current assessment of the market power in European competition law is not fit to deal with innovation as a competitive constraint on the power of online platforms. European competition law focuses on static efficiencies and adopts a static view of the market. This is a problem as innovation relates to dynamic efficiencies and requires a dynamic view of the market. I will first explain this difference. Afterwards, I will show how market power or a 'dominant position' is currently assessed in European competition law in both abuse of dominance as well as merger control cases.

2.1 Static versus dynamic efficiency

European competition law has traditionally been driven by static concerns, which means that undertakings and consumers are observed at a particular point in time (OECD, 2012, p. 12). Static concerns have made the assessment of a dominant position and certain types of abuses measurable but give an incomplete representation of reality. Static efficiencies focus on the most efficient result as it relates to output, price, and costs, which can be calculated by using allocative efficiency and productive efficiency (OECD, 2012, p. 12). A market achieves allocative efficiency when all resources are allocated to their highest valued use (Kolasky and Dick, 2003, p. 242). When there is productive efficiency, it is not possible to produce a given quantity of output at a lower cost (OECD, 2012, p. 13). For these efficiencies, it is assumed that the technology with which goods are produced is also assumed to be fixed, or, not subject to change (OECD, 2012,

p. 12). This is at odds with what we observe from platform-mediated markets, which seem to be constantly subject to change.

Dynamic efficiencies are more closely related to that potential of change in technology. Dynamic efficiencies denote the ability of an undertaking and its incentives to introduce new products or processes of production or to improve existing ones (OECD, 2012, p. 14). Dynamic efficiencies display their effects over time and show the best combination of production factors considering how they might be improved (OECD, 2012, p. 14; Costa-Cabral, 2017, p. 8). It seems that dynamic efficiencies, considering a longer time frame and development, are better fit to deal with the changes and uncertainty in platform-mediated markets than static efficiencies.

In the next two sections I will show how in European competition law the assessment of market power in abuse of dominance cases and merger control is focused on static efficiencies, which only accommodates innovation to a limited extent.

2.2 Market power and innovation in abuse of dominance cases

To determine whether an undertaking has a dominant position in European competition law, the Commission examines the competitive structure of the market, and, in particular, the competitive constraints imposed by actual competition, future entry and exit or potential competition, and countervailing buyer power (Guidelines 102 TFEU, paras 13–24). The existence of a dominant position derives in general from a combination of these factors which, taken separately, would not necessarily be determinative for the assessment of a dominant position (*United Brands*, 1978, paras 65–66; *Hilti*, 1991, para 90; *Gøttrup-Klim*, 1994, para 47; *Telefonica*, 2012, para 148).

However, from these factors, the actual competition as measured by market shares is highly important in determining that an undertaking has a dominant position (*Hilti*, 1991, para 90; *Imperial Chemical Industries*, 2010, paras 255–256; *Telefonica*, 2012, para 148). An undertaking holding a market share in excess of 40% will be presumed dominant but additional factors like barriers to entry will have to be observed to conclusively establish dominance (Communication of the Commission on article 82, para 15). Very large market shares of more than 50% “are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position” (*Hoffmann-La Roche*, 1979, para 41; *Solvay*, 2009, para 277; *Imperial Chemical*, 2010, paras 256 and 259).

The Commission and the Court have always nuanced the importance of market shares by clarifying that “a substantial market share as evidence of the existence of a dominant position varies from market to market according to the structure of these markets […]” (*Hoffman La Roche*, 1979, paras 39–41; *AKZO*, 1991, para 60; *Hilti*, 1991, paras 90-92; *France Telecom*, 2007, para 100). In previous cases on

online platforms, the market shares have nearly always exceeded this threshold of 50%, which has been a decisive factor in determining that an undertaking has a dominant position (*Google Shopping*, 2021, para 54; Commission decision *E-Book MFN*, 2017, para 58; Commission decision *Google Android* 2018, para 439).

For online platforms, the Commission held that a dominant position can still be determined based on market shares, as the "fast-growing market does not show signs of marked instability during the period at issue and, on the contrary, a rather stable hierarchy is established" (*Google Shopping*, 2017, para 267).

Subsequently, market shares and barriers to entry and expansion were used to determine that Google had a dominant position and innovation as a competitive constraint was therefore not a factor to refute these indicators of market power (*Google Shopping*, 2017, section 6.2.1 and 6.2.2). This decision by the Commission has been recently confirmed by the Court (*Google Shopping*, 2021).

Another way for the Court and the Commission to consider innovation as a competitive constraint on undertakings is by using the concept of potential competition. The Court and the Commission can then consider how potential competitors exert a competitive constraint on undertakings. This concept of potential competition does not immediately relate to innovation. Yet, when a potential competitor is fuelled by innovation, innovation can indirectly be taken into account as a competitive constraint on the dominant position of an undertaking. For a potential competitor to discipline an undertaking or pose a competitive constraint on the position of undertakings, it must be reasonably certain that entry is likely, timely, and sufficient, which in practice means that a potential competitors should be able to enter the market within the next two years (Commission Guidelines 102 TFEU, para 16).

In sum, market power in abuse of dominance cases is assessed using relatively certain and predictable competitive constraints, focusing the assessment on static efficiencies. Market shares as an important factor show the current competition on the market and potential or future competition can only be taken into account when it is likely, timely, and sufficient. Innovation as an inherently unpredictable and uncertain factor is rarely considered.

2.3 Market power and innovation in merger control

In merger control, concentrations that significantly impede effective competition are not allowed, in particular if this is the result of the creation or strengthening of a dominant position (Article 2(2) and (3) Merger Regulation). This makes the assessment of a dominant position only a subset of the broader assessment of significant impediments to effective competition. This is a forward looking assessment where the Commission compares the pre- and (estimated) post-merger competitive conditions (Article 2(1) (b) Merger Regulation). The assessment of

a dominant position is therefore different from abuse of dominance cases, which assesses the past.

As assessing a dominant position in merger control is only a subset of the overall assessment and has a forward-looking nature, there is a different weight placed on the factors used to assess a dominant position than in abuse of dominance cases. In abuse of dominance cases, the Court and the Commission seem to rely heavily on market shares at the time of the alleged abuse. Market shares in merger control are inherently less important as other factors may also significantly impede effective competition and as the market will necessarily change following the concentration. Post-merger market shares can then only be *an estimation* of what is expected after the merger.

The Court and the Commission therefore more readily accept other competitive constraints such as innovation in the assessment of competitive conditions. Innovation is seen as a competitive constraint on undertakings that leads to market shares not being indicative of market power and, therefore, of lasting damage to competition (Cisco, 2013, para 69). The fact that an undertaking has high pre- or post-merger market shares can be made insignificant by other market conditions such as the instability of a market due to innovation or low entry barriers combined with a heterogeneous market character with growth, innovation and technological change (*Tetra Pak/Alfa Laval*, 1991; *Philips/Agilent Health Care Technologies*, 2001, paras 31-32; *HP/Compaq*, 2002, para 39; *Microsoft/Skype*, 2011, paras 78 and 99; *Cisco Systems*, 2013, paras 61 and 65). The problem with these assessments is that we cannot predict the future of innovation. The forward-looking assessments in merger control therefore always have a certain level of uncertainty, reducing the credibility of the assessment.

Similar to abuse of dominance cases, innovation can also be considered as a competitive constraint by using the concept of potential competition. This concept of potential competition does not immediately relate to innovation but might take into account *innovative* potential competitors. Potential competitors can only impose a competitive constraint if their entry is likely, timely, and sufficient to deter or defeat any potential anti-competitive effects of the merger (Commission Guidelines on horizontal mergers, paras 68–69). This entails that barriers to entry are assessed for the likelihood of entry, entry should take place within two years for the timeliness of entry and be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger (*Saint-Gobin/Wacker-Chemie*, 1997, para 184; *Alcoa/Reynolds*, 2002, paras 31–32; *Tetra Pak/Laval*, 1991, section 3.4). It seems that the Court and the Commission still adhere to a static view of competition by limiting the impact of innovation in time.

In sum, the assessment of a dominant position in merger control is only part of the overall assessment of significant impediment of competition and is forward-

looking in nature. As a consequence, a different weight is placed on the factors for determining market power and other factors than market shares, such as innovation, are more readily accepted as a competitive constraint on a dominant position. However, the static nature of European competition law remains a problem, as innovation is inherently uncertain and unpredictable, reducing the value of the forward-looking assessments of market power in merger control.

For online platforms, innovation and its inherent uncertainty and unpredictability becomes even more important and there is a need to understand when innovation is important as a competitive constraint. The research done by economists on the industry life cycle can help *inform* and *nuance* the notion of innovation as a competitive constraint in European competition law, with the concept of a dominant design functioning as a key turning point.

3. Dominant designs for online platforms

In innovation studies and economic theory, there has been a move from static efficiencies to including more dynamic theory by showing that all industries follow a similar pattern. The emergence of a dominant design is the key turning point when innovation stops constraining market power. Online platforms seem to also follow this pattern but innovation might constrain market power in the ecosystem longer than in the traditional manufacturing industries (section 3.1). This pattern can inform and nuance European competition law concepts of market power and innovation by identifying a dominant design. If the emergence of a dominant design is the key turning point for using innovation as a competitive constraint, it is important to know how to determine when we can speak of a dominant design. Besides a 50 % market share of the dominant design, the design needs to be the archetype of the product in both the user and the designer imagination, the design needs to provide an answer to the need of a large number of people and the winning design freezes the socio-economic context (section 3.2).

3.1 Dominant design in the industry life cycle for online platforms

Dynamic efficiency as associated with innovation shows that markets are not stable and do not necessarily reach an equilibrium but there can be a degree of change. This change can be visualised by a dynamic pattern, which all industries follow, called the industry life cycle. The phases are roughly the same across industries: the start-up phase, the growth phase, the maturity and the decline phase. Customer demand starts out limited in the start-up phase and then slowly gains traction, attracting other undertakings to the market in the growth phase. In the maturity phase customer demand stagnates, which leads to a shake out of undertakings and thus consolidation in the market. In the decline phase,

customer demand declines in favour of a new industry. Profitability and market characteristics depend on the phase of the industry (Porter, 1980).

The competitive constraint of innovation on undertakings also varies with these market phases (Utterback and Abernathy, 1975; Tushman and Murmann, 1998). After a technological breakthrough, in the start-up and growth phase, there are many competitors that market many different designs of a product. For example, when the automobile was brought to the market, there were many different designs with different engines, steering wheels, clutches, and materials. The companies that market these designs compete on innovation and try to persuade the most customers to use their design (Utterback and Abernathy, 1975, p. 641; Anderson and Tushman, 1990, p. 606 and 610; Tushman and Murmann, 1998, p. 10). Competition at this stage is marked by competition on innovation (Anderson and Tushman, 1990, p. 611).

Online platforms also start with this start-up phase or era of experimentation, where innovation is a competitive constraint on the power of online platforms. Taking the development of mobile operating systems as an example, we currently have two dominant mobile operating systems: Apple's iOS and Google's Android (Taleby, 2017, p. 31). Until Apple and Google made their mobile operating systems open to third party app developers, different manufacturers, such as Nokia, Blackberry, and Samsung, had introduced various different devices with different operating systems that substantially differed from each other since the introduction of the smartphone in 2000 (Markovic and others, 2018, p. 6). At this point, innovation imposes a competitive constraint, as new designs are often and quickly introduced in the market and gain some traction among customers.

This phase of uncertainty and innovation as a competitive constraint ends with the establishment of a dominant design. Although the definition of dominant designs has varied over time, in essence, a dominant design is the successful design which is widely adopted and changes the nature of competition, driving out other competitors (Murmann and Frenken, 2006, p. 932; Sidak and Teece, 2009, p. 604). The emergence of a dominant design means that future technological progress consists of incremental improvements elaborating the standard, meaning that subsequent design are so similar that disruption seems unlikely. (Anderson and Tushman, 1990, p. 613). Innovation therefore *stops being a competitive constraint on the core platform* and undertakings switch to price competition (Anderson and Tushman, 1990, p. 613). For example, once Google introduced a mobile operating system open to third parties, other undertakings either copied the design (e.g., Apple) or left the market (e.g., Symbian) (Taleby, 2017, p. 31). Dominant designs tend to remain stable for long retention periods in a relatively concentrated market, which then enters the maturity stage in the industry life cycle (Sidak and Teece, 2009, p. 604).

This can also be seen in platform-mediated markets. For example, in the 1990s, many search engines entered the market with different ways of categorizing and searching the Internet. Dominant positions were taken over by new entrants with an innovation quite frequently until Google Search entered the market with its PageRank algorithm (Buganza and Della Valle, 2010, p. 47). Google Search became the dominant platform design, which comprises a stable technological architecture of core components (Zeijen and others, forthcoming). The core platform has a community of organizations and individuals that produce goods and services value on the core platform (Moore, 1996). The dominant platform is the core platform and the community depending on the platform is the ecosystem or the periphery (Kenney and Zysman, 2016, p. 67; Kenney and others, 2021, p. 1). Google Search, for example, has advertisers, businesses, and users depending on the search engine.

The emergence of a dominant design on the core platform leads to a shake out of undertakings in the market of the core platform (Porter, 1980). A shake-out means that the market consolidated and competition on the core platform market diminishes. For mobile operating platforms, Apple and Google became the dominant platform designs around 2011, after which they have not changed substantially despite new entrants such as Amazon's Fire OS (Taleby, 2017, p. 31). As innovations elaborate on the standard, users are not persuaded to switch to alternative designs because of network effects, switching costs, and market tipping. Users are attracted to platforms with many other users and when a critical mass of users is reached, the market tips toward the platform, leaving no room for alternatives (Katz and Shapiro, 1994, p. 93; Crocioni, 2007, pp. 468–469; OECD, 2020, p. 17). New entrants in the market are not different enough to overcome the costs that users occur when switching to alternatives, such as losing connections with other users or learning how a new platform works (Fan and Suh, 2017). Innovations therefore no longer a competitive constraint on the market power of undertakings.

In the periphery of the core platform an opposite movement takes place: a shake-in. A shake-in means that where core platforms leave the market, the number of complementor firms in the periphery of the platform increases (Ozalp and others, 2018, p. 1205; Zeijen and others, forthcoming). Complementor firms are attracted to stable core platforms, as they face steep learning curves and increased development costs with every significant change to the core platform (Ozalp and others, 2018, p. 1205). For example, if Apple changes its operating system, all app developers need to change their apps. Stable core platforms with a dominant design benefit complementor firms (Impact Assessment Report Digital Markets Act, 2021). When it became clear that Google and Apple were

the dominant platform designs, more app developers dared to invest in their platforms (Markovic and others, 2018, p. 6).

Complementors in the periphery of the core platform can still innovate after the emergence of a dominant design. Even if Android and iOS are the dominant core platforms, app developers can still innovate on those operating systems. Complementors design and develop their own functionality within the boundaries that the core platform gives them. This means that even when a dominant design has emerged on the core platform level, and innovation is no longer a competitive constraint on the market power of core platforms, more significant changes can still be expected in the periphery of the product (Zeijen and others, forthcoming). In the periphery of the platform, innovation can therefore still be a competitive constraint on the companies in the periphery of platform, such as app developers.

In sum, a dominant design is the key turning point for innovation as a competitive constraint on online platforms. Before a dominant design emerges, innovation makes the future trajectory of the market uncertain and unpredictable. A new undertaking can enter the market at any time with an innovation and take over the market. After a dominant design has emerged, this is less likely to happen and innovation is no longer a competitive constraint on the core platform. Yet, it can still constrain the complementor firms that operate in the periphery of the core platform.

3.2 Determining the emergence of a dominant design

If the emergence of a dominant design is the key turning point for using innovation as a competitive constraint, it is important to know how to determine when we can speak of a dominant design. A dominant design has emerged if a majority of designs in the market is the same. The notion of a majority of designs can be defined empirically by using either a threshold (e.g., 50, 40, 30, 20% market share) measure or a variety measure (such as the Herfindahl index) (Murmann and Frenken, 2006, p. 944). To determine whether a dominant design has emerged, it is not the market shares of an undertaking that needs to be measured but the design.

In economic theory, using only the empirical calculation of market shares is regarded as oversimplified and insufficient to determine the existence of a dominant design (Anderson, Tushman, and O'Reilly, 1997; Murmann and Frenken, 2006, p. 944). This criterion has therefore been expanded with three further characteristics to know whether a dominant design has emerged. Besides a 50% market share of the dominant design, the design needs to be the archetype of the product in both the user and the designer's imagination, the design needs to provide an answer to the need of a large number of people and the winning design freezes the socio-economic context (Anderson, Tushman, and O'Reilly, 1997). For example,

Google Search answered nearly all needs of people using search engines and other search engines changed to Google's single search bar design. This froze the socio-economic context and changed innovation from disruptive to incremental innovations (Buganza and Della Valle, 2010, p. 47)

Using a combination of these three criteria is also important because a dominant design can be best viewed as a continuum instead of a binary state: it is not that there is or is not a dominant design but there can be a dominant design to a certain extent (Murmann and Frenken, 2006, p. 944). This means that a design can be more or less dominant in an industry (Murmann and Frenken, 2006, p. 944). This could entail that when the majority of these factors point towards a dominant design, innovation might no longer pose a competitive constraint.

The industry life cycle can inform and nuance the current static market power assessments in European competition law. By determining the phase of the market, innovation as a competitive constraint can be either integrated in the assessment of market power or not. In the industry life cycle, the turning point for innovation as a competitive constraint seems to be the emergence of a dominant design. For online platforms, before a dominant design, innovation is a competitive constraint on the core platform. After a dominant design emerges, the competitive constraint of innovation is no longer exerted on the core platform but on the periphery of the platform, which in turn flourishes because of the stability of the core platform.

4. Dominant designs for online platforms in European competition law

Market power assessments in European competition law are inherently static in nature, where the market power of an undertaking is measured at a certain point in time. Innovation as an unpredictable and uncertain force is important in markets where online platforms operate but is also difficult to integrate in these static European competition law assessments. By identifying the market phase and the emergence of a dominant design through market surveys can help our understanding of innovation as a competitive constraint. When a market is in the start-up or growth phase and does not have a dominant design, innovation can constrain the market power of online platforms. However, when the market is in the maturity phase, it seems less likely that innovation will disrupt the core platform (section 4.1). A dominant core platform means that there will be little innovation on the core platform level (section 4.2) but might leave room for innovation in the ecosystem of the online platform (section 4.3).

4.1 Integrating innovation in the market power assessment

European competition law currently looks at market power at one point of time in the case of abuse of dominance cases and two points in time in merger

control. This is a static assessment of market power and innovation. Innovation is inherently dynamic, unpredictable, and uncertain. Identifying the broader pattern of the market and identifying whether a dominant design has emerged or not can help integrate innovation as a competitive constraint in European competition law.

The phase in which the market is, can show the value we should attach to market shares in market power assessments. When the Commission has measured the market shares, it can simultaneously identify the market phase through the use of market surveys and customer surveys. Before a dominant design has emerged, innovation as a different factor should be taken into account, as has been done by the Commission and the CJEU in merger control cases (see *Cisco v Commission*, par. 69). The turning point is the emergence of a dominant design, which needs to comprise at least 50 % of the designs in the market. The design also should be perceived as the archetype of the product in both the user and the designer imagination, answers the need of a large number of people and freezes the socio-economic context (Anderson, Tushman, and O'Reilly, 1997). Determining if a majority of these elements are present in the market can be measured through market and consumer surveys, the Court and the Commission can use this as a reason to pay less attention to innovation in the market power assessment. The industry life cycle or the concept of a dominant design is not the holy grail for assessing the constraining influence of innovation on market power but might be an element to consider.

4.2 Core platform level

For abuse of dominance cases using the industry life cycle and the emergence of a dominant design can be a complementary factor for the Court and the Commission to determine if and if so, how to consider innovation in its assessment. When a dominant design has not been established, innovation could be a factor to consider in the market power assessment. Market power or a dominant position can be constrained by innovation and other factors need to therefore play a more prevailing role in assessing market power. For example, innovation in a general broad sense or *innovative* potential competitors as a competitive constraint could be taken into account. As markets may remain in the pre-dominant design state over a number of years – as we have seen in the case of operating systems and search engines – this might imply that the two-year threshold for potential competitors needs to be extended. After a dominant design has emerged, innovation is less likely to constrain market power due to the stability of the dominant core platform design and the Court and the Commission might be less inclined to consider innovation as a competitive constraint.

For merger control, the industry life cycle and the concept of dominant design can inform the market power assessment in the same way as in abuse of dominant cases. The Court and the Commission have previously considered innovation as a competitive constraint on market power in specific cases. However, the concept of a dominant design and the overall pattern of the industry life cycle might still be valuable for the assessment of market power. The concepts might nuance or clarify why innovation is considered to be a competitive constraint in some cases, whereas in others it is not.

4.3 Ecosystem or complementor level

For the undertakings in the ecosystem, the emergence of a dominant platform design can be beneficial. When a dominant design emerges in the core platform, complementors are more willing to invest in building on that platform as their investment will less likely to be lost. The competitive constraint of innovation therefore moves from the core platform level to the ecosystem once a dominant platform design emerges. For European competition law, the industry life cycle and the emergence of dominant design may have implications beyond the assessment of market power. While it is outside of the scope of this article to examine these implications, they can be interesting avenues for future research. For example, it can be observed that once a dominant platform design emerges, complementors become increasingly dependent on these dominant (online) platforms. That turning point of an emerging dominant design therefore might also signify the need for a closer scrutiny abuses of dominance and mergers. The concept of a dominant design shows that horizontal mergers can be a natural movement in the development of markets when a shakeout occurs. The concept also shows that after a dominant design emerges for an online platform with an ecosystem, it seems unlikely that there will be a competitor on the core platform level. Undertakings inside and outside of the ecosystem of the core platform are then more vulnerable to abuse or killer acquisitions.

5. Conclusion

Innovation brings uncertainty to the market. With innovation, a new undertaking may at any point enter the market and quickly take over the dominant position from another undertaking. This uncertainty is especially prominent in platform-mediated markets. This poses a problem for European competition law, which focuses on static efficiencies that are measured at a certain point in time. The development and changes in the market over time are not always considered by competition law tools. The question therefore arises how the market power assessment in European competition law could deal with the uncertainty that innovation brings to platform-mediated markets.

Innovation studies move beyond static theories and conceptualize a more dynamic theory, the industry life cycle. The industry life cycle shows that all industries follow a similar pattern, where the emergence of a dominant design is the key turning point in when innovation is no longer a competitive constraint. It is this more dynamic theory that the Court and the Commission could use to both *nuance and inform* the market power assessment and the role of innovation used in abuse of dominance and merger control cases. These theories will not replace the market power assessment but it could support the current assessments of market power.

How can the Court and the Commission use the industry life cycle and the concept of a dominant design to inform their current assessments? Before a dominant design has emerged, market power may be short lived as innovation constrains it by letting a new undertaking suddenly taking over. Before the emergence of a dominant design, innovation could be a factor to consider in the market power assessment. However, after a dominant design has emerged, we might need to be more sceptical of the competitive constraint that innovation exerts on the market power of online platforms. After a dominant design has emerged, innovation is less likely to constrain market power due to the stability of the dominant core platform design and the Court and the Commission might be less inclined to consider innovation as a competitive constraint. The industry life cycle and dominant designs might be a first step in the direction of dealing with the dynamic force of innovation in the static analyses of European competition law.

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Attention being bought and sold by online platforms.

User's self-determination in governing their own data as a dimension of consumer welfare in antitrust?

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Abstract

Extensive data gathering, the fact that one's attention is being bought and sold, occurs due to the lack of self-determination on the side of the users of online platforms. Users are aware that their data contributes to the improved performance of an online platform, however, they are not aware of other purposes for which this data can be used. Consequently, they cannot decide how much and which kind of data they wish to reveal and where it is going to be used. In fact, users are nudged to reveal as much data as possible and the only choice they have is to not to use the online platform at all if they do not agree for data gathering.

This article asks whether self-determination, the ability of the user (also referred to as 'consumer' depending on the context) to decide how their data is used later, could be seen as a dimension of a consumer welfare in antitrust. What would this fundamental change to the foundations of competition law denote and what does it require in practice? For example, how can competition law consider the decreased welfare of a particular individual as a loss of self-determination where the extent in which this data will be used in the future can differ from consumer to consumer. The situation where the consumer cannot decide on what happens to the data, the commodity with which they are paying for seemingly free services such as social media etc. and where they are left with only two choices: agree to terms and conditions of a platform or not, is like a Goliath and David encounter, a situation of power asymmetry. The article has been inspired by the comics that has been as result of discussions by the group of researchers at the Legal Tech Lab, University of Helsinki.

Keywords: attention, consumer welfare, extensive data gathering, online platforms, self-determination.

JEL Classification: K210

1. Introduction

Information intermediaries gather data often without consumers being aware of which data are in fact gathered and how are these data used later on. This is commonly known as 'nudging' consumes into transactions that can be seen as exploitative (Petit, 2017, p. 261) or 'the digital grand bargain' (Balkin, 2018, p.6). Here, 'the human seems to be only a "user" or a "resource", necessary to supply energy, new data or approval of adhesion contracts that impose take-it-or-leave-it conditions' (Wróbel, 2021). Consumers seem to be stuck in some kind of feeling of hopelessness that there is nothing they can actually do about their data once it is gathered by online platforms and these data become a commodity of these platforms and can be sold or used for other purpose without the knowledge of the person from whom originally data was gathered from. This has been defined by 'digital irritation' (Ytre-Arne and Moe, 2021) or 'digital resignation' (Draper and Turow, 2019). This problem could be viewed as a competition law issue as it is most vivid in the environment of large tech giants where self-determination is further impaired by asymmetries of information and power. Such a practice could be an abuse of dominance. A single person is like a biblical David fighting with Goliath, where the chances of winning are scarce.

How does this lack of self-determination look in practice? Think of the following scenario. I am not actually aware of what happens to my data once I click 'agree' on terms and conditions on that website with cute puppy pictures. Even where I consent, I do not necessarily know what that means. I am under the influence of a dominant online platform and experiencing asymmetry of power. This is because Google or Facebook is in a stronger business position than me and can dictate the terms of a relationship between us. Moreover, perhaps I may not feel comfortable with too much responsibility over my data, especially where the environment in which my data is gathered and used, the mode of operation of online platforms as well as terms and conditions of the use of these platforms are non-transparent.

The issue of self-determination concerns both the issue of which data is gathered by gatekeepers (e.g., my sensitive data when I visit flirting apps etc.) and possibly the issue of what can be done with my data in the future. Nevertheless, this second dimension of self-determination is more etheric as it has to be assessed hypothetically. Consequently, consumers do not really know how they are harmed, or harm may only happen in the future.

However, I argue here that the issue of self-determination could be tackled by re-defining the notion of consumer welfare which can be defined as "the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of their satisfaction, given prices, and income. Exact measurement of consumer welfare therefore requires information about individual preferences" (OECD; 1993, p. 29).

While enhancement of consumer welfare has been one of the goals of the EU competition law, next to economic freedom and market integration, however it has not been supported in positive law. Enhancing consumer welfare denotes the need for lower prices, increased quality as well as increased choice and innovation on the market (*Helberger et al.*, 2021, p. 151). Similarly, a lack of self-determination impairs consumer welfare, that is their choice, where consumers are worse off due to the lack of autonomy, lack of privacy, suffering due to the lack of transparency they face. This in result affects consumers' behaviour where they are more prone to sharing their data with dominant online platforms without a deeper consideration. However, including such a consideration in the notion of consumer welfare requires widening discretionary limits of consumer welfare, which seems inevitable in the environment of digital platforms. Before the existence and popularity of online platforms, consumer welfare was not concerned with the loss of autonomy or privacy of a consumer as it is originally concerned with monetary harm, one that can be measured in euros etc.

Here, the concern touches directly upon agreeing to data collection by a dominant online platform, and this shifts the analysis to the area of competition law. This is because of some working principles that limit the purpose of data gathering such as purpose limitation principle etc. However, the execution of this principle has been in the hands of controllers/co-controllers and the responsibility has been on companies, and such an issue has not been a concern of public competition authorities. Where we are talking about data collection by dominant companies, even where it is done in accordance with GDPR, that is on the basis of consent given to a dominant platform for the collection of data of its users, however, the question arises whether this consent is strong enough and how it affects the self-determinantion of consumers where they are only faced with two options, (1) consent to the terms and conditions, or (2) not use the services of an online platform at all.

In terms of autonomy, the right to choose is already a big step forward. However, what does this autonomy denote in the context of excessive data collection? How much autonomy should be given to consumers of dominant platforms? Or is in fact too much autonomy given to consumers when the decision to give their data away or not is based on too much information that needs to be processed before consenting to the terms and conditions which they rarely do (information dumping on consumers). Would autonomy in this context denote that a consumer has more choice than only using Facebook according to the terms and conditions it offers and get the full personalized experience or do not use it at all? Instead, some options in between could be offered, i.e., different levels of personalization would denote different amounts of data being given away. However, could we leave such a decision to consumers?

Or should we offer such possibilities by default as it has been suggested in the German Facebook saga investigations?

This change to the core of competition law is a part of a larger movement, where the mutual connection between human behaviour, how people interact with technologies and whether it leads to changes in law has to be explored (See Cohen, 2019, Hildebrandt and O'hara, 2020; Hildebrandt 2017). Increasing human interaction with online platforms will indispensably lead to challenging the application of current law (see Mäihäniemi, 2020). Most importantly, law could in fact assist a human in deriving more benefit from these technology interactions and protect her rights (e.g., European Parliament, 2020, European Commission, 2020a, European Commission, 2020b).

In part 2, I look at how is self-determination impaired in digital markets, in part 3 I tackle discretionary limits of consumer welfare and explain why self-determination could increase consumer welfare by increasing consumer choice.

2. How is self-determination impaired in digital markets?

Are consumers sovereign in their choice of which data can be gathered from them and what can be done with their data in the future? It seems that they are not for various reasons. One of them is the unclarity as to whether they own their own data. Unclear relationship as to the ownership of data as these could be seen as a 'commodity'– a property where we can identify 'the existence of "an owner" who can decide what to do, and with whom' (Benkler, 2006, p. 61). This is contrast with seeing data as 'commons' where 'no single person has exclusive control over the use and disposition of any particular resource in the commons.' (ibid). It has been widely discussed that in fact one cannot fully own their data, since data is co-created and gathered in interaction with online platforms and other users (Klein, 2021).

What is more, where dominant platforms are increasingly treated in the EU competition law as public utilities, (*Google and Alphabet v Commission* judgement, 2021) we could hypothesize that in such a public space, self-determination of a consumer should be enhanced as it would require more transparent rules (see e.g., Graef, 2021, Graef 2018). This could be compared with an area with surveillance cameras, where privacy and autonomy of consumers in under constant supervision, however, the standards need to be higher than in private space.

Self-determination of a consumer is also impaired as they are vulnerable where they end up revealing their data all the time while searching for stuff on the Internet. Facebook itself claims that

> to create personalized products that are unique and relevant to you, we use your connections, preferences, interests and activities based on the

> data we collect and learn from you and others (including any data with special protections you choose to provide where you have given your explicit consent); how you use and interact with our Products; and the people, places, or things you're connected to and interested in on and off our Products (Facebook, no date).

Self-determination is however an issue that may depend on peoples' perception of the level of privacy they wish to protect and these differ amongst individuals. Some are happy to give their data up without further questioning, some will avoid using a dominant platform in the first place. What is more, privacy self-management for consumers is limited to few meaningful options (Zuboff, 2015, p. 83, see also Zuboff, 2019).

However, even given the choice between a more or less personalized Facebook profile which denotes being able to control the amount of data revealed to Facebook, consumers may struggle as they are in fact only informed what data they are giving away to Facebook in its privacy policy, however, they are not informed how this information is going to be used later on.

Self-determination is also impaired where consumers are not giving away data for specific purpose but to access some service overall. A dominant platform can be perceived as an 'essential facility' that consumers consider indispensable to communicate with their friends etc. It may also be difficult for Facebook's or Google's competitors to face the first mover advantages, the amount of data gathered, the quality of service that these provide.

Self-determination is also impaired due to non-transparent terms and conditions that serve valid consent to data gathering, accompanied with non-transparent-explanations of the further path of consumers data or at least possible options. This is so as transparency is typically discussed in an unquestioning manner: it is not treated as problematic that giant corporations, such as Google and Facebook, are far from being transparent (Ruckenstein and Pantzar, 2017, p. 406).

The idea of consent derives from the German introduction of informational self-determination and denotes that citizens are able to participate in the processing of their personal information. This empowerment of users is supposed to come from allowing them to consent (van Alsenoy, Kosta and Dumortier, 2014, p. 188). Consent is, among other justifications for the processing of data, one that is used most often by online services but it does not really denote the pure right to information self-determination it originally derives from (ibid.). Nowadays, it is very much used as a shield for the companies to protect themselves from legal actions that may follow the use of data. Moreover, consent also gives the impression of some kind of 'intrinsic force', however it does not in fact denote that the processing is in itself legitimate (ibid.).

3. Tackling discretionary limits of consumer welfare. Proposing self-determination as a dimension of consumer welfare

As pointed out by Graef, even though we are facing new mechanisms that are based on personalization of services on the basis of their data, the harm in such a situation is the same as the consumer surplus is shifted to dominant firms as a result of exploitation of consumers and it could be seen as an competition law issue (Graef, 2021, p. 474).

Could we then in a situation where a consumer is clearly losing their right to self-determine where their data is going to, resort to consumer harm standard as known in competition law? Could competition law take autonomy of a consumer and their privacy preferences into account and allow increased self-determination. I claim that the situation is not entirely hopeless, at least not when we talk about dominant online platforms such as Facebook or Google. If we see the situation as one where the consumer is significantly worse off as their perceptions of what is gathered and the potentials of which data and how data are used diverge significantly, this could be seen as a negative change in consumer welfare. However, this denotes offering leeway and discretions for the concept of consumer welfare. Self-determination as a consumer harm would then made of loss of privacy and loss of autonomy.

Firstly, self-determination inherently involves the question of how privacy considerations can become a part of competition law but also how this can be taken into account on a larger scale, e.g., in interpreting ways in which consumer welfare can be understood in digital markets that involve privacy concerns. The starting point is that for competition law privacy issues are either totally separate from competition law or privacy is seen as a dimension of e.g., consumer welfare (consumers' well-being).[12] It is important to note that competition law does not directly take into account fundamental rights such as privacy into account as it focuses on economic welfare instead. Competition authorities cannot act solely on the basis of privacy argument and there the actors are different so it is about the foundations of competition law – some limitations of how these can be used. Privacy is slowly becoming a part of competition law but it is very novel but this is not established.

Secondly, a consumer, using the model of consent as a part of the business model of online platforms, one that is based on terms and conditions, loses their autonomy and has no options to opt out from revealing their connections, preferences, interests, and activities in the form of data given to Facebook if they want to use Facebook. It could be seen as a significant decrease in consumer welfare. Here, self-determination could be seen as one of the ways consumer welfare has been interpreted, that is consumer choice. This is because excessive data gathering could be seen as and exploitive abuse where consumers are left

without valid options to choose from. To benefit from personalized products that are unique and relevant to the particular consumer this consumer has to agree for data gathering by Facebook.

However, where online platforms and their enormous impact on our social life show that the classical focus on seeing people as rational consumers, or the focus on seeing competition harm as connected to the loss that derives from high prices, less choice or not enough innovation has to broadened in technological markets (see e.g., Lianos, 2013).

It seems that the approach that self-determination over ones's data could be seen as a dimensions of consumer welfare, in particular, the increased consumer choice. In fact, the Digital Markets Act sets as its expected results and impacts "interventions aiming at increasing the contestability of the digital sector would have a significant positive and growing contribution to achieve all of the potential benefits of a Digital Single Market, also resulting in lower prices and greater consumer choice, productivity gains and innovation" (European Commission, 2020a, Article 14.3.).

Therefore, the increased consumer choice is explicitly mentioned as a goal of a specific EU competition policy that aims at dominant online platforms. What is more, references to online platforms impairing consumer choice by their operations can also be found in the recent ruling of General Court on Google Search (*Google and Alphabet v Commission*, 2021, paras. 556 and 558). The problem of consumer choice was also originally tackled by Bundeskartellamt in its Facebook investigations where it has been pointed out that the choice for the user is either to accept 'combination of data or to refrain from using the social network (…) the consumer's choice cannot be referred to as voluntary consent' (Bundeskartellamt, 2019, p. 2). Enhancing individual's right to self-determination would denote making the well-being of individual a goal of competition law and it could be done by means of self-determination.

Self-determination can be actually be made up of a harm a of many individual well-beings, where some will be worse off than others, still all of them are kind of left without choice – here – whether they prefer to give their data away and receive more personalized Facebook – social media or not. This problem could be solved in the form of a "personalized welfare standard" to accommodate abuses involving data extraction that are based on the provision of personalized services. This would lead to increased consumer sovereignty and freedom of choice (Graef, 2021, p. 474).

Self-determination denotes that we need to look at the choice of a consumer as to what data they wish to reveal and what can it be done in the future *ex ante*. However, competition law is inherently *ex post* focused. Nevertheless, an *ex ante* approach is already existing as regards mergers, as well as to be introduced later on by means of new legal proposals of Digital Markets Act (European

Commission, 2020a) and Digital Services Act (European Commission, 2020b). Still, in competition law the anticipatory approach is novel.

4. Conclusion

Changes could be done to the understanding and definition of consumer welfare in the EU competition law which would denote moving away from economic harms to the consumer in the form of paying high prices for the product, having not enough choice of products etc. to the harm in the form of having no influence of what happens to my personal information. Here, data is not given away freely and with a clear purpose etc., a consumer is not worse off because they are paying too much for the product but the harm to them cannot be easily grasped and monetized. According to Ezrachi and Stucke (2018) 'the design of competition law should be based on its core values which are dependent on 'what do we, as a society, want to promote' (ibid., 1-2). Enhancing self-determination of data would make people feel safer and that they have more control over own data.

However, what would this self-determination denote in practice? It would denote that consumers could decide whether they would prefer to receive a more personalized service and consequently give more of their data away as a payment for this personalized service or whether they prefer to give less data away and receive less personalized service. This would lead to increased consumer welfare in competition terms. Such a standard increases a more conscious choice and more autonomy of consumers. Recognizing self-determination as a dimension of consumer welfare would also constitute some kind of form of nudging of gatekeepers into specific, preferred – in the light of competition law – behaviour.

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Intermediation power, aftermarkets and mobile ecosystems: the Apple app store litigation

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Abstract

Digital platforms often perform intermediation roles and control an 'ecosystem' of interdependent products or services on multisided markets. Market power can arise through the control of narrow proprietary 'walled gardens' where there are direct and indirect network effects, high switching costs, little multi-homing, information asymmetries and a high degree of consumer loyalty or inertia. This can give rise to a form 'economic dependency' which allows exploitation over an 'installed base'. These ecosystems may or may not be defined as separate markets under traditional competition law but can be subject to 'intermediation power'. Like an aftermarket, this 'lock in' on one side of the market can co-exist with a high degree of competition on the other side of the market. The paper will explore some of these issues in the context of current competition law actions in the EU, US and elsewhere concerning the fees and restrictive conditions imposed for in-app purchasing on smart phones and tablet devices on the Apple app store.

Keywords: intermediation power, aftermarkets, antitrust, digital platforms, in-app mobile purchasing

JEL Classification: K210

1. Introduction

The extraordinary growth of digital platforms and companies such as Google (Alphabet), Apple, Facebook (Meta), and Amazon have revolutionized the way businesses and consumers transact. In January 2022 these companies collectively had more than $US 7 trillion in market capitalisation and Apple became the first publicly-traded company to reach a market value of $US 3 trillion (CompaniesMarketCap.com, 2022; Nicas, 2020). These platforms have the potential to entrench their market power through network effects and vertical integration which can create the incentive and opportunity to 'self-preference', leverage into, and colonize adjacent conglomerate markets within the same 'eco-system'.

One increasingly important area of innovation and form of monetization in the digital economy is the development of apps for smart phones and tablet devices. These apps are becoming indispensable sites for consumers to access services, e-commerce, games and information. Apps are largely only accessible on smart phones through 'app stores' on a particular smart phones' operating system. These app stores generally operate as 'walled gardens' where access is regulated by restrictive terms and conditions. These issues are central to the current antitrust actions in the EU, US and elsewhere concerning the fees and restrictive conditions for in-app purchasing on smart phones and tablet devices on both the Apple app store using iOS (and iPadOS) operating systems, and Google Play using Google's Android operating system. One central antitrust issue in these cases is whether a narrow single brand market within an 'digital ecosystem' intermediated by a digital platform can be subject to 'monopolization'.

There is an ongoing debate in global competition law jurisdictions about the adequacy of current competition laws to deal with the challenges of the abuse of power and data in the digital economy (Crémer Report, 2019; US Subcommittee on Antitrust, 2020) While these debates have increasingly led to proposals setting out sector-specific regulation and the imposition of *ex ante* obligations on 'gate-keepers' (Digital Markets Act, 2020), this paper examines some aspects of the Apple litigation through the lens of traditional competition law analysis.

2. The Apple 'App Store' litigation

Apple is the sole distributer of apps on iOS and prevents iOS users from downloading any apps from any source other than Apple's own storefront, the App Store. Apple requires all in-app purchases to be made exclusively via Apple's own proprietary In-App Purchase (IAP) system and charges app developers a 30% commission. Apple also restricts developers from informing users of alternative (usually cheaper) purchasing possibilities outside of the app ('anti-steering provisions'). It is argued that these excessive prices and restrictive conditions mean that iOS developers are discouraged from innovating and are forced to increase prices to app users.

These restrictive conditions have led the European Commission, in response to a complaint by the music streaming service Spotify, to submit a 'Statement of Objections' to Apple for abuse of dominance under Article 102 TFEU in the market for the distribution of music streaming apps through its App Store (Statement of Objections, 2021). In the US, Epic, the creator of the popular online video game Fortnight, has sought an injunction against Apple in the Californian District Court (*Epic v Apple*, 2021; Epic Findings of Fact, 2021; Apple Findings of Fact, 2021). Epic added its own direct payment processing option as an alternative for in-app purchases made by users of Fortnite on iOS devices and offered a 20% reduction

on IAP prices. In response, Apple removed Fortnight from its App Store (Paul and Sweney, 2020).

It is not intended to discuss all the possible antitrust claims that may arise in these ongoing EU and US cases but to consider the issues arising from market definition and market power and two possible theories of harm: the possibility in the EU of an action for unfair or excessive pricing and the treatment of the anti-steering provisions in the US *Epic* litigation (see Geradin and Katsifis, 2021). As the EU case is only at the 'Statement of Objections' stage this paper draws on some of the factual findings by the US District Court (California) in the 2021 *Epic* decision. Epic claimed the exclusivity and anti-steering provisions amounted to maintenance of a monopoly and denial of an essential facility in the iOS App distribution market and the market for in-app payment processing on iOS devices under s2 Sherman Act and unreasonable restraint of trade and tying under s1 Sherman Act. A claim for 'excessive pricing' is not actionable in the US because, the Supreme Court stated in *Trinko*, '[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system' (*Verizon v Trinko*, 2004, p. 294). It has been argued however that the fee could amount to a failure to provide access under 'just and reasonable terms' in the US under the essential facility doctrine (*Kotapati et al.*, 2020, pp. 27–28).

3. Market definition, market power its relationship to intermediation power

In its 'Statement of Objections' the European Commission made a preliminary finding that Apple has a dominant position in the market for the distribution of music streaming apps through its App Store. The Commission claims that the fees and mandatory use of the IAP distorts competition for the distribution of music streaming apps because music streaming apps compete with Apple's music streaming app 'Apple Music'. But a market for music streaming apps within the App Store would seem to be a particularly narrow market. In the US *Epic* decision Apple had argued for a broad market of all digital game transactions (including console gaming on Xbox, PlayStation and cloud-based streaming) because users tend to multi-home and in this case play Fortnite on more than one device (*Epic v Apple*, 2021). The presence of multi-homing and the rise of cross-platform gaming services such as cloud-based streaming services places competitive pressures on platforms providing gaming app transactions and potentially lowers barriers to entry (*Epic v Apple*, 2021, pp. 64, 94). As they are not tied to a single device, gaming through web-browsers and on multi-platforms can operate as a form of middleware and threaten the monetization of gaming app transactions. This may explain Apple's refusal to remove the App Store's restrictive conditions.

The US District Court rejected Apple's broad market definition however and found a 'market for digital mobile gaming transactions' where Apple had 52-57% market share (*Epic v Apple*, 2021, p. 137).

Gaming apps are highly profitable and crucial to Apple App Store's revenue. According to Apple's internal records and evidence at the US *Epic* trial, 83% of the apps on the App Store in 2019 were free (Epic Findings of Fact, 2021, p. 32). These are monetized through the 'freemium model' where the initial download is 'free' but revenue comes from in-app purchases or payments for upgrades. In 2016, despite accounting for only approximately 33% of all app downloads, game apps accounted for 81% of all app store billings that year (Epic Findings of Fact, 2021, p. 43). In 2017 gaming revenues overall accounted for 76% of Apple's App Store revenues (Epic Findings of Fact, 2021, p. 43).

There is a competitive market for the downloading of apps through iOS or Android devices or though other sources such as the app developer's webpages. There is also an increasing duopoly in the smart phone market of Android and iOS devices. The US Subcommittee on Antitrust found that:

> …both Apple and Google have durable and persistent market power in the mobile operating system market; iOS and Android run on more than 99% of mobile devices in the U.S. and globally. There are high switching costs in the mobile operating system market and high barriers to entry. (Subcommittee on Antitrust, 2020, p. 94, cf pp. 102–105).

A central issue in these cases however, which has important ramifications for the application of antitrust to digital markets generally, is whether a narrow single brand market (the Apple App Store), within an 'digital ecosystem' intermediated by a digital platform, can be a relevant market for antitrust purposes.

The iOS App distribution market operates as a two-sided market comprising app users and app developers where there are strong indirect network effects. There is a positive feedback loop, where users prefer an app store where they can access a large number of apps and app developers wish to write for a platform that has a number of app users (Geradin and Katsifis, 2021, pp. 510–11). The iOS user base is particularly desirable to app developers because there are more than one billion iPhone users (1.5 billion active iOS devices, including both iPhones and iPad) and these users are found to spend twice as much money on apps than Android users, making them an indispensable trading partner for app developers (Epic Findings of Fact, 2021, p. 64).

Apple, as a gatekeeper which sets the conditions for access to an indispensable network for software developers means that there is no competition in the iOS app distribution market and the iOS In-App Payment Processing Market. In performing this gatekeeper role, Apple exercises a form of intermediation power.

Digital platforms, depending on the business model, perform intermediation roles and control an 'ecosystem' of interdependent products or services on multisided markets. Market power can arise through the control of narrow proprietary 'walled gardens' where there are direct and indirect network effects, high switching costs, little multi-homing, information asymmetries and a high degree of consumer loyalty or inertia. This can give rise to a form 'economic dependency' which allows exploitation over an 'installed base'. The EU Crémer Report explains:

> It is a commonplace in the economics of two-sided platforms that there can be market power even in an apparently fragmented marketplace…This kind of market power – which is linked to the well-known competition law concept of "unavoidable trading partner" and has, with a view to platforms, sometimes been called intermediation power – is compatible with fierce competition on the "monopolistic side". (Crémer Report, 2019, p. 49).

The ability to charge 'excessive prices' and extract data in these circumstances was identified by the US Subcommittee on Antitrust:

> While a firm in a competitive market would lose business if it charged excessive prices for its goods or services because the customer would switch to a competitor, dominant platforms have been able to charge excessive prices or ratchet up their prices without a significant loss of business. Similarly, certain dominant platforms have been able to extort an ever-increasing amount of data from their customers and users (Subcommittee on Antitrust, 2020, p. 390).

The EU proposed Digital Markets Act (DMA) draws on the term 'online intermediation services' to denote the specific services which may be restricted by gatekeepers which place conditions on users, limiting inter-platform contestability (Digital Market Act, 2020, para [26]). The 10th Amendment to the German Act against Restraints of Competition (ARC), which came into force on 19 January 2021, embraces the concept of intermediation power directly within competition law to target firms with 'paramount cross-market significance.' It includes gatekeepers and intermediaries with conglomerate power that may or may not coincide with dominance.

> Instead, the power derives from a net of dependencies from one and the same company and a multi -market influence of that company covering all relevant elements of the ecosystem. (Budzinski, O., *et al.,* 2020, 12).

These legislative solutions specifically acknowledge the complex market power issues that arise from the exercise of 'intermediation power' within digital ecosystems but this paper asks whether we must always resort to sector-specific legislation or whether intermediation power can be equivalent to dominance under traditional competition law? We commence this analysis by considering whether the App Store can be a relevant separate market.

4. The monopolisation of an aftermarket

A single brand market, although rare, can be established in antitrust law. In the US Epic argued that the app distribution market (and the payment processing for iOS apps) was an aftermarket, drawing on the analysis of the Supreme Court decision in *Eastman Kodak* (*Epic v Apple*, 2021, p. 44; *Eastman Kodak,* 1992). While there is intense competition in the primary market for mobile devices where Apple competes with non-iOS devices, this can co-exist with 'lock-in' and exploitation in an aftermarket. The iOS app distribution market arguably operates as an aftermarket 'where high prices and other abusive terms are not self-correcting' (Geradin and Katsifis, 2021, p. 533) and an 'installed base' of consumers can be subject to exploitation.

Aftermarket cases concern the sale of original equipment such as a car or a computer in a primary, usually competitive market, together with the sale of complementary goods or services such as software, spare parts or repair services in an interdependent aftermarket. The aftermarket may be narrowly defined and contain proprietary spare parts which are not substitutable with generic parts. The question arises whether a firm can monopolise an aftermarket by raising the price for spare parts, refusing to supply or by tying the sale of spare parts to repair services.

A majority of the US Supreme Court in *Eastman Kodak* held that Kodak, which sold photocopiers and micrographic equipment in the primary market, could monopolise the aftermarket for repair parts and service. Kodak, facing competition from independent service operators (ISOs), had changed its practice of selling repair parts to ISOs. Unable to obtain parts, ISOs were forced out of the market. Kodak argued that it could not monopolise the aftermarket because consumers engage in 'life cycle pricing' and take account of the aftermarket prices at the point of purchase of the original equipment. Any attempt to raise price in the aftermarket would be restrained by reputational effects, fall in demand and loss of profits in the original equipment market. A majority of the Supreme Court found that a separate market could exist for the parts or service of a single brand of original equipment (*Eastman Kodak*, 1992, pp. 481–482). Life cycle pricing was considered difficult and costly and its accuracy varied with each consumer. It found that competition in the original equipment market could co-exist with market power in aftermarkets where higher aftermarket prices could more than compensate for lost equipment sales. The Court found that '[i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands' (*Eastman Kodak*, 1992, p. 476). The *Kodak* decision demonstrates that s2 Sherman Act may be used to restrain the charging of higher prices in aftermarkets.

While subsequent US Federal Circuit courts have limited the application of *Kodak* in the US to circumstances where the aftermarket policy has been changed post-purchase of the original equipment (*PSI Repair Services*, 1997; *Newcal Industries,* 2008), the EU has accepted the approach in *Kodak* in a number of decisions under Article 102 TFEU (*Hilti,* 1991; *Pelikan/Kyocera*, 1992; *Digital Undertaking*, 1997; *Info-Lab/Ricoh*, 1999). These decisions recognize that exploitation through the imposition of restrictive conditions and high prices in narrow/proprietary aftermarkets can be abusive.

In *Pelikan/Kyocera,* Kyocera supplied printers in a competitive market together with consumables such as laser replacement toners and repair parts in an aftermarket. Pelikan, which competed in the aftermarket for replacement toners and spare parts, argued that warranties imposed by Kyocera that restricted use of competitor brands in the aftermarket amounted to an abuse of dominance under Article 102. The European Commission found that 'the market for supply of toners and/or other consumables for printers of a specific brand must be considered a separate market'(*Pelikan/Kyocera*, 1992, p.54). The Commission, referring to *Eastman Kodak*, found however that dominance and lock-in in an aftermarket was unlikely to occur in that case because a customer

> (i) <u>can</u> make an informed choice including lifecycle – pricing… (ii) is <u>likely</u> to make such choice accordingly, and that, in case of an apparent policy of exploitation being pursued in one specific aftermarket, a (iii) <u>sufficient number</u> of customers would adapt their purchasing behaviour at the level of the primary market (iv) with <u>reasonable time</u> (*Pelikan/Kyocera*, 1992, p. 61 (emphasis in original)).

In the US, Epic argued that the App Store distribution market constituted an aftermarket that was subject to exploitation by Apple. Any attempt to increase the price to app developers and for in-app purchasers would not be constrained by competition in the market for smartphones because consumers do not generally engage in 'life-cycle pricing' when they purchase a smartphone (*Epic Findings of Fact*, 2021, paras [88], [173]). This is because it is difficult to calculate and compare the lifecycle costs of smartphones. There is often a complicated cost structure that includes the comparison of features, contract length, the mobile service operator and the device cost and these are subject to information asymmetries regarding the price of app distribution *(Epic Findings of Fact*, 2021, paras [88], [173]). The cost of distributing apps is low compared to the overall cost of the phone so that even if consumers had better information it would not likely be a major factor in their choice of mobile phone (*Epic Findings of Fact*, 2021, para [173]). They are unaware at the time of purchase how much they are likely to spend over the life cycle of the device.

Once purchased, iOS device users also face substantial switching costs when they switch to alternate mobile phones with a different operating system such as Android. These costs include data portability, learning costs and loss of compatibility of devices within the Apple 'ecosystem'. Users of Apple's devices are also very loyal to the brand with a retention rate of 92% and they do not switch easily (*Statement of Objections*, 2021).

Primary equipment sellers can also benefit from feedback, sales and repair information in the aftermarket 'as "counting devices" to measure the intensity of customer equipment usage' (*Eastman Kodak*, 1992, p. 499, per Scalia J (dissenting)). In the same way the 'the app store's review service remains an important source of value-added for app upgrades in aftermarkets' (Cabral *et al.*, 2021, p. 18). But different from the relationship in *Eastman Kodak*, this value flows as much as to the Apple App Store as gatekeeper as much as the app developer (Cabral *et al.*, 2021, p. 18). As Geradin and Katsifis point out the 'Apple has detailed information. on which apps are successful, and even how much time and money users spend in them. These are commercially sensitive data, which app developers would normally never hand over to their rivals' (Geradin and Katsifis, 2021, pp. 560–61). To the extent that these provisions also permit Apple to take control of the billing relationship with the consumer they allow unprecedented access to customer data and their purchasing profile The mandatory use of the IAP

> …disintermediates app developers from their users, deprives them of the data they could use to improve their products and services, but it also deprives app developers from the innovation and tailor-made solutions that could be brought by providers of other in-app payment solutions. (Geradin and Katsifis, 2021, p. 531).

In the US *Epic* decision Apple rejected the aftermarket theory as non-applicable because single brand market definitions are rare. Apple argued that as it was a two-sided transaction market it must be considered as supplying only one product (Citing *American Express Co.,* 2018, p. 2286 n. 8). The US District Court also rejected the aftermarket theory and found, as previously mentioned, a 'market for digital mobile gaming transactions' where Apple had a 52–57% market share. The Court did recognize however that a single brand could constitute a separate market although considered rare (*Epic v Apple,* 2021, p. 127). The Court rejected as artificial the idea of a primary or foremarket for Apple's iOS operating systems because the operating system is not licensed or sold. Competition exists for smartphones which are more than just an operating system (*Epic v Apple,* 2021, p. 45). The Court was also critical of the evidence presented by Epic to support switching and information costs. Epic failed to prove that users were subjected to high switching costs and were therefore locked-in (*Epic v Apple,* 2021, pp. 48–50). No consumer survey was presented that consumers were unaware of the restrictive

conditions before purchasing the smartphone and the 30% rate had not changed post-purchase (*Epic v Apple,* 2021, pp. 50-51). The Court also took account of Apple's evidence that strongly suggested that low switching between operating systems stemmed from overall satisfaction with existing devices, rather than any 'lock-in' (*Epic v Apple,* 2021, p. 51).

The EU courts have been more willing to find narrow markets in aftermarket cases and in digital markets. In *Google (Android)* iOS was considered to be in a separate market to Android (*Google (Android),* 2018). Apple's gatekeeper control over the mobile device, iOS, App Store and IAP operates as a 'walled garden' and the Commission stated in its 'Statement of Objections' that 'Apple's devices and software form a *"closed ecosystem"* in which Apple controls every aspect of the user experience for iPhones and iPads' (Statement of Objections, 2021).

- In a 2021 case concerning the mobile phone and apps market, the French Autorité de la concurrence in *Interactive Advertising Bureau France et al.*, applied the four criteria in *Pelikan/Kyocera* to reject Apple's argument that competition in the primary market for smartphones was sufficient to prevent dominance of an aftermarket. It was possible for lock-in and exploitation to occur in the aftermarket for apps (*Interactive Advertising Bureau France,* 2021, paras [113–115]).
- The French Commission found that a consumer's choice of a mobile device is primarily influenced by price and the expenditure on the purchase of apps is not a determining factor. It was unlikely that users of iOS would switch to an alternate offering on the primary market because of the importance of interoperability within the Apple ecosystem user experience. They were unlikely to switch in light of degradation of the quality of apps in the App Store 'since such a change would imply, for some iOS users, the loss of their investment in Apple's ecosystem. High costs in the event of a change of environment is therefore a strong barrier to switching' (*Interactive Advertising Bureau France*, 2021, para [115]).

5. Could the 30% fee amount to excessive pricing?

Could the imposition of the 30% fee amount to an unfair purchase or selling price as an abuse of a dominant undertaking under Article 102 TFEU? The 30% fee may be passed on and result in higher prices to consumers. The European Commission in its 'Statement of Objections' argued that the payment of the fee by Spotify distorts competition with respect to Apple's own music streaming app 'Apple Music'. The *US Subcommittee on Antitrust* noted

> [A]pple's monopoly power over app distribution on iPhones permits the App Store to generate supra-normal profits. These profits are derived by

> extracting rents from developers, who either pass on price increases to consumers or reduce investments in innovative new services. Apple's ban on rival app stores and alternative payment processing locks out competition, boosting Apple's profits from a captured ecosystem of developers and consumers." (*Subcommittee on Antitrust*, 2020, pp. 339–351; cf p. 345).

In the foundational case of *United Brands,* the European Court of Justice set out a two limb test for 'excessive pricing' (*United Brands,* 1978, p. 248). The first limb asks if the price is 'excessive' and will examine this on the basis that it 'has no reasonable relation to the economic value of the product supplied' (*United Brands,* 1978, p. 250). The Court stated that whether the price is 'excessive' can be determined 'objectively' by 'making a comparison between the selling price of the product in question and its cost of production' (*United Brands,* 1978, p. 251). If the answer to the first limb is in the affirmative, the second limb of the test asks 'whether a price has been imposed which is either unfair in itself or when compared to competing products' (*United Brands,* 1978, p. 252).

Could the fee charged by Apple be considered excessive on the basis of 'cost'? Apple's net revenue from the App Store is projected to be $US 17.4 billion for Fiscal Year 2020-21 (Subcommittee on Antitrust, 2020, p. 344). Apple receive in excess of $US 100 million in commissions from Epic and Fortnite (Iyenger, 2021). Apple's running costs for the App Store are estimated at less than $US 100 million (Subcommittee on Antitrust, 2020, p. 345, citing Shoemaker, P.). As many of the costs are common to a range of services offered by the mobile ecosystem it is difficult however to allocate costs and determine a benchmark (ACCC, 2021, p. 72). In the US *Epic* case the Court found that the 30% fee has allowed Apple 'to reap supracompetitive operating margins' and it 'already reflects monopoly levels' (*Epic v Apple*, 2021, p. 92). 'Absent competition, however, it is impossible to say that Apple's 30% commission reflects the fair market value of its services' (*Epic v Apple*, 2021, p. 98).

On a 'comparator' basis, the 30% commission rate is similar to the commission rates charged by other app and digital game marketplaces (ACCC, 2021, pp.72–73). This is difficult to justify however when only 16% of all apps pay for in-app purchases (*Subcommittee* on Antitrust, 2020, p. 340). The cost of alternative electronic payment processing tools is also considerably less than that charged by Apple. The average cost for processing outside of iOS was 4.3% (Epic Findings of Fact (2021), para [454]). On the basis of 'cost-based' and comparator products it could be argued that the fee is excessive. O'Donoghue and Padilla recommend that 'excessive pricing' investigations should be confined to markets where 'consumers have no credible alternatives to the products of the dominant firm' (O'Donoghue and Padilla, 2013, p. 776). This is arguably the situation here given

the high switching costs identified above in the treatment of the App Store as an aftermarket.

In evidence at the *Epic* trial, Apple's CEO Tim Cook, stated '[i]t has nothing to do with money' (Iyengar, 2021). Apple argue that the 30% is not a processing fee but reflects the value of the App Store to the developer. This includes access to a huge network, Apple's technology and development tools, marketing efforts and customer service (Subcommittee on Antitrust, 2020, p. 343). The marketplace provides privacy, security, and a seamless transaction (Apple Findings of Fact, 2020, paras [64]-[92]). Apple claims they require the 'walled garden' to protect their intellectual property and prevent free riding on its success and innovation (Apple Findings of Fact, 2021, para [316]).

Large app developers can also exercise countervailing power in the distribution market. Epic's owner, for example, is worth $US 28 billion (Kleinman, 2021). Apple claimed that developers have many options for distribution and monetization and that prior to Fortnight's removal from the App Store, Epic had negotiated a greater level of support from Apple (Apple Findings of Fact, 2021, para [114]). The fee was also reduced for smaller developers. Apple introduced a change from 1 January 2021 to allow any developer who earns less than $US 1 million in annual sales per year from all of their apps to qualify for a reduced App Store cut of 15% on all paid app revenue and in-app purchases (Statt, 2020). These developers accounted for less than 5% of the revenue Apple collected from apps however (Statt, 2020) and reflect that '[o]nly rarely has Apple reduced its commission in response to competitive pressure' (*Epic v Apple*, 2021, p. 62).

The 'economic value' and welfare benefits that flow to consumers from the benefits of an interoperable ecosystem, 'walled garden' and homogenous system may however shift the balance in favour of Apple. At the same time, it is important to remember that the Commission in *Microsoft* found that consumer choice was diminished by 'locking them into a homogeneous Microsoft solution' (*Microsoft*, 2004, para [782]). It is always difficult however to place a value on intangible benefits for determination of 'economic value'. The US District Court in *Epic* was also critical of Apple's lack of transparency about the value of its intellectual property, 'there is no evidence that Apple set or maintains its specific commission rate with any consideration of the value or cost of intellectual property in mind' (*Epic v Apple*, 2021, p. 146).

6. Are the Anti-steering provisions anti-competitive?

In the US *Epic* case claims under s1 Sherman Act that the restrictive terms in the developer agreement amounted to an unreasonable restraint of trade and tying in the iOS distribution market ultimately failed. No concerted agreement was established and no anticompetitive effect was found on the rule of reason,

the US District Court largely accepted Apple's justifications on security and intellectual property grounds (*Epic v Apple*, 2021, pp. 143, 149). The IAP was also not considered a separate product market for the purposes of a claim for tying (*Epic v Apple*, 2021, p. 155). Claims under s2 Sherman Act for maintenance of a monopoly and denial of an essential facility on the iOS app distribution market also failed because 52–57% market share in the mobile gaming market was considered insufficient to sustain a monopoly and the conduct was not found to be anticompetitive under the rule of reason (*Epic v Apple*, 2021, pp. 152,159).

Judge Gonzalez Rogers however found the 'anti-steering provisions' which prevent app developers from informing iPhone and iPad users of alternative cheaper purchasing possibilities outside of App Store to be anticompetitive under California's *Unfair Competition Law* which prohibits business practices that constitute 'unfair competition' and imposed an equitable remedy restraining the practice (*Epic v Apple*, 2021, pp. 159–167). The Judge found that the lack of information and transparency about polices to allow consumers to find cheaper prices and better quality elsewhere prevented an informed choice among users of the iOS platform. In doing so Judge Gonzalez Rogers made some observations about the importance of pricing information and price advertising to the efficient operation of the market as a form of 'commercial speech' (*Epic v Apple*, 2021, p. 164). Transparency and the open flow of information were particularly important for informed choices in technology markets as 'information costs may create "lock-in" for platforms as users lack information about the lifetime costs of an ecosystem' (*Epic v Apple*, 2021, p. 164) and create the potential for anticompetitive exploitation of consumers (*Epic v Apple*, 2021, p. 164, citing *Eastman Kodak*, 1992, pp. 473–75). The Court also stated that in retail brick-and-mortar stores 'consumers do not lack knowledge of options' but that technology platforms differ (*Epic v Apple*, 2021, p. 165, distinguishing *American Express*, 2018). Apple created 'a black box' and 'enforced silence to control information' (*Epic v Apple*, 2021, p. 165). Apple also used marketing activities such as 'push notifications' and 'email outreach' to keep users coming back (*Epic v Apple*, 2021, p. 163). As Cabral *et al.* put it:

> …incomplete information impedes rational consumer decisions and may result in market failure. Apps are experience goods; aftermarket needs are not known at the time of initial purchase and only emerge over time… online aftermarket sales are subject to behavioural biases in in-app advertising and to lock-in effects in apps that exhibit social network effects. (Cabral *et al.*, 2021, p. 18).

7. Conclusion

Digital platforms often perform intermediation and gatekeeper roles within an 'ecosystem' of interdependent products or services on multisided markets. Market power as 'intermediation power' can arise from the control of narrow proprietary 'walled gardens' which permits exploitation of an 'installed base'. The issues arising from the Apple App store litigation exemplifies how firms with intermediation power can impose restrictive conditions and excessive prices in circumstances where the consumer has little possibility of switching.

Several jurisdictions are considering sector-specific legislation to deal with this conduct. In the US a bipartisan Open App Markets Act Bill was introduced to the US Congress in August 2021. It specifically targets app stores to prevent self-preferencing and mandating use of own IAP systems. It will only apply to companies with more than 50 million US users and so specifically targets Google and Apple. In the EU, the DMA is much broader in scope. It proposes to deal with anti-steering by imposing duties on gatekeepers under Article 6(c) to allow the installation of and access to third party software applications. Another regulatory solution could be a cap on fees similar to the regulation of interchange fees.

Notwithstanding these regulatory solutions, this paper has explored some of these issues within the context of traditional competition law and its treatment of aftermarkets. Competition law recognises that a narrow aftermarket can be exploited through the imposition of restrictive conditions and excessive prices and this framework can assist in understanding the competitive constraints in digital markets. While the US *Epic* decision rejected the aftermarket theory it also reaffirmed the importance of the admission of cogent evidence to support claims of high switching costs and information deficiencies which may prevent lifecycle pricing. In contrast, a number of EU decisions have found that narrow single brand markets can be exploited as aftermarkets. While the European Commission's case against Apple is still at the 'Statement of Objections' stage it is argued that a successful case may be made for 'excessive pricing' and other possible claims such as tying under Article 102 TFEU.

In proposing antitrust solutions it is also important to recognise that if Apple is forced to reduce its fee or allow alternate payment systems, it would no doubt expect to recoup investments elsewhere within the ecosystem, including higher prices for all app developers and mobile devices. It is also a valid defence to wish to preserve the consumer benefits that flow from a secure and proprietary 'walled garden' and interoperable system. At the same time the EU *Microsoft* case expressed dissatisfaction with conduct that ties consumers to a homogenous system.

There is a final aspect to this discussion which raises important issues for the competition regulation of digital platforms. The US Court in *Epic* finding that the 'anti-steering provisions' were in breach of California's *Unfair Competition*

Law highlights the importance to consumer choice of the flow of accurate and transparent information in digital markets. Intermediation power creates opportunities and incentives for the dissemination of obscure and opaque information. Gaming apps remain a huge source of revenue for Apple and the threat of competition from middleware through cloud computing and web-based browsers poses a threat to this important source of monetization. This provides an explanation for Apple's use of 'push notifications' and emails to manipulate consumer attention and its imposition of the 'anti-steering provisions' and other restrictive conditions. The European Commission and Courts have already demonstrated that they have been willing to incorporate considerations of consumer behaviour such as the role of consumer inertia and 'status quo bias' within their discussion of switching costs in the assessment of market power in the *Google* litigation. There is an ongoing debate in global competition law about the adequacy of current competition laws to deal with the challenges of the abuse of power and data in the digital economy. The Apple litigation may provide another opportunity to demonstrate the flexibility of EU competition law to regulate novel abuses and complex business models.

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The recent EU antitrust regulation of digital platforms, its enforcement and pressure from below

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Abstract

The power of the platform's providers such as Amazon, Google Play or Booking is still rising and the existing standard EU antitrust rules do not seem to be sufficient. Consequently, the P2B Regulation, a new complementary regulation, was adopted. In addition to the regulation from above, individuals and civic movements are gaining ground to battle against the power of these companies as well. The paper discusses the way of enforcement of the P2B Regulation in the selected Member States and the shortcomings of the P2B Regulation. In addition, the paper is focused on the civic activities and collective actions of business users that try together to acquire higher bargaining power against the platform and reach better (working) conditions.

Keywords: digital platforms, horizontal agreements of business users, P2B regulation

JEL Classification: K210

1. Introduction

The Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, known as the P2B Regulation, was adopted to limit several unfair practices that the providers of online intermediation services (platforms) apply against the business users and to bring more transparency to the providers' platforms. In practice, it has an impact on the e-commerce marketplaces, app stores and social media, namely Google Play, Booking or Amazon. Besides, the P2B Regulation imposes several transparency duties on the providers of online search engine such as Google in order to improve the position of corporate website users.

The duties that the P2B Regulation sets out to the providers of online intermediation services focus in part on the form of the terms and conditions (clear, understandable, and easily available) and in part on the material content

of such conditions and dispute resolution. These duties should ensure higher transparency of the operation of the online intermediation services to the business users (explanation of the main parameters of the ranking, differentiated treatment with products or services of the provider or business user controlled by it) and also provide certain guarantees and protections to the business users (reasoned suspension or termination of online intermediation services to the business user, clear visibility of the business user's identity, introducing of internal complaint-handling system on the provider's platform, a lawsuit brought by an organization representing business users etc.).

In order to increase compliance with the duties, the P2B Regulation also imposed the obligation to ensure adequate and effective enforcement of the Regulation on the Member States without setting specific form of such enforcement. Thus, the conference paper compares the enforcement mechanisms adopted by the selected Member States.

The P2B Regulation is in practice the very first regulation considering the specifics of platforms, albeit rather lenient. As a result, solutions and adequate regulation for all problems of the P2B relationships are not included. Thus, the paper is focusing on the shortcomings of the P2B Regulation, shows the reality of protests of the business users of the platforms and its limits in competition law.

2. Problem Formulation and Methodology

The study is structured into three parts. Firstly, it examines the way of enforcement of the P2B Regulation in selected Member States. Secondly, the study is focused on the shortcomings of P2B Regulation. Lastly, the study discusses the civic activities, namely the transition to alternative providers, practice, and legal limits of the collective actions of business users in order to acquire better conditions towards the providers of online intermediation services. The paper is based on a descriptive, analytical, and comparative method.

3. The Enforcement of the P2B Regulation in selected Member States

The P2B Regulation has been effective from 12 June 2020; thus, it was partly overshadowed by the problems associated with the COVID-19 pandemic. It has not been much discussed in professional circles and, in addition, some of the Member States did not implement additional rules to ensure the enforcement of the P2B Regulation. However, the P2B Regulation explicitly imposed the obligation to ensure adequate and effective enforcement of the Regulation on Member States. The measures must be effective, proportionate, and dissuasive (Art. 15 of the Regulation).

The conference paper compares individual approaches of selected Member States – the Czech Republic, Germany, Finland, Netherlands, and Italy – and discusses which Member States introduced the administrative control or the enforcement of the P2B Regulation by courts.

3.1 The Czech Republic

The enforcement of the duties arising from the P2B Regulation is currently provided by courts in the Czech Republic and is not specifically regulated.

In 2019, the Ministry of Industry and Trade firstly confirmed that the enforcement of the Regulation would be provided by courts, not by the administrative bodies (Ministry of Industry and Trade, 2019). Nevertheless, afterwards it changed that statement and considered a failure to designate a supervisory (administrative) authority as ineffective and slow in the long run (Explanatory memorandum to the proposal, p. 11).

This approach is reasonable, considering the fact that the civil proceedings take a considerable amount of time in the Czech Republic, namely 281 days on average in 2020 (Ministry of Justice, 2021, p. 24). On the other hand, the average time to issue an administrative decision is much shorter. For example, the proceedings in the public procurement review agenda took before the Office for the Protection of Competition (Czech Competition Authority) 38,8 days in 2020 as average (The Office for the Protection of Competition, 2021, p. 28). The comparison is only illustrative and made in the public procurement review agenda because the data relating to administrative decisions in the unfair practice agenda were not published.

Therefore, the administrative control and the threat of sanctions imposed by the national authority could be in the case of enforcement of the P2B Regulation probably more appropriate and less time-consuming.

In 2020 and 2021, the Ministry submitted in the Chamber of the Deputies a proposal of the amendment to the Act No. 480/2004 Sb., on certain information society services. Both proposals established administrative delictual liability of the providers of the online intermediation services or online search engine and set out the administrative control powers to the existing Czech Telecommunications Office. The first proposal was not approved before the end of the term of office of the Chamber of Deputies so a new identical proposal was submitted in December 2021.

According to the draft bill, the Czech Telecommunications Office (the CTO) shall hear and enforce administrative delicts that are based on the infringement of obligations under the P2B Regulation (similarly as Italian Communications Authority). Moreover, the draft bill proposed a special informal procedure that should give providers a second chance to rectify an incompliant existing situation in the case of a less serious breach of duties. Based on the call of the Czech

Telecommunications Office, the provider may comply with the duties within the additional period of 15 days in order not to be sanctioned.

The fine is set up to 10,000,000 Czech crowns, approximately € 400,000. Such an amount is incomparably lower than the sanctions set by the Competition Act in field of abuse of dominant position or conclusion of cartel agreement. However, the amount also reflects the fact that the duties arising from the P2B Regulation is still rather new (Explanatory memorandum to the proposal, p. 17). In addition, it is still much lower than the sanctions imposed for breaches of the P2B Regulation in other Member States (see below).

Besides that, according to the draft bill it should be possible to impose administrative penalties consisting of the publication of decisions on the administrative delict, thus informing the public about the unfair commercial practices of the providers. Such a sanction could have a negative impact on the provider and could discourage not only the business users but also the customers from using the provider's platform.

3.2 Germany

According to the Federal Ministry for Economic Affairs and Energy, the enforcement of the P2B Regulation is ensured through civil law instruments (such as lawsuit lodged at the courts). Breaches of the P2B Regulation are considered to be the breaches of unfair competition law and a claimant (mainly a competitor) may ask for removal, injunctive relief, or damages. After the adoption of amendment to the Unfair Competition Act, the claimant may also be organisations, associations and public bodies that meet the requirements set in the Regulation (Art. 2 Act Amending the Telemedia Act and Other Acts of 19 November 2020).

The enforcement of the P2B Regulation by the state authorities is seemingly not envisaged in Germany (The Scientific Services of the German Federal Parliament, 2020, p. 6).

3.3 Other selected Member States

Like Germany, Finland also ensures the enforcement of the P2B Regulation by the courts and does not appoint a state authority in order to ensure administrative control. Finland has passed a new act and assigned jurisdiction on the Market Court to consider cases relating to the P2B Regulation. The Court may impose a general prohibition on using breaching practices and even a penalty on the provider. Individual private claims such as a claim for damages will be handled before a district court (Ministry of Economic Affairs and Employment of Finland, 2020).

On the contrary, like the Czech Republic, the Netherlands also intends to introduce administrative control. Pursuant to the draft bill, the existing Dutch Authority for Consumers and Markets should enforce the P2B Regulation in the Netherlands. It will be able to impose binding compliance orders, orders subject

to a penalty, and administrative fines up to 870,000 euros or 1 percent of the turnover of the provider. It will be possible to increase the fine by 100 percent in the case of a repeat infringement (Dutch draft bill, art. 4 and 5).

Finally, Italy introduced administrative control and a sanction mechanism in order to enforce not only the P2B Regulation but also to ensure compliance with new duties set by the national law. The Italian Communications Authority shall ensure effective application of the P2B Regulation. In addition, Italy introduced new duties to providers of online intermediation services and online search engine, namely to enrol in the Register of Communication Operators and to pay the annual contribution to the Italian Communications Authority (Law No. 178/2020, Art. 1, par. 515, 517). The Authority may impose a fine from 2 percent up to 5 percent of the turnover generated in the previous fiscal year (*Bisceglia et al.*, 2021).

3.4 Conclusion of the enforcement of the P2B Regulation

Based on the analysis above, it is obvious that some Member States (the Czech Republic, Netherlands, and Italy), ensured or intend to ensure enforcement of the Regulation by administrative control and sanctions, while others (Germany and Finland) leave enforcement to the courts through the actions of the competitors, organizations, etc. Although it is too early to assess the pros and cons of both systems in the Czech Republic, the administrative control will probably be more effective. The reason behind this is the preventive function of the threat of administrative sanctions, ex-officio proceedings instead of permanent need of action brought by the party concerned and presumed shorter duration of administrative delictual proceedings compared to the length of civil proceedings.

Besides enforcement mechanisms, some Member States introduced additional duties. Especially the duty to enrol in the Register and to pay annual contribution that were introduced in Italy may be inspiring for other Member States. The former could be very useful from the point of view of the supervisory authority – to have an overview of which providers it supervises and controls. The latter is also very useful in financing the administrative costs of the supervisory authorities.

The Member States' inconsistencies in enforcing the P2B Regulation, the different number of cases that they handled, and the different effectiveness of each system may play a role in the Commission's forthcoming assessment of the P2B Regulation. Is it possible that Commission concludes that unification is needed (also considering usual cross-border nature of the providers) and it is necessary to designate a national supervisory authority by each Member State? Or even would the control of compliance with the P2B Regulation fall directly under the European Commission, as it is also proposed in very similar agenda according to the Digital Markets Act proposal (Art. 18 et seq.)?

3.5 Implementation of the P2B Regulation by the providers

There have been some cases of missing enforcement mechanisms and ignorance or possible unpreparedness for new regulation by the platform providers after the date of effectiveness of the P2B Regulation.

The last study provided by the Observatory for the Online Platform Economy in June 2020 focused on "Monitoring of the implementation of the Platform to Business Regulation" and showed that not all platforms undertook necessary steps at that time. There were several platforms that did not update their Terms & Conditions and were not in compliance with transparency duties set by the P2B Regulation, including Apple and Google Play (Lechardoy et al., 2021, p. 9). To illustrate this point, Google Play did not provide any information on internal complaint mechanism, on mediation or on ranking, while Apple did not provide any information on internal complaint mechanism and ranking (Lechardoy et al., 2021, p. 13).

After almost 18 months, the compliance with the P2B Regulation is probably higher. As the first evaluation and assessment of the compliance with the most essential obligations of the P2B Regulation will be carried out by the European Commission by 13 January 2022, it will be interesting and useful to compared it with such valuable resource. Due to the date of the publication, such comparison could not be done in this paper.

4. Shortcomings of the P2B Regulation

The P2B Regulation is a first attempt to specifically regulate business of online intermediation services on the EU level. Naturally, it could not legislatively solve all problems of the platform economy. One of its aims is to ensure more transparency in P2B relationships and set internal mechanisms to solve the complaint within the platform. Thus, the paper suggests some of the current shortcomings that may be included in the future regulation.

Firstly, transparency in the differentiated treatment within the online intermediation services is defined too narrow. It includes only the differentiated treatment applied by the provider of online intermediation services to the goods or services offered by the provider itself or by any business users which the provider controls. If there is no control competency of the provider over the business user and the provider prefers its goods or services on the platform, there is no transparency duty within the scope of the P2B Regulation. Thus, other business users may not even know that such a business user is favoured.

Secondly, introducing the internal complaint-handling system is applied only to providers of online intermediation services, not the providers of online search engine. Even though there is no contractual relationship between the provider

of online search engine and corporate website user, an unreasonable decrease in the ranking could be effectively explained or correct within internal mechanism. However, its introduction is voluntary and in the case of its absence, the corporate website users are left to deal with it in other ways.

Thirdly, the P2B Regulation is based on the transparency and proclamations of the providers on how they work. Unilateral sharing of information by the platform on the one hand and the passive receiving of the information by the business users on the other hand in order to improve transparency on the platforms may not be sufficient. Much more practical could be introducing algorithmic disclosure co-regulation (a regulatory sandbox model) as Di Porto and Zuppetta suggest. In principle, this mechanism is based on the cooperation between stakeholders (platforms, the business users, the consumers, and the regulator) that train an algorithm on disclosures of platform's operations to the business users. Before implementing it in the platform, the algorithmic disclosures are pre-tested in a co-regulatory process carried out by a small group of stakeholders based on the training and feedback, and also freed of biases or risks of manipulation. (Di Porto and Zuppetta, 2021, pp. 285, 288)

Di Porto and Zuppetta took transparency of main ranking parameters as an example. In course of their suggested mechanism, the main aim would be to provide and obtain useful information with the dynamically adapting content and in the format (simple/detailed) according to the different informational needs and understanding capabilities of the various groups of business users. In order to reach such an aim, the algorithm would get to know the preferences of the various groups of recipients based on their behavioural data in the pre-testing phase. (Di Porto and Zuppetta, 2021, pp. 286–287)

Finally, the P2B Regulation has almost no limitations and prohibitions to empower the business users. In this respect, the current Digital Markets Act proposal tries to balance the weaker bargaining position of the business users towards the selected platforms with the significant position ("gatekeeper platforms").

For instance, the Act proposal set a duty to the gatekeeper platforms to provide complimentary access to data relating to platform services used by the business users and the end users (Art. 6(1)(i) of the Digital Markets Act proposal). In addition, it also set a duty to enable to use other distribution canal for offering the goods and services by the business user under different prices and conditions (Art. 5(b) of the Digital Markets Act proposal). Regarding ranking, there is also an explicit prohibition of favouritism of services and goods of the gatekeeper, or a third party controlled by it and also a duty to apply fair and non-discriminatory conditions to such ranking (Art. 6(1)(d) Digital Markets Act proposal). Favouring any business user in ranking that would be unfair is therefore also prohibited regardless of the character of the business user.

5. Civic activities against platforms

In practice, there is also other forms of enforcement of business users needs against the platforms in order to improve their positions and (working) conditions on the platforms. Such enforcements complement the regulation or try to be more effective than the existing regulation. The question is if the business users are legally eligible to jointly enforce better terms against the platforms, either by various protests or similar joint actions. The outflow of users from the dominant platform to another alternative platform may be also a solution.

5.1 The Outflow of users from dominant platforms

Civic activities such as "the DeGoogle movement" or transition from Facebook to alternative communication platforms such as Telegram have gained ground recently. Promoters of such movements provide several tips for alternatives to e.g. Google products, mostly with alleged greater protection of personal data and based on open-source types of service.

However, the alternative platforms still attract only few people. A strong network effect of the dominant platform and its usual character of multi-sided market often prevails and are the most significant barriers for outflow of its users. Simply explained it means that the more customers / clients are on the platform, the more advantageous the platform is for the business users.

Such an effect is probably the most common reason why the users do not switch to the alternative. This is also a reason why the business users have only limited options not to be on the dominant (mainstream) platform and to use an alternative platform with better conditions for them or a direct canal to their end customers without the intermediation. Convincing their clientele to use an alternative platform can be very demanding and possibly difficult to implement in practice, but it is still naturally not impossible. However, building comparable own infrastructure may require inherently higher costs, therefore small and medium business users would probably stay on the dominant platform and try to improve the conditions there.

5.2 Collective bargaining of solo self-employed persons towards the platforms

In addition to the legislative regulation and executive intervention, the business users of platforms themselves have been trying to improve their low bargaining power by their collective action against the platform providers in the recent years. There were approximately 324 protests by platform workers organized around the world between January 2015 and July 2019, most of them organized for better pay and working conditions (Joyce et al., 2020, p. 4). Although it is true that some protesting users are or should be in the position of employees of the platform

providers and therefore such protests are not too exceptional, some are not in this position. They are freelancers (self-employed persons), objectively independent of each other, thus not cooperating colleagues as employees. Therefore, regarding the competition rules, they should compete, not cooperate with each other in order to negotiate the same advantages against the platform providers.

The question is, what do the protesting freelancers risk? As they are not in the position of employees with an explicit right to collective bargaining, they run the risk of infringing the competition rules, in particular the prohibition of horizontal agreements (agreements between undertakings that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market according to Art. 101 of the Treaty on the Functioning of the European Union).

However, they could also be a weaker party that deserves protection or some instruments that improve their low bargaining power. Considering the fact that the platform providers play a role of market organizers who enable the business users to connect and contract with other users (consumers) and the fact that such a role is difficult to replace for the usual website nowadays in the global and digital economy, the freelancers cannot leave them easily. They are economically dependent on the platforms and in order to be in contact with other users (customers), they have to tolerate the unfavourable conditions.

Is it therefore necessary to change the legislation in order to enable the collective negotiation and collective action (protests) to the business users of the platforms? Or is it sufficient to interpret the existing competition law and exemptions from the prohibited agreements between competitors?

5.2.1 Case law on collective labour agreement of self-employed persons

Current development of case law and decisions of committees show that the essential change of legislation is perhaps not necessary.

In the case of *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, the Court of Justice emphasized that collective agreement concluded by an association of self-employed medical specialists and insurance companies in order to guarantee a certain level of pension to all the members of a profession is not excluded from the scope of Art. 85(1) of the Treaty (Art. 101(1) of the Treaty). According to the Court, the Treaty does not enable the members of the liberal professions to conclude collective agreements in order to improve their working conditions (Joined cases C-180/98 to C-184/98, para 68).

However, the Court of Justice of the European Union in the case of *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, C-413/13 concluded that the collective labour agreement that sets minimum fees for "false self-employed service providers" (service providers in a situation comparable to that of workers)

does not fall within the scope of Art. 101(1) TFEU. The Court emphasised also its settled case-law findings and the loss of status of undertakings, if the service provider is dependent on their principal, does not bear any financial or commercial risks from their own activity and operates as an auxiliary within the principal's undertaking (The Court of Justice of the European Union, 2013, point 33, 42)

The European Committee of Social Rights went one step further in the case of the *Irish Congress of Trade Unions (ICTU) v. Ireland*. Firstly, the Committee dealt with the decision of the Irish Competition Authority that considered collective agreement between the trade union (representing actors) and another entity as breaching the Irish Competition Act 2002 because of agreed fixed prices for the sale of their services (European Committee of Social Rights, 2018, para 97). The Committee considered such prohibition of collective bargaining concerning remuneration for certain self-employed workers as an excessive restriction breaching the right to bargain collectively guaranteed by Article 6(2) of the European social charter (European Committee of Social Rights, 2018, para 98, 101).

Secondly, the Committee dealt with the Irish Competition (Amendment) Act 2017 that stated that is not applied to collective bargaining and agreements of certain categories of workers – also "false self-employed" person and fully dependent self-employed persons specified in an Order made by the Minister. The Committee acknowledged that such rules do not breach the Charter (European Committee of Social Rights, 2018, para 104, 111, 116).

According to the Committee the key parameter of right to collectively bargain is not the distinctions between worker and self-employed but the bargaining power – when it is low and the self-employed workers have no chance to influence the contractual conditions, they should have a chance to bargain collectively and improve such imbalance. The Committee found out that the Art. 101 TFEU has no effect on the right of the workers to collective bargain and enables exceptions for certain category of self-employed persons (European Committee of Social Rights, 2018, paras 36, 38, 115).

Considering above mentioned case law, the Court of Justice has not acknowledged any general right to bargain collectively to all self-employed persons so far. However, the concept of exception for "false self-employed persons" from competition rules is hardly sufficient in the digital era and the Committee considerations on imbalance in bargaining power could be an inspiration. As Biasi described "the limitation of the antitrust exemption for collective bargaining to employees has turned into a vehicle of social injustice and it has to be thus rethought" (Biasi, 2018, p. 372).

The possible stricto sensu interpretation of "undertakings" made by the Court and its exceptions for other self-employed persons (especially economically dependent) could be a way. The European Commission has meanwhile taken steps and

proposed the guidelines that can help predictability of collective bargaining of some of the self-employed persons.

5.2.2 Draft of guidelines of the European Commission

In terms of this development and restrictions for self-employed persons for collective bargaining, the European Commission submitted on 9 December 2021 a proposal of Guidelines on the application of the EU competition law to collective agreements regarding the working conditions of a solo self-employed person. As the document is supposed to be in the form of guidelines, not the legislative act, it will bind the Commission to interpret and enforce the EU competition law but it will not bind the Courts or other persons.

The Commission try to make the draft technologically neutral and does not distinguish between an online and offline regime, with or without platforms. The proposal recognizes and gives advantage to two categories of collective agreements concluded by the solo self-employed persons concerning their working conditions:

- Collective agreements concluded by the solo self-employed persons comparable to workers falling outside article 101 TFEU – such agreements are completely excluded from the regulation of the EU competition law.
- Selected collective agreements concluded by solo self-employed persons against which the Commission will now intervene and therefore they will not be sanctioned.

First category is based on the definition of the solo self-employed persons comparable to workers. Generally, they have to rely on their own personal labour, namely to provide services on their own, and have to belong to one of the following categories:

- solo self-employed persons that are economically dependent to one counterparty (earning at least 50 percent of their total annual work-related income from a single counterparty);
- solo self-employed persons working "side-by-side" with workers and were not reclassified by the national authorities or courts as workers (generally they provide services under the direction of their counterparty without the commercial risks of the counterparty's activity); or
- solo self-employed persons providing their services through digital labour platforms (dependency on the digital platforms, especially because of their outreach to customers through the platform, little or no negotiation power to influence their working conditions).

The solo self-employed persons that meet above-mentioned requirements are in comparable situation as workers and therefore their collective agreements fall outside the Art. 101 TFEU.

The collective agreements concluded by solo self-employed persons with counterparties of a certain economic strength belong to the second category of collective agreements. The general principle is a clear imbalance in bargaining power of a solo self-employed person compared to the counterparty. The counterparty/counterparties therefore must represent the whole sector or industry and its/their annual aggregate turnover exceed €2 million or the staff headcount is equal or more than 10 persons. Such agreements on the one hand are not excluded from the application of Art. 101 TFEU, on the other hand the Commission commits itself not to taking action against them.

In addition, this category includes also the collective agreements concluded by self-employed persons pursuant to national or EU legislation (for instance, sectoral exemption from national competition law or a right of collective bargaining granted by the Member State to a particular category of self-employed person).

Finally, as for the scope of collective agreement, the guidelines are generally applied to collective negotiation, a "strike" of solo self-employed persons (a collective decision not to provide services under specific conditions) and generally to agreements concluded between undertakings concerning the working conditions of the solo self-employed persons. Such an agreement may include the remuneration of solo self-employed persons, health and safety insurance but not the end prices for the end-user (consumer).

In the sense of above-mentioned guidelines, there is a question of how the national Competition Authority will proceed. Will they be inspired by the Commission guidelines? Or not? Will they wait for the first national courts judgments on this matter or legislative explicit exception?

From the perspective of low bargaining power, the scope of the right to bargain collectively and the possibility to include small companies - for example, one-member companies such as one-member LLC ("s.r.o.") that are common in taxi services in the Czech Republic could also be discussed, as their position may also be comparable to a solo self-employed person.

It is also discussable if a special national regulation of collective bargaining for self-employed persons should be adopted or to apply the existing one, in particular the Czech Act No. 2/1991 Sb., on collective bargaining. Due to the transnational operation of some counterparties (esp. some platform providers), certain unification of this procedure across the EU countries should also be considered.

In any case a special law should be adopted that reflects the specifics of the business relationships of the solo self-employed, flexibility, but at the same time provides coveted protection for the solo self-employed. The negotiation of the collective agreement should be also concerned – especially the conditions that need to be met before a "strike". As Katsabian emphasises in the case of platform-based workers, the mediation between a platform and platform-based workers

could "help the parties overcome conflict and reach an agreement without the need for a strike" (Katsabian, 2021, p. 1038). Similarly, the mediation could be one of such mandatory steps before a "strike".

Consequently, neither party will rely on later assessment provided by the courts to find out if their conduct was "reasonable" (especially the "strikes" organized by the platform users).

6. Conclusion

The paper discussed three main topics – the enforcement mechanisms of the P2B Regulation in the selected Member States, the shortcomings of the P2B Regulation, and existing civic activities and collective actions of business users against the platform providers.

Analysis of the P2B Regulation enforcement mechanisms in the selected Member States showed that some of the Member States (the Czech Republic, the Netherlands, and Italy) ensured or intend to ensure enforcement of the P2B Regulation by the administrative control and sanctions, while others (Germany and Finland) leave enforcement to the courts through the actions of the competitors, organizations, etc. Some additional duties imposed by the Member States may be inspiring for the others – for example, the enrolment of platform providers in the register in order to have an overview of controlled providers, or the mandatory annual contribution for financing the administrative costs of the supervisory authorities.

As the P2B Regulation is the first legislative act in the field of platform regulation, the paper pointed out its shortcomings. It was emphasised that the transparency duties in the differentiated treatment is too narrow and should include all the business entities acting on the platforms. In addition, the internal complaint-handling system should be mandatory not only for platforms providers (providers of online intermediation services), but also for online search engine providers in order to apply the complaints more effectively by the corporate website users. Drawing on Di Porto and Zuppeta, the paper suggested introducing algorithmic disclosure co-regulation. According to this suggestion, the cooperation of stakeholders of the platform could improve for instance transparency of main ranking parameters and show the results in more user-friendly and understandable format and content. Finally, the paper summarized the improvements of the P2B Regulation in the Digital Act proposal regarding to the duties of the gatekeeper platforms.

In the final part, the study focuses on the civil actions and collective bargaining of business users. Among the marginal trend of the outflow of users from dominant platforms, there are several protests of business users against platforms with the most common aim to reach better pay and working conditions. The study reviewed the case-law of the Court of Justice and concludes that the Court has not

acknowledged a general right to bargain collectively to all self-employed persons so far, only to so called "false self-employed". The prohibition of horizontal agreements set by the competition law is therefore still a restriction for them.

In addition, the paper analysed the recent draft of guidelines of European Commission that concerns collective agreements of the solo self-employed persons with the counterparties (thus not only the business users acting on the platforms, but generally the solo self-employed persons). Although such guidelines are not generally legally binding, it provides at least some security for business users and for the platforms in the collective bargaining. These guidelines may be also one of the first complex inspiration for national institutions – not only for exemptions from enforcement of competition law for collective bargaining of certain self-employed persons on the national level, but also as a useful source for national regulation in the field of collective bargaining of the self-employed persons.

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Platforms and Protocols: can Competition Law Help the Decentralisation of Social Media Platforms?

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Abstract

Social media platforms have been criticised for their approach in moderating harmful content online and their power over online speech. It has been suggested that one solution could lie in opening platforms to a new layer of services that would provide better content moderation and user experience. Such efforts have already started, with one spearheaded by Twitter itself. The paper discusses whether such efforts correspond to the goals of EU competition law and whether the current competition toolbox could be used to achieve such de-centralisation. Following the Competition for the Digital Era strategy, it discusses the opening of social media platforms to a new type of services or turning current platforms into "protocols" with corresponding "applications". It will also look at competition law as an aid in maintaining such proposed regimes. It will argue that the latter option may be feasible with current tools; conversely the former could require a bold reimagining of competition law as well as *ex-ante* regulation.

Keywords: competition law, content moderation, de-centralisation of social media platforms, online platforms, protocol interoperability.

JEL Classification: K210

1. Introduction

The paper aims to connect two areas in which large online platforms are subject to criticism: their role in hosting, spreading, and moderating online content, and their positions as undertakings under EU competition law and their corresponding market power.

Concerning the former, the success of large online platforms has created a situation in which online speech is increasingly centralised on several largest platforms. Through the space provided by limited liability for content hosted by platforms, as well as internal and external pressures to create a decent online environment, platforms have gradually developed systems for moderating online content,

including the removal of illegal or otherwise harmful content (Klonick, 2019, pp. 1631–1635). Content moderation, has, however, come under increasing pressure, both from proponents and opponents of active moderation and removal of harmful content. Platforms have also had to adapt to the COVID -19 pandemic and deploy effective means of containing disinformation and correcting inaccurate information (Douek, 2021, pp. 802–803). Further criticism has also risen against the disparate levels of moderation in different jurisdictions (Tworek, 2021).

The criticism has been addressed by platforms and regulators alike. Online platforms are increasingly making their moderation policies more specific and transparent, going as far as creating dedicated dispute resolution bodies (Klonick, 2021, pp. 2470–2471). In EU law, the European Commission (hereinafter "Commission") aims to address the issue with the Digital Services Act Regulation, a reform of the existing regime of intermediary liability established by the E-Commerce Directive. It lays down several layers of rules aimed at various providers of online services, including online platforms (including a special category of "very large online platforms"). The proposal retains the core of the EU intermediary liability regime established by the E-Commerce Directive (Directive 2000/31/EC) while attempting to create a "Good Samaritan" clause and places content moderation (including the moderation of *legal* but *harmful* content) under more scrutiny (European Commission, 2020; Ochodek, 2021, pp. 201–202). Other attempts, with some being controversial, to reform the existing regime have been launched in the U.S. (Electronic Frontier Foundation, 2021).

In light of the persisting issues in content moderation (e.g. the scope of content that is moderated), alternatives to the current regulatory efforts have been presented. Platforms could be opened to a new layer of "middleware" services that could take away content curation from current platforms and provide a wider variety of user experiences (Fukuyama *et al.*, 2021, p. 5, Keller, 2021, p. 168). Another similar proposal views platforms through the lens of protocols and various applications that build upon them (Masnick, 2019). These proposals would lead to at least a partial decentralisation of what is currently known as social media platforms.

2. Problem Formulation and Methodology

The paper deals with the question of whether EU competition law has a role in decentralising social media platforms. Since the process of decentralisation of social media platforms is already underway, but still nascent, the aim of this paper is not to provide an exhausting description of all kinds of social media environments, but primarily to discuss whether the current state of EU competition law creates any role for EU competition law with respect to the process of decentralisation of social media platforms and to identify the limits of its use.

Firstly (Section 3), the paper provides a brief overview of the current state of decentralised social media platforms, or the models currently used by several platforms, proposed, or foreseen by currently ongoing projects. With this overview, the paper attempts to distinguish some basic types of decentralised platforms. Furthermore, it suggests values that could be identified as *platform decentralisation goals* to contrast them with the goals of EU competition law. Subsequently (Section 4 and corresponding subsections), the paper turns to the main problem. To answer this main research question, the paper explores several sub-questions and is accordingly divided into corresponding parts:

a) Do the generally recognised goals of EU competition law correspond with the (so far) recognised goals of decentralising social media platforms?
b) Can the structure of existing, proposed, or currently developed decentralised social media environments be "translated" into sufficiently delineated relevant markets as EU competition law understands them?
c) Can EU competition law be used to *decentralise* social media platforms?
d) Can EU competition law be used to maintain a decentralised environment achieved without the intervention of EU competition law?

After reviewing all of the abovementioned questions, the paper provides an overview of conclusions.

3. Decentralised Social Media Platforms

To contrast the existing, developed, or proposed models of decentralised social media environments, it is necessary to briefly outline the contrasting centralised model (employed e.g. by YouTube, Facebook, and Twitter). In such a model, an online platform both provides the necessary "infrastructure" (i.e. user profiles, user interfaces, and the necessary mechanisms to share and spread online content) but is also in control of monitoring, evaluating, preferencing, flagging, and removing user content, either directly or with an additional layer in the form of a dispute resolution body. On the other hand, there is a variety of architectures used either by existing decentralised platforms or services that partially decentralised some aspects of their operation.

3.1 Decentralisation currently in use

Mastodon is a microblogging network, existing in thousands of "instances", i.e. different servers run directly by users on their own server infrastructure. While servers are independent, they all use open-source code anyone can contribute to (Mastodon, 2021a). Mastodon instances are usually crowdfunded and users from one instance can connect to another community (if permitted). Each instance is moderated according to its own rules, by community moderators, and with

anti-abuse tools embedded within the platform. (Mastodon, 2021b). *Diaspora* is another decentralised network that functions in a way similar to Mastodon. Crowdfunded and open-source, the network is separated into "pods" and users belonging to these communities. Moderation of content is delegated to individual pods and their moderators (Diaspora, 2021).

A different system is employed by *Aether*, a fully peer-to-peer social network divided into communities. Content moderation is given to moderators, who are chosen by active users in an always-ongoing election; additionally, users can "self-moderate" content seen by them through various filters (Aether, 2021). In its current form, Aether is possibly the network (currently operating) closest to the "protocol" model of social media described below. These models are networks that decentralise *both* platform infrastructure as well as the task of content moderation.

Different models are also possible. *Minds* presents a different type of decentralisation: while the code is open-source, the platform is not divided into separate servers and communities. Instead, the delegation to users occurs to some degree at the level of preferencing and content moderation. Users can award each other tokens that can be in turn used to boost the presence of user content. Content moderation policy employs a randomly selected jury of users to act as an appeal mechanism (Minds, 2021). Additionally, though not a social media platform as much as a social news site, *Slashdot*, otherwise a website with its own server, employs a user-based content moderation system. Users can be temporarily chosen to moderate content a limited number of times (Slashdot, 2021). In contrast to the category of platforms above, the clear difference in this group is that the platform controls most of its own infrastructure while delegating some parts of content moderation to its community.

3.2 The "Middleware" solution

The proposals mentioned in Section 1 focus on the reform of the largest currently existing platforms and are more like the latter category of decentralised social networks or websites than the former. As Keller points out, most of them revolve around the same idea, which is to insert a new layer of independently operated services into the environment currently only controlled by social media platforms (Keller, 2021, p. 168).

Masnick's version of the idea is based on the notion of *protocols* used until today in many areas of the Internet (e.g. the e-mail protocols still in use today) and subsequent *applications* of these protocols (e.g. various e-mail clients). He thus imagines a version of a "platform protocol" and applications that would build on it, handling e.g. content moderation instead of a centralised platform (Masnick, 2019).

Similarly, Fukuyama *et al.* see an opportunity to separate some functions of social media platforms from their current operators and place them in a "middleware" layer of services. These services could in theory serve as anything from mere content

filters to curating and ranking content on the entire platform with the "platform" layer providing little more than the necessary infrastructure (Fukuyama *et al.*, 2021, p. 8).

While all authors acknowledge that there are many obstacles of technical and legal (especially privacy law) nature (once more, see Keller, 2021, p. 169) that need to be solved before their ideas could be fully turned into practice, they argue that there are many benefits to this kind of Internet architecture as opposed to the current state.

As of 2019, the idea of reforming existing dominant platforms also has a concrete manifestation in Twitter's Bluesky project, whose goal is to create a decentralised standard (largely inspired by Masnick's protocol idea) for social media and for Twitter to ultimately become a client of this standard (Bluesky, 2021).

3.3 Decentralisation Goals

A variety of goals and values is hidden behind both the existing and the proposed social media environments. Two ideas are strongly present in the "middleware" proposals directly above: the removal of platforms as the ultimate moderators of content and enabling different models of content moderation to users as well as creating the space for more competition and innovation in the "middleware" layer of services, providing better user experience in turn. The existing decentralised platforms (or features) have been built with various goals (often more at the same time), including users' privacy (Diaspora), enabling community-based content moderation (Mastodon) or maintaining a free-speech environment (Minds), or even decentralisation in itself (Aether).

4. Role of EU Competition Law

To deal with the research problem, the paper below builds upon Section 3 and attempts to connect the proposals therein and the framework of EU competition law.

4.1 Recognising the Goals Platform Decentralisation in EU Competition Law

The first question is whether the platform decentralisation goals can be recognised by EU competition law. Naturally, competition law is not primarily bothered with decentralisation as such or with the perils of mass content moderation. While not completely limited to a single theme, EU competition law has been firmly rooted in the protection of *(consumer) welfare, market structure,* and *competition process* as such (Stylianou, Iacovides, 2020, p. 26).

While the goals of platform decentralisation and competition law do not align at the highest level, competition law does recognise the values that are close to

the ideas behind the decentralisation of social media platforms. In particular, there has been a continuing movement away from solely *price-based* competition towards the recognition of *non-price* factors of competition. In particular, the Court of Justice recognised in the *Post Danmark I* (2012) case that "competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, **choice, quality or innovation**" (para 22).

There has also been a development of the recognition of non-price factors (particularly privacy) in the merger practice of the Commission. While restricting any privacy-related concerns caused by the increased concentration of data within the control of Facebook to the realm of privacy and data protection law in the *Facebook/WhatsApp* (2008, para 164) case, the Commission adapted its views. In both *Microsoft/LinkedIn* (2016, paras 255, 350) and *Google/Sanofi* (2016, para 69) merger decisions, the Commission acknowledged that privacy or data protection could play a role as non-price factors of competition.

In principle, there is no reason why the various features of decentralised platforms mainly revolving around some form of content moderation and user experience should not be recognised in the same way as privacy or data protection. It could be even argued that the mere existence of various decentralised networks each with individual models of content moderation provides proof that there already is a general form of competition on these factors.

4.2 Drawing Relevant Markets for Decentralised Platforms

Secondly, it is necessary to examine whether decentralised platforms can be placed in relevant markets.

A relevant market for social *networking* services (in general) has already been defined. According to the Commission's decision in *Facebook/WhatsApp* (2008, paras 51–55), social networking services as products have as their defining features the creation of a personal profile, list of contacts, exchanging messages, sharing information, commenting on other users' content recommending content to others. In contrast to consumer communication applications, social networking services offer a richer user experience but are not aimed primarily and solely on facilitating real-time communication. Clearly, most of the abovementioned existing decentralised platforms could be placed in this type of relevant market (albeit with a very small market share).

On the other hand, to put the proposed "middleware" solution requires a different delineation of relevant markets: an upstream and a downstream market. The precise definition of relevant markets would depend on the level of decentralisation of a social media platform's roles: as already pointed out in Section 3, the original

platform could only take charge of hosting user profiles, user content, and user interactions. Conversely, another possible form of decentralisation would only include new services as additional filters and the original platform would not substantially change from its current form.

In the former scenario, an upstream market would most likely entail the provision of user data and most likely some form of "platform" data (covering data necessary for middleware service to fully connect to the platform). On the other end, a downstream service would most likely encompass some form of analytic software and/or some of the functionalities already associated with social networks in the Commission's practice.

The concept of markets *for* data is not unknown in EU competition law: in merger practice, Commission defined various upstream and downstream markets where data [financial markets data in *Thomson Corporation / Reuters Group* (2008, paras 34–35, 109–110), TV audience data in *VNU/VPP/JV* (2004, paras 8–11) or data used in navigation software in *TomTom/Tele Atlas* (2008, paras 1, 17)] was provided on the upstream market and used in services provided on the downstream market. However, it should be stressed that current competition law standards only allow for the definition of a market for data in case the information is *already* traded (Graef, 2016, p. 81).

The latter scenario is slightly less explored in practice, though in the case of social media platforms, it had a relatively close counterpart in the relationship between Twitter and TwitterAdder, a software built in 2011 to exist "on top" of the entire Twitter platform and provide users with functionalities (mainly automated posting) not available on the platform itself (Twitter, however, sued TwitterAdder, which subsequently shut down, see MarTech, 2013).

4.3 Use of Competition Law and Decentralised Social Media Platforms

Lastly, the paper inquires whether any use of competition law is possible to either achieve decentralisation or maintain a decentralised state.

There are many hypothetical situations where competition law could play a role when it comes to the relationships between large social media platforms and newcomers. One is a situation where platforms and independent service providers enter into agreements on the sharing of user data that may be contrary to Article 101 of the Treaty on the Functioning of the EU ("TFEU") (European Commission, 2019, p. 91).

However, it is Art. 102 TFEU that is the most relevant in the context of platform decentralisation, as it directly relates to the position of the largest online platforms. As these platforms would most likely satisfy the definition of "dominant undertakings", they would be covered by the prohibition on abuse of dominance. In its Competition Policy for the Digital Era document, the Commission foresees

two situations that could be relevant for decentralising social media platforms: refusals to access to data and refusals to provide interoperability. These scenarios, however, are only relevant to the "middleware" type of proposals, as they fit the upstream and downstream structure of relevant markets needed to apply competition law concepts (European Commission, 2019, p. 91).

Furthermore, the Commission has also recognised as relevant a scenario where a dominant undertaking has individual-level data of either personal or non-personal nature that is needed by another undertaking to provide complementary services (European Commission, 2019, p. 75).

A refusal to supply access to data would follow the test for refusals to supply under Article 102 TFEU established in the *Oscar Bronner* (1998) case: a refusal would have to be likely to eliminate all competition in the market on the part of the undertaking requesting the access, this refusal would have to be incapable of being objectively justified, and the input access to which was sought would in itself have to be indispensable to carrying on that undertaking's business without any actual or potential substitute in existence for that input (para 41). Alternatively, a refusal could concern *interoperability* information, that is information ensuring that two systems can fully work together and that *complementary* services can be provided (European Commission, 2019, pp. 83).

Concerning the decentralisation of social media platforms, both concepts could be seen as relevant, depending on the scope of functionalities the "middleware" layer of services would take on. However, these competition interventions could only be used once platforms have opened themselves to decentralisation, not to "break up" these platforms. As stated in subsection 4.2, competition law currently does not allow creating new markets inside existing undertakings where no "trade" has taken place before (Graef, 2016, p. 81). The only foreseeable path towards such a decentralisation can be either through voluntary action of platforms (e.g. through projects like Bluesky) or with the help of *ex-ante* regulation that would require that platforms provide the access described above. On the other hand, even though there are only a few cases of refusals that have been dealt with by the Commission and the Court of Justice, it could be argued that once decentralisation happens, the frameworks will be useable and available to maintain the already achieved level of decentralisation. In this way, whatever progress towards decentralisation of social media platforms happens, there will be brakes against a reversal back to an environment controlled by one undertaking (even if there formally are more relevant markets).

5. Conclusion

In conclusion, there is a link between EU competition law, the process of platform decentralisation, and proposals for solving current issues with a so-called

"middleware" solution. EU competition law is capable of incorporating the values of platform decentralisation, albeit not as the primary goals of EU competition law, but as non-price factors of competition. Question a) thus can be answered in the affirmative. There is already some experience with markets that are divided into upstream and downstream markets, where the former consists of markets for some kind of data that is subsequently processed within the downstream markets and offered to customers as part of a service. This kind of understanding thus creates the background for platform decentralisation in EU competition law. Question b) thus can also be answered at least partially in the affirmative.

On the contrary, there is little room for EU competition law to be used as a tool to break up existing social media platforms and turn the social media environment from a centralised model to a decentralised model in the form of a platform and "middleware" model. Such an approach would require a much more pervasive use of competition law tools than is currently accepted and could be only taken through legislation. Competition law, however, still may play a role as a guardian of decentralisation achieved through other means, mainly voluntary action. In particular, if platforms were to decentralise parts of their operation (e.g. in the form of content moderation) and let independent service operators provide additional services, EU competition law could in principle help maintain this state of affairs. While Question c) must be answered negatively, Question d) may be also answered in the affirmative.

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On the use and abuse of Big Data in competitive markets – Possible challenges for competition law

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Abstract

Today many companies are collecting and extracting data from different sources to help them with their strategic decision-making. Big data is the basis of the data-driven economy, bringing significant competitive advantage and market power to companies who are able to harness and exploit its potential. The digital transformation of markets and economy challenges the existing structures of consumer protection, data protection, and competition law. Data is a commodity and a strategic asset. Traditionally, data issues are part of data protection law. However, given their possible effect on the competitive structure of the market, the use of big data and its underlying technology requires the involvement of competition regulators as well. A huge amount of data can reveal information about consumers' behaviour and preferences, and companies are keen on harvesting and monetising this data. This is quite evident in the multi-sided platforms where on the one side of the platform there is monetary payment, and on the other side the users are paying with their data. The use of algorithms may lead to a dominant position and possible abuses, as critical mass of data collected can lead to competitive advantage. The paper will examine the possible application of Article 102 TFEU on the disputes over access to data. It will scrutinize some examples of anticompetitive practices though accumulation of big data. The idea is to try to bridge the gap between competition and data protection law.

Keywords: big data, EU competition law, digital economy, dominant position

JEL Classification: K210

1. Introduction

We are confronted with the era of big data that transforms our traditional way of thinking. Undertakings may gain a competitive advantage with the collection of huge amount of data. Personal data becomes a key input in the digital economy. Undertakings gain valuable information that enable them to understand users'

behaviour and preferences and to adapt their future business strategy. This may lead to practices that pose competition, consumer, and privacy considerations (Stucke, Grunes, 2016, p. 1). The phenomenon of big data is not necessarily negative. It all depends on understanding and using it. In the Digital Single Market Strategy, the European Commission points out that

> A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. (A Digital Single Market Strategy for Europe, 2015, p. 2).

Big data converts into the key element for catching the benefits of the data economy. Harvesting data does not need to be perceived negatively. The objective is to understand the way how can everyone, from companies to consumers, gain from it. The competition authorities are paying much attention to companies that rely on data in their business performance. When it comes to online platforms, usually one side of the platform is monetized and the other side is offered without payment (Pošćić, 2019, p. 252). Today, undertakings compete not only over goods and services, but also over data. The boundaries between competition, data protection, and consumer protection law have been blurred.

The process of digitalisation has brought tremendous benefits for the evolution of business by opening the door to vast opportunities in flourishing new products and services. These developments invoke possible competition concerns. Fast market expansion and possible changes have to be addressed. It has to be accentuated that new technologies and innovations must not be perceived negatively. Indeed, the synergy and the balance in the protection of privacy considerations and market development could guarantee the stable development.

With the emergence of new markets, the competition enforcers are confronted with challenges. The main idea is to protect the existing rules without supressing innovation. New innovative products bring benefit to every aspect of society and contribute to consumer welfare but, on the other side, deteriorate and challenge existing practices and established norms. There is a need to reassess the existing norms and see if they are fit for new markets.

In the past decades, we have witnessed the flow of big data and big data analytics. There are many books and reports dealing with the question of big data and privacy considerations. Despite that, many open and unresolved questions remain. The paper will try to shed some light on some issues concerning big data, particularly the data and privacy considerations in the context of competition law. The query is whether competition law should pay more attention to various

data accumulation and eventually bring forward new tools in its assessment (Robertson, 2020a, p. 3).

Innovation and digitalisation challenge the traditional competition concepts. Competition law plays an essential element in fostering innovation that must become an integral part of competition assessment (Pošćić, Martinović, 2020, p. 250). There are many open questions at the intersection of competition and new digital markets. Due to the size constraints, this paper will focus only on the possible application of Article 102 TFEU on the disputes over access to data. It will examine some examples of tech giants' dominant position and possible anticompetitive practices though accumulation of big data.

2. Definition of Big Data

Today, a person can get information with only one click. We use digital platforms to interact with our family and friends, to shop or to do business. A vast amount of data is collected and processed. This phenomenon is called Big Data. What do undertakings do with the immense amount of personal information? Can it lead to possible abuses?

Before analysing the undertakings' behaviour and potential anticompetitive practices it is necessary to define Big Data. There is no uniform definition accepted. There are various definitions proposed. One sees Big Data as "a collection of data that cannot be processed by traditional informatics devices in a short amount of time, …" (Gallo Curcio, 2020, p. 7). Inglese speaks of mass of stocked, anonymous data with certain economic value (Inglese, 2019, p. 138).

Doctrine distinguishes "four Vs" that characterize Big Data: volume, variety, velocity, and value. Some other authors add another two features: veracity and valence (Gallo Curcio, 2020, p. 7). Volume refers to the amount of data from different sources. In the past years, companies have collected a vast volume of data thanks to decreased costs of data collection, storage, and analysis (Stucke, Grunes, 2016, p. 17). Duhigg stresses that data trails begins before one's birth and lasts and increases until one's death (Stucke, Grunes, 2016, reference 25, p. 19). With the increase of volume, velocity, and variety of data an undertaking can predict future behaviour. It is also called a "freshness" of data and refers to the swiftness of change (Kathuria, Globocnik, 2019, p. 522). Those moments bring potential competitive advantages. The situation is called "contemporaneous forecasting" (Stucke, Grunes, 2016, p. 19). Variety refers to different types of data collected. Velocity means the speed at which big data is generated and is closely associated with time frame as with time the value decreases. Every undertaking urges for new and updated data so it can tailor them to users' demand. The last situation is known as data fusion and it entails a situation where data from different sources is connected with new particulars that emerge (Stucke, Grunes,

2016, p. 21). Put in simple words, it is a synthesis of different information that bring new facts. Volume, variety, and velocity increase the value of data. The interrelation of big data, algorithms, and network effects reinforce undertaking's position. Veracity means truthfulness of data. The last characteristic is valence and it shows the level of connections between different data (Gallo Curcio, 2020, p. 7).

Having in mind all the above-mentioned characteristics of Big Data, it is easy to understand its importance in the context of digital markets. However, Big Data alone does not have much value. Here, algorithms come to scene. They must process, store, and analyse it in order to have certain value. The undertakings filter necessary data, increase their market power, and lock users. Consumers are used to certain platforms and will unlikely switch to another portal. Everything is just one click away and is user friendly. The distribution and production of these data amount to zero. Despite that, this does not have to lead to the false conclusion that in these markets barriers to new entrants are really low. Small undertakings are not equipped with powerful algorithms and are unable to process huge amount of data in short time period.

Data is seen as a valuable asset that can bring a lot of benefits in terms of new products and services with increasing number of efficient companies (Final report on the E-commerce Sector Inquiry, 2017).

3. Dominant position and Big Data

Big data strengthen an undertaking's position. The dominant position in EU competition law is not problematic. It is not prohibited, but its abuse is. An undertaking possessing a large amount of data can lay down entry barriers to new entrants.

Article 102 TFEU deals with the abuse of dominant position and states: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".

The definition of a dominant position and its assessment has been well developed in the case law of the Court of Justice of the EU (CJEU). In the case *United Brands* and *Hoffman la Roche* the dominance was defined as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of consumers. This definition developed for traditional markets must be applied to new digital markets as well. The criterion of independence has been disputed as the one that is neither applicable nor suitable to digital markets

(Pošćić, Martinović, 2020, p. 258). The digital market is interconnected and every market player depends on the other's actions.

Although a dominant position is not prohibited, the undertaking has a special responsibility not to abuse its dominant position. Abuse can take a number of different forms. Article 102 TFEU provides a non-exhaustive list of possible abuses. Unlike Article 101 TFEU, no exemptions are foreseen to Article 102 TFEU.

New technologies develop sophisticated algorithms that process a large amount of data. We can imagine a situation where an undertaking has acquired a dominant position by the manipulation of algorithms. This is legal and legitimate for now, even though the dominant position is not a consequence of undertaking's merit. This relates to the dilemma expressed in the literature. The argument is as follows. One criterion of establishing dominant position relates to the position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market. A dominant position precludes effective competition, but the dominant position is not sanctioned by itself. Maybe, as Surblytė-Namavičiene suggests, the time is ripe for a "monopolization" type of abuse as it is regulated in the US competition law (Surblytė - Namavičienė, 2020, p. 220 and on).

Today undertakings operate in different markets. They accumulate data in one market, gain market power, and possibly try to leverage it to another market. Robertson speaks about data – centric nature of digital ecosystems (Robertson, 2020a, p. 14). We can encounter another scenery where an undertaking does not have a dominant position in the primary market, but has a dominant position regarding the users' data (Lucchini *et al.*, 2018, p. 567). The dominant undertaking possessing a large amount of data and refusing to share it with its competitors may qualify as abuse in the form of limiting market and technical development to the prejudice of consumers (Lucchini *et al.*, 2018, p. 567). According to the European Commission, privacy considerations are part of the consumer welfare standard. It is part of quality reduction assessment.

3.1 Can accumulation of Big Data be considered an essential facility?

Another point that is gaining more attention is the so called "portability of data". Competition regulators pay more and more attention to it. We can easily imagine a situation where a small undertaking cannot access data owned by a dominant undertaking (Chirita 2018, p. 159). Is it possible to invoke Article 102 TFEU in a situation where we want to protect access to data? It is not a novelty. The essential facility doctrine refers to an undertaking in dominant position owning an indispensable facility that has an obligation to grant access to its competitors. A dominant undertaking owns something that other undertakings need access to in order to grant products or services. The first decision dealing with this

was *Sea Containers v. Stena Sealink* where an essential facility was defined as "a facility or infrastructure without access to which competitors cannot provide services to their customers".

According to the well-established case law of the CJEU there are five elements to be satisfied in order to determine that a refusal to supply amounts to abuse: is there a refusal to supply, does the accused undertaking have a dominant position in an upstream market, is the product indispensable to someone wishing to compete in the downstream market, would a refusal to grant access lead to elimination of effective competition in the downstream market, and can the refusal to supply be objectively justified (Whish, Bailey, 2018, p. 716).

There are many CJEU leading cases establishing the essential facility doctrine but we shall mention *IMS Health* case that may be of particular interest for this paper. *The IMS Health* case involved a company that abused its dominant position by refusing to grant licences to other companies. The case was decided in the preliminary procedure. It started before the German courts. IMS Health developed a database on the regional sales of pharmaceuticals. This database was protected by copyright under German law. The competing company NDC referred the case to the European Commission claiming that IMS Health was abusing its dominant position by refusing to grant licence for that database. The European Commission ordered an interim measure, that was later suspended by the General Court and confirmed by the Court. The decision was withdrawn by the European Commission. Meanwhile, the German court requested a preliminary ruling from the Court on the same issue. The Court addressed the case from the perspective of compulsory licence of a database. Here, one interesting point emerges. A former manager of IMS Health, after leaving the company, created the company Pharma Intranet Information. He wanted to use the database protected by the German copyright law and was prohibited access. As Surblytė-Namavičienė stresses, the case was more about whether a particular piece of data can be used by a former employee. So, the case was not about access to data, but on the possible unfair behaviour of a former director. This is outside the scope of Article 102, but may provide guidance of the reasoning of the Court on this issue as well (Surblytė-Namavičienė, 2020, pp. 208 and 209).

Although all the elements must be determined in order to apply an essential facility doctrine, we find the indispensability test interesting. It was developed in the *Bronner* case. The case confirmed that a refusal to supply may amount to an abuse of dominant position where the input is incapable of being duplicated or it is extremely difficult to duplicate, especially where it is physically and legally impossible and economically not viable (Whish, Bailey, 2018, p. 719). It is crucial to formulate a balance between the need of companies to compete on their merits and to give access on some indispensable information. Can we apply those criteria

to the digital environment? Can we consider data as indispensable in certain situation? Despite the well elaborated criteria, the obligation to give access to a facility will be granted only in exceptional circumstances in the situation where it is difficult or almost impossible to duplicate access and only where there is no justification for the refusal.

4. Possible abuses of dominant position

Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it as incompatible with the internal market in so far as it may affect trade between Member States. The article further provides a list of possible abuses, such as directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. We differentiate between exclusionary and exploitative abuse, although any abuse can take both forms.

All of the above-mentioned practices can be found in digital markets. We shall try to point to some problematic situations from the perspective of digital markets and see if the applicable tools are adequate to deal with "new abuses". A technical revolution is ongoing and it is impossible to predict all possible breaches. This is not problematic as Article 102 TFEU enumerates only a list of possible abuses and it is not exclusive.

Contrary to Article 101 paragraph 3 TFEU, there is no list of justifications in the Treaty. Nevertheless, the undertaking has to show that some conduct can be justified by bringing certain benefits to consumer welfare. The EU is usually concerned about economic efficiency that entails also benefit to consumers. Data protection is not part of economic efficiency and does not serve economic goals (Graef, 2018, pp. 124 and 125). But if data are becoming indivisible part of consumer protection, does it not mean that protecting consumers from harm involves also data issues?

We have seen that tech giants, such as Google, accumulate a huge amount of data on its users and advertisers. Big data together with algorithms are main tools for their functioning. Tech giants collect vast amount of data about its users, analyse their choices, and offer suggestions for search results. The user receives personalised information (Gallo Curcio, 2019/2020, p. 15). An online service is provided for free with companies receiving data. Those are zero price services. (Gallo Curcio, 2020, p. 7). The question is: is it prohibited or can it come under

the Article 102 TFEU scrutiny? We have to take a look at possible abuses and see if they fit under Article 102 TFEU framework.

The European Commission has been centred mostly on exclusionary abuses. Recently, a few possible exploitative abuses have been brought to its attention. One form of exploitative abuse is excessive pricing in the form of imposing "unfair purchase or selling prices". Usually, the European Commission is not keen to intervene in cases of possible excessive prices as it is considered a barrier to innovation (Jones, Suffrin, 2004, p. 380). In data driven markets the balance between data given and received can be problematic. Here we have to recall the case law about excessive prices, especially the *United Brands* case.

In this case, United Brands was condemned for charging excessive prices for bananas. Although the decision of the European Commission has been crushed because of not providing sufficient evidence, the Court stated that excessive prices will constitute abuse in a situation where an undertaking is charging a price that has no economic value to the product. The Court considered that comparison with a price of other product was valid. It is necessary to answer the question if the price exceeds its costs. One way suggested is to compare the prices charged and the costs occurred. These criteria are usually not feasible, so the European Commission turns to other criteria such as comparing the disputed prices with those in other markets or comparing the price with competitors' prices (Whish, Bailey, 2018, p. 740).

The *United Brands* case determined two steps in establishing excessiveness of a certain price. The first criterion is whether there is a difference between the costs occurred and the price charged. Applying it to our situation it means to compare the amount of data gathered and the gain of the user in turn. If the answer is positive, then the second phase is to see if the price is unfair in itself or in comparison to competing product. So, it means that there is a need to determine the connection between the data collected and the economic value the user receives. The user is usually not aware of the way the data is collected. In platform markets products are diverse. The comparison between platforms may be a good starting point only if their terms of policy are transparent and accurate. Privacy policy may be seen as trading conditions and come under the Article 102 TFEU assessment. In other words, it is necessary to see if the terms and conditions are unfair alone or in comparison to competing conditions. Close collaboration of experts from different sectors will be crucial.

It is extremely difficult to determine at what point the value of data exceeds the value of services received. The situation of excessive price is difficult to determine in the current traditional markets. In online markets it will be even more difficult to measure. How to address those situations? Can criteria for excessive prices be applied to excessive data collection? The assessment of excessive prices is one

of the most controversial elements in competition analysis. The difficulty is in showing monetary value of data. There are some tests for establishing the cost of data in market value. As Robertson rightly points out, we have to be careful because it will be difficult to specify the price of data, as for example it depends on the person that uses it. So, the potential analogy is probably questionable. There are also some pitfalls as personal data include notions of privacy and moral standards. These are so called non-monetary values of data (Robertson, 2020b, p. 10). In order to suppress the difficult test in showing the excessiveness of data, Robertson suggests defining this situation as unfair trading conditions according to Article 102 TFEU as it speaks of unfair prices and unfair pricing conditions (Robertson, 2020b, p. 13). He further proposes also taking into consideration other EU instruments, such as GDPR or Unfair Commercial Practice Directive (Robertson, 2020b, p.10 and 11). He points to the situation where competition law and data protection law are not in line, as for example data protection breach may not result automatically in the abuse of dominance.

In its Guidance on Article 102 TFEU, the European Commission states that it will intervene only where a pricing practice has been, or is capable of, hindering competition from undertakings that are "as efficient" as the dominant undertaking (Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009, paras 23 and 27). The excessive prices involve a situation where the price charged is excessive in relation to the costs incurred. It is not a simple task, since a regulator has to understand economic terms, various cost concepts such as fixed costs, sunk costs, marginal costs, variable costs and so on (Whish, Bailey, 2018, p. 733). Although excessive prices are unlawful under Article 102 TFEU, the European Commission investigates those cases very rarely. Nevertheless, there always has to be space for competition authorities to act instead of market (Whish, Bailey, 2018, p. 737).

A tech giant can abuse its dominant position by involving practices of tying where party sells one product on the condition that the buyer also purchases different or tying product or agrees not to purchase that product from any other supplier. According to Article 102 TFEU it is a situation where the conclusion of contract is subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts. In the digital markets as well as in traditional markets the undertaking tries to leverage its dominant position from one to another market. Curcio distinguishes two situations: one where tying is offered through contractual basis and the other where it is formed on technological basis (Gallo Curcio, 2020, p. 33). The second situation is of our particular interest. In the famous *Google Android* case the European Commission

determined that Google's Android mobile operating system was engaged in anti-competitive tying by requiring manufactures of smart phones to pre-install its search and browser apps if they wanted to license Google's popular Play store. Also, it was deployed in another instance of tying by requiring manufactures to install the Google approved version of Android if they wanted to pre-install Google apps. These cases rely on classic tying cases. The user has no other options (Gallo Curcio, 2020, p. 34). It will be extremely difficult to separate the situation where it is indispensable to receive products together or where we are speaking of complementary or separate products.

According to Article 102(c) TFEU one example of abuse is applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The question is how can price discrimination take a form of abuse of personal data. According to case law there are certain elements to be satisfied to apply Article 102(c) TFEU: has a dominant undertaking entered into equivalent transactions with other trading parties, has a dominant undertaking applied dissimilar conditions and are other trading parties placed in a competitive advantage (Whish, Bailey, 2018, p. 779).

Privacy and competition questions come to an intersection with platforms collecting personal data. The dilemma is whether we have to rethink the list of possible abuses enumerated in Article 102 TFEU or maybe develop new ones.

5. Conclusion

With the emergence of Big data competition regulators might be confronted with possible new abuses. Big data is the basis of the data-driven economy, bringing significant competitive advantages and market power to companies who are able to harness and exploit its potential. Given their possible effect on the competitive structure of the market, the use of Big data and its underlying technology requires the involvement of competition regulators as well. There are some reasons why competition authorities should be concerned by the abuse of personal data in digital markets. One relates to economic value of personal data to undertakings. Data becomes a new currency and a strategic asset. Despite forming part of data protection law, an undertaking can be condemned for abusing its dominant position by exploiting data about consumer preferences and their private life (Chirita, 2018, p. 157, 158).

A large amount of data boosts companies' position but it is not enough just to possess a huge amount of data, it all depends on the undertaking's capability in analysing and using it. It is not all in harvesting data but also in increasing a potential value in terms of monetisation. The competition regulators will have to invest in education and experts in order to understand the fine tuning of possible data breaches. We are confident that current competition tools are adequate and

ready to deal with possible abuses of big data. We are not witnessing a dramatic shift in taking other parameters into competition assessment as non-price criteria. One slight change can be seen in the European Commission's position towards Google where it had tried to establish new types of abuses.

We agree with Robertson, who proposes to introduce a code of conduct for digital companies of certain size or some sort of digital markets board or digital authorities (Robertson, 2020a, p. 16).

Finally, it is important to insist on mutual collaboration and coordination of competition and data protection regulators. Despite certain differences in their approach, those two fields can co-exist perfectly.

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Teleological Perspective of EU Merger Control and its Interplay with Killer Acquisitions on Digital Markets

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Abstract

"Killer acquisitions" are the acquisitions of small, innovative companies (start-ups) by undertakings with significant market power. The scope of the research is limited to digital markets, where a low level of competition can be observed. The paper aims to analyse killer acquisitions from the perspective of the teleology of the EU merger control. The research is based on the assumption that the insufficient level of prevention of start-up acquisitions is inconsistent with the deontological approach teleology of EU competition law. The paper explores if and how the European Commission refers to freedom of competition and consumer welfare (the core values of the deontological and consequentialist approach) in its merger control decisions and how this could influence competition policy towards killer acquisitions on digital markets.

Keywords: competition law, digital markets, killer acquisitions, merger control, teleology

JEL Classification: K210

1. Introduction

1.1 Killer acquisitions

In the last few years, particular attention in terms of adjustment of the antitrust rules to the digital sector has been put on merger control and how to address so-called "killer acquisitions".

"Killer acquisitions" are the acquisitions of small, innovative companies (start-ups) by undertakings with significant market power. The scope of the research is limited to digital markets, where a low level of competition can be observed: smaller undertakings are excluded from the innovation race by entities with significant market power. This *status quo* can be disturbed by the development of start-ups. Innovation, on which start-ups base their business model, is a parameter

of competition on the market and allows start-ups to take part in the innovation race mentioned above.

On the one hand, start-up acquisitions play an important role in facilitating entrepreneurship and innovation (e.g. Rasmusen, 1988). The combination of the start-up's resources (e.g. a specific set of data the start-up generates), services or products with those of the digital platform may give the merged entity a significant competitive advantage over its rivals (Lécuyer, 2020, p. 43). On the other hand, killer acquisitions may have negative effects on competition, market structure and even innovation of products and services. On digital markets, even more problematic may be "reverse" killer acquisitions, where the question is what innovation is being foregone by the buyer as a result of buying a business it could have built organically instead (Caffara *et al*. [online], 2020).

1.2 Teleological perspective

In recent years, several reports on the competition policy towards digital markets have been published (Crémer, 2019 (the "EU law report"); Furman, 2019 (the "UK law report"); Stigler [online], 2019 (the "US law report") (the "Reports"). They propose a new theoretical framework for merger control, e.g. related to the theory of harm (for instance, the use of the balance of harm theory by competition authorities instead of the balance of probability theory), but their axiological context has not been presented in detail. Regardless of this, the Reports represent different teleological perspectives of competition law: they all postulate the consumer welfare protection, but perceive its value differently. According to the EU law report, "even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains" (Crémer, 2019, p. 3). The UK law report advises the Competition and Markets Authority (the "CMA") to "take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary" (Furman, 2019, p. 12). The US law report postulates the most consequentialist concept of consumer welfare, as "the categories of economic harms to consumer welfare from digital platforms are the standard ones: price, quality, and innovation" (Stigler [online], 2019, p. 57).

At the same time, scientific papers on killer acquisitions do not relate to digital markets (e.g. Cunningham *et al*., 2020) or papers on the axiological context of digital markets do not include references to killer acquisitions (e.g. Ezrachi, 2018). The present paper aims to analyse killer acquisitions from the perspective of the teleology of the EU merger control.

The research is based on the assumption that the insufficient level of prevention of killer acquisitions is contrary to the teleology of EU law, in particular the EU competition law. In this paper, the notion of teleology with regard to the competition policy is understood in accordance with Kantian thought (see: Kant, 2000): it postulates (self-)purposiveness of undistorted competition instead of a consequentialist approach arguing for the consumer welfare lens alone.

1.3 Content of the paper

The paper begins with a brief introduction of the axiological foundations of European competition law, such as consumer well-being and consumer welfare, effective competition structure, efficiencies and innovation, fairness, economic freedom and market integration. These values are put in perspective of the EU merger control law. Following this, the paper considers the significance of the multitude of goals and values that European competition law seeks in the policy towards killer acquisitions.

The paper explores *inter alia* the tension between the numerous goals of the EU competition law (consistent with ordoliberalism) and a pure economic analysis of the effects of killer acquisitions. These two opposing thoughts are referred to in the paper as deontological and consequentialist.

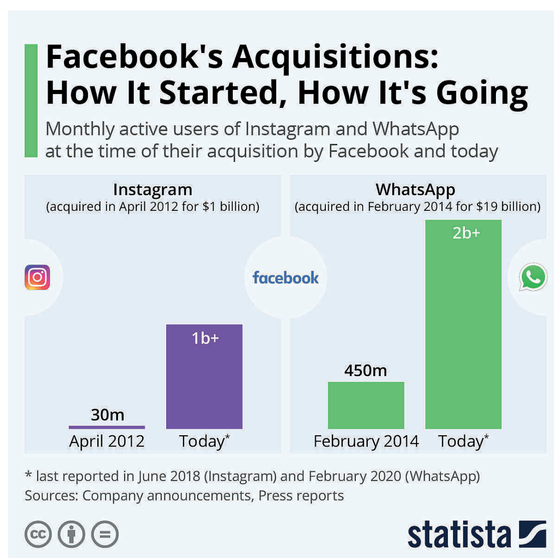
With regard to killer acquisitions, there is a need to re-open the debate as to whether ordoliberal ideas are shaping and/or should continue to shape the future of the EU merger control policy.

2. Problem Formulation and Methodology

2.1 Problem Formulation

The current EU legal system seems to be inadequate with regard to killer acquisitions. The EU merger control is based on the thresholds criterion, which is not adapted to transactions with start-ups, i.e. undertakings with a minor market share, but with an immense potential for growth. For example, when Facebook bought Instagram in 2012, it had 30 million monthly active users. However, in 2021 it exceeded 1 billion users.

Figure 1: Rise of active monthly users of Instagram after its acquisition by Facebook



Source: Richter [online], 2020

Numerous attempts to address the killer acquisitions problem can be observed. For example, in 2020 the Commission announced its new approach to Article 22 of the EUMR. A new policy meant that the EC would accept referral requests from national competition authorities under Article 22 EUMR to investigate transactions that do not meet national or EU notification thresholds, but could seriously harm competition (see: Communication from the Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, *OJ C 113, 31.3.2021, p. 1–6.*). The debate on preventing killer acquisitions by digital platforms with significant market power, such as Google, Amazon, Facebook, Apple and Microsoft ("GAFAM") has been ongoing, also in the context of the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). *COM/2020/842 final* (the "DMA") (see, for example: European Parliament [online], 2021). Some EU Member States (Germany, Austria) have already introduced an additional transaction value criterion into their merger control systems.

However, it is still not clear what EU competition policy should be adopted towards the acquisitions of start-ups by GAFAM. Should the EU competition policy address such acquisitions, despite the fact that they often go beyond

current thresholds? Should the EUMR be updated in order to address this problem? What if killer acquisitions do not pose a significant threat to consumer welfare, but distort competition itself?

Ordoliberalism, commonly perceived as the axiological basis of European competition law, provides a unique perspective of the EU competition policy, which should serve a multitude of purposes. According to Ordoliberals, the competitive process and the economic freedom are values in themselves and therefore should be protected by competition law. However, it can be observed that such an ordoliberal perspective on competition policy has been marginalised (especially since 2004, when a more economy-based approach was introduced in the process of modernising the EU competition law). Consumer welfare seems to be the core of the assessment of merger cases by the European Commission.

Freedom to compete and consumer welfare seem to represent opposite approaches to competition law: deontological and consequentialist. The paper does not intend to analyse the details of this distinction. The paper does, however, intend to investigate whether the core values of these two approaches (freedom to compete and consumer welfare) are present, and if so, to what extent, in the decisions of the EC and the judgments of the Court and the Court of Justice of the European Union (the "CJEU") related to these decisions, with the scope limited to concentrations between undertakings. The results may indicate whether the Commission "automatically" applies the EUMR rules based on the threshold, or whether it does include references to the teleological perspective of the EU merger control.

This approach might influence the (lack of) prevention of killer acquisitions on digital markets. The effects of killer acquisitions on digital markets are not unambiguous. For example, reverse killer acquisitions are not necessarily detrimental to innovation; combining the best two development processes in order to bring a more innovative product onto the market faster could involve discontinuing one of the pre-merger products (Yun, 2020, p. 669). Therefore, a pure economic analysis consistent with consequentialist thought may justify non-intervention in such killer acquisitions. At the same time, Ordoliberal thought would lead to a different perception of killer acquisitions, which enable GAFAM to become digital conglomerates. Presumably, a strategy of GAFAM companies to acquire start-ups (if identified) is to "kill" (future / potential) competition "and/or extend their domination by acquiring complementary services in neighbouring markets resulting in marginalisation of rivals and higher barriers to entry" (Lécuyer, 2020).

2.2 Methodology

The methodology of the paper is based on the formal-dogmatic method, the historical method and a case study.

The research was conducted using the official European case-law database ("EUR-Lex"), as well as the formula to search for the European Commission (the "Commission" or "EC") cases in Google Search: "keyword" site: https://ec.europa.eu/competition/mergers/cases/decisions/ file type: pdf after: 1989 before: 2022".

Four terms were searched for in all the documents that relate to "concentrations between undertakings" in the EU case-law since 1989, as categorised by EURLex, and all the cases that relate to "merger control" on the Commission's website. This resulted in the total of 17 entries on 2 January 2022 with regard to EURLex and the EC website. The search terms were: "freedom to compete", "freedom of competition", "economic freedom" and "consumer welfare". These keywords were chosen on the basis of the formal-dogmatic method (analysis of the literature and cases), as they relate to the fundamental values of the deontological and the consequentialist approaches to competition policy.

The search was limited to concentrations between undertakings: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, (the "EUMR") and Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, (the "Old EUMR").

3. Analysis and Problem Solution

3.1 Teleology of EU competition law

European competition law has two teleological dimensions. First, free competition (competition *sensu stricto*) can be perceived as a value in itself. Second, the teleology of competition law is based on the implementation of broader EU goals, such as the internal market, which "as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted" (Protocol (No 27) on the internal market and competition.

Contrary to what would result from a purely consequentialist approach to competition law, although "the goals of European Competition law centre around, and are primarily consistent with, consumer welfare" (Ezrachi, 2018, p. 4), they are not limited to it. The literature (*inter alia* Ezrachi, 2018 and Maier-Rigaud, 2012), distinguishes a multitude of purposes of the EU competition law, such as: consumer welfare, consumer well-being, efficiency and innovation, effective competition structure, freedom to compete, market integration and fairness. The division of these values into a representation of consequentialist and deontological approaches is illustrative only, and an explanation of it would require a separate article.

Table 1: Multitude of aims of EU competition law

Approach	Consequentialist			Deontological			
Value	**Consumer welfare**	**Consumer well-being**	**Efficiency and innovation**	**Effective competition structure**	**Freedom to compete**	**Market integration**	**Fairness**
Example	"*[I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition*" (Judgment of the Court of Justice of 27 March 2012, *Post Danmark A/S v. Konkurrencerådet* (C-209/10), ECLI:EU:C:2012:172, para. 42).	"*[T]he ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers*" (Judgment of the Court of First Instance of 7 June 2016, ***Österreichische Postsparkasse v. Commission*** (T-213/01 and T-214/01), ECLI:EU:T:2006:151, para. 115).	"*[A] dominant undertaking may demonstrate that the exclusionary effect arising from its conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer*" (Judgment of the Court of Justice of 6 October 2015, *Post Danmark* (C-23/14), ECLI:EU:C:2015:651, para. 48).	"*[C]ompetition rules of the Treaty, [are] designed to protect not only the immediate interests of individual competitors or consumers but also to protect the stucture of the market and thus competition as such*" (Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08), ECLI:EU:C:2009:343, para. 38).	"*[T]he referring court is uncertain as to the compatibility of the restrictions at issue in the main proceedings with the principles of Community law regarding the freedom of competition of undertakings, and with the action of the European Union seeking to improve and protect health. In particular, it asserts that, contrary to that aim, the legislation concerning the organisation of pharmacy services currently in force in the Lazio Region prevents an effective contribution to the protection of public health*" (Judgment of the Court of Justice of 1 July 2010, *Sbarigia* (C-393/08), ECLI:EU:C:2010:388, para. 15).	"*[T]he Commission stated that the clause was, in addition, liable to delay integration in the electronic communications sector, since the market integration process would be seriously jeopardised if incumbents such as Telefónica and PT could reinforce their already very strong market position by participating in collusive practices with the aim of protecting their home markets and avoiding the entry of other operators to those markets*" (Judgment of the General Court of 28 June 2016, *Telefónica, SA v European Commission* (T-216/13), ECLI:EU:T:2016:369, para. 45).	"*[C]ompetition, if it is fair, generally ensures technological progress and improves the qualities of a service or product while ensuring a reduction in costs. It therefore benefits consumers because they can also benefit from products and services of better quality at a better price. In that way competition is a source of progress and development*" (Judgment of the Court of Justice of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07), ECLI:EU:C:2009:519, para. 245).

Sources: Ezrachi (2018); own study (2022)

3.2 Teleology of EU merger control

It is clear from the Commission's documents that the teleology of the EU merger control is driven by the teleology of Articles 101 and 102 of the Treaty on the Functioning of the European Union, ("TFEU"). Taking into account that the Old EUMR was introduced in late 1980's, i.e. almost 30 years after the current Articles 101 and 102 TFEU, it is not surprising that it was treated as "a vital additional instrument made available to it by the Council in order to ensure a system of undistorted competition in the Community" (European Commission [online], 1991, para. 20).

3.2.1 Consumer welfare

Consumer welfare is one of the core values not only of the EU competition law, but, more broadly, of EU law. It seems that for the moment, EU law perceives consumer welfare as an answer to the principal question "whether competition policy should seek to advance consumer welfare or total welfare, or ought to aim, instead, at protecting 'Wettbewerbsfreiheit' or the 'freedom to compete'" (Vanberg, 2009, p. 4). Consumers are protected by the primary law of the EU, *inter alia* Article 38 of the Charter of Fundamental Rights of the European Union, (the "Charter"). Although Article 38 of the Charter is "short and abstract, it symbolically shows that consumers are valued not only as market actors but also as human beings" (Benöhr, Micklitz, 2018, p. 22). In the EU competition law, "the concept of 'consumers' encompasses all users of the products covered by the agreement, including wholesalers, retailers and final consumers" (MacCulloch, 2018, p. 65).

Consumers are referred to directly in the EUMR: "it is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition" (EUMR, 2004, recital 29).

Consumer welfare itself appears in soft law, for example in para. 13 of the Communication from the Commission. Notice. Guidelines on the application of Article 81(3) of the Treaty, *OJ C 101, 27.4.2004, p. 97–118*: "the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources", or with regard to Article 102 TFEU: "the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare" (para. 19 of the Communication from the Commission. Guidance on the Commission's

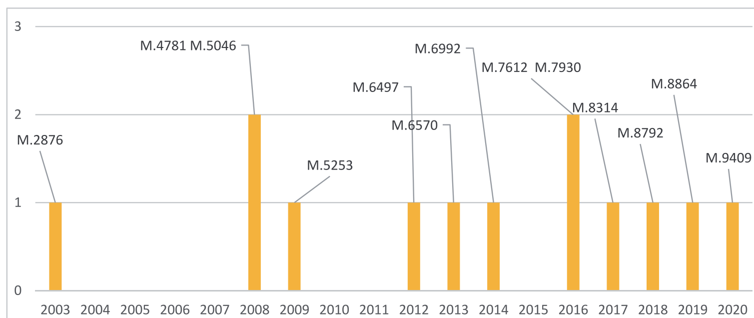
enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

Consumer welfare seems to be at the heart of the EU merger control teleology. As the official EC documents state, "the Commission (…) adopts a consumer welfare standard, clearing mergers only if they are not likely to negatively affect consumers" (European Commission [online], 2006, para. 3.28).

The actual welfare standards used in the application of the merger control legislation are strongly biased in favour of consumers (European Commission [online], 2006, para. 3.16). Such an approach contrasts with the total welfare, which includes not only consumer surplus, but also "producer surplus – basically the producers' profits" (Albæk1, 2013, p. 71). It is believed that consumer welfare maximises total welfare, as it leads to more appropriate and balanced competition law enforcement (Neven and Röller, 2000).

Despite the key role of consumer welfare in the merger control teleology, surprisingly only 13 of the Commission decisions from the merger control sector included a reference to this value (Figure 2). No cases before the Court or the CJEU were found on the basis of this keyword.

Figure 2: Consumer welfare in the concentration control decisions of the Commission



Source: own study (2022)

In the decisions, the Commission analysed whether the transaction at issue would lead to a dominant position of a merging undertaking and therefore raise a concern of a reduction in consumer welfare.

In Case No. M.2876 – *Newscorp / Telepiu*, one of the merging parties adduced that "the Commission [was] clearly correct that such a transaction may create or strengthen a dominant position held by a third party and, accordingly, may harm consumer welfare" (para. 269). However, in Case No. M.6992 – *Hutchison*

3G UK / Telefonica Ireland, one of the merging undertakings argued that "the Commission should base its assessment on total welfare rather than on consumer welfare" (para. 637).

The analysis of consumer welfare by the EC was not price-centric, as it included other, nonprice values. For example, in Case No. M.6497 – *Hutchison 3G Austria / Orange Austria*, the Commission took into consideration that a merger "may also imply pursuit by the merged entity of fewer improvements in functionality of the services available than would have applied in the absence of the merger, resulting in consumer welfare losses by mechanisms other than price" (para. 316).

As a rule, the Commission analyses the effects of a merger on both "*competition and consumer welfare*" (for example, Case No. M.6570 – *UPS / TNT Express*, para. 721). However, the EC stated in Case No. M.5253 – *Sanofi-Aventis / Zentiva* that even in some cases in which the strategy of a merging undertaking may raise concerns of the EC, "whilst there may be a negative effect on competitors, any effect on consumer welfare is ambiguous" (para. 507). In Case M. 7930 – *ABP Group / Fane Valley Group / Slaney Foods*, the EC emphasised that "*increased buyer power can be beneficial to consumers if the reduction in input prices is passed on to consumers*" (para. 326). Such an attitude of the Commission may confirm the hypothesis that competitors, market structure *et cetera* are not as important as consumer welfare protection.

Only in one, most recent case (from 2020) – Case No. M.9409 – *Aurubis / Metallo Group Holding*, did the Commission emphasise the value of competition itself. It referred to the EUMR and the Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011, (the "Guidelines"), which do not preclude the EC from intervening in buyer power cases where direct harm to consumers cannot be demonstrated. The Commission indicated that "the legal test of the Merger Regulation is whether the merger can significantly impede 'competition', which includes the protection of the competitive process, even if it cannot be demonstrated that such reduction of competition affects consumer welfare" (para. 376).

It shows that in most cases the consumer welfare protection was treated as an ultimate aim of the Commission's analysis. Only in one of 13 decisions referring to the consumer welfare standard did the Commission invoke the value of competition itself.

3.2.2 Freedom to compete, freedom of competition, economic freedom

Although "the genesis of the idea of protecting competition was imbedded in the idea of protecting freedom" (Gerber, 1998, p. 17), freedom to compete, freedom of competition and economic freedom are much less emphasised in the European

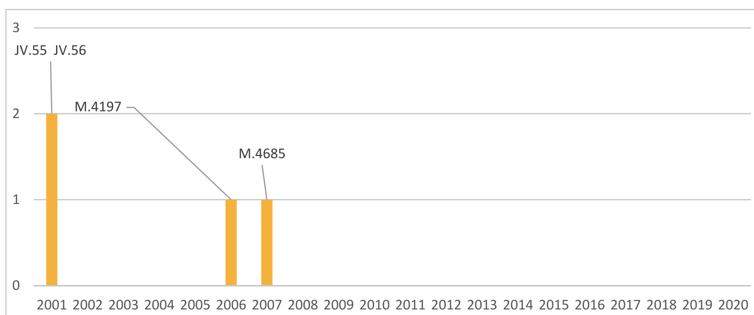
Union law system than consumer welfare. These three values are not explicitly protected by the primary or secondary law and soft law. However, "the creation and protection of the freedom to compete should remain the purpose of competition law" (Akman, 2014, p. 186), as it would be consistent with ordoliberal thought, which is perceived as a fundament of the EU competition rules.

All of these three values are used in the paper in the meaning of German Wettbewerbsfreiheit, present in ordoliberal thought. Wettbewerbsfreiheit (as an individual freedom) was perceived by ordoliberals as the teleology of the EU competition law, an aim in itself (Hoppmann, 1967, 79). This concept "can be translated into English in a number of ways: "freedom of competition", "freedom to compete", or "economic freedom"" (Akman, 2014, p. 189).

This perspective seems to be rejected by the CJEU; see for example para. 62 of AG Wahl's Opinion in Case C-525/16 *Meo – Serviços de Comunicações e Multimédia*: "it is well established that a practice of discrimination, and a differential pricing practice in particular, is ambivalent in terms of its effects on competition. Such a practice may have the consequence of increasing economic efficiency and thus the well-being of consumers. These are goals which, to my mind, should not be overlooked in the application of the rules of competition law, and they are, in any event, quite distinct from considerations of fairness. As the Court has repeatedly held, the rules of competition law are designed to safeguard competition, not to protect competitors".

Only four Commission's decisions were identified on the basis of the keywords "freedom to compete", "freedom of competition", and "economic freedom". 0 results appeared on the EURLex website.

Figure 3: Freedom to compete, freedom of competition, economic freedom in the concentration control decisions of the Commission



Source: own study (2022)

However, the remarks about freedom to compete in the two decisions were made only in the context of the contractual relationship between undertakings (to confirm an undertaking's freedom to compete). Two cases including the keyword "economic freedom" were found. In these decisions, the Commission considered whether the imposition of the financial and investment requirements significantly limits an undertaking's economic freedom, "thereby creating an obstacle to the exercise of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment" (Case No. M.4197 – *E.ON / Endesa*, para. 65).

No decisions were identified on the basis of the keyword "freedom of competition".

Although recent studies relating to all competition decisions of the Commission note the post-2013 rise in such decisions that reference ordoliberal goals (Stylianou, Iacovides, 2019, p. 32), it seems that the Commission's concentration control practice lacks such ordoliberal perspective. The Commission hardly ever referred to freedom to compete, freedom of competition and economic freedom in its merger control decisions.

3.3 Impact on policy towards killer acquisitions on digital markets

Not only does the merger control legal system based on thresholds seem to be outdated with regard to digital markets, but also any references to the teleology in the Commission's decision-making practice in the field of merger control are very rare. Even when such references exist, competition as a value in itself is underestimated and the parameter on the basis of which the Commission assesses the transaction is consumer welfare. It leads to a philosophically inconsistent system, creating "a paradoxical situation where one economic phenomenon (i.e. competition) is semantically covered by the other (welfare)" (Andriychuk, 2012, p. 355).

The statement that not only consumer welfare, but also competition itself and freedom to compete should be protected, could have an impact on the competition law approach towards killer acquisitions. Such an approach would encourage protection of the competition process, which also includes the structure of competition (on numerous relevant markets, digital conglomerates dominate), while the consumer welfare objective would mean focusing on the outcome of the competition process as the ultimate criterion.

While choosing the right merger control system, "it is critical to take into account the important role that exit via acquisition plays in providing incentives for venture capital (VC) investment and entrepreneurship, and more broadly in driving dynamic innovation" (Reilly [online], 2021). However, if a deontological competition policy is adopted, other values, such as competition structure and freedom to compete, may prevail. Then there might be no place for killer acquisitions and, for instance, the threshold criterion from the EUMR would be

supplemented with another criterion, more suitable for digital markets. It seems that the Commission looks at mergers from the consumer welfare perspective, but probably there will be more and more deontological references, like in the recent Case No. M.9409.

The DMA seems to introduce a deontological approach: a subjective criterion, without any analysis of the effects of the gatekeeper's behaviour. Apart from the controversy related to the DMA and the replacement of loopholes in competition law with sector regulation, since such regulation has already been created, it is a pity that only the notification duties of gatekeepers related to killer acquisitions have been introduced.

4. Conclusion

It is uncertain whether the current effect-based approach can effectively prevent killer acquisitions on digital markets. However, preventing such killer acquisitions would be desirable on the basis of ordoliberal axiology. An insufficient level of "implementation" of ordoliberal thought under the current EU merger law may therefore have a negative impact on the structure of digital markets. A free market economy is not about competitors buying themselves out, but about competing with each other.

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NATIONAL EXPERIENCE AS INSPIRATION FOR EUROPEAN COMPETITION LAW

TEU Competition Law and Sustainability: key aspects from the Dutch ACM Draft Guidelines towards a unified EU approach

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Abstract

Following the many demands to have clarity on when cooperation agreements pursuing sustainability objectives are compatible with EU competition rules, and, specifically, when can they fall under the exception of Article 101(3) TFEU, two key concepts will be discussed: 'efficiency gains' and 'fair share'. The starting line of the discussion is the approach taken by the ACM in the recent Draft Guidelines on Sustainability Agreements (second draft version, January 2021). While some consider that the ACM goes too far broadening the conditions for exempting sustainability agreements, others consider the proposal too narrow. This paper analyses the solutions proposed by the ACM regarding the concepts of efficiency gains and fair share, and evaluates its possible adequacy at EU level in the upcoming guidelines since, ideally, all the EU countries should follow the same interpretation to avoid market inequalities in this regard. The solutions proposed by the ACM are studied in order to determine what could/should we take at EU level (or what not) or whether a different underlying approach could be taken.

Keywords: Article 101(3) TFEU, Draft Guidelines ACM, efficiency gains, fair share, sustainability agreements

1. Introduction

Sustainability has been at the forefront of the discussions within the competition law community for some time. All the efforts are needed to fight against the climate emergency, achieve the UN sustainable development goals (SDGs), or, even more locally, the EU Green Deal objectives. The efforts of the private sector are also necessary. While there are types of cooperation based on private self-regulation pursuing sustainability objectives that do not restrict competition and do not fall under the application of Article 101 TFEU regarding the prohibition of anti-competitive agreements, there are also sustainability agreements that might

restrain competition. For example, the sustainable measures agreed on might result in a general price increase of the products available to consumers, or end up limiting their options. Besides the heated academic discussion in this context (among many others, Claassen and Gerbrandy, 2016; Gerbrandy, 2017; Lianos, 2018; Blocks, 2019; Holmes, Middelschulte and Snoep, 2021), diverse national competition authorities and the European Commission have also acknowledged the controversy regarding sustainability agreements and Article 101 TFEU and are working on it. The Dutch competition authority, named Netherlands Authority for Consumers and Markets (ACM), has been particularly busy in this regard, and its proposals will be object of analysis in this paper.

This paper focuses on the exception of Article 101(3) TFEU as a possibility to promote sustainability agreements. Article 101(3) TFEU states that agreements, decisions, or concerted practices declared anticompetitive according to Article 101(1) TFEU might be excepted if they: 1. contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains); 2. allow consumers a fair share of the resulting benefit; 3. their conditions are indispensable to the attainment of these objectives; and 4. sufficient competition remains in the market. In the context of sustainability agreements, most of the questions arise regarding the first two conditions, i.e., efficiency gains and fair share: should non-economic benefits (sustainability benefits) be taken into account to calculate efficiency gains? If so, how can they be measured? What is considered a 'fair share' to consumers? Does it allow to take into account benefits that are directed to most society at large, or also affecting a different group than the consumers suffering the consumer-welfare loss, or benefits that will occur in a much longer term?

Following the heated debate in this regard, and numerous calls for clarity from stakeholders, the Commission has acknowledged the need to provide clarity regarding the exception of Article 101(3) TFEU and sustainability agreements and has stated that new guidelines regarding the applicability of this provision will be issued by the beginning of 2024 (European Commission, 2021). This paper wants to contribute to the debate and help to bring some clarity to the discussion by analysing the Draft Guidelines on sustainability agreements issued by the Netherlands Authority for Consumers and Markets (ACM) (Netherlands Authority for Consumers and Markets, 2021) and whether the solutions proposed would be adequate for a European approach to sustainability agreements. The ACM published on 26 January 2021 its revised Draft Guidelines on sustainability agreements ('Draft Guidelines') containing a flexible and open approach towards sustainability agreements, together with a joint economic report on the methods to quantify the efficiency gains of environmental sustainability initiatives (in cooperation with the Greek authority) (Netherlands Authority for Consumers

and Markets (ACM) and Hellenic Competition Commission (HCC), 2021). The Draft Guidelines offer three main opportunities for sustainability agreements: first, the ACM clarifies which agreements may fall outside of the scope of Article 101 TFEU; second, the application of the exception of Article 101(3) TFEU is discussed; finally, the ACM discusses several enforcement considerations and alternatives for those cases where an agreement cannot be found outside the scope of Article 101 or within the exception of Article 101(3). The ACM proposes a model based on cooperation and flexibility, where undertakings are welcome to consult any concerns regarding the potential anti-competitiveness of the agreement in which they want to be involved.

In this paper, we focus on the core of the Draft Guidelines, which is the application of Article 101(3) TFEU. Specifically, focus is placed on the approach taken regarding the questions concerning the efficiency gains and fair share requirements. First, the ACM's approach regarding the assessment of sustainability benefits as efficiency gains will be discussed. Questions regarding the measurement of sustainability measures as non-economic benefits are examined. Second, the ACM's approach regarding the requirement of a 'fair share' to consumers is analysed. In this regard, the ACM differentiates between environmental-damage agreements and other sustainability agreement, which impacts to a big extent the scope of application of Article 101(3) TFEU. This innovative approach and its consequences will be the object of discussion, and remarks will be submitted. Finally, conclusions will be reached regarding whether the Dutch Draft Guidelines could be a good example for a unified EU approach for sustainability agreements, or which aspects could be improved.

2. Assessment of efficiency gains and the ACM's approach regarding measurement of sustainability benefits

The first criteria for application of the exception of Article 101(3) TFEU requires that the agreement carries more benefits than offsets, or, in other words, that the agreement offers efficiency gains. However, it is not entirely clear whether sustainability objectives as non-economic benefits can be taken into account. As from the end of 1990s, the European Commission initiated a process of economization and modernization of EU Competition law that placed economics and efficiency at the center of the competition law analysis. The so-called 'more economic' approach has brought different developments in the area, such as the focus on the effects on the market of a specific practice to determine whether it is anticompetitive rather than focusing on its form (Jones, Sufrin, and Dunne, 2019, pp. 28–35; Blockx, 2019, p. 477). Also, when referring to the effects on the market it is meant the economic effects on the market. Consequently, the resulting approach is based on the concept of consumer welfare and focuses on

economic efficiency. This is reflected in the 2011 Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (European Commission, 2011). Consumer welfare, meant as the ability of consumers to benefit from lower prices and higher output, is placed at the center of the economic analysis. Within the context of Article 101(3) TFEU, losses and gains to consumer welfare are calculated and, if costs are greater than benefits, the agreement is generally considered contrary to EU competition law. Thus, when considering the anti-competitiveness of an agreement or conduct, competition law relies on economic efficiency and does not seem to take into account (or only to a marginal extent) non-economic objectives (Lianos, 2018, p. 7). This approach has been challenged in the last years, and discussions regarding the pursuing of public interests have been raised (Dunne, 2020).

The ACM departs from this narrower interpretation and considers that sustainability benefits can be taken into account in the analysis. In its Draft Guidelines on sustainability agreements, the ACM introduces the requirement that the benefits offered by the agreement must be objective (para. 35). They can be justified on existing studies by knowledge institutions, government agencies, international organizations, NGOs, or studies of their own. However, complications arise regarding whether those non-economic benefits must be quantified and, in that case, how should they be quantified.

When assessing the efficiency gains, it is necessary that benefits are identified and described as concretely as possible. The ACM distinguishes between agreements with benefits that can be quantified through a qualitative assessment and those which would require a quantitative assessment to determine the efficiency gains. Given the difficulty quantifying the sustainability benefits, the ACM states that there is no quantification needed when the parties have only a limited combined market share of less than 30 per cent or when the harm to competition is obviously smaller than the benefits of the agreement (e.g., agreements that will lead to a limited price increase or limited reduction in choices while users will obviously receive large benefits in return). The first exception seems logical, since there is a considerable amount of competition remaining in the market and therefore it can be assumed that the benefits of the agreement will have to prove its value in the market. The second exception brings to mind some of the uncertainty existent in the competition law assessment before the economization process of competition law. It seems that a rough estimation of benefits and offsets would still be necessary (Gassler, 2021, p. 438). The ACM, given the difficulties regarding the assessment of non-economic benefits, takes a pragmatic approach and further clarifies this exemption with an example. Under Example 4 of the Draft Guidelines, companies make an agreement involving the promotion of re-using paper and

cardboard packaging. This agreement results in a modest increase of production costs but it produces benefits for the environment, and promote a more responsible use of raw materials. In such a case, the ACM considers that the possible price increase for buyers is modest and only temporary, and benefits clearly overrun the offsets. It seems a strong emphasis may be needed on the very limited price increase (or limitation of user's choices) in order to apply this exception.

Regarding sustainability agreements that do not fall under these two situations, the ACM makes a clear distinction between environmental-damage agreements and other sustainability agreements. This distinction affects the scope of the exception of Article 101(3) (i.e., who is granted a 'fair share' of the agreement -which will be discussed below) but also the quantitative assessment of the agreements.

'Environmental damage agreements' are those concerning the reduction of negative externalities and a more efficient use of natural resources. They aim at avoiding damage to the environment in the production and consumption of goods and services (e.g., emission of harmful air pollutants and greenhouse gases, waster of raw materials, etc., that results in atmospheric heating, a reduced biodiversity, or less healthy livelihoods, therefore affecting society as a whole). The benefits of environmental-damage agreements can be expressed in monetary terms through the so-called environmental prices (or 'shadow prices'), which reflect the price that society assigns to the harm of the environmental damage in question. Quantitative assessment of the benefits of environmental-damage agreements is facilitated through environmental prices. However, it has been pointed out that the relation between the avoidance costs and the utility loss caused by externalities is not so strong, and the actual damage might differ from avoidance costs (OECD Directorate for Financial and Enterprise Affairs Competition Committee, 2020, pp. 16–17).

On the other hand, the other sustainability agreements cannot usually use environmental prices. The ACM proposes the option to determine what value can be assigned to the improvements derived from the agreement in question by discerning the valuation of users of a certain product or product feature (e.g., animal friendliness). The ACM refers to the willing-to-pay study. This method can either determine what consumers are willing to pay on the basis of revealed choice behaviour (revealed preferences) or on the basis of choices consumers would make in certain hypothetical scenarios (stated preferences). The ACM used the latter willingness to pay study in the well-known *Kip van Morgen* (Chicken from Tomorrow) case, where the ACM concluded that the animal welfare benefits derived from the agreement between several supermarkets and poultry producers were not sufficient to justify the anti-competitive effects (increase of prices) (Netherlands Authority for Consumers and Markets, 2015).

By using a direct evaluation method (a technique that asks consumers which value they ascribe to a product) such as the 'willingness to pay' method used by the

ACM, it is possible to assess goods that otherwise would be difficult to value (i.e., non-economic benefits). However, the ACM recognises in its Draft Guidelines that such a method is not easy. Indeed, it comes with several inconveniences. For instance, results may be influenced by the chosen structure of the survey or wording of questions. Moreover, it has been showed that the actual willingness to pay frequently differs from the stated willingness to pay (bounded rationality of consumers) (OECD Directorate for Financial and Enterprise Affairs Competition Committee, 2020, pp. 16–17; White, Hardisty, and Habib, 2019; Volpin, 2020, pp. 3–4). Finally, the evaluation can become significantly expensive due to the need of expert opinions or studies (Gassler, 2021, p. 103).

There are multiple evaluation methods that can be used. Indirect evaluation methods, which determine the value of a good that has not been priced from the value of another good which price exists in the market, have as an advantage that they are based on real decision-making situations. However, the big limitation is that the demand for the priced good should be directly connected to the demand for the non-priced good in order to apply which methods (OECD Directorate for Financial and Enterprise Affairs Competition Committee, 2020, pp. 16–17).

However, on top of the disadvantages of a method itself, the existence of a plurality of methods becomes a practical problem, since different evaluation methods can be used for different improvements regarding sustainability objectives. When the resulted prices vary depending on the method chosen, uncertainties arise, which makes the assessment vulnerable. (Gassler, 2021, p. 103). More importantly, it is not always possible to economically quantify all aspects of sustainability goals (e.g., think of the incommensurability of human life) (Gerbrandy, 2019, p. 116).

Thus, the quantitative assessment of non-economic benefits is indeed not an easy task, and the uncertainties around it might prevent businesses to enter into sustainability agreements. A broader use of the qualitative assessment might allow taking into account all the specialties of sustainability benefits (see below for further discussion in this regard).

3. 'Fair share' to consumers: ACM's differentiation between environmental-damage agreements and other sustainability agreements

The second prerequisite for the application of the exception of Article 101(3) TFEU requires that consumers must receive a fair share of the benefits resulting from the agreement. In other words, consumers should be compensated for the harm caused by the restriction of competition (e.g., increase of prices, limitation of products, etc.).

In the previous section, the controversy regarding non-economic benefits and its measurement has been analysed. However, when referring to the 'fair share' it is

not entirely clear whether the requirement only refers to benefits for users of the relevant market of the product and a full compensation for them is necessary, or whether the scope can be broader. This issue is fundamental in the context of sustainability agreements, since the negative externalities that a sustainability agreement may aim to avoid, or the benefits that it aims to seek, will generally affect society as a whole (e.g., less pollution, health, etc.). While it seems that the European Commission in the 2011 Guidelines (European Commission, 2011) stipulates that users should be seen as a group for each relevant market, and full compensation of the users on the relevant market is necessary, it also mentions that society benefits as a whole in certain situations (para. 65). In the *CECED* case (Commission Decision of 24 January 1999), which concerned the agreement between washing machine manufacturers to stop the production of the least energy-efficient washing machines, the Commission assessed the individual economic benefits for the washing machine users but also analysed the collective environmental benefits for society as a whole. Still, the conclusion was based on the decision that users of the relevant market were fully compensated.

The Dutch ACM makes an important distinction in the Draft Guidelines between environmental-damage agreements and other sustainability agreements. Regarding environmental-damage agreements, the ACM believes that benefits for others than merely the users should be taken into account, since, in those cases, it is the demand for the products in question, the one creating the problem that affects society, and it can be fair not to fully compensate users for the harm that the agreement causes. The ACM also mentions that these users enjoy the same benefits as the society. In this context, it is necessary to mention that the ACM has published a legal memo on 27 September 2021, titled 'What is meant by a fair share for consumers in Article 101(3) TFEU in a sustainability context?'. On the basis of the current wording of Article 101(3) TFEU and after an analysis of the relevant case law of the CJEU (e.g., *Mastercard* (2014), but also previous cases such as *GlaxoSmithKline* (2006) or *Compagnie Générale Maritime* (2002)), the ACM concludes in this document that 'out of market benefits are relevant, full compensation of directly affected consumers in the relevant market is not required in all cases, and we should act accordingly when applying Article 101(3) TFEU to sustainability agreements' (Netherlands Authority for Consumers and Markets, 2021, p. 4). The ACM further justifies in this memo the position taken in its Draft Guidelines regarding environmental-damage agreements. Considering the principle of 'polluter pays' established in Article 191(2) TFEU, which entails that the costs of the negative externalities should be borne by those directly benefiting from the pollution, it is submitted that the benefits of addressing those externalities should not be limited to those direct beneficiaries (Netherlands Authority for Consumers and Markets, 2021, p. 4). Thus, when

considering this principle in relation to Article 101(3) TFEU, full compensation of relevant market consumers is not necessary to fulfill the fair share requirement. The memo is a reminder for the need of a consistent interpretation of competition rules with other objectives of the Treaty (Article 7 TFEU concerning consistency between the different EU policies and activities; Article 11 TFEU regarding the integration of environmental protection requirements in the different policies and activities with a view to sustainability development, and the above-mentioned Article 191(3) TFEU). In addition, for this more extensive interpretation regarding environmental-damage agreements to be applicable, the ACM requires in the Draft Guidelines that the agreement must contribute efficiently towards the fulfilment of an international or national standard or concrete policy objective.

On the other hand, the ACM in the Draft Guidelines states that, with regard to other sustainability agreements that do not fall within the category of environmental-damage agreements, users need to be fully compensated for the harm caused by the restriction of competition. These other sustainability agreements might concern, among others, working conditions, animal welfare, social sustainability, or human rights. Since the negative externalities are not present, the reasoning that the ACM applied to environmental-damage agreements and the 'polluter pays' principle do not apply in these cases. Thus, the ACM concludes that for these other agreements the benefits for the users of the product (as a group) must offset the anticompetitive results (e.g., price increase), even when a concrete policy objective existed.

While there have been many scholarly discussions regarding the notion of 'fair share' and, in general, the requirements of Article 101(3) TFEU and the necessity (or not) of broadening or changing the consumer welfare standard (among many others, Lianos, 2018; Nowag, 2019; Gerbrandy, 2019; Witt, 2019, Dunne, 2020) the ACM takes a practical and original approach by differentiating between environmental-damage agreements and other sustainability agreements. In short, environmental-damage agreements can fall easier under the exception of Article 101(3) TFEU: as opposed to other sustainability agreements, the ACM, when assessing whether consumers receive a 'fair share' of the benefits of the agreement, does not require that the benefits of such agreement fully compensate the competition harm to the relevant market users, but considers that in those cases it can be fair to consider the benefits to others. As mentioned in the previous section, a quantitative assessment based on environmental prices would be conducted in those cases to measure the benefits. On the contrary, regarding other sustainability agreements, full compensation of the relevant market users is required, and a 'willing-to-pay' study is suggested to measure whether the consumers believe that the benefits offset the damage to competition.

However, we could wonder if such a distinction is necessary. Following the explanation of the Dutch ACM in the legal memo 'What is meant by a fair share for consumers in Article 101(3) TFEU in a sustainability context?', and the referred case law, and always saving the distance between those cases and the situations discussed in this paper, the ACM submits that out of market benefits can be taken into account as long as users of the relevant market receive at least some substantial part of those benefits. Also, the ACM refers to the obligation to apply the competition rules in a manner consistent with the objectives of the Treaty. Article 11 TFEU demands that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. The ACM also refers to the 'polluter pays' principle, but the previous arguments seem sufficient to justify that the 'fair share' requirement does not strictly require full compensation of relevant market users, especially in the pursuit of sustainable development. These arguments do not require a distinction between environmental-damage agreements and other agreements but could support the application of the broad 'fair share' interpretation for both cases. Instead of this differentiation, the requirement disposed by the ACM asking for compliance with an international or national standard, or concrete policy objective, could be imposed as the condition necessary for all sustainability agreements in order to extend the fair share requirement as to include benefits to society and not full compensation of market users (as long as they also receive the same benefits than society).

On the other hand, the quantitative assessment of the benefits deriving from environmental-damage agreements are said to be easier to quantify than those from other sustainability agreements. The Dutch ACM might have been more inclined to introduce this distinction in order to show its compromise to fight the climate emergency and promote sustainable development, and defend the role that competition law can have, but at the same time avoiding most of the complications that come with the measurement of non-economic benefits. Still, none of them come without difficulties (see above previous section). In this regard, attention can be directed to the exception stipulated by the ACM in the Draft Guidelines regarding 'obvious' cases in which benefits clearly offset harm to competition. In these cases, there is no need for a quantitative assessment of the benefits, and the agreement would fall under Article 101(3) TFEU after a qualitative consideration. Given the difficulties deriving from the quantitative assessment of sustainability benefits, a broader use of the qualitative assessment, going beyond the 'very obvious cases', can be explored. As previously mentioned, more attention could be placed on the fact that certain agreements aim to pursue pre-established objectives (derived from international or national standards, or concrete policy objectives, which are not mandatory for the companies involved).

While benefits deriving from the agreement are required to be objective and based on existing studies, more focus can also be placed on the objectives of the agreement. For example, the sustainability objectives that our society is aiming for are specified, in general, in the SDGs and Paris agreement and its related strategies, and, even more locally, in the EU Green Deal and its derived strategies. When the agreement pursues pre-established public objectives, whose benefits can also be objectively substantiated, a broader use of a qualitative assessment could be promoted. For example, in order to ensure legal certainty, certain specific scenarios related with these objectives could be included within the exception regarding 'obvious cases' contemplated by the ACM. Such an approach would benefit legal certainty and encourage companies to safely enter into sustainability agreements. At the end, all efforts -including those of private actors- are needed for the accomplishment of these objectives.

4. Conclusion

The Dutch ACM has had a long experience regarding sustainability agreements (e.g., Energieakkoord (2013) Kip van Morgen (2015)). Thus, the approach taken by the Dutch ACM in its revised Draft Guidelines concerning sustainability agreements should be carefully studied in view of the future guidelines being prepared by the Commission regarding Article 101(3) TFEU. The ACM recognizes that agreements between undertakings can contribute to achieving public sustainability objectives, and takes a practical and comparatively progressive approach to the interpretation of Article 101(3) TFEU. The guidelines provide companies with more certainty when entering into these agreements, which, at the same time, encourages them to do so.

In this paper, focus has been placed on the strategy stated by the ACM in answering whether a sustainability agreement provides efficiency gains and allows consumers a fair share of the resulting benefit. The ACM seems to allow certain sustainability agreements to fall under the exception of Article 101(3) and explains how non-economic benefits (in this case, sustainability benefits) will be measured and what a 'fair share' for consumers is in those cases. In this paper, several remarks to the ACM's approach have been made, and can be summarized as follows:

First, the ACM makes a big differentiation between environmental-damage agreements and other sustainability agreements that has a crucial impact on the application of Article 101(3) TFEU. Regarding environmental-damage agreements, understood as those aiming at reducing environmental damage, the ACM maintains a broader interpretation for the requirement that consumers should be allowed a fair share of the benefits of the agreement. In the case of these agreements, benefits relate to the reduction of negative externalities in production or consumption, that have as a result a more efficient use of scarce

natural resources. Thus, the ACM considers that it can be fair not to fully compensate users in those cases, since their demand for the product essentially creates the problem for society, and as long as the agreement contributes to the compliance with an international or national standard or concrete policy objective. In such cases, the consumers of the product will enjoy the same benefits as the rest of the society. On the other hand, as regards other sustainability agreements, which concern aspects such as working conditions, animal welfare, social sustainability, human rights, etc., the ACM considers that full compensation for the harm to competition of relevant market users is necessary. The distinction is based on the fact that, in these cases, the element of the negative externalities and inefficient usage of common resources is missing. However, in my opinion, this distinction does not seem strictly necessary, and the arguments used by the ACM do not seem to rule out that the broad interpretation of the fair share requirement could be used as well for these other types of agreements. The requirement of compliance with an international or national standard or concrete policy objective could have more weight to extend a fair share including benefits to society and not full compensation of market users (as long as they also receive the same benefits as society) than the actual differentiation between environmental damage agreements and other sustainability agreements.

Second, regarding the assessment of sustainability benefits in order to evaluate whether the agreement produces efficiency gains, the ACM considers two exceptions which can be assessed through a quantitative assessment: when the parties to the agreement constitute less than 30% of the relevant market or when the harm to competition is obviously less than the benefits that the agreement brings. In the rest of the cases, a quantitative assessment will be conducted. In the case of environmental-damage agreements, the ACM refers to the use of environmental prices to help the assessment, while, in other sustainability agreements, when that is not possible, the ACM refers to the use willingness to pay studies. However, it has been submitted that, despite the existing tools, the economic assessment of non-economic benefits brings several difficulties and uncertainties, and, therefore, a broader use of the quantitative method can be explored. Besides the requirement of objective benefits based on existing studies, adding the previously mentioned requirement of compliance with an international or national standard or concrete policy objective, or even concrete examples, could allow a broader use of a qualitative assessment.

To conclude, the ACM's approach is a big step in the right direction and we encourage the Commission to thoroughly study this approach. Still, the above-mentioned remarks could be taken into account in order to ensure that companies are encouraged to pursue sustainability agreements as part of the collective effort needed to pursue sustainability (in all its environmental, social and economic aspects).

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What can the EU learn from the Chinese Anti-Monopoly Guidelines for the Platform Economy Industries?

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Abstract

The rising economic importance and market power of many digital platforms raises concerns that they may engage in anti-competitive conduct and misuse their power to the detriment of competition and consumer welfare. Regulators worldwide resort to traditional *ex-post* antitrust methods or propose *ex-ante* regulatory frameworks. Given the global scale of operations of the platforms, regulators may find inspiration in approaches adopted in other jurisdictions. This paper draws attention to the Anti-Monopoly Guidelines for the Platform Economy Industries promulgated on 7 February 2021 by the Antimonopoly Commission of the State Council of China. The guidelines "put on paper" what has been a matter of theoretical debate in the EU competition law and its approach to digital markets. For example, they expressly state that a platform can, in certain circumstances, constitute an essential facility, that requiring a counterparty to the transaction to choose between two competitive platforms ("either-or-choice") can constitute exclusive dealing or that implementing differentiated prices and other transaction conditions based on big data can constitute discrimination ("big data discrimination"). Chinese experiences may be insightful to the EU which is on its quest to find a proper balance between *ex ante* and *ex post* regulation of digital platforms.

Keywords: China, digital platforms, regulation, enforcement

JEL Classification: K210

1. Introduction

The economic power of digital platforms is rising globally. These platforms are often blamed for rising economic inequality and related negative social phenomena. Policymakers resort to different instruments to impose some boundaries on their operation, ranging from competition law, economic regulation, or hybrid methods such as specific enforcement teams. As a part of this global endeavour,

on 7 February 2021 the Antimonopoly Commission of the State Council of China promulgated the Anti-Monopoly Guidelines for the Platform Economy Industries (Guidelines). Given the extraterritorial reach of the platforms and the importance of China's market, China's approach to digital platforms may be relevant for policymakers globally.

2. Updating of regulatory tools for digital era

The European Union (EU) has been particularly active in devising an appropriate regulatory response to the digital platforms. The report on competition policy for the digital era (Crémer *et al.* 2019) which summarizes the main issues related to digital economy, including digital platforms, generally recommends relying on the established competition rules and up-dating them for the digital age. Where necessary, it recommends bolstering such rules by regulation. The proposed Digital Markets Act (DMA) as an *ex ante* regulatory tool to address some aspects of the operation of the most important platforms designated as "gatekeepers" is an illustration of this approach. Tailoring of generally applicable competition rules for the digital era as a part of the traditional *ex post* regulation through competition law rests mainly on the case law of the Court of Justice of the EU (CJEU) or the decision-making practice of the European Commission (Commission). Some of the aspects of digital platform markets are also promised to be reflected in the revision of some regulations, guidelines or notices, such as in the Vertical Block Exemption Regulation or Notice on the Definition of Relevant Market.

The Chinese Guidelines may be particularly insightful in such "updating" of competition rules for the digital era. The Guidelines were adopted to complement China's Anti-Monopoly Law of 2007 (AML) and are not technically a formal law, but rather a public policy guide (Smithurst 2021, p. 643). Pursuant to Article 2, they are applicable to platform operators and to businesses operating on or in connection with such platforms. The Guidelines fine-tune the principles of market definition in the platform economy, include a list of practices that are likely to raise competition-related concerns and suggest an appropriate competition law response to those concerns. If those responses prove useful in containing the economic power of digital platforms, they may serve as an inspiration for the EU. The aim of this Article is to evaluate whether there is a scope for such an inspiration.

To do so, the Article first describes some of the key principles of the Guidelines. Second, it identifies how the same concepts can be approached under EU law. Third, it compares those approaches and identifies the scope for potential inspiration. Finally, the Article concludes by summarizing the main findings.

3. Key principles of the Guidelines

The Guidelines consist of 24 Articles divided into 6 Chapters. They cover general principles and market definition, specify what can constitute unlawful monopoly agreements and abuse of market dominance, expand on the rules applicable to concentrations of business operators, provide details on practices constituting abuse of administrative power by government bodies, and addresses ancillary matters such as the interpretation of the Guidelines. Below mentioned are some of the most noteworthy provisions.

First, the Guidelines suggest a departure from a strict insistence on a precise market definition in antitrust cases. The initial version of the Guidelines released for discussion suggested an extreme overhaul. It stipulated that in some cases, no formal definition of relevant market needs to be provided if sufficient direct evidence exists for a finding that the conduct in question was non-transitory and the harms involved were clear. Following a public consultation, this extreme language has been abandoned. Yet, the adopted version seems to keep the backdoor open to evade market definition in some cases. Article 4(3) of the Guidelines states that "a case-by-case analysis principle will be adhered to, where the actual need for definition of the relevant market will differ for differing case types. For investigation of monopolistic agreements and abuse of dominant market position cases in the platform sphere, and for merger reviews, a definition of the relevant market will normally be required." The phrase "normally required" suggests that it will not be required in all cases. Smithurts hypothesizes that softer language may be the result of the fact that all changes to legislation, i.e., here the AML which expects market definition in all cases, require measures with the status of law, and cannot be amended by regulatory acts such as the Guidelines (Smithurts 2021, p. 644). The "softened" approach to market definition is probably a response to difficulties in defining relevant markets in platform cases which usually involve two or more different but interlinked markets. Article 4(1) of the Guidelines explicitly mentions that the relevant product market can be defined based on the products on one side of the platform, which requires consideration of the interrelation and influence of the other side of the platform, or based on the platform as a whole.

The Guidelines also provide notable examples of what may be considered an abuse of dominance in platform markets. For instance, Article 15 of the Guidelines makes clear that where a platform requires merchants to sell exclusively on the platform as a condition of operating on it, this can constitute an abuse of dominance. Forcing counterparties to enter into transactions with specific merchants or via restricted channels can also be considered abusive. In assessing whether the platform engaged in that conduct, the enforcement agency (i.e., State Administration for Market Regulation, or SAMR) shall examine whether the platform adopted

any punitive measures such as rendering a merchant undiscoverable to search, lowering it on search results, and throttling its visitor volumes. It shall also examine any positive incentivizing measures, such as subsidies, kickbacks, and discounts afforded by the platform to the merchant. Yet, the Guidelines provide a rather extensive list of justifications that the operators can resort to, including a necessity to "*maintain a sound business model*". Interestingly, the Guidelines omit the reference to exclusive dealing being caught as an anti-competitive agreement as stipulated in the initial version.

Abuse of dominance can also be constituted by using by a platform of the data collected on users or merchants to engage in price discrimination or differential treatment with respect to other financial terms. Article 17 of the Guidelines differentiates between permissible and impermissible data-driven discrimination. It is permissible to distinguish based on transaction costs, credit status, or transaction duration. Yet, it is impermissible to distinguish based on ability to pay, purchasing habits, or consumption habits. There is also a number of justification grounds, such as where the discrimination comports with "legitimate trade or industry practice".

Refusal to enter into a transaction on reasonable terms by a party that controls an essential facility in the platform sphere can also qualify as an unlawful abuse of dominant position based on Article 14 of the Guidelines. Whether such an essential facility exists will be evaluated with reference to the amount of data held by the platform, replaceability by other platforms, the ability for a new competitor platform to enter the market, and the degree of dependence on the platform. In comparison with the initial version, the Guidelines omit the reference to data as essential facility. Instead of considering the data as essential facility, the Guidelines mandate to consider the uniqueness of a platform's dataset when assessing whether the platform itself is essential.

The Guidelines also clarify that some practices may be considered under both the abuse of market dominance provisions, if employed by a dominant operator, and the anti-monopoly agreements provisions. This is the case of, e.g., the so-called most-favoured-nation clauses (MFN). Article 7 of the Guidelines states that clauses that obligate a merchant to offer terms on a platform that are at least as favourable to merchant's sales on competitive platforms may constitute a monopoly agreement or abuse of market dominance.

In the sphere of anti-monopoly agreements, Article 5 of the Guidelines reflects that in digital platform markets, concerted conduct can be organized or coordinated through an information exchange facilitated by data, algorithms, or platform rules even if no written or verbal agreement or decision is made. Article 9 of the Guidelines authorizes the SAMR to rely on logically consistent circumstantial indirect evidence suggesting concerted practice when direct

evidence is difficult to obtain while allowing the operators to rebut its conclusion by providing opposite evidence.

Finally, a notable invention of the Guidelines in the area of merger control is that the Guidelines explicitly target "killer acquisitions". They reiterate the power granted to the SAMR by the Merger Notification Regulations of 2008 to proactively review mergers that do not meet statutory reportability thresholds. Article 19 of the Guidelines links this power with transactions involving start-ups and new platforms, companies providing services to consumers for free or limited fee resulting in low turnover of such companies, or transactions in highly concentrated markets.

4. The EU approach

The concepts under the Guidelines are not new to the EU competition law. All of them have been to some extent discussed or considered also within the current EU framework.

First, some of the rules incorporated in the Guidelines correspond to those proposed in the DMA. The definition of a digital platform in the Guidelines would substantively coincide with the definition of a gatekeeper in Article 3 of the DMA, except that the latter only applies to the largest platforms which surpass high turnover thresholds. Article 5(c) of the DMA explicitly prohibits "either-or" abuses by requiring that gatekeepers allow business users to transact outside the platform. Article 5(b) of the DMA specifically prohibits "wide" MFNs clauses when it stipulates that gatekeepers shall not implement MFNs clauses that prevent business users from offering the same products at different prices or conditions through third-party online intermediation services. It also pre-emptively assumes that gatekeepers' platforms effectively work as "essential facilities" (Cabral *et al.* 2021, p. 20), and imposes a number of data-sharing obligations to prevent any "refusals to deal". Finally, Article 12 of the DMA aims to prevent "killer acquisitions" by requiring gatekeepers to inform the Commission about any intended concentrations which involve another provider of core platform services or of any other services provided in the digital sector.

Anti-competitive behaviour of digital platforms can also be caught by general competition rules. The "either-or" abuses would fall within the prohibition of exclusive dealing arrangements. In 2017, the German competition authority working in close cooperation with the Commission closed proceedings against Audible.com and Apple regarding a long-term agreement under which Apple exclusively purchased audiobooks from Audible for sale in the iTunes Store and Audible did not supply any other digital music platform other than iTunes (European Commission [online] 2017). Price discrimination based on data may amount to a discriminatory abuse under Article 102 Treaty on the Functioning of the EU (TFEU) in the form of imposing unfair trading conditions or excessive

pricing. The imposition of MFNs clauses can constitute abuse of dominance prohibited by Article 102 TFEU. In the *E-book MFNs and related matters (Amazon)* case, the Commission provisionally concluded (before closing the case by accepting commitments) that the terms requiring publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms to given to Amazon's competitors constituted an abuse of dominance. Also, the MFNs clauses can be regarded as an anti-competitive vertical agreement between a supplier and its distributors contrary to Article 101 TFEU, as illustrated by the probe into the online hotel bookings sector by several European competition authorities and the Commission (ECN [online] 2017). "Wide" MFNs clauses are also to lose the benefit of exemption under Article 5(1)(d) of the proposed revised Vertical Block Exemption Regulation. Denying access to platforms or its data can theoretically be regarded as an abusive refusal to deal if engaged in by a dominant undertaking and if such platform or data qualify as "essential facilities" – a dominant undertaking is prohibited, in the absence of objective justification, to refuse to supply to existing customers and to grant access to "essential facilities" on a non-discriminatory basis to new customers, at least in circumstances where a refusal would eliminate effective competition on the downstream market (Thompson *et al.* 2018, para. 10, p. 149). Finally, the review of concentrations that do not fulfil the notification criteria may be undertaken under the Commission Guidance on the Application of the Referral Mechanism set out in Article 22 of the EU Merger Regulation which allows it to review such concentrations provided that the national competition authorities consider those concentrations important. According to its para 10, the Guidance primarily targets the pharmaceutical and digital sectors.

Yet, given the complexity of the practices, the application of some of the above rules requires a thorough analysis and fulfilling rather onerous evidential burden to establish their detrimental effect on competition and consumer welfare. This is particularly true of the price discrimination based on data or refusal to deal and the essential facilities doctrine. As regards price discrimination, where the application of Article 102(c) TFEU is in itself difficult in traditional markets as it requires identification of equivalent transactions, dissimilar conditions, and occurrence of competitive disadvantage, its application to digital platforms may bring additional challenges. For example, having to prove that it is repeated conduct or that there are equivalent transactions would require a thorough analysis of the logic of the firm's algorithms (Botta and Wiedemann 2020, p. 393). In addition, it is recognized that personalized pricing can have a positive effect on consumer welfare, which can pave the way for successful justification of the practice by a platform (Sears 2021, p. 9). Also, the application of the prohibition on the business-to-consumer level is not common in the EU as exploitative abuses

are only rarely investigated (Botta and Wiedemann 2020, p. 389; Geradin and Katsifis 2021, p. 46). All these factors can make the prohibition of discrimination based on data by dominant undertakings only a theoretical endeavour. Similarly, the application of the essential facilities doctrine is dependent on the extent to which a platform and its data may be considered an essential facility. The CJEU had the opportunity to apply this doctrine in the recent *Google and Alphabet v Commission (Google Shopping)* case, but it rather approached the case as an abusive discriminatory treatment. Although it considered that Google's general results page has characteristics akin to those of an essential facility in that there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market, it concurred with the Commission's framing of the case as the one about self-favouring. Graef hypothesizes that the Commission might have intended to eschew the strict rules of refusal to deal and essential facilities doctrine (Graef 2019, p. 59).

Finally, some of the novel approaches suggested by the Guidelines have not been entirely accepted in the EU. This is the case of potential lessening of importance of market definition. Although the report on competition policy for the digital era (Crémer *et al.* 2019) suggested that the EU may head in a similar direction as it noted that in the case of digital platforms, market definition may not be that important as compared to theories of harm and identification of anticompetitive strategies, the Commission's Draft Notice on Market Definition does not seem to share this view as it insists on the importance of market definition even in the platform cases (Commission Staff Working Document 2021, p. 27).

5. Comparison of the Guidelines and the EU approach suggests room for inspiration

The comparison of the Guidelines and the EU law shows that the EU currently lacks a comprehensive tool that would summarize what its competition law's position to digital platforms is. Although some of the concepts are to be reflected in the upcoming updates of the guidelines and notices, the EU still largely relies on the case law of the CJEU and the decision-making practice of the Commission to clarify how the traditional competition rules apply to digital platforms. Many controversial issues are left open. The Guidelines, on the contrary, provide a comprehensive framework, partly based on experience from the case law, partly on what the Chinese policymakers consider an appropriate approach to the novel conduct (Smithurst 2021, p. 6).

This comparison highlights the added value of the Guidelines. First, they "forced" the SAMR to reach a formal position on some of the issues of applying traditional competition law to digital platforms. Although the core provisions of the Guidelines are still couched in rather vague terms allowing for flexible

interpretation on a case-by-case basis, they still narrowed down the rules of the game. In the assessment of the conduct, the SAMR is expected to focus on the factors enumerated as relevant, and the business operators are expected to invoke the justifications mentioned. Express designation of some types of conduct in the platform realm as abusive or otherwise anti-competitive also provides a stronger legal ground for the SAMR in its enforcement actions. Second, the compilation of all the rules in a single document promises to increase transparency and legal certainty.

The EU can find inspiration in the Guidelines in two ways. First, it can consider moving faster with taking a formal stance towards some of the open issues. The adaptation of the rules for the platform economy through case law is notoriously slow (European Parliament resolution 2021, paras 33, 38, and 42; Botta 2021). In addition, the rules enunciated in case law are limited to a very specific situation, which cannot be easily applicable in different settings (Geradin and Katsifis 2021, p. 4). This considerably limits their relevance in other cases. Although it may be tempting to resort to the DMA to devise clues on what the EU's approach to the regulated issues under competition law is, this can at times be misleading as the DMA follows a different regulatory logic. Driven by its primary aim to ensure fairness and contestability, especially by early controlling unfair practices, the DMA as an *ex ante* regulatory instrument often imposes special affirmative obligations which may go beyond what is necessary to protect competitive process in cases involving a "regular" dominant undertaking (Larouche and de Streel 2021).

Formulating the EU position would also benefit the overall regulatory landscape in the EU. In the absence of guidance on the EU level, some national authorities have started issuing their own position papers or guidelines (such as the competition authorities of Denmark, Finland, Iceland, Norway, and Sweden through their joint declaration of 2020), or started adopting *ad hoc* competition law instruments (such as § 19a of the German Competition Act). Diverging approaches of national competition authorities to practices by digital platforms within the EU may be detrimental to the functioning of the internal, single market and hamper the scaling up of innovative homegrown digital businesses (Franck and Peitz 2021, p. 526).

Closely observing how the SAMR applies the Guidelines can help the EU formulate its own approach to some of the open questions as to how to adapt competition law to digital platforms. The EU can watch and learn from the wanted and unwanted effects of the Guidelines, thereby effectively approaching the Chinese experience as a regulatory "laboratory" or "sandbox". Nonetheless, in any borrowing of the rules, the EU should be mindful of the specific context in which the Guidelines were issued. They are a part of what is by some regarded as a "crack-down" on the Big Tech in China (McConnel [online] 2021). Although the Guidelines abandoned some controversial proposals that would

make them a rather aggressive enforcement tool, the flexibility inherently tied with the application of competition law rules leaves space for pursuing a strict enforcement trend by the SAMR if necessary. After all, this trend seems to continue after the adoption of the Guidelines (Competition Policy International [online] 2021; Competition Policy International [online] 2022).

Second, the EU can be inspired by the Guidelines to summarize the rules applicable to digital platforms in a single document. The current regulatory landscape in the EU is difficult to navigate, for both the enforcement agencies and the businesses. It is scattered in the case law and the decision-making practice, soon-to-be-modernized guidances or notices that primarily deal with other topics, or non-binding strategic documents. A comprehensive approach would ensure more transparency. Alternatively, if such a comprehensive approach would not be feasible given the complexities involved, policymakers can consider at least updating the current regualtions to digital age also other regulatory instruments on top of the envisaged ones as enumerated in the Commission's Work Programme for 2022. The Communication on the Commission's Enforcement Priorities in Applying Article 102 TFEU is a prime candidate for modernization to reflect the platform economy.

6. Conclusion

The promulgation of the Guidelines marks an important milestone in China's attempts to set boundaries to the operation of digital platforms. Being a complement to the AML, they are a projection of the traditional *ex post* antitrust response to the challenges that the digital platforms bring to competitiveness and contestability of digital markets. The review of their contents suggests that the Guidelines "put on paper" what has been a matter of policy debate in the EU competition law or occasionally reflected in the case law and other instruments. In many cases, the Guidelines take a resolute approach to controversial issues that are still open in the EU. For example, the Guidelines expressly state that a platform can, in certain circumstances, constitute an essential facility, engage in exclusive dealing by way of requiring a counterparty to the transaction to choose between two competitive platforms, or engage in discrimination through implementing differentiated prices and other transaction conditions based on big data. The Article suggests that the Guidelines may be inspiring for the EU in two ways. First, the EU can refer to the substantive rules in the Guidelines in formulating its own position towards the same issues. The possibility of witnessing some of the alternatives applied in practice allows it to tap into the Chinese "regulatory sandbox" so that it can decide on its own which principles are worth following also in the EU. Yet, any "borrowing" of rules shall be informed by the fact that China announced a rather strict approach towards

digital platforms, which can be projected in the enforcement of the Guidelines. Second, the EU can draw inspiration from the form in which the rules were adopted. Rather than up-dating sectional instruments that deal primarily with other issues, such as relevant market definition, or fine-tuning the rules through the case law, the Guidelines summarize all aspects relevant for digital platforms in a single document, which promises greater transparency and easier navigation through otherwise complex rules.

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Effectiveness of Public Enforcement of Competition Law in Bosnia and Herzegovina

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Abstract

The protection of competition in the market depends not only on the quality of legal regulation but also on the effective enforcement of the law. Public enforcement of competition law implies that the procedure is initiated and conducted by public authorities or competition authorities, while private application implies filing a lawsuit for damages caused by anti-competitive behaviour. Bosnia and Herzegovina is a country in transition and development that does not inherit a long culture of competition and on the way to membership in the European Union encounters many obstacles, including those related to ensuring effective protection of market competition. The paper will present the institutional aspect of competition protection in the market of Bosnia and Herzegovina and give an analysis of the efficiency of the Council of Competition as authorities responsible for public enforcement of competition law. The assumption is that the GDP growth, corruption intensity, intensity of local competition, and extent of market dominance affect the effectiveness of antimonopoly policy in Bosnia and Herzegovina and that reforms of the competition law regime and Council of Competition coordination of effort with other institution in Bosnia and Herzegovina are necessary to obtain better competition law results.

Keywords: effectiveness of antimonopoly policy, extent of market dominance, intensity of local competition

JEL Classification: K210

1. Introduction

Competition policy is a public policy that aims to ensure that market competition is not restricted, distorted, or hindered by business practices of economic entities, which creates harmful consequences for the economy and the state. Competition law is a tool for achieving the goal of competition policy. The law and other legal acts therefore regulate certain business practices that may result in negative

effects on market competition. Competition law is aimed to obtain acceptable level and balance of companies' freedom and customer and public interests protection to eliminate generating some unjustified level of profit or extra profit. In some situations extraordinary profit is acceptable for companies if their profit is based on companies' innovativeness and operational efficiency, but even in that circumstances competition enforcement authority have an obligation to effectively enforce competition law. Effectiveness of competition law enforcement is a prerequisite for the effectiveness of competition policy. The efficiency of the application of competition law and thus of competition policy depends on several "direct" and "indirect" determinants. Direct factors of efficiency would be related to the efficiency of the antitrust authority. The efficiency of the work of the antitrust agency is determined by its size, quality, and education of employees, especially those who act in competitive cases, equipment and technology, or the budget available to the body. Without a doubt there is a positive correlation between resources and effective enforcement across public enforcement agencies (McNutt, 2000, p. 40). Indirect determinants refer to relations competition law and policy with macroeconomic indicators. The paper will deal with the impact of certain macroeconomic indicators on the effectiveness of competition law and policy in Bosnia and Herzegovina.

Bosnia and Herzegovina is a country in transition and development that does not inherit a long culture of competition and on the way to membership in the European Union encounters many obstacles, including those related to ensuring effective protection of market competition. The area of market competition in post-Dayton BiH was an unknown thing, considering the fact that there was no tradition in terms of market competition, as well as no legal and regulatory framework in this field. Without technical, professional, and material support from EU institutions, the transposition of rules and standards in the area of competition in BiH could not have been initiated. The EU demands from EU membership candidate countries to harmonise the area of competition well before accepting them in its membership. Generally, a candidate country is obligated to create all necessary conditions for the functioning of legal and institutional framework that would be identical to the one in the EU at the moment of admission to the EU. However, in BiH, the process concerning the introduction of modern competition law and its enforcement, meaning adaptation to the legal acquis, is conditioned by the complicated state and legal arrangement and represents a field of political determinism (Imamović-Čizmić and Sabljica, 2020, p. 58). Namely, the election of members of the Council of Competition of Bosnia and Herzegovina and the manner of decision-making in the Council of Competition is conditioned by national principles. This means that representatives of the constituent peoples must be represented in the composition of this competition authority

and in the validity of decision-making. The assumption is that by eliminating this determination by amending Competition Law and by influencing the determinants (GDP, attracting FID, education, corruption), preconditions can be created for a more efficient competition policy in BiH.

2. Literature review

The effective competition law implementation depends on different components within some national economy and it must take in consideration various relational macroeconomic indices. Many scholars consider that public enforcement of competition law is insufficient, and it needs to be complemented with private enforcement. These studies indicate that the level of economic development, the size of an economy, transition and economic reforms, foreign direct investment, sectoral structure, economic activity of the state, openness to trade, international organizations, membership in regional trade agreements, and corruption might have an impact on effective enforcement of competition law (Kronthaler, 2007, p. 6).

Michael W. Nicholson (2008) discusses the Antitrust Index and turns the presence of "law" into a numerical measure of the competition regime by awarding binomial points in case there are competition laws in a particular national jurisdiction, and to get the final result by summing the individual components. The finding he made is the claim that "strong laws" do not necessarily represent an effective antitrust policy. He also believes that there is a nonlinear link between the adjustment of antitrust laws and the size of the national economy. Analysing the results, the view is that the impetus for the adoption of antitrust laws is linked to the guidelines of "model" laws and highlights the gap between *de jure* legislation and *de facto* implementation.

There are a number of studies on the relationship between GDP and competition policy. It is indisputable that the growth of GDP per capita in one country is a precondition for higher allocations in the budget to antitrust authorities. Increasing the budget of antitrust bodies provides more financial resources for sophisticated equipment and education of employees in these bodies. Better equipment and education of employees in antitrust authorities are one of the internal factors of work efficiency and efficiency of law enforcement. On the other hand, an effective competition policy has a positive impact on economic growth (Voigt, 2009; Singh, 2002).

The correlation between foreign direct investment and competition policy raises many questions. It is undisputed that Foreign direct investment is the engine of growth in small open economies and that foreign investors want legal certainty and protection of competition in the national market. On the other hand, policy makers in countries where there is an influx of foreign investment have a dilemma of how to protect domestic industries (Clarke, 2008). There are studies that

indicate that there is no clear evidence that effective competition policy (developed institutions) discourages foreign direct investment (De Oliveira, Hochstetler and Kalil, 2001).

During the last pandemic period, competition law lost its edge in its activities, especially in the part of state interventionism that was necessary as such during the COVID 19 pandemic crisis. Certain economic entities suffered certain damages due to governmental measures related to lockdown and due to the mentioned obstructions, there were disturbances in the markets within various sectors, so that the basic forces of supply and demand were disturbed, which of course had its implications for price adjustment and markets. For these reasons, the development of the economy and consequently in the interrelation of the state apparatus that regulates certain anomalies in the markets with its instruments and legislation was to some extent absent, which could lead to certain abuses in markets within different sectors but national and supranational bodies in coordination should, in the near future, bring some order and make market disruptions gradually stabilize. Regardless of the above, the capacity of state intervention will remain extremely important in the coming period in order to ensure transparent competition between economic entities in the national, regional, international and global markets. Some industries may never look the same after COVID-19 because their way of operating is changed and showed that there was some more efficient way for doing business. If large portions of temporary shocks become permanent, state aid will become more problematic for the sectors or firms that aim to preserve the status quo. Given the large fiscal strains on many countries, we submit that such support schemes for sectors that are unlikely to fully recover should not go ahead. We admit that such decisions are from a political perspective, particularly hard to sell if the respective sectors are labour-intensive and have powerful trade unions or industry lobbies (Motta and Peitz, 2020).

Education of citizens about protection of their rights in the market is also very important precondition for upgrading competition law effectiveness in a country because citizen existing of two stream of competition law enforcement where we can find "ex-officio" option from one side and "ex-lege" option from the other. It means that very well educated citizens can recognize some breach of competition law that damaged their economic position and right and start different activities using instruments of nongovernment organisations to start the competition law cases in front of Competition Council or other responsible institutions. Effective private enforcement of competition law can create a culture of competition among citizens and a relief of pressure on competition authorities-a possibility to save their resources for more complex cases (Mantas, 2016).

Additionally, corruption is very widespread problem in transition countries and different evidence states that that social phenomena has a very negative impact

on ruling of law in any segment or institution and it is logically expected to find a negative correlation between level of corruption and the effectiveness of competition law in any country or economy. Ningrum and Mahmul in their works claim that corruption is believed to correlate with state's economy. The correlation could be notified in terms of low investment rate and the slowdown economy of the state. Corruption is also triggered the high government expenditure due to the high cost of procurement which at the end will generate an increase in state debt. While for consumer welfare, high corruption will cause an impact on poverty and slow economic growth (Sirait and Siregar, 2018, p. 135).

3. Methodological framework

This paper will present the intensity of application competition law relation with the main components that can impact on it. It will set up trend comparison between some categories and values and in the second stage the measure of the correlation between the intensity of local competition, extent of market dominance, GDP level, FDI level, and the level of corruption and an index of the application competition law. Since competition law is relatively new in Bosnia and Herzegovina and involved economic analysis, the application of an empirical method is essential. Hence the study involved data collection from The Council of Competition BiH and data from World Economic Forum (WEF, 2021), World Bank (WB, 1995–2020), International Monetary Fund (IMF), and Corruption Perception Index by Transparency International. The data collection will be oriented to the period between 2007 and 2017 according to the available and reliable data for named categories above.

Figure 1 presents a conceptual framework regarding the key influencing factors that determine the effectiveness of the competition law enforcement in general with a special application of this model in Bosnia and Herzegovina in the period from 2007 to 2017 in accordance with available data. Namely, it is expected that the effectiveness of the the competition law enforcement is positively correlated with the dynamics of GDP and of course FDI dynamics and the quality of the education system, while the correlation with the degree of corruption should be negative. In this regard, the analysis of these indicators will be performed within the period with discussion of the results and their interpretation in the context of the specifics of the small open transitional economy, such as the economy of Bosnia and Herzegovina.

Figure 1. Conceptual model of Effectiveness of antimonopoly policy in BiH

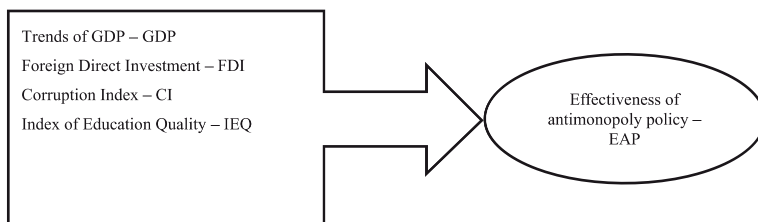
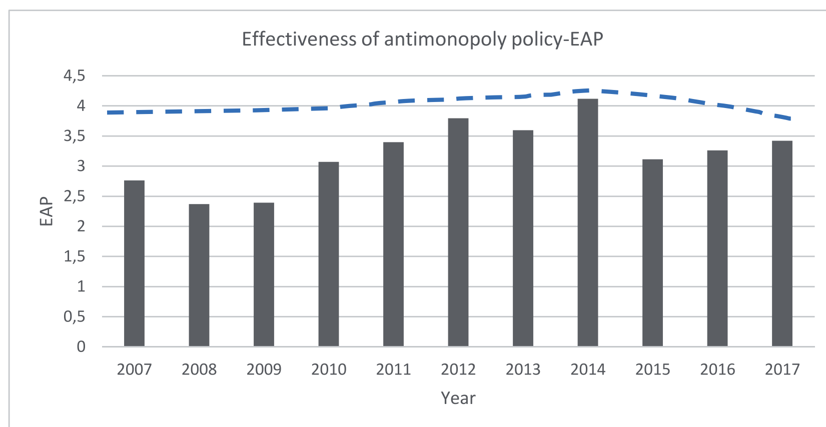


Figure 2 represents the effectiveness of antimonopoly policy (EAP) values during the period 2007–2017 according to available data from The World Bank where it is possible to observe a significantly lower average value of the EAP index in the period 2008–2009 during the great financial crisis where the state focused on maintaining economic activities but because of that the EAP index decreased. During the time of stable economic growth, the growth of the EAP index can be noticed in line with the dynamics of GDP growth and was above the world EAP average in 2014, but it can be expected that 2020 and 2021 will again be marked by a significant decline in the EAP index due to the crisis caused by the COVID 19 pandemic.

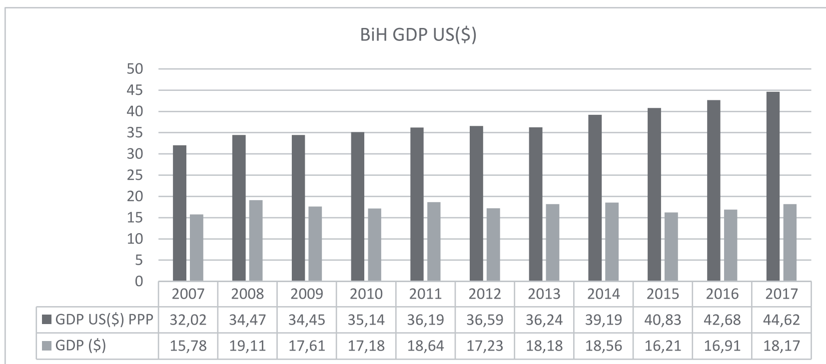
Figure 2. Trends of EAP



Source: ***https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=BA*** *(own elaboration, 2021)*

If we look at Figure 3 we can see the movement of GDP of Bosnia and Herzegovina took a ten-year observed period. It is easy to see that there was a disturbance in the movement of GDP in the period of the great financial crisis that affected different economies in the period from 2008 to 2011, which is fully in line with the EAP index in the period, which gives indications period. Given the above, an analysis of the correlation and regression between these quantities will be performed, where in a single regression model it will be assumed that GDP is a predictor / independent and EAP criterion / dependent variable with reading the above relationships from the obtained formula and diagram.

Figure 3. GDP US($) and GDP US($) PPP movement within the period 2007–2017

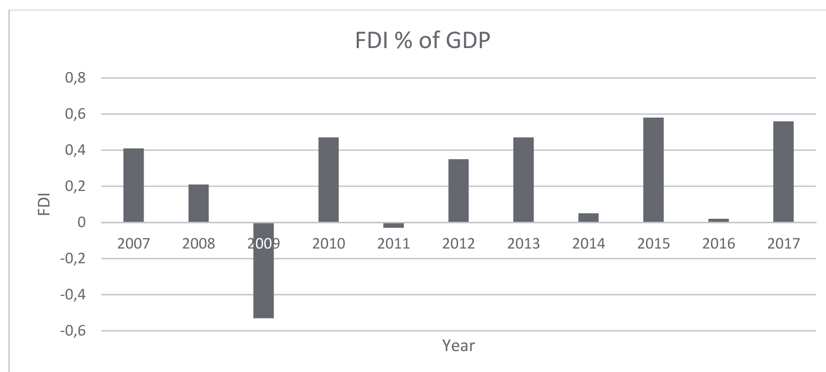


	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
GDP US($) PPP	32,02	34,47	34,45	35,14	36,19	36,59	36,24	39,19	40,83	42,68	44,62
GDP ($)	15,78	19,11	17,61	17,18	18,64	17,23	18,18	18,56	16,21	16,91	18,17

Source: ***https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=BA***

When we look at the movement of foreign direct investment of FDI during this period (Figure 4), we see an even more pronounced negative trend where FDI in Bosnia and Herzegovina in 2009 and 2011 was negative so that clear oscillations can be observed. For this reason, it can be inferred that there is some agreement regarding the movement of FDI and EAP during the reference period of ten years, which will be tested using a single linear regression model by reading the obtained relationships and relations.

Figure 4. FDI movement within the period 2007–2017

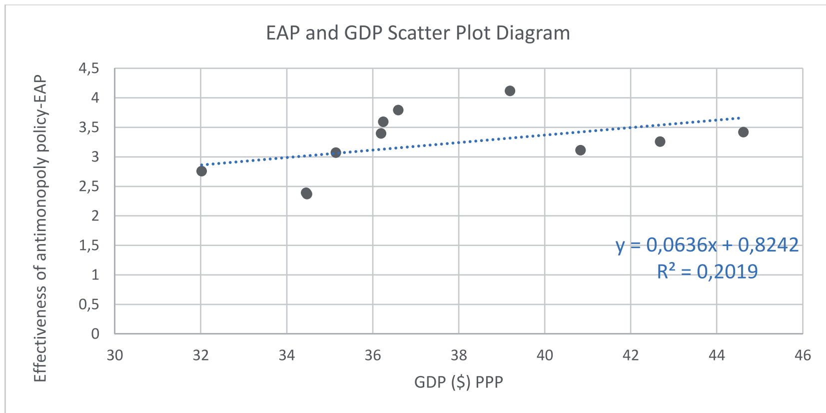


Source: Own elaboration (2021)

4. Linear correlation and linear regression modelling

If we test the correlation between the previously observed indicators regarding the size of the EAP index and GDP value we can use the Scatter Plot Diagram, Figure 5, and conclud that the movement of EAP index and GDP value is consistent and that the correlation is linear and positive while the coefficient of determination is about 0.20. Based on supposed model of single linear regression it can be concluded that 20% of the variance of the EAP index can be explained by the change in GDP value in the specified period. Naturally, standardized and adjusted regression coefficient that coluld be obtained by deeper analysis would be lower, but for this level of analysis and inference based on trends in certain phenomena is quite satisfactory for recognizing the contours of certain relationships between individual indicators and values monitored for Bosnia and Herzegovina by international institution. When we look at the regression equation $Y = 0.0636X + 0.8242$, which in the original sense should read $EAP = 0.0636GDP + 0.8242$, it can be understood that the linear regression equation says that with the increase in GDP, the EAP also increases, which is a sufficient sign that with the growth of living standards and economic growth, the state can expect a better application of competition law.

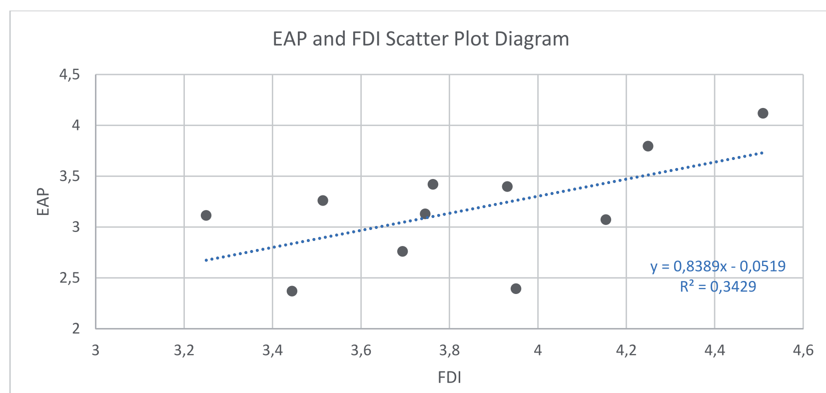
Figure 5. EAP and GDP correlation and regression model



Source: Own elaboration (2021)

Furthermore, if we look at the Scatter Plot Diagram, Figure 6, we can see that there is a certain level of linear correlation between EAP index and FDI value movement, and through deeper analysis using the supposed single linear regression model, it could be seen that the coefficient of determination is about 0,34 and it means that 34% EAP index variance could be explained by change in FDI value. Further analysis through the observation of the regression equation can be seen that it shows an increase in FDI value will produce increasing of the EAP index, which indicates the fact that companies coming from abroad implement and require standard business conditions in the context of protection their rights and especially in the field of competition law.

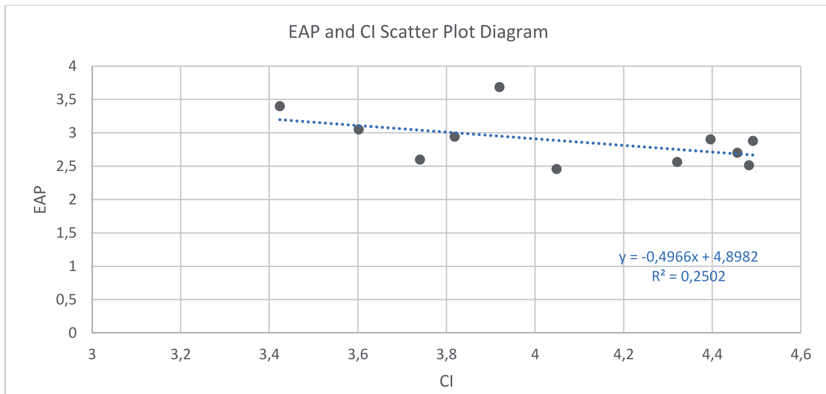
Figure 6. EAP and FDI correlation and regression model



Source: Own elaboration (2021)

Furthermore, Figure 7 implies that care should always be taken to establish a system or institution that aims to eliminate corruption if a state wants to ensure a higher intensity of competition law implementation, therefore resort to competition activities of a competition council in a national economy because the competition council alone cannot achieve satisfactory results. In this case, a negative slope of the line can be clearly seen on the diagram, which indicates a negative correlation between the level of corruption and the implementation of competition law index, where through deeper analysis using single linear regression model it can be seen that 25% of the change of variance in EAP index can be explained by changes in corruption level. On the other hand, if we look at the regression equation in this supposed model, it is possible to notice a decreasing linear function negative sign in front of X, which specifically represents that increasing value of Corruption Index-CI will produce decline in the effectiveness of antimonopoly policy enforcement.

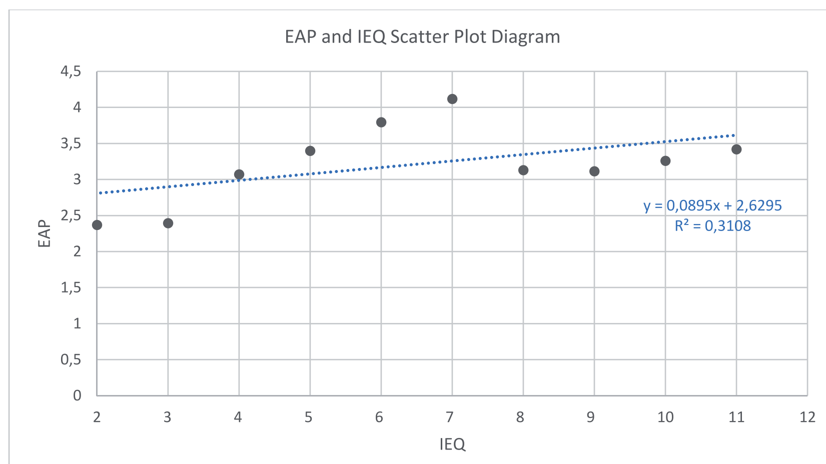
Figure 7. EAP and CI correlation and regression model



Source: Own elaboration (2021)

When it comes to the Index of Education Quality-IEQ (Figure 8), it is easy to conclude that with the growth of the quality of education, the literacy of the population increases regarding the protection of various rights, including reactions and initiating procedures related to competition law. In this regard, if we look at the IEQ in the reference period in correlation with the EAP index, we can see the existence of a positive linear correlation between these indicators. If these phenomena are observed through a deeper analysis that includes a supposed linear regression model, it can be concluded that the quality of an education system measured by IEQ as a supposed predictor or independent variable in the model positively affects the movement of EAP index as a dependent variable in the model. The magnitude of the coefficient of determination manifests itself in such a way that about 31% of the EAP variance can be explained by changes in the IEQ indicator over the observed 10-year reference period. When observing the regression equation of the mentioned model of single linear regression, it is possible to see that with the growth of the quality of education will generate the growth of EAP index.

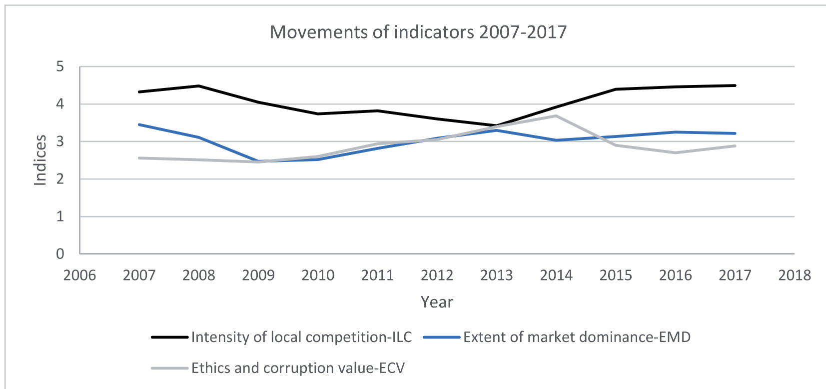
Figure 8. EAP and IEQ correlation and regression model



Source: Own elaboration (2021)

Figure 9 shows the movement of the indexes of different variables that are interesting for tracking changes in state capacity and dynamic of competition law enforcement. Hence, it could be seen movement of the intensity of local competition-ILC, the extent of market dominance-EMD and ethics and corruption value-ECV. If we look at the indicators related to the intensity of local competition-ILC (World Bank, 2007–2017a), the extent of market domination-EMD (World Bank, 2007–2017b), and Ethics and corruption value-ECV (or CL), certain patterns of movement of these indicators can be applied. If the ILC and ECV values are observed in isolation, a certain dependence can be seen where the increase in the value of the ECV (or CL) decreases the ILC value and vice versa, so that the inverse relationship between these values can be clearly indicated. This means that with the increase in the intensity of corruption in a society, the capacity of application of competition law and ensuring competitiveness between economic entities in a certain economy decreases.

Figure 9. Trends of the indicators



Source: Own elaboration (2021)

5. Conclusion

The effectiveness of competition law enforcement or competition policy in general, therefore the implementation of laws that regulate competition in particular, is a very important area within the legal framework of a national economy. The importance is reflected on the one hand as a vehicle for consumer protection and on the other hand as a basis for improving the competitiveness of a national economy both in terms of attracting foreign investment and the export potential of individual businesses. Of course, the correlation between individual macroeconomic indicators and the effectiveness of antitrust policy can be recognized through monitoring the trend of individual indicators in the context of the index of effectiveness of antitrust policy of individual national economies. After recognizing the trends of individual variables in a certain period of time, it is possible to analyse them by recognizing the existence or non-existence of a correlation between these macroeconomic indicators and indicators of the effectiveness of competition policy.

It can be clearly seen that with the growth of GDP in a national economy, the application of competition policy through the application of competition law increases, which in turn increases the competitiveness of a national economy, which again leads to GDP growth, that is, mutually supportive and correlative, as is often the case in modelling relations in the economy. The price of goods and services can be viewed as a function of production or supply and vice versa the quantity of goods and services produced or offered on the market can be viewed as a function of price. In this regard, it is possible to recognize that the coefficient of effectiveness of antitrust policy in a national economy is positively

correlated with most macroeconomic indicators, including the level of foreign direct investment, because through standardized business and a corporate culture of a developed high degree of business transparency and, of course, corporate social responsibility, which by definition includes respect for the principles of competition law that are enshrined in the statutes of modern companies.

A negative correlation was recognized between the index of corruption and the effectiveness of competition policy in Bosnia and Herzegovina, because with the growth of corrupt activities, the capacity of institutions and the rule of law in general and antitrust law in particular decreases. Of course, if the regression models of single linear regression between the mentioned variables are simulated by setting macroeconomic variables as predictor / independent variables in the model and the antimonopoly policy effectiveness index as a dependent variable, through the analysis of the obtained regression equations through earlier correlation analysis. In this paper, the intention was not to test the significance of individual relations in the classical hypothetical sense, but primarily to review the logic of thinking and decision-making economic policy and the functioning of individual institutions, noting that over a period of time or rather positive externalities in different segments. This means that in Bosnia and Herzegovina, as a small open economy, through the dedicated work of key decision makers related to economic policy through the adoption and implementation of certain laws can improve key parameters that affect the decision of certain corporations where to invest and certain countries decision with whom they will cooperate.

Given the analysed correlations of macroeconomic indicators and the Antimonopoly Policy Efficiency Index, taking into account the findings that the COVID 19 pandemic had a negative impact on GDP (United Nations, 2020), FDI (United Nations, 2021), the quality of the education system (Schleicher, 2020) and the increased risk of corruption (Terziev, Georgiev and Bankov, 2020), it can be concluded that the COVID 19 pandemic had a negative impact on the effectiveness of competition policy.

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The monopoly of PVZP on travel medical insurance for foreigners in the Czech Republic

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Abstract

The article focuses on disclosing the various aspects of granting PVZP a monopoly to provide commercial health insurance services to foreigners in the Czech Republic over the next 5 years. The justifications of the stated reasons for its adoption are considered and it is concluded that a number of these reasons could have been resolved by other mechanisms, as mentioned in the article. This step is violating European antitrust laws (state aid and direct exclusion of other entities from the provision of the relevant services) and the changes made to the law were disproportionate and unjustified. It is difficult to see how human rights have been protected; on the contrary, it is obvious that the state only pursues its own interests. In this way, the Czech Republic cast doubt on its status as a "rule of law", "European" and "social" state. Nevertheless, the norm of the law indicating the tightening of requirements for commercial insurance companies is evaluated positively.

Keywords: European law violation, foreigners, inequality, medical insurance, monopoly

JEL Classification: K210, G220, I130, O150, K380

1. Introduction

Even though migration flows have dropped by one-third due to the COVID-19 pandemic, right now OECD urges countries to support migration due to its very high fiscal return (OECD [online], 2021), which in turn requires ensuring the health needs of migrants (WHO, 2021, p.10) for their successful integration (Jervelund *et al.*, 2018, p.14). In different countries, even within the EU, we can see a different approach to resolving the issue of affordable healthcare for migrants. In the main, EU countries have been following a significant expansion of publicly funded coverage in recent years. Also, along with state or public coverage, there is the commercial health insurance, which can perform a supplementary/complementary role covering user charges (usually used by more affluent segments of the population or to cover additional medical services with certain privileges)

or a substitutive role (mainly where it is impossible to be included in public health insurance, or in some cases as a right for certain groups of people).

Although in the WHO report (WHO, 2016, p.42) commercial health insurance is called 'voluntary', for many foreigners in the Czech Republic, private health insurance ("travel medical insurance") is, in fact, a mandatory requirement to be able to stay in the country. This applies to all non-EU citizens as well as those from countries with which Czechia has not concluded international agreements on mutual medical and social security, who stay in the territory more than 90 days, but less than 5 years (the required period to obtain permanent residence) and who are self-employed, studying or not employed (based on family reunification).

In previous years (2004–2021) in the Czech Republic, all those with this migrant status were able to purchase commercial travel medical insurance from any one of 6 different insurance companies (AXA Assistance, ERGO, Maxima, PVZP, Slavia, UNIQA). However, for a period of five years from August 2nd, 2021, to August 2nd, 2026, commercial travel medical insurance in the scope of comprehensive healthcare as required by the Act on the Residence of Foreign Nationals may be concluded exclusively with PVZP (Act No. 326/1999) which is a subsidiary of state public insurance company VZP. As a reaction to such a change in legislation, on 29th November a complaint from the Czech Insurance Association was submitted to the European Commission stating that this excludes competition from the market (ČAP [online], 2021).

2. Problem Formulation and Methodology

We consider that granting monopoly power to the PVZP company for providing commercial insurance services for the next 5 years does not comply with EU law, according to several signs, among which the most important we highlight as follows: 1) "state aid" prohibited by antimonopoly legislation; 2) granting exclusive rights for PVZP with direct exclusion of other entities from the provision of the relevant services. So, the aim of this study is to determine whether there is objective and reasonable justification for granting a monopoly to PVZP and the apparent violation of EU antitrust legislation, in the light of alternative ways to solve existing medical insurance problems to these migrants; as well as to reveal the possible social consequences of such a violation.

Our work is based on a comparative analysis of EU antitrust provisions and law with adopted changes in the aforementioned Czech legislation. We highlight the stated reasons for making changes and the concrete steps that have been taken or omitted to achieve their goals. Furthermore, we apply the contextual and discursive analysis method to put forward a thesis about the actual causes of the changes made. To be unilateral and provide a more objective study and for

a deeper understanding of the whole situation, we also use justificatory discourse, historical method, and analysis of alternatives.

3. Analysis and Problem Solution

3.1 Historical context

If we turn to the historical context, then we can confirm the existence of real problems in the commercial travel medical insurance sector for foreigners in Czechia that needed to be solved. From 1993 to 2003 (Hnilicová, 2012) the state insurance company VZP already provided contractual insurance services for all migrants. From 2004 to 2021 commercial insurance was provided by various insurance companies, but this period is very often criticized by researchers in this field, who call it non-functional and discriminatory (Dobiášová, 2016) because in practice migrants faced problems: 1) the insurance company could refuse coverage if the migrant belonged to a high-risk group (age; chronic diseases); 2) the insurance contract contained a lot of exceptions, so the migrant was, in fact, uninsured from several diseases; furthermore emergency treatment or extra treatment was not paid by insurance companies to medical institutions, causing large debt to be accrued for both clients and medical institutions. The UN also criticized this period (UN, 2014, p. 4) as discriminatory against migrants, especially children. Even though the Czech Government's Resolution 930 of 2014 required the inclusion of further categories of foreigners in public insurance, this decree was not implemented. Conversely, further restrictions on the rights of migrants are observed.

There were 2 possible paths to take to solve how commercial insurance functioned (Pojmanová, 2017, p. 72). Some state institutions proposed improving the legal regulation of the activities of commercial insurance companies and the services they provided. The other parties (mainly public non-governmental organizations and scientists involved in the protection of human rights) insisted on the need to include unemployed and self-employed foreigners with long-term residence in the public insurance system (Dzúrová *et al.*, 2014; Tepperová *et al.*, 2016). The Czech authorities chose the first option but with radical changes.

3.2 Description of the situation: what has changed

The new provisions that have been replaced by the Amending Act (Act No. 274/2021) are: 1) travel medical insurance may be arranged only with an insurance company authorized to operate this insurance in the Czech territory and whose sole shareholder is a health insurance company (Article 180j (6)) (public list of these companies is being introduced by Article 180j (12)). 2) The commercial insurance company is obliged to guarantee the provision of health

care through its network of health service providers with whom it has concluded direct individual contracts for the provision and payment of reimbursed services; said company must have a contract with at least 10% of health service providers providing outpatient care and with at least 60% providers providing acute inpatient care, registered in the appropriate register (Article 180j (9)). 3) The remuneration for insurance mediation may not exceed 10 % of the annual premium in one year of insurance (Article 180j (10)). 4) Travel medical insurance is to be provided exclusively by PVZP for a transitional period of 5 years after the Act comes into force (Article 180j (13)). Thus, there is a tightening of requirements for commercial insurance companies on the one hand, and on the other, only one company is granted the right to provide insurance services for foreigners to obtain long-term residence.

3.3 The legal analysis

As is known, specific features of the health insurance sector need to be taken into consideration when applying the antitrust law. Commercial health insurance plays a substitutive role in Czechia, so, as an exception, governments may impose rules restricting free competition. States are not subject to competition law in the exercising of their powers if they do not pursue the goal of making a profit and are simply fulfilling their duty to their citizens (social security, non-profit, national solidarity).

It should be 'considered that the solidarity exception from antitrust law and Art. 106(2) TFEU are complementary for the healthcare sector it will always first need to be analysed whether the entities in question constitute undertakings (and thus whether the solidarity exception applied), after which (in case the undertaking infringed the competition rules) it can be analysed under article 106(2) whether the restriction of competition can be justified' (Makkink, 2017, p. 59).

Considering the ability to apply solidarity exception we claim that we cannot do this in our case. According to law-case for the exception to apply, it must be taken into (1) the social objective of the activity performed by the entity; (2) the existence of State control over the activities of the entity; and (3) the solidarity principle, which is essentially a principle of redistribution (Makkink, 2017, p. 23). PVZP is a commercial private company that is not based on the principle of universal protection of the consumer, it is not under enough state control (the State has no power to influence nor approve the amount of the contributions made by clients), they show no evidence of operating under pure solidarity aspect or redistributive policy. We are discussing a very profitable business in Czechia that was approved in many Czech investigations earlier (Dobiášová, 2016, p. 79, 114; Pojmanová, 2017, p. 12, 55). So, it is clear that PVZP's activity has never been nor is it in the sphere of social security.

Moreover, under the third Non-life Insurance Directive (Council Directive 92/49/EEC) there are some important conditions to apply solidarity exception: 1) it must be to protect the general good; 2) measures must be shown to be necessary and proportional to the aim, not unduly restrict the right of establishment or the freedom to provide services.

Regarding the general good, it is important to state the following. Today, most states – "representatives of all dominant cultures – participate in the universal consensus according to which the protection of human rights is an integral component of international law" (Káčer, 2021, p. 517). So, if the norm on any innovation includes the idea of protecting human rights to decent health services and increasing access to quality health care, then even if it went against EU law, this norm would be legal. Was the Czech Republic's real goal to protect the rights of migrants to affordable and high-quality medical care?

The first of two main arguments (Pozměňovací návrh [online], 2021) for these alterations was the "deficit of guarantee of provision of comprehensive health care" ("it is a measure aimed at fulfilling an objective of general interest, i.e. guaranteeing the protection of the health of long-term residents of third countries and their access to healthcare").

Regarding this point, which is called "to protect the consumer" and is the main essence of "general good", it is indeed true that previous to this decision, there were insufficient guarantees of adequate and full-fledged provision of medical services for unemployed foreigners with long-term residence. But we must recognize that the new rules do not solve these problems, because: 1) the law did not stipulate that it was an obligation of the insurance company to insure all foreigners (non-insurance still exists); 2) there is no direct legislative prohibition on exceptions for coverage of chronic diseases (there are still claimants whose pre-existing conditions are not covered, thus violating Article 5(b) of Directive 2003/109/EU); 3) Article180j (7) states that the insured should not pay direct charges for treatment (this paragraph existed before); however, in practice, the insured foreigners must pay and wait for reimbursable expenses from the insurer.

PVZP is offering 2 insurance options for foreigners now. The "Plus" option does not apply to chronic diseases (pre-existing conditions). The "Exclusive" option is offered without exceptions; it also applies to chronic diseases, but the final price is set after an introductory medical examination (3 options for insurance coverage depending on the price of the insurance policy). To contextualise: 1) the average gross salary in Czechia is about 1500 Euros, the upper limit of average salary is about 2375 Euros (ČSÚ [online], 2021]; 2) price of insurance policy: adult – 1 150 Euros in a year, child – more than 1400, elderly – more than 2,000 Euros. What seems apparently reasonable, quickly becomes inaccessible because of the unfounded limitations placed on clients: all payments must be made upfront

(contrary to public insurance policies) and often for a 2-year period. The same applies to all clients, which means that a 2-child family will often have to make a lump-sum payment of around 8,000 Euros.

Furthermore, regarding the guarantee of accessibility to medical services, we must analyse the price of these services. Earlier criticisms were made regarding: 1) the formal use of health insurance by foreigners only to obtain or extend a visa; 2) the low price of such insurance of several commercial policies, which could not theoretically guarantee full payment for all medical services, especially in complex cases. PVZP solved this problem by significantly increasing the insurance policy price: what was already the most expensive insurance base price available rose by about 22%, with a later cancellation of existing bonuses and discounts, and a further price increase announced for 2022. In our view, in this case, the Czech authorities could have taken measures to minimize the effects of monopolization, such as regulation of legal monopolies (average cost pricing, price ceiling), if it wanted to help migrants.

Thus, by granting powers to a sole company in the form of PVZP to provide 'affordable' or 'better' medical care for migrants as was previously stated by the government, in fact, insurance options have deteriorated significantly in all aspects for most migrants. Based on the above, the general good was not protected under the monopoly of PVZP.

In the next analysis, it is necessary to address the ability to apply Art.106(1) TFEU because PVZP was granted the exclusive right in the health insurance sector for migrants. Art.106(1) is addressed at the Member States and can only be applied in conjunction with another article of the Treaty (Art. 101 or Art. 102) (Makkink, 2017, p. 52; OECD, 2009, p. 7).

In the aforementioned practices of PVZP, we can see signs of abuse of a dominant position (Art. 102 TFEU) within the internal market which consists of directly imposing unfair purchase prices and trading conditions. This would be impossible in a competitive environment. However, under the second main argument for mentioned law alterations, for the transition period, the Czech authorities needed a company, which had already met the established requirements of the sole shareholder and for the number of contracts concluded. They consequently decided that PVZP was the only suitable and legitimate contender. It is true that PVZP was the only contender. But only because, in fact, no other commercial insurance company could meet new requirements that its sole shareholder must be a health insurance company. Was it done in advance without a preliminary waiting period so that no other company could fulfill the new conditions, but only PVZP could?

Regarding the sole shareholder of the insurance company, the OECD warned on this subject in 1998: 'The Office does not agree with an attachment to the exclusive supply of contractual health insurance only with health insurance

companies. The exclusive provision of this insurance would have a negative impact on the competitive environment in the relevant market of that insurance product and will give some competitors an advantage to the detriment of others' (OECD, 1998, p. 114–115).

At the same time, in European case law, usually Art.102 does not apply to the healthcare insurers, so the impact of Art. 102 on national healthcare systems remains limited (Makkink, 2017, p. 51). This may refer to applying Art. 106(2) TFEU to justify the restrictions of competition in the healthcare insurance sector.

All three requirements must be fulfilled in order to achieve justification under Art. 106 (2) TFEU: 1) there must be a service of general economic interest; 2) the entity entrusted with general economic interest must be an undertaking; 3) "proportionality test": competition would create conditions for obstructing the performance of the particular tasks assigned to PVZP. It is obvious that the second requirement is fulfilled because PVZP is a commercial undertaking providing insurance services. As for points 1 and 3, they will be analysed in relation to the state.

Services of general economic interest (SGEI) are defined by the Member States which have wide discretion in this matter. Compulsory (not commercial) healthcare insurance usually belongs to SGEI. Economic interest is mentioned in the explanation of the Amendment too, as is stated: "Given the current historical deficit of the state budget and the expected negative balance of the economic results of health insurance companies, in this extraordinary time, it is necessary to highlight the fact that the public service VZP owns PVZP, which, as the largest health insurance company, is crucial for financial stability and therefore profits from its activities ending up in the form of dividends back in VZP, which is part of the public budget. The result of this change will be …also the support of the public budget entity of the Czech Republic" (Pozměňovací návrh [online], 2021). However, the question remains: is protecting the economic viability of VZP in the "general" economic interest? Or maybe should the economic interest of migrants and medical institutions be included in this definition?

Protocol 26 on services of general economic interest (Protocol No 26) states that SGEI includes in particular a high level of quality, safety and affordability, equal treatment, and the promotion of universal access and of user rights. We could see the violation principle of affordability and universal access above; the situation with safety will be described further.

Regarding guarantees of safety, it is worth noting that Czech National Bank (as a licensing authority) had expressed its disagreement with the proposed changes before their adoption: because this "poses an increased risk of failure of the entire health insurance system for foreigners if the preferred insurance company would face an unfavourable financial situation. Since the possibilities of replenishing the capital at the insurance company owned by the health insurance company

are legally limited, proposed changes would also require some form of guarantee, presumably in the form of a state guarantee. … a system based on the provision of a product by a single provider is vulnerable and its dependence on that provider may pose a threat to continuity" (Česká Narodní Banka [online], 2021). The state did not provide these guarantees and we can hereby draw an obvious conclusion that instead of guaranteed medical care, we must assume that in fact, more vulnerabilities have appeared in this restructuring, in the form of insufficient financial solvency without such a state guarantee.

In addition, Czechia observes the existence of financial debts to medical institutions from commercial insurance companies was a reason for granting a monopoly to PVZP. We can use this statement as a proportionality test. As for the debts of commercial insurance companies to medical service providers, this aspect is difficult to assess without official economic indicators. The available data to the end of 2017 shows that outstanding payments owed to medical institutions for foreigners from non-EU nations remained at just 1.7% of the total cost of health care for all foreigners in hospitals, with patients from EU countries at 1.2% (ČSÚ (2018), p. 184). No statistics have been presented to explain this amendment. At the same time, there were statements from authorized representatives that the problem for the Czech medical system is not insured foreigners, but foreigners without an insurance policy at all (ČAP [online], 2021), and in the long term, their level of debt is stable and there is no indication of a critical situation that would need to be radically addressed (Přikryl [online], 2021). In other words; allowing competition in the commercial insurance services for migrants would not lead to competitors carrying out this activity profitably, at the expense of the medical services provider, who would have to provide unprofitable and unpaid medical services. So, in this aspect, we cannot determine that SGEI gains any significant advantages from the monopoly of PVZP.

In my opinion, it should be considered doubtful to apply justification under Art. 106(2) in our case, although the final decision is the Commission's issue. Thus, there is a violation of Art. 106(1), 102(a) TFEU and Art. 4(3) TEU, because the bodies of State must also respect the requirements of public law protection of competition, otherwise such acts are part of the procedure of state that is contrary to its loyalty obligation under EU law under Article 4 (3) of the TEU (Šmejkal, 2017, p. 93).

Moreover, before the adoption of this amendment to the legislation, Czech experts had noticed that this new law presented a conflict with EU law (Brabec [online], 2021). 1) It violates Art. 188 of Directive 2009/138/EC (the Member States shall ensure that monopolies in respect of the taking-up of the business of certain classes of insurance, granted to bodies established within their territories and referred to in Art. 8, are abolished). 2) It is disrupting the EU single market

(Art. 15 of Directive 2009/138/EC; Art. 26, Art. 49 and Art. 56 of TFEU), which is the direct infringement of EU provisions. 3) It bears signs of illegal and prohibited State aid (Article 107 (1) of TFEU).

State aid, which is incompatible with the internal market, is regulated by Art. 107 (1) TFEU. Decision-making practice, as well as theory, identifies the following 4 characteristics (attributes) of state aid (Sciskalová, 2014, p. 224): 1) measure (aid) granted by a State or through State resources, in any form; 2) economic advantage to the particular undertaking (business) or sector (industry) (confers a selective advantage to certain undertakings or the production of certain goods); 3) threat of disruption or distortion of competition within the internal market of the EU; 4) effect on trade between the EU Member States.

It is settled case-law that, for a measure to be classified as State aid (Vasbek, 2019, p. 630–631), it must not only (1) be attributable to the State but also (2) be granted through State resources, be it directly or indirectly. These are therefore distinct and cumulative criteria. Regarding the first criterion, we should agree that the criterion of attributability refers to the involvement of the State in the adoption of the measure, which will typically be obvious if it results from the legislation. For example, CJEU (Case C-262/12) states that it is clear if the measure was established by Law, it must therefore be regarded as attributable to the State (para 18). In our case, we can directly see this criterion, because granting a monopoly to PVZP was done by the amending Act. Regarding the second criterion, in fact, it is far from that simple if no transfer of state resources takes place. However, in Case C-262/12, CJEU regarding the sub-criterion of whether state resources were involved, recalled that measures not involving a transfer of state resources may constitute an aid (para 19).

Granting the exclusive right to provide insurance services for foreigners confers a selective advantage to PVZP for a period of 5 years in Czechia. Regarding distortion of competition within the internal market of the EU and the effect on trade between the EU Member States: the new amendment directly excluded any insurance company from the Czech insurance market for foreigners. This amendment does not allow other insurance companies (ERGO from Germany, AXA from France, UNIQA from Austria, Maxima and Slavia from Czechia) to provide insurance services for foreigners. These companies under Art. 4 of the Czech Act of Insurance (Act No. 277/2009) can operate because: 1) they have been granted authorization by the Czech National Bank; 2) based on the right to establish or on the freedom to provide services. However, in this case, they find themselves illegitimately excluded from doing business as stipulated as part of the so-called single European passport.

Granting PVZP monopoly powers does not fall under Article 107(2)(b) and 107(3)(b) of TFEU about state aid in exceptional circumstances, neither does

it fall into the main criteria under antitrust assessment business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (Communication from the Commission, 2020). We cannot apply the exception from the general prohibition of state aid under Art. 107 (2) and Art. 107 (3), because usually, they have forms different from exclusive rights such as, for example, a direct grant, subsidy, repayable advances, guarantee, exemption from income taxes, etc. in the framework of ad hoc aid, individual aid, scheme. Besides, usually, they may be allowed based on the decision of the Commission according to certain decision-making processes. If granting state aid occurs without the Commission's decision, usually this is small state aid amounts.

Furthermore, the analysed actions violate the internal Czech national law, specifically exactly Article 19a (1) of Act on the Protection of Competition (Act No. 143/2001), which stipulates that a public authority exercising its public powers must not distort competition without justifiable reasons, by (a) favours to a particular competitor or group of competitors; (b) excluding a particular competitor or group of competitors from the competition, or (c) eliminating competition on the relevant market.

We must therefore assess if any other options were available to avoid creating a monopoly under the pretence of protecting the consumer.

3.4 Alternative solutions

Regarding debts of commercial insurance companies to medical service providers: 1) if an insurance company violated the law, the Czech National Bank could have revoked its insurance permits in this segment; 2) it is also possible to protect the interests of medical institutions through the court. The monopoly of PVZP does not solve the issue of revoking insurance permits and does not protect the interests of either clients or medical institutions.

As an option, the Czech government could have increased the liability of insurance companies. For example, they could have established a condition on the confirmation of the ability to ensure payment for medical services by all private insurance companies providing comprehensive medical insurance for foreigners, with a suitable waiting period for its implementation. If a private insurance company did not fulfil solvency capital requirements, this situation would be solved by the Czech National Bank. Also, to avoid situations with no payment, they could have improved contract regulation (WHO, 2016, p. 85) or determined a reasonable level of administrative costs like in Belgium and Germany (WHO, 2016, p. 83).

Various new alternative solutions were presented in December 2021, when, against the background of a complaint filed, the Senate decided to consider the abolition of the monopoly. The proposal envisages the establishment of a register

of medical insurance for foreigners, which would be administered by the Czech Insurers' Bureau. The register would include selected data on the arranged commercial health insurance for foreigners, access to it would be granted to health care facilities and, if necessary, the police. Also, the proposal includes doubling the limit of health insurance for foreigners with long-term residence (at least 120,000 euros instead of today's 60,000) (Senát podpořil zrušení monopolu [online], 2021).

Furthermore, in the light of alternative solutions, we point out that it is unequivocally positive that the norm of the law indicates the tightening of requirements for commercial insurance companies in the form of service agreements with 10% of companies providing outpatient services and with 60% of companies providing services for acute cases recorded in the corresponding register. It should encourage companies to deliver better services, as well as to take their commitments more seriously.

Summing up, alternative solutions have existed and still exist, so ousting other players from the market for providing health insurance services can be considered not only as violating European antitrust laws (distortion of conditions of competition on the EU market), but also as a disproportionate and unjustified action.

3.5 Consequences of violating Antitrust

What is being violated today due to the changes analysed in the article? The list is long: freedom to provide services; fundamentals of competition (Art. 106(1) TFEU in the form of granting exclusive rights to PVZP and direct exclusion of other companies from the insurance market for foreigners without sufficient factual evidence; Art. 102(a) TFEU abuse of dominant position; Art. 4(3) TEU sincere cooperation and loyalty obligation; as well as Art. 107(1) TFEU in the form of prohibited state aid which distorts competition); unity of the EU internal market; as well as for migrants the right to freely choose a commercial insurance company; the right to equal and non-discriminatory treatment; the right to affordable health care; children's rights. In that way, the Czech Republic makes us doubt the rule of law in its territory.

The Czech Republic today is one of the strongest socially-oriented states. However, in the context of recent changes, the status of "social" can be called into question. Firstly, Czechs and foreigners with permanent residence can choose a mandatory public health insurance policy from 7 "public" insurance companies (state VZP and 6 professional/sectoral or "employee", which provide healthcare under the Czech public health insurance system). On the other hand, all self-employed, unemployed and student migrants must pay for the sole, state-assigned private insurance company. Secondly, many family members with long-term residence status may be forced to leave due to the inability to pay

for all insurances, which now costs 4 times more per person. There are obvious negative psychological consequences for children who have already gone to school, kindergarten here and, within a period absorb Czech culture and become acclimatised. Besides, they had strong psychological stress during the pandemic, and finally, they would be forced to leave the country. The movement of Czech politics towards the division of people into "native/alien", an unequal attitude towards care for the psychological health of foreign residents, their children, and the Czech population, as well as the division of people according to their financial capabilities, removes the country from social equality.

In addition, the purpose of the Czech authorities probably goes beyond the financial and insurance context. Using the method of discursive analysis, we can pay attention that during the vote for amendments to the law, one of the theses in support of it was that if it was not adopted, it would mean "again opening the door to migration", which seems to allude to existing anti-migrant sentiment in the Czech Republic (Bauerová, 2018). This sentiment is also confirmed by the fact that in 2018 the Czech Republic voted against The Global Compact for Migration at the General Assembly of United Nations despite this Compact being just a political declaration, not a legally binding treaty (IOM, 2020, p. 296). But it is not the concern for the health of migrants that is the content and purpose of the analysed changes.

The Czech Republic cast doubt on its status as "European", because the protection from monopolies, the single market and the right to free choice are values of the EU. Also, under Art. 2 TEU the value of the EU is "respect for human rights, including the rights of persons belonging to minorities", but Czechia wants to assume migrants only as employees and does not want to protect family relationships, by producing barriers for unemployed family members, including children and students. European values depend on the rule of law which delivers confidence in predictability (May, 2018, p. 385). Moreover, it is known that respect for "the principles of representative democracy, of the rule of law and social justice" is a condition for membership in the EU (Janse, 2019, p. 345).

Nevertheless, today we can see a value crisis affects the entire Union – not only one Member State – and therefore calls for answers on the Union level (Mader, 2019, p. 165). The problem of violating EU values is related to correlating the interests of the state, expressed in the adopted legislative acts, with the EU regulations, which have been unprecedentedly questioned in recent days (not only in the Czech Republic but also in the recently adopted court decision of Poland). It is noteworthy that States violating EU law use non-formalistic, nontraditional and misleading arguments with baseless, vague or insufficient information. In that case, it is right that the effectiveness of current rule of law initiatives, which

emphasize the role of dialogue, can be questioned regarding if the Member States deliberately distance themselves from EU values (Mak *et al.*, 2016, p. 48).

Therefore, it needs to use antitrust mechanisms more actively to detect instances of states taking advantage of the current situation to breach the EU for two important reasons. On the one hand, there is no doubt that competition law responds to the objective social need for the satisfaction of which society has not yet found another more effective and at the same time more clear-cut legal instrument (Šmejkal, 2017, p. 101). On the other hand, the EU's repeated failure to promptly and determinedly act not only undermines its credibility and legitimacy, it is also bound to lead to the unravelling of the EU's interconnected legal order (Pech *et al.*, 2021, p. 42).

4. Conclusion

Granting a monopoly to PVZP for travel medical insurance for foreigners in the Czech Republic cannot be justified. The measures taken were disproportionate to the proposed aims and were not in keeping with a democratic society. Moreover, there is no discernible extra protection for migrants, quite the contrary; it is alleged that, by eliminating all competition at the expense of infringing on the freedom to provide services, the Czech state is only pursuing its own interests by receiving additional political control of the insurance industry and possible dividends, as well as reducing migrants' access to residency in the Czech Republic.

Many internationally renowned documents have stated the fundamental importance of the right to adequate medical care. In the conditions of the Czech state's chosen path of not including the aforementioned foreigners in the public insurance system (which, of course, has proven to be a more viable solution in other EU-states), this issue cannot be successfully implemented without competition and freedom of choice. This is especially true for commercial insurance companies that can offer different insurance options, bonuses, and programs in their competition for clients. The only thing that is required is proper legal regulation of the private sector by setting minimum standards to avoid abuse in this potentially sensitive and vulnerable sphere.

Even though the significance of antimonopoly legislation has been repeatedly confirmed in many studies, this article once again convincingly shows that the truly worrisome monopolies are those that are government engineered and maintained (McKenzie, Richard B., 2008, p. 226).

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The limitation of the use of public procurement during the COVID-19 pandemic under the Directive 2014/24/EU

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Abstract

The pandemic caused by the SARS-CoV-2 virus, commonly known as COVID -19, that has been spreading since the beginning of 2020, paralyzed the functioning of society, state authorities and, above all, the health service. The need to obtain the means and services necessary to combat the effects of the pandemic has resulted in the introduction of appropriate legal regulations regarding the public procurement system. Their usual application would not allow quick decisions to be made regarding the execution of the necessary orders. The subject of the study is an analysis of the provisions of EU law and Polish, Italian, and Spanish regulation in terms of possible flexibility of the public procurement regime in connection with the pandemic. The main issue which requires a solution is the compliance of national legal regulations introduced before 31 March 2020, that is until the publication of the European Commission's communication (2020 /c 108 I /01). The research is carried out using the descriptive method, the dogmatic exegesis of legal provisions and a comparative and legal analysis of the solutions in question. In the final conclusions, the authors point out that despite the difficult situation caused by the pandemic, there was no need to introduce new solutions in both the EU and Member States' regulations. It was enough to properly apply the provisions of Directive 2004/18 / EC.

Keywords: public procurement, COVID-19 pandemic, public procurement announcement, European Union law, laws of the Member States.

JEL Classification: K12, K210

1. Introduction

The pandemic caused by the COVID-19 virus significantly slowed down the economy, stopped education, social life, and caused changes in the way people work. The lockdown introduced in most countries in the world has forced the introduction, by governments and authorities of international organizations,

appropriate legal regulations in order to stop the spread of the pandemic and combat the negative effects caused by it. Apart from statutory changes in the functioning of public administration, private enterprises, universities, schools, and communication, the health services responsible for public health have become an important sphere. From this perspective, the law, in particular the public procurement system, has become an extremely important tool for preventing and combating the effects of the pandemic. The purpose of these regulations, whether in the EU or individual Member States, was to define how the public sector should pursue the delivery, service, or perform public works necessary to combat the effects of a pandemic, such as the construction of temporary hospitals.

Public procurement is the foundation for the system of administering public funds while maintaining openness of the procedure, fair competition, equal treatment of bidders, and control of the implementation of the public procurement process (Zborowski, 2019, pp. 151–163). However, a fairly formalized system of public procurement may become an obstacle in satisfying the needs which arise in the circumstances of a pandemic when speed becomes the value.

The subject of the study is the analysis of the rules of abrogating or limiting the application of the public procurement law in extraordinary situations. Undoubtedly, the epidemic caused by the SARS-CoV-2 virus may be considered as such conditions. The aim of the study is to analyze the initial Polish, Italian, and Spanish legal solutions developed at the start of the pandemic until the end of March 2020. Such a methodological procedure, and in particular, a specific period of time, will allow the *ex-ante* assessment of the legal regulations of the three legal orders in terms of the legislature's interference with the existing provisions of public procurement law in relation to the guidelines of the European Commission, issued in the form of a communication on April 2020 (2020 / C 108 I / 01).

In this research perspective, the following questions arise: what is the relationship between the solutions adopted in the communication and the provisions of Directive 2004/18 / EC (Sadowy, 2011)? What solutions did the Commission propose in its communication? Has the position of the Commission in the Communication had an impact on the basis of the freedom principle of the Union, which are: the freedom of movement of capital, services, and people? Finally, has it had any impact on the principles of free competition on the EU market? After all, it is extremely important to look for an answer to the question of whether it was necessary to regulate Member States' public procurement systems in view of the pandemic (Farca, Dacian, 2020, pp. 60–79)? The implementation of the adopted goals requires not only the use of the classic legal and dogmatic method, thanks to which the analysis of legal provisions will be carried out, or the descriptive method, but also the method of comparative legal analysis. The latter method will allow for the examination and assessment of the adequacy of legal measures adopted by the

Polish, Italian, and Spanish legislatures in relation to the EU regulations. The analysis of the Italian and Spanish systems is justified by the fact that both countries had the highest incidence of COVID-19 in the European Union.

2. Communication from the European Commission 2020 / c 108 I / 01

The increase of morbidity and mortality curve of people infected with the SARS-CoV-2 virus was the direct reason for the European Commission to issue on 1st April 2020 a Communication providing guidance on the application of the public procurement framework in the context of the COVID-19 crisis (2020 / c 108 I / 01). With this communication, the European Union introduced a more flexible application of the public procurement regime. The basic question which arises in this perspective concerns the compliance of the communication with Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2005/18 / EC.

The solutions contained in the communication regulated issues related to the growing demand for personal protection equipment, such as protective masks and gloves, and medical devices, in particular respirators and other medical supplies (Goniewicz *et al.*, 2020, p. 3838). Moreover, there was a need to strengthen the hospital and IT infrastructure. In many places, temporary hospitals have been created or there has been a need to adapt existing facilities to medical needs. The expansion of the IT infrastructure was of great importance in the period of the growth of the infection curve, without which it would not have been possible, for example, to control the quarantine of millions of EU inhabitants (Sanchez-Graells, 2020, pp. 81–87).

The announcement stated that the COVID-19 outbreak was an unpredictable phenomenon which had significantly disrupted the supply chain of the aforementioned medical products and services. According to the European Commission, it may be physically or technically impossible to apply the normal procedures provided for in the Directive 2014/24 / EU in these extraordinary and unforeseeable circumstances. For these reasons, the European Commission in the communication indicated the possibility of using public buyers:

- establishing contacts by phone with potential contractors, both from the EU and from outside the EU, as well as using e-mail or personal contacts,
- employing intermediaries who have better contacts in the markets for materials and services necessary to combat the pandemic,
- sending its own representatives directly to third countries where the necessary stocks exist and which can ensure immediate delivery,
- asking potential suppliers to increase production or restart production.

An interesting solution introduced in the communication is the possibility of public buyers using innovative digital tools in order to generate wide interest of economic entities which are able to propose alternative solutions to those existing on the market. The so-called hackathons (design marathons) could be lunched in order to develop new solutions, for example: re-use of protective masks and gloves, more effective methods of protecting medical personnel or the possibility of detecting the virus in the environment. In the communication, the EU encouraged cooperation with innovation ecosystems or business networks which could propose new solutions (Baratta. 2020, pp. 365–373).

The European Commission pointed out to the possibility of using the so-called expedited procedure, it is the restricted and open procedure. According to the Article 27 § 1, in the open procedure, the deadline for submitting bids is 35 days. However, this period may be reduced to 15 days where contracting authorities published a prior information notice which was not a call. Pursuant to the Article 28 § 1, in the restricted procedure, the period for submitting the offer is 30 days. However, due to the urgency of the situation, the deadline for submitting applications may be shortened to 15 days, and the deadline for submitting offers even to 10 days.

Later in the Communication, reference is made to the Article 32 § 2(c), of the Directive 2014/24 / EU, concerning the possibility of introducing a negotiated procedure without prior publication. However, the use of this procedure is exceptional, even during the COVID-19 pandemic. This procedure allows contracting authorities to negotiate directly with potential contractors. This procedure may be used when the company is able to perform a contract under the conditions of urgent technical and time constraints.

The European Commission in this communication, point 2.3.2. concluded that the growth curve of COVID-19 infections in March 2020 was so high that it undoubtedly forms the basis for the application of accelerated procedures by contracting entities of the Member States in the area of supplies, services, and works. The causal link between the increased needs of hospitals and public health institutions and the incidence of COVID-19 cannot be denied. In these circumstances, the use of negotiated procedures without prior publication may offer an opportunity to meet urgent health care needs. This procurement mode fills the gap until more stable solutions are found. However, any deviation from the assumptions adopted in Directive 2014/24 / EU requires an individual assessment.

To sum up, it should be stated that the European Commission in its communication 2020 / c 108 I / 01 issued, in connection with the growing COVID-19 infection curve, only the possibility of applying special procurement law solutions in the event of emergency situations, which were already provided for in the Directive 2014/24 / EU. Namely, it is about the use of negotiated procedures with shortened

deadlines for submitting offers. Moreover, the possibility of conducting an "accelerated" procedure of public procurement without publication was recalled. Eventually, contracting entities may use alternative solutions. Such solutions, justified by extraordinary unforeseeable circumstances, will allow the needs caused by the COVID-19 pandemic to be met (Beuter, 2020, pp. 1–4). According to the case law of the CJEU (*European Commission v Italian Republic,* C-353/12 P, paras 50–52), the application of the accelerated procedure does not violate the fundamental principles of European and national law in the field of public procurement law, which are the principles of equal treatment and transparency as well as the principle of ensuring the competition.

The provisions adopted in the Communication apply to the public buyers and entities implementing contracts from public funds. At the same time, the exemption from the obligation to publish contracts was linked to the expanding COVID-19 pandemic. It should therefore be noted that in its communication, the European Commission stated the possibility of applying the special modes provided for in the Directive 2014/24 / EU and made some flexibility in the application of the provisions on public procurement.

3. Limitation of the use of public procurement in Poland due to the COVID-19 pandemic

In the individual Member States, even before the publication of Communication 2020 / c 108 I / 01 by the European Commission, appropriate legal regulations were introduced to limit the use of the public procurement system in the activities of public authorities in activities aimed at preventing and combating the effects of the COVID-19 pandemic. In March 2020, Poland passed two acts, known as anti-crisis, shields, in which the Polish legislature limited the application of public procurement law by public sector institutions.

The Polish legislature in the Article 6 of the Act of 2[d] March 2020 on special solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 347), apart from numerous restrictions, the exclusion of application of the provisions on public procurement referred to in the Polish Act of 29 January 2004 – Public Procurement Law was also introduced. The radically rising disease curve could be use as a reason when the purchaser was allowed not to use a public procurement of a good or service related to the prevention or eradication of COVID-10. The basic rationale for such a solution was the likelihood of rapid and uncontrolled spread of the disease or, if necessary, for the protection of public health.

The Act of 31 March 2020 on amending the Act on special solutions related to the prevention, and combating of COVID-19, other infectious diseases and crisis

situations caused by them, and certain other acts (Journal of Laws No. of 2020, item 568) referred to as the Anti-Crisis Shield No. 2 was another legal act issued by the Polish legislature. In the amending act, Article 6 was extended in such a way that the understanding of the necessity to take actions aimed at counteracting COVID-19 in the context of the application of the provisions of the public procurement law has been made more precise. The main goal of counteracting was to combat the negative effects of, inter alia, socioeconomic problems caused by COVID-19. The conditions for exempting a specific procurement of goods or services from the provisions of the public procurement law must be met jointly. Each time, it is necessary for the contracting authority to assess whether both premises are present simultaneously.

In this context, the Article 6 received the additional paragraph 2, in which the legislature exempted Bank Gospodarstwa Krajowego (National Development Bank) and the Social Insurance Institution from the application of the provisions of the public procurement law. In the case of the aforementioned Bank, the legislature's intention was to exempt this institution from the application of the provisions of the public procurement law when the bank awards contracts related to the implementation of government programs, and which are part of the policy of counteracting the negative economic effects caused by COVID-19. In turn, the Social Insurance Institution could withdraw from the application of the public procurement law in the case of establishing the rights or paying the benefits to entrepreneurs, the so-called downtime benefits (benefits paid when the work cannot be done due to COVID) and the exemption of entrepreneurs due to unpaid social or health insurance contributions (Article 15zza, Article 31 zv.).

Moreover, in the Article 15(r)(1) of the anti-crisis shield 2, the legislature introduced the obligation to immediately inform the parties about the impact of circumstances related to the occurrence of COVID-19 on the proper performance of a contract. Mutual information should concern such circumstances as: the absence of employees caused by COVID-19, decisions issued by the Chief Sanitary Inspector in connection with COVID-19, orders issued by voivodes or the Prime Minister, suspension of deliveries of products, materials, or difficulties in accessing equipment.

The possibility to negotiate the terms of a contract with the contractor was an important solution introduced by the legislature in the Article 15(r)(4) of the anti-crisis shield no. 2. If there is a risk that, for reasons beyond the contractor's control, the obligation cannot be performed properly, then the following can be made: the change of the contract performance date, the temporary suspension of the contract, the change of the method of pursuing the delivery as well as conducting services or construction works. In addition, the contractor's remuneration may be changed, but the remuneration increase may not exceed 50% of the value of the

original contract. In the Article 15(r)(6), the legislature introduced a mechanism of measuring contractual penalties for improper performance of a contract by the contractor, consisting in the legitimacy of their investigation and the size in connection with the severity of the pandemic.

The regulation in both anti-crisis shields concerned the exclusion of the application of the public procurement law regime with regard to supplies and services. The deliveries were to include medical equipment, personal protective equipment (gloves, masks, aprons), and disinfectants. It can be assumed that the act also applied to the supply of IT equipment, including computers or devices which save health or life, such as respirators. Both – in the case of deliveries and services, the parties should prepare appropriate statements and documents indicating the impact of the pandemic on the performance of a contract and the exclusion of the application of the public procurement law regime.

In addition, the issue introduced in the second anti-crisis shield regarding the possibility of changing the terms of a contract due to the increase in the COVID-19 infection curve requires clarification. Such a solution is included in the article 144, paragraph 1, point 3 of the Public Procurement Law. Therefore, repeating this solution in the second anti-crisis shield is a kind of *superfluum* or a reminder of this possibility.

A positive solution adopted in the second anti-crisis shield concerns the suspension of deadlines provided for by law for public procurement. From this perspective, the tender procedure could be conducted. Although the legislature decided that it was still possible to appeal against the actions or omissions of the awarding entity under the existing rules, but such action did not stop the implementation of the tender procedure (Szymańska, Kowalczyk, 2020).

4. The limitation of the use of public procurement in Italy due to the COVID-19 pandemic

Italy, and in particular the Lombardy region, was one of the first European countries or regions to be affected by the COVID-19 pandemic. The first cases of COVID-19 were recorded at the end of January 2020. The infection curve in Italy was growing quite rapidly, as already on 19 March 2020, about 2,400,000 cases were recorded, including over 100,000 of them ended with the death of patients (www.ilsole24ore.com).

The first legal act issued in Italy after the outbreak of the pandemic was the ordinance of the Council of Ministers of 31 January 2020. On the basis of this executive act, a state of emergency was introduced throughout the country for a period of 6 months (GU Series Generale n.26 del 1 February 2020). Subsequently, decrees with the force of law of the president of the republic were

issued. The first such decree No. 6 was issued on 23rd February 2020 (GU Series Generale n. 45 del 29 March 2020) on the basis of which restrictions in the functioning of public administration were introduced, including courts, in particular court sessions were reduced (Article 2), universities, restaurants, and other public facilities were closed, and the Crisis Fund's budget was increased by € 20 million for 2020.

Another decree was issued by the President of Italy on 17 March 2020, No. 18 (GU Series Generale n.70 del 17 March 2020). The decree introduced financial support for health workers, thus encouraging them to increase the number of working hours. In both these decrees, no specific legal regulations concerning the public procurement regime were introduced.

Finally, the decree of 28 March 2020 No. 19 necessary measures to solve the epidemiological threat situation related to COVID-19 (GU Series Generlae n. 79 del 25 March 2020) was issued. This legal act introduces numerous restrictions on the movement of people, including a ban on representatives of certain social groups, such as the elderly, from leaving their place of residence (Article 1). Organizing public or family events, such as weddings or funerals, was temporarily forbidden, public facilities, including sports facilities, were closed.

The analysis of the above three legal acts show that in the early months of the pandemic, no specific regulations concerning possible changes to the public procurement regime were introduced in Italy. The subject regulated by the Italian legislature were issues related to limiting events which were an opportunity for the spread of the virus.

The first legal regulations regarding the public procurement system appeared only in the decree-act n. 10 of 22 May 2020 – public procurement in the context of COVID -19. Further legal regulations in this regard were included in the decree n. 18 of 2020 known as "Cura Italia". Among other things, public authorities responsible for combating the effects of the pandemic could open bank accounts which would allow instant transfers. Concluding supply contracts from public funds could omit publishing information about the initiated public procurement procedure. Also, the purchase of ICT devices which are used by public administration, especially the health service, to fight the effects of the pandemic were excluded from the public procurement system. In this way, it will be possible to provide some medical services in the form of telemedicine indefinitely. The suspension of the application of certain public procurement rules during the pandemic in Italy was temporary and lasted until 31 December 2020 (Orabona, 2021, pp. 1–17).

The normative solutions introduced in the above-analyzed legal acts were in principle compliant with the European Directive 2014/24 / EU.

5. The limitation of the use of public procurement in Spain due to the COVID-19 pandemic

Spain was one of the European Union countries most affected by the COVID-19 pandemic. The first confirmed cases of the SARS-CoV-2 virus were found on 31 January 2020 in the Canary Islands (Gonera Island). In the second half of February 2020, a significant number of cases had already been reported, which must have caused concern among the state authorities. For this reason, two royal decrees with the force of law were issued in March 2020. The first regulation was the Decree 463/2020 of 14 March which announced a state of emergency for a period of 15 days (BOE No. 67, 14 March 2020). The second was the Royal Decree 8/2020 of 17 March on Emergency Measures to Cope with the Economic and Social Impact of COVID-19 (BOE No. 73 de 18 March 2020).

The response of the Spanish authorities to the spreading pandemic was relatively late. The preamble to the royal decree mentions the World Health Organization's statement of 11 March which unequivocally stated the COVID-19 pandemic. This statement highlighted the negative economic and social impact of the pandemic. Thus, not only the increasing number of cases in Spain, but also the position of the WHO became an impulse for legislative action.

In the Royal Decree 8/2020, instructions regarding social and institutional support were introduced. Thus, Chapter One of the decree covers support for workers, families, and vulnerable groups caused by the pandemic. Chapter two sets out the necessary measures to make the temporary adjustment mechanisms more flexible in order to avoid redundancies. The Spanish legislature considered the COVID-19 pandemic a force majeure. Companies and enterprises have been exempted from paying 75% of social security contributions. In the third chapter, financial resources were established in the state budget to guarantee the liquidity of operations of enterprises in the pandemic and economic situation.

The introduction of financial and legal instruments to promote scientific research on the COVID-19 virus to develop effective drugs and vaccines was an important element of the Royal Decree 8/2020. Scientists could work overtime. In the last, sixth chapter, appropriate legal regulations concerning the application of the provisions of the public procurement law were introduced in order to facilitate the conclusion of contracts (de Brujón, 2020, pp. 37–41).

In the Article 34 of the Royal Decree 8/2020, the issue of the implementation of the subject of public procurement during the pandemic was mainly regulated. The legislature stated that the implementation of contracts concluded under the public procurement procedure, which cannot be performed due to the pandemic, are suspended in whole or in part. The contracting authority must cover the damages resulting from the suspension of the public procurement. This solution

was in line with the Directive 2014/23 / EC of the European Parliament and of the Council.

The Article 16 of the Royal Decree 8/2020 has significant importance for the issue of spending public money on the purchase of resources and services. The Spanish legislature decided that public administration bodies, in particular health care authorities, may use exemptions in order to meet the needs arising from the protection of health and life of people as it is referred to in the Act 9/2017 of 8 November on public sector procurement (BOE No. 272 of 11 September 2017). Pursuant to the Article 119(2) in connection with the Article 153(3), the deadline for announcing a public contract may be shortened to 15 days in the event of an urgent contract. The state of the epidemic is one of the most urgent cases. In turn, in the Article 120, the Spanish legislature provided for the possibility of concluding agreements to suspend the application of the provisions of the public procurement law in extraordinary cases. The contracting authority may sign a contract with a contractor without applying the public procurement regime. In this case, the term of such contract may not exceed one month (Arroyo González, 2021).

Also, in the case of Spain, there was no violation of the principles of the European framework of the public procurement system resulting from the Directive 2014/24/EU.

6. The comparative analysis of legal solutions limiting the use of public procurement during the COVID-19 pandemic

The paper discusses four models of legislative responses to the functioning of the public procurement system in the period of the COVID-19 pandemic. The use of public procurement in the context of the expanding pandemic has become quite an important problem due to the need to quickly execute procurement with public money, goods, and services necessary to combat the effects of the pandemic. Under these circumstances, the application of ordinary public procurement procedures could prove disastrous for people's life and health, and for the functioning of the economy. Such a conclusion results from the analysis of legal acts of all three legal systems.

The authors made a preliminary assumption that the European Union law provides the model solution. In this case, it is the Communication of the European Commission of 1 April 2020 (2020 / c 108 I / 01). In turn, the solutions adopted in this Communication are in line with the Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement, which is a model solution for legal regulations in this area for the Member States of the European Union. With regard to the application of public procurement

rules, the European Commission in this communication only recalled the solutions already existing in the Directive 2014/24 / EU.

Initially, in Poland, on the basis of the regulation of the Minister of Health of 13 March 2020, the state of the epidemic threat was introduced, and on the basis of another regulation of the Minister of Health of 20 March 2020, an epidemic state was called (Borski, 2020). Similar states were introduced in the other two analyzed legal systems. And so – in Spain, pursuant to Article 1 of the Royal Decree 463/2020 in connection with the Act 4/1981 of 1 June 1981 on the emergency and extraordinary states (BOE number 134, de 5 June 1981), a state of emergency was introduced (*estado de alarma*) and also in Italy, on the basis of the Regulation of 31 January 2020, the Council of Ministers introduced a state of emergency (*stato di emergenza nazionale*).

In connection with the introduction of states of emergency in these three countries, various types of restrictions were implemented, including those concerning the application of public procurement law. The Polish and Spanish legal systems allowed *expressis verbis* the introduction of the provisions limiting the application of the ordinary public procurement regime. The earliest to introduce such provisions was Poland – which was under the Act of 2 March 2020, the so-called the first anti-crisis shield. The Italian legislature reacted last, because the relevant legal provisions regarding the application of public procurement provisions appeared in the decree-law n. 10 of 22 May 2020, which is after the publication of the European Commission communication.

The limitation of the application of public procurement provisions in relation to medical materials and services related to counteracting the effects of the epidemic caused by the COVID-19 virus was common for the three analyzed legal systems. In addition, in all analyzed legal systems, these restrictions were also extended to the area of combating the negative effects of the pandemic in the area of economics and social support for people who lost their jobs.

The limitation of the application of the provisions of the public procurement law consisted basically in reducing the deadline for publication of the notice from 30 days to 14, and in special cases, it was also possible to omit this deadline by awarding a contract without notice. The most common were single-source orders or negotiations with a selected contractor who was able to quickly deliver the necessary funds or provide the necessary services. The Spanish legislature decided that in the event of omitting the negotiations, the service should be provided within one month. A quite original solution was found in the Spanish one, namely the mere possibility of financing research aimed at searching for new drugs to combat COVID-19, by omitting public procurement.

7. Conclusion

The analysis of the legal provisions contained in the European Commission's communication and the provisions of three European countries – Poland, Italy, and Spain, indicate their full compliance with Directive 2014/24 / EU. The epidemic caused by the COVID -19 virus did not change the EU concept of the public procurement law system. The detailed solutions already provided for in the above-mentioned Directive were applied. However, there was a tendency to some flexibility, depending on the existing circumstances caused by an increase in the infection curve. This possibility has already been foreseen in the European Commission communication.

It is obvious that the analyzed solutions had a significant impact on limiting the freedom of movement of capital, services, and people within the territory of the European Union. It was undoubtedly connected with the spreading pandemic and the necessity to take the necessary measures to protect the life and health of citizens. These solutions also had a negative impact on the principles of free competition on the European market. The scale of the pandemic was a sufficient reason to introduce the above restrictions.

In conclusion, it should be stated that the temporary restrictions and limitations in the application of public procurement regulations have not led to significant changes in the public procurement system of the European Union or in the individual Member States. Therefore, the provisions of Directive 2014/24 / EU of 26 February 2014 remain in force.

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Key Aspect of the 2021 Austrian Competition Law Reform

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Abstract

This paper presents the key amendments to Austrian competition law introduced in fall 2021 (KaWeRÄG 2021). It describes how the Austrian legislature, in implementing rather minor adaptations called for by the ECN+ Directive, also substantially addressed the debate on sustainability and competition law, dealt with the growing competition challenges in digital markets and readjusted the merger control provisions. The amendments include a revision of Austria's revenue-based merger control threshold, the introduction of the significant lessening of competition test, and a broadening of the scope of potential public interest justifications. As to restrictive agreements, sustainability considerations as a potential justification of restrictive agreements are recognized. Finally, the amendments add to the definition of dominance and relative market power based on criteria relevant to digital markets and confer jurisdiction to the Cartel Court to rule that companies active in multi-sided digital markets hold a dominant position.

Keywords: ECN+, digital markets, sustainability, merger control, relative dominance.

JEL Classification: K490, K210

1. Introduction

A number of rather significant changes to Austria's competition enforcement system (Thyri, 2007) entered into force on 10 September 2021, alongside minor procedural and inter-institutional changes that shall not be further addressed for the purposes of this conference (Hartung/Reidlinger ecolex 2021). The Austrian legislature thus used its obligation under EU law to implement the ECN+ directive, which did however not call for major changes to national law due to the already previously rather advanced standards of Austrian competition law enforcement (Thyri in Terhechte, 2008), to introduce some potentially ground-breaking material changes that may propel the country to the forefront of innovative competition law enforcement EU- if not worldwide.

2. New Sustainability Exemption

Traditionally, mirroring Article 101(3) TFEU, Austrian competition law exempts a restrictive agreement from the prohibition of restrictive agreements if (i) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, (ii) allows consumers a fair share of the resulting benefit, (iii) does not impose disproportionate restrictions, and (iv) does not eliminate competition in respect of a substantial part of the products in question.

The revised competition law now expressly acknowledges sustainability considerations as a potential justification for restrictive agreements. It does so by stipulating that consumers are deemed to "also" participate in the benefits resulting from the agreement if the agreement "contributes significantly to an ecologically sustainable or climate-neutral economy". In other words, if the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes to an ecologically sustainable or climate-neutral economy, this is held equal to a fair share of the resulting benefits for consumers.

The Austrian legislature thus appears to be one of the first worldwide to explicitly mention considerations regarding environmental sustainability in competition law context. Technically, the contribution to a sustainable economy is in itself deemed to be a contribution to the improvement of the production or distribution of goods or to technical progress. Also – and this is an absolute novelty – the contribution to sustainability does not need to produce its effects specifically on the affected market but recognizes so called "out-of-market-efficiencies" (Zöhrer/Reumann, ecolex 2021).

The amended Austrian law thus goes beyond current EU law which recognises the benefits flowing from restrictive agreements in principle only "within the confines of each relevant market", except if the efficiencies materialise in "related markets" provided the consumers affected by the restriction and benefiting from the efficiency gains "are substantially the same". Whether the new Austrian qualification of "sustainability efficiencies" is compatible with primary EU law and Article 3 of Regulation 1/2003, remains to be seen.

3. Digital markets and dominance

Given the difficulties in finding dominance in digitals markets (Thyri, 2020), the KaWeRÄG 2021 expands the notion of dominance in introducing additional factors that can be taken into account when deciding whether an undertaking holds a dominant position, specifically addressing digital markets. The amendment adds three new criteria to be taken into account when assessing the existence of a dominant position, i.e., (i) the significance of a company's intermediation

services for other companies' ability to access upstream or downstream markets, (ii) access to data, and (iii) network effects.

Also, and irrespective of effects to digital markets, the notion of relative dominance is strengthened in that is now explicitly mentioned in a separate section of the amended act. An undertaking shall also be deemed to have market dominance if, as a supplier or a buyer, it has a superior market position in relation to other undertakings in its business dealings; such a position exists in particular if these other undertakings are dependent on the establishment or maintenance of the business relationship in order to avoid serious commercial disadvantages.

The Austrian legislation thus builds on recent case law of the Austrian Supreme Cartel Court further detailing the conditions of market power vis-à-vis a single business partner (by way of economic dependency) and irrespective of the finding of "absolute" dominance based on market definition (Case *Buechl v Peugeot Austria*, Wegener/Schwenker, 2020). Furthermore, the existing concept of "relative market power" is expanded to include providers of intermediation services in multi-sided digital markets who will be deemed dominant if their customers depend on access to these intermediation services.

The 2021 amendments also introduced a new power of the Cartel Court – upon application – to render decisions ascertaining a dominant market position of an undertaking operating in a multi-sided digital market: A new procedure is introduced allowing the Official Parties (i.e., the FCA and Federal Cartel Prosecutor) and the regulators to lodge an application with the Cartel Court requesting it to declare that an undertaking operating in a multi-sided digital market holds a dominant position. Such a proceeding does not require an allegation of an abuse of a dominant market position. Therefore, once such a decision has been rendered, the existence of a dominant position will no longer have to be established in a subsequent proceeding alleging an abuse of dominance. According to the legislative materials, this new procedure is designed to enable market participants (or the regulator) to take action against abusive market conduct more quickly in abuse-of-dominance proceedings (Zöchling, ecolex 2021). However, this new power applies to absolute market dominance only, not relative market dominance.

A company that was declared dominant can request the Cartel Court to declare that the dominant position no longer exists if the relevant factual circumstances that were the basis for the declaration of dominance have changed.

4. Merger control

The changes of most practical relevance introduced by the KaWeRÄG 2021 presumably concern the provisions on merger control (Hlina/Wollmann, ecolex

2021). Already in 2017, alongside Germany, Austria introduced an additional transaction value threshold into its merger control provisions in order to catch transactions that concerns targets with no substantial turnover, in order to mend a regulatory loophole recurrently observed in the digital industry.

Now, with the 2021 amendment, a new local revenue requirement is added to the existing revenue-based threshold: In addition to a combined Austrian turnover of all undertakings concerned exceeding € 30 million, the amendment introduces a new second domestic turnover threshold, requiring that at least "two of the undertakings concerned each […] have a turnover of more than € 1 million" in Austria (the other two turnover thresholds remain unchanged, i.e., a combined worldwide turnover of more than € 300 million and at least two concerned undertakings having a worldwide turnover of more than € 5 million).

It is expected that the number of notifiable mergers in Austria will substantially decrease as a consequence to the new threshold. The Austrian Federal Competition Authority estimates the number of notifiable transactions to decrease by more than 40%. Based on this estimate, the number of notified transactions in 2020 would have been around 240 instead of 429. In particular, the amendment will exclude most cases of acquisition of sole control where the target company only achieved insignificant domestic turnover from Austrian merger control (unless the transaction falls under the alternative transaction value threshold or if a joint venture is created where the turnover of other shareholder(s) has to be taken into account, such as a remaining shareholder with a participation of 25 % or more).

The other elements of the existing jurisdictional thresholds remain unchanged: The parties' combined worldwide revenues must have exceeded € 300 million and each of at least two parties must have had worldwide revenues of more than € 5 million.

Also, the existing *de minimis* exemption and the existing transaction value threshold are unaffected by the amendments. Accordingly, a transaction that otherwise meets the revenue-based thresholds is not notifiable if only one party had revenues of more than € 5 million in Austria and all other parties' combined worldwide revenues did not exceed € 30 million. Also, a transaction that does not meet the revenue-based thresholds is notifiable if the parties' combined worldwide revenues exceeded € 300 million, the parties' Austrian revenues exceeded € 15 million, the transaction value is more than € 200 million, and the target has significant market-related activities in Austria. This threshold can be met in circumstances where the target has zero revenues in Austria, provided its non-revenue generating activities in Austria are "significant".

The broad Austrian rules on the determination of the relevant group revenue are not amended either. Note that the revenues of companies that are connected via non-controlling 25%-shareholdings are relevant in full for jurisdictional purposes. Transactions, where the target itself has Austrian revenues of less than

€ 1 million, might therefore exceed the new threshold if the target is connected via 25%-shareholdings to other companies that generate revenues in Austria. Transactions, where the target had revenues of less than € 1 million in Austria, may therefore still exceed the notification thresholds if the target is connected via 25%-shareholdings (even if they are non-controlling) to other companies that generate revenues in Austria.

With the amendments discussed in this paper, Austria also introduces the significant lessening of competition standards for the substantive assessment of mergers (SIEC test). The law however still maintains the traditional dominance test as an alternative. The new test applies to transactions that are notified as of 1 January 2022.

Previous to the KaWeRÄG 2021, Austrian merger control rules enabled the Cartel Court to approve transactions that would otherwise significantly lessen competition only if (i) the transaction is likely to improve the general conditions of competition to such an extent that the transaction's negative effects are outweighed or (ii) the transaction is necessary to maintain or improve the parties' international competitiveness and the transaction is justified based on macroeconomic grounds.

The amendment now adds a third ground for justification: The Cartel Court can exceptionally approve a transaction that would otherwise significantly lessen competition if (iii) the transaction's macroeconomic advantages "significantly" outweigh the transaction's negative effects. Factors that the Court may consider in this assessment include economic growth, innovation, full employment, the increase of overall welfare, or "the fair distribution of income considering appropriate social and environmental standards".

Another – practically quite noteworthy – alteration concerns the costs of filing merger notifications in Austria: The filing fee is increased from € 3,500 to € 6,000 (applicable to notifications submitted as of 1 January 2022).

Finally, the amendment includes an important connection of the Federal Competition Authorities merger control proceedings with investment control proceedings exacted by the Ministry of the Economy. The Federal Competition Authority is obliged to forward all merger notifications to the Ministry of the Economy to enable it to verify whether the transaction might be subject also to foreign investment control review. Under the Austrian Investment Control Act 2020, the Ministry of the Economy can initiate proceedings *ex officio* if it considers that a transaction that would require an investment control notification was not notified to the Ministry. This rule applies to notifications submitted as of 10 September 2021.

5. Conclusion

Overall, the long-awaited KaWeRÄG 2021 brings a balanced mix of new procedural and material changes to the already quite complex Austrian system of competition law enforcement (Thyri, 2007). While practically speaking, merger control will definitely be the most affected by the recent amendments, some almost revolutionary potential is added to the law of anti-competitive agreements in that a sustainability-defence is explicitly included. Whether this new sustainability exemption will stand the test of time – and the test of compatibility with the primacy of EU law – or rather remain a niche-provision hardly ever applied for lack of suitable cases, will be up to the institutions and applicants that may rely on it. In any case, further guidance, be it from the Federal Competition Authority or the Cartel Court, will be needed and it is to be assumed that also on the EU-level, discussions about sustainability will not cease and continue to interact with national developments. Finally, as concerns digital markets, we will see whether Austrian enforcement will remain the forefront of innovative developments as it was following the introduction of the transaction value threshold that brought a number of critical digital merger cases under the scrutiny of the Austrian competition authority (Thyri, 2020). Especially as larger member states and especially the EU Commission start to tackle digital gatekeepers with ever more fervour – and presumably will even further increase to do so after the implementation of the Digital Markets Act – we shall see how much remains to be done at the Austrian level.

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ISSUES IN COMPETITION LAW ENFORCEMENT

On-site Inspection and Legal Certainty

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Abstract

The aim of the article is to clarify and describe the inspection and the location, in the terminology of dawn raid competition law, and the legal certainty of the competitors affected by the inspection. An on-the-spot inspection is one of the effective tools for detecting anti-competitive behaviour. It is a tool that places high demands on competition authorities, not only on their professional execution, but also on the justification for carrying out the inspection itself. The degree of broad authorisation of the competition authorities to intervene, on the one hand, is compensated by the possibility of a procedural defence against possible unlawful interference by the entity under investigation, on the other. The article aims to indicate the limits of legitimate expectations when conducting an on-site inspection with both competition authorities and competitors. Examples or descriptions of procedures are based on the author's long-term administrative practice. The issue of the on-the-spot inspection is also illustrated in the article through the case law of the Court of Justice of the European Union (hereinafter the CJEU), the administrative courts of the Czech Republic and the administrative practice of competition authorities. The paper also outlines the current topics of the on-site inspection, such as the provision and handling of data and information in electronic form, the issue of the right of defence or issues raised by measures taken in connection with the COVID 19 pandemic measures.

Keywords: on-site inspections (dawn raids), electronic data, legal certainty

JEL classification: K 210

1. Introduction

On-site inspections, dawn raids, are an essential part of the procedural acts carried out by competition authorities in all jurisdictions of the world. It is no different in the Member States of the European Union. The legitimate aim of an inspection is to ensure that information is available which can be regarded as evidence against competitive conduct in the context of further administrative proceedings with a competitor. A legal authorisation by a competition authority to carry out the inspection itself often includes an extensive authorisation not

only to enter a competitor's premises, but also to secure its documents, internal materials, email communications or all types of data sets. The inspection thus constitutes a significant interference with the privacy not only of the competitor himself, but also of his employees. There is therefore no doubt that the inspection and the securing of evidence must be carried out in full compliance with the law and not exceed the legitimate expectations of competitors.

In the current conception of law, it is more than obvious that its interpretation is for the correct application of law (Gerloch, A.; Tryzna, J.; Winter, J., 2012). In our case, it is primarily a question of interpreting the legal certainty of competitors and their possibilities of procedural defence not only at the time of the inspection itself, but also after its completion. Legal certainty is not itself an absolute concept, and is always relativised, softened, by the degree of probability for a particular situation. Our aim should be to define at least a basic limit for determining the limit of legal certainty for competitors.

The inspection itself is often the culmination of the long and demanding work of the Competition Office, which must be sufficiently substantiated thanks to the rich case law of the national and especially the CJEU. Thanks to the administrative practice of competition authorities and judicial case law, we can consider that an inspection can be divided into three basic phases, namely the phase.

- exploratory
- implementing
- evaluating

For each of those stages, it is possible to identify a legitimate expectation of legal certainty both on the part of the competitor under investigation and on the part of the competition authority. Thanks to technological changes in all areas of life, when modern information technologies are increasingly used, the conditions and rules for carrying out inspections are regulated in much more detail, compared to those used at the end of the last century (Jalabert-Doury, N., 2020). This fact immediately has two aspects.

First. Officials carrying out the inspection must be adequately trained not only what indications and evidence can be searched for in the investigated entity, but also how to document or take their own evidence. To this end, most competition authorities around the world have an internal methodology on the conduct and actual conduct of an on-site inspection verification. Despite the recommendations of the European Competition Network (hereinafter the ECN) and the COMPETITION SECTION of the OECD, the procedures of competition authorities in conducting inspections within the European Union (hereinafter the EU) may often differ. For this reason, the European Commission (hereinafter the EC) has adopted Regulation 1/2019, ECN +. Differences in procedural procedures and inspection

results for a single competitor operating in more than one EU country, unless it is an inspection conducted by the EC, may lead to different conclusions and thus to a fluctuation in legal certainty for a particular competitor.

Second. The existence of a more detailed methodology gives the investigated subjects wider possibilities of procedural defense. And how against a possible deviation from the accepted rules, or the existence of interpretative ambiguity. In addition to reservations about the record made during the inspection, in many cases it is a matter of filing an administrative action for unlawful interference.

Legal certainty has been, and to a large extent is today, undermined by the existence of the pandemic situation in 2020–2021, caused by the COVID-19 viral infection. Thanks to anti-epidemic measures, very few inspections were carried out across the EU during this period. The impossibility of carrying out an inspection caused by the frequent closure of entire industries or states and the regulation of teleworking has made the supervisory role of competition authorities considerably more difficult. In such a situation, many competition authorities have assessed that verification visits can only be carried out when the pandemic situation has passed or at least mitigated it to a socially acceptable level. In 2020, at the beginning of the pandemic, there was no unanimous opinion within the ECN on whether and how to evaluate certain types of anti-competitive behaviour and whether an inspection was necessary to demonstrate them, mainly in the area of purchase and sale of medical supplies and coordinated procedures of manufacturers and distributors of disinfectants and medicines. That uncertainty on the part of the competition authorities has also led to a breach of legal certainty on the part of the competitors concerned. It was only after the EC issued a recommendation on how individual Member States should approach the application of competition law that it led to a reduction in the legal uncertainty of competitors (Directive (EU) 2019/1, Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03)).

The resumption of investigative activities by the competition authorities subsequently took place in mid-2021, when the anti-epidemic rules were partially relaxed across the EU. Examples can be found cross-cutting in all Member States. For example, the Greek Competition Authority carried out seven inspections during June and July. For inspection cases that were postponed due to the pandemic, data or inputs had to be updated. It should be noted that in cases of cartel behaviour or abuse of a dominant position, the impact of competition rules has not been limited during the pandemic, as was the case with the COVID-19 State aid framework. Thanks to the aforementioned work from home, which has become an essential standard for some competitors, the competition authorities have been forced to adjust their internal rules for on-the-spot inspections. In particular, these were issues relating to the judicial authorisation for an inspection where it

is necessary to carry out an inspection in an apartment or private area where an employee of the competitor under investigation works (Hastings, P., 2021).

2. Verification visits

2.1 Authorisation to carry out a local investigation

An on-site inspection itself, at none of its stages, can be carried out without a predetermined authorisation. This must be in line with clearly defined procedural safeguards in advance. These are formed not only by law but also by case law, thereby creating a legitimate expectation of legal certainty that initial raids will be carried out only by entities that are authorised to do so. With permission to carry out a dawn raid, I always ask myself who and in what administrative mode is authorized to carry out their own morning raid. With regard to the question of the entrusted public authority in the field of competition, for many years there has been no doubt that the authority entrusted with the inspection is always the competition authority. Here, too, we must take into account the existence and membership of individual states in the European Union, which extends the number of potentially authorised entities that carry out the initial raid not only on the authorities of a particular Member State, but also on the European Commission. In addition, we must also take into account that cooperating competition authorities may also be eligible. The determination of the inspection authorisation must therefore be based on Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty (hereinafter referred to as "the Regulation") and Articles 20 to 22. and the definition of authorisations to carry out initial raids in the different legal systems of the Member States. In addition to the above, the authorisation is also based on OECD and ICN recommendations (Practical procedures for planning Dawn Raid. European Competition Network).

The question of the designation of the body entitled to control may in some cases also be a question of conflict of jurisdiction between regulatory authorities. This occurs in cases where there is a similar inspection authorisation as from a competition authority and another regulatory authority. In the case of the Czech Republic, these are areas of energy regulation where the Energy Regulatory Office has the right to carry out an inspection in a similar procedural regime and the scope of the inspection authority in cases that affect competition. Such a risk of a conflict of public authority can be avoided by regulatory authorities, within the framework of their powers, coordinating their activities while maintaining and respecting all legal safeguards for the exercise of their administrative activities.

2.2 Exploratory phase

This phase of the inspection is an ex-ante stage that places high demands on competition authorities. Evidence and evidence are provided both by the competition authority that conducts the inspection, but may also be based on information from other competition authorities within the framework of mutual cooperation. "Documents or analyses drawn up by another administration, both national and national, may form the basis if they are relevant for the conduct of a particular proceeding" (Judgment of the CJEU, *Archer Daniels Midland* C-511/06 P).

It is not uncommon for legal or economic evidence, analyses or data obtained on anti-competitive conduct to be challenged by actions for unlawful interference by competition authorities after this fact is known to the parties. This is happening not only in national courts, but also in the European Court of Justice.

The big question is how extensive or clear the evidence or evidence seized by the competition authorities must be, which legitimately entitles them to carry out an on-the-spot inspection, without prejudice to the legal certainty of competitors that there will be no unlawful interference with them. A possible answer, and the determination of the boundary between lawful and unlawful interference by competition authorities, is given to us by the CJEU itself, when, in the case of the judgment of České dráhy v European Commission, it states the following: "…if there are sufficient indications justifying the suspicion of (…) unlawful conduct, the Commission cannot be required to examine also all the evidence to the contrary". At this stage, the competition authority should consider very carefully all the information it is examining in order to avoid suspicion of bias or favouritism of one of the competitors. These are notably cases where possible cartels are investigated, the investigation of which is based on submissions made under leniency programmes. Even at this stage, when the actual administrative procedure has not yet been initiated, it is necessary to guarantee that the information, documents, data or analyses obtained are not unilateral, favouring one of the parties to any administrative proceedings. Impartial and objective action must always be taken to ensure that the limits of the principles of equal treatment and impartiality are respected. At this stage of the inspection, the competition authority should always be able to prove the existence and so-called procedural traces. Thus, to have recorded and substantiated in its file everything that leads to the conclusion that it is in the interest of protecting competition against the infringement to order and carry out an on-site inspection verification. Even at this stage, the competition authority is obliged to comply with and respect all the principles of administrative procedure and the limits of legal certainty. Where there is a boundary between legal and illegal procedure can be found in the case of a local investigation at the premises of Fortuna GAME a. s. on the initiative

of Sazka a. s. The inspection carried out by the Czech Office for the Protection of Competition was challenged by Fortuna as an unlawful interference precisely because the supervisory authority should have used only information from the complainant, i.e. in a specific case from Sazka. 6 The Regional Court in Brno first granted the unlawful interference, stating that: "The addition of SAZKA's complaint in the present case is 'shrouded in secrecy', which results from the fact that, according to their content, the additions were clearly made following the conduct of SAZKA and the complainant, about whom no procedural trace is found in the administrative file. It is not entirely clear in what position SAZKA was in the relatively long period between the filing of the original complaint (June 2017) and the local investigation (March 2019), how the roles between SAZKA and the complainant were realistically divided at that time in obtaining possible evidence of anti-competitive activities of SAZKA's competitors, on what basis this occurred, and is therefore not entirely excluded, that the complainant has become an instrument of SAZKA's competitive struggle. This also weakens the probative value of the facts on which SAZKA's gradual informing of the complainant is based by supplementing the original complaint without a clear activity of the complainant, which would consist in verifying the facts resulting from SAZKA's submission. Of course, the fact that a relatively long period elapsed between the filing of the complaint (June 2017) and the local investigation (March 2019) cannot be evidence that the complainant himself investigated the SAZKA complaint. At the time of the local investigation, according to the Regional Court, the complainant had no real evidence of coordination between the applicant and the TIPSPORT group in the field of odds betting, and the local investigation carried out at the applicant's business premises, which was defined quite broadly, showed signs of an effort to "find something" " (Judgment of the Regional Court in Brno, 29 A 183/2019). However, the Supreme Court also ruled on the case, rejecting the above-mentioned conclusions of the Regional Court in Brno: "The Supreme Administrative Court agrees with the complainant that the current complaint, including its subsequent amendments of 9. 1. 2017 and 6. 6. 2018, containing a description of the sports betting business, including data on total revenues on the relevant betting market in the Czech Republic and shares of the largest players, a description of the legal conditions for simplified identification of bettors when operating odds bets, a description of the mutual division of marketing activities between FORTUNA and TIPSPORT and their coordination, a description of the pressure on the submitter with regard to 2 As 295/2019 "undercutting" of prices in the odds market, a description of the coordination of odds offers and a description of the coordination of entities within the APKURS association with its the content and level of processing seems to be entirely plausible. the combination of the information resulting from these documents was sufficiently specific (and therefore verifiable in further

investigations by the Office), provided reasonable grounds for believing that it was a description of conduct that could very well have taken place, could have made reasonable economic sense for the actors (in the case of secrecy, could have given them a substantial economic advantage) and the way in which it was carried out, correspond to general knowledge of the normal commission of anti-competitive conduct of that type in a given constellation of participants (market structure, market shares of each operator, their role on the market and their intentions over a given period of time) on the relevant market." (Judgment of the Supreme Administrative Court, 2 As 295/2019-99)

It follows from the foregoing that, in order to ensure the success of the inspection, it is essential that competition authorities carefully and objectively assess all available information justifying the conduct of their own inspection. The above example of the existence or absence of unlawful interference at this stage of conducting a morning raid is of fundamental importance for the morning raid as such and the subsequent administrative procedure itself. A similar conclusion was reached by the Supreme Administrative Court (hereinafter referred to as the SAC) in the case of a local investigation by the Ústí nad Labem Public Transport Company (Judgment of the Supreme Administrative Court 3 As 92/2020-59).

2.3 Implementing phase

This phase of the inspection always begins with the actual issuance of the decision on the authorisation to carry out the inspection. The decision should respect both the rules of law and the claims to its scope defined by case law. The decision to carry out an on-site inspection should not arbitrarily interfere with the rights of the persons under investigation. The decision should respect the general principles of administrative law in the form of the principles of legality and legitimacy. The question is how broadly and to what extent the authorisation to carry out an inspection should be formulated and where the limits of legal certainty of the competitor under investigation are given. In general, the CJEU considers that, in the case of an investigation by the European Commission, it is not necessary in the context of an inspection authorisation: "to communicate all the information at its disposal about suspected infringements, nor does it have to give an accurate legal classification of such infringements, provided that it clearly indicates the presumptions it intends to examine. While the Commission is required to state as precisely as possible what is the subject of the investigation and the facts to which the inspection is to relate, it is not necessary for the decision ordering the inspection to contain a precise definition of the relevant market, a precise legal classification or an indication of the period during which the infringement should have been committed, provided that the inspection regulation contains essential elements." (Judgment of the CJEU, *Nexans* C-37/13 P)

It follows from the foregoing that, if the very power to carry out an inspection is to pass the test of legality and legitimacy and at the same time be considered disproportionate by the courts, it must always meet the following basic requirements envisaged by the court:

a) Definition of the subject of the inspection.
b) Definition of the purpose of the inspection.
c) Definition of the scope of the control.
d) Verifiability of indications leading to an on-the-spot investigation.
e) Clarification of the essential facts that are subject to inspection by the Competition Authority.
f) Preserving the right to enforce defense.

3. Essential requirements for decisions authorising a verification visit

3.1 Object of the inspection

The appropriate and, from the point of view of legal certainty, sustainable definition of the subject matter of the on-site inspection can be demonstrated by the example of a hypothetical competitor waste PLC operating in the waste collection and disposal market and in the market for recycling and production of plastics. When defining the subject of an inspection, it is always a matter of determining what the inspection will cover. The subject matter of the self-monitoring should not be defined too broadly to include de facto all possible conduct of the entity under investigation. An excessively broad definition of the subject matter of the inspection may be assessed by the courts as unlawful interference on the grounds of the so-called 'unlawful interference'. fishing expedition. That is, an investigation where it is not clear at the outset whether there is a distortion of competition law, but the competition authority is guided only by intuition without a credible justification for conducting an inspection.

In our particular case, in the case of Waste PLC, we will assume that the company is suspected of bid rigging in the procurement of waste collection by several contracting authorities when the contracts were awarded by two cities and two regions within three years. The complaint about bid rigging at Waste a.s. was anonymous. So how to define the subject of the inspection correctly? In our case, the subject of the inspection should be determined in such a way that the subject of the inspection is contracts for the collection of waste, not for the recycling and production of plastics. The subject of the review should not be the evaluation of Waste PLC's own offers, but information that confirms the existence of a prohibited agreement, such as the director's diary, email or information obtained from a mobile phone.

In defining the subject-matter of the inspection, it is not necessary to indicate the precise legal classification of the anti-competitive conduct, since it may not be precisely known to the competition authority. It is clear from administrative practice and case-law that the subject matter of the legal classification of anti-competitive conduct may be regulated and clarified in various ways during the administrative procedure itself. In the event of a suspicion of the participation of bid rigging by Waste PLC, it would be a suspicion of so-called "bid rigging". target cartel.

The subject matter of the inspection should also not be too extensive. However, what to do if the inspection finds information that is not related to the subject matter of the inspection, but indicates other anti-competitive conduct. In our case, for example, the abuse of a dominant position by Waste PLC. The question therefore arises whether the seizure of documents outside the subject-matter of the proceedings is not a fishing expedition.

For the legality of conducting an on-site inspection in the event of suspicion of bid rigging by Waste PLC, where evidence of anti-competitive conduct other than that which is in the subject of the authorisation to carry out the on-site inspection is found, it is appropriate to secure and separate it from the ongoing investigation. Only after the information seized has been evaluated as possible evidence to initiate a possible new administrative procedure so as to safeguard the rights of the defence.

It is clear from the above that the consequence of incorrect or illegal definition of the subject matter of the on-the-spot inspection may lead to the illegality of carrying out the inspection. Illegality may also apply to information and evidence that has been seized at the inspection carried out. From the administrative practice of competition authorities, however, we also know other cases where the courts find illegality in connection with exceeding the subject of the right to inspect on the spot. It does not have to be the illegality of the entire inspection, but only the part of the inspection that exceeds the subject matter of the inspection authorization (Judgment of the CJEU, *HeidelbergCement* C-247/14 P).

3.2 Purpose of the inspection

In the inspection decision, the competition authority should indicate the available information in its possession on the suspected infringement. The competition authority should clearly state its assumptions, which should be verified during the inspection. The reason should not be arbitrary action by a competition authority, but should be based on objectively proven facts (Judgment of the CJEU, *Dow Chemical*, C-499/11 P and other cases). In the case of our hypothetical inspection at Waste PLC, a justification should be given as to why the company's conduct is found to be contrary to competition law. This means that there are factual circumstances of the existence of bid rigging in relation to some or more public contracts on the market for waste collection.

In the case of investigations into prohibited agreements, however, it may not always be justified and indicate all the information received or secured by the competition authority before the start of the inspection. These are cases where the inspection is based on information obtained under the leniency program, where one of the cartel participants cooperates with the competition authority with the prospect of being reduced or even forgiven for any fine. It would be completely counterproductive if the existence of leniency were communicated to the other cartel participants together with the initiation of the verification visit. Such a procedure could lead to a difficulty or even to the termination of the conduct of administrative proceedings. Information obtained by a competition authority as a result of a leniency notification shall, on the basis of administrative practice, be communicated to the parties to the administrative procedure only at the time of the statement of objections. This is one of the exceptions, as opposed to general administrative proceedings, where the procedural defence of the subject under investigation is not limited (Jalabert-Doury, N. 2020; Judgment of the CJEU, *Archer Daniels Midland* C-511/06 P).

However, the competition authority should always, irrespective of leniency, justify all the facts both to the detriment and in favour of the entity under investigation. Both administrative practice and courts place emphasis on an objective assessment of whether it is necessary to carry out a self-monitoring exercise and whether there are other legal instruments or procedures that could lead to the protection of competition law. The purpose of the inspection should always be to clarify whether there is evidence which, on the basis of the principle of material truth, demonstrates the existence of both anti-competitive conduct and a causal link between the anti-competitive conduct and the serious disturbance of the relevant market. In addition, competition authorities should also be able to demonstrate liability for anti-competitive conduct towards a particular entity (Jalabert-Doury, N., 2020).

3.3 Scope of inspection

When defining the scope of the inspection, care must also be taken to ensure that, before the actual initiation of the inspection, the competition authority can identify, on the basis of circumstantial evidence, the sectors which may be affected by the anti-competitive conduct. In our case, it will be a question of which public contracts for waste collection may be affected by bid riging. For example, these can only be contracts for the disposal of hazardous waste or for the collection of sorted waste.

The scope of the inspection is defined not only in substance, but also by the scope, the number of places where the inspection is carried out. It is common practice of competition authorities that even before the start of an inspection, physical inspections of sites that are suitable for inspection are carried out.

Inspection should only apply to those places where evidence can be expected to be found. Therefore, if our model company Waste PLC has several establishments or branches in the territory of several regions and there is a suspicion of bid manipulation of only two of them, the inspection should be carried out only in the two regions concerned and at the headquarters of the company. It often happens today that some activities, such as technical and service support of IT services, are provided to the company by third parties. If there are sufficient indications for such a conclusion, the check should also be carried out here .

However, what to do if there is prima facie evidence that the information in question, unlike the competitive conduct, is outside the competence of the competition authority ordering the inspection? There is a possibility to make use of mutual cooperation between competition authorities. Article 24(2) also contributes to achieving this objective. 2. (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 enforcers and to ensure the proper functioning of the internal market laying down the conditions for mutual assistance for the performance of inspections: "Member States shall ensure that, where national administrative competition authorities carry out inspections or interviews on behalf of and on behalf of other national competition authorities pursuant to Article 22 of Regulation (EC) No 1/2003, officials and other accompanying persons approved or appointed by the applicant national competition authority may, under the supervision of officials of the requested national competition authority: participate in that inspection and actively assist the requested national competition authority during the inspection or interview, where the requested national competition authority exercises the powers referred to in Articles 6, 7 and 9 of this Directive." (Directive 2019/1)

Thus the, not only the possibility to request an inspection in another member state of the EU, but also the possibility of the participation of a representative of a competition authority who orders the inspection of a particular competitor. A similar level of cooperation in control takes place on the basis of cooperation between competition authorities in Europe within the ECN (European Commission, Competition Policy, European Competition Network).

For the scope of self-control may perceive the following situations:

- securing evidence of a material nature,
- securing evidence in digital form.

The division of evidence into solid and digital may not be indicated in the inspection mandate, as initially the inspection may not be clear where the information in question is located. As a general rule, competition authorities have a fairly broad power to preserve evidence against competitive conduct. Competition authorities are generally entitled to examine both all books and

other economic or other records relating to the business activities of the person under investigation. It is not decisive where this information is located, on which medium and where it is stored. Competition authorities may obtain or obtain information on anti-competitive conduct in any form, not only original documents but also copies or extracts from the accounts. Where information in electronic form is subject to inspection, competition authorities may, through authorised officials, search all electronic devices, data storage facilities such as servers, desktops, laptops, mobile phones or tablets and, where appropriate, other mobile devices and storage media such as CD-ROMs, DVDs, USB keys, external hard drives, backup tapes, cloud services of the entity under investigation, etc. The above authorisation shall also apply to private establishments located at the site of the inspection at the time of the inspection.

To do this, the keywords you enter should also be part of the credential. Specialized forensic (investigative) tools in the form of special software or hardware can also be used for searching. These tools should record data in an unchanged form, therefore so-called fingerprints of data should be created, which should be kept unchanged or even modified throughout the administrative procedure. The imprint is captured in the form of a forensic copy. This in itself is an authentic duplicate, both partially and in all the data stored on the original carrier (Jalabert-Doury, M., 2020; Practical procedures for planning Dawn Raid. European Competition Network)

In the taking of evidence, the person under investigation is obliged to cooperate, otherwise he is threatened with the imposition of a procedural fine. Investigations using forensic tools shall be carried out by a responsible official of the competition authority. As part of proper cooperation, between the competition authority and the competitor under investigation, the provision of an employee who is able to explain the functioning of a particular IT system of the company or is able to block access to e-mail or disconnect specific computers from the network. The subject under investigation should also disclose all access passwords through its own entity. During the inspection, the body under investigation should not interfere with the inspection or attempt to circumvent the inspection. The subject under investigation should not avoid investigations with reference, for example, to the absence of a director or owner of a company or to the fact that the e-mail servers are located in another company. The fact that such a practice is not tolerated can be demonstrated by the judgment of the Regional Court in Brno in the lawsuit of Egem s.r.o. the illegality of the on-site inspection of the investigation carried out by the Czech competition authority on the basis of the chairman's authorisation (Authorisation of the President of the Czech competition authority of 3. 9. 2019). The unlawful interference required the blocking and extraction of J.N.'s mailbox and its transport to the site of a local investigation carried out by the defendant at the plaintiff's premises. The court stated that: "It

is true that according to Credential No. 1 (in conjunction with § 21f para. 5 of the Act on the Protection of Competition), the local investigation should have taken place at the complainant's premises at Starochodovská 41/68, Prague, but as already mentioned, the defendant's requirements discussed here, even though in a certain sense they exceeded these precisely defined premises, were related to these premises and constituted, in the court's opinion, an expression of cooperation pursuant to Section 21f(5) of the Act. Article 2(b) b) f) of the Act on the Protection of Competition. The Court also takes note of this from the point of view of the "accessibility" of Mr. Mailbox N. from these premises. If the court were to accept the plaintiff's interpretation, it would be easy for competitors to "extricate themselves" from the defendant's investigative powers by placing their mailboxes, etc., in the infrastructure of another competitor and their communications being "transferred" there. In such a case, the defendant would have virtually no means of obtaining the necessary information (see the court's interpretation of Sections 21e(2) and 21g(1) of the Competition Act).)". (Judgment of the Regional Court in Brno, 29 A 183/2019)

However, in terms of the scope of the inspection, in connection with the change in behavior and work habits during the COVID 19 pandemic, another practical question arises, namely, whether it is possible to carry out an inspection not only in the establishments, but also in the employees of the company under investigation who work from home? Solutions can be as follows.

At this stage of the inspection, it is appropriate to divide the inspection into an investigation inside and outside the premises. Inspection in business premises is a fairly common phenomenon. Investigations outside business premises, for example, in employees' apartments or passenger cars, are used very rarely. Outside business premises investigations must be very well reasoned and can only be carried out with the consent of a judicial authority. Changing the terms and conditions will also require changing and revising the existing rules for conducting your own raids at dawn. In the UK, for example, it is conducting a public consultation on changing the rules as part of the competition reform and considering strengthening the powers of a competition authority and extending its right to search national premises on the basis of a search warrant (Hastings, P. 2020).

What can be assumed:

- Increase in the number of inspections outside the premises, in the form of inspections of apartment buildings, personal technical equipment that serves work purposes and is not owned by the employer. An example is the inspection by the French competition authority, the Authority de la concurrence, of the investigation of competitors in the retail food market, where employees who were ordered to have a home office were investigated.

- Increased activity of competition authorities after the end of economic or social restrictions. See. inspections carried out in 2021 by the Greek Competition Authority.
- Extension of the duration of the inspection itself, when it will be necessary to respect not only the legal but also the health conditions of the inspection.
- Inspection will increasingly be carried out through IT tools and remote access to technical equipment, not only in relation to the subject under investigation, but also to its employees.
- It should be taken into account that in cases where the entity under investigation has employees in the home office, how to coordinate the inspection to ensure cooperation and the need for the presence of employees in the business premises.
- An online connection will also have to be considered for possible questioning and witness statements.
- Consider a hybrid control model and require remote data access.
- Possibility to carry out an inspection by a competition authority without a physical presence only in online form.
- Interruption and possible continuation of the inspection due to a restriction or impossibility to continue the inspection due to health and pandemic restrictions.
- Interruption of the inspection in the event of the impossibility of reviewing the evidence seized. This conclusion is based on the case law of the CJEU: "The European Commission may continue the morning raid on the premises of the Office by making copies during a raid without first examining them on the spot" (Judgment of the CJEU, *Nexans*, C-606/18 P)

3.4 Verifiability of indications leading to an on-site investigation

Any authorisation for inspection shall be duly justified so as not to call into question the legitimacy of the self-inspection. The reasons should also be verifiable from public sources. A competition authority should therefore not rely on only one submission, but should have all the grounds for inspection objectively verified.

3.5 Clarification of essential facts that are subject to inspection by the investigated subject

The mandate itself should not be a terse finding of an infringement of competition law, but should, above all, clarify the facts when a competition authority finds an infringement of the law. This clarification should be reviewable and comprehensible. In itself, it should not give rise to suspicions of a biased assessment of the reasons for initiating the self-monitoring.

3.6 Preservation the rights of the defence.

The rights of defence of those subject to investigation should always be preserved. The investigated entity shall retain the right to consult an external legal adviser on the procedure of the intervening competition authority. The undertaking may consult an external legal adviser during the inspection. The actual presence of an external legal adviser is not a mandatory condition for the legality of the inspection itself. Authorised persons of a competition authority may enter a competitor's business premises and initiate their own inspection without waiting for the presence of the legal representative of the entity under investigation. Waiting for a lawyer can be if it takes an unusually long time, as it prevents the inspection from being carried out.

A big topic is the question of who is an external legal adviser, how a legal private privilege can be defined. This issue was addressed by the CJEU in the cases of *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*: "The Court of Justice has held that where an undertaking which is the subject of an investigation pursuant to Article 14 of Regulation No 17 and which invokes the protection of the confidentiality of communications between: lawyers and clients refusing to produce, among the business records requested by the Commission, correspondence exchanged with his lawyer, is in any event required to provide Commission officials with useful information capable of demonstrating that those records satisfy the conditions justifying their legal protection, without revealing the content of the documents in question. The Court has stated that, if the Commission considers that such evidence has not been adduced, it may, on the basis of Article 14(1) of the Sixth Amendment, take the form of such evidence. 1 of the Ecclesiastical Code to order that such evidence not be presented. Pursuant to Article 3(3). In accordance with Article 3(3) of Regulation No 17, the production of the correspondence in question and, where appropriate, the imposition of a fine or periodic penalty payment on an undertaking under that regulation in order to punish that undertaking for refusing to adduce additional evidence which the Commission considered necessary or to produce documents which the Commission did not consider to be of a confidential nature protected by law (*AM & S v Commission*, paragraphs 29 to 31). An undertaking under investigation may also bring an action for annulment of such a Commission decision and, if necessary, attach to it an application for interim measures under Articles 242 EC and 243 EC (see, to that effect, *AM & S*, paragraph 32). … 'The purpose of that protection is, first, to protect the public interest in the sound administration of justice, which consists in ensuring that every client is free to have recourse to his lawyer without having to fear that the confidential information which he has communicated may subsequently be disclosed." (Judgment of the

CJEU, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* joined cases T-125/03 and T-253/03).

The Court has also stated that a competitor's legal communication with an independent lawyer is protected. Protected, but there is no communication between the in-house lawyer, even if that in-house lawyer has the authority of a lawyer in another jurisdiction (Judgment of the CJEU, *French Republic v European Commission* C-601/11). An important factor is the issue of an independent and impartial approach. In order to be protected, documents or information must in themselves constitute correspondence with an independent lawyer or be internal notes relating to such communications (Judgement of the ECJ, *AM & S Europe* 155/79).

The rights of the defence should be preserved at all stages of the control, with the possibility of defending oneself against any unlawful interference. A breakthrough decision in the Czech Republic was the case of the inspection in the case of Delta Bakery. The result of many court decisions was an amendment to the Act on the Protection of Competition in Section 21f para. 7 of Act No. 143/2001 Coll., when the possibility of filing an action for an unlawful act during the inspection of the competition authority in establishments was enacted.

3.7 Evaluation phase

At this stage, the evidence seized and whether there are grounds for continuing or initiating administrative proceedings should be evaluated. In the case of securing bulky evidence that could not be evaluated at the inspection site itself, such as a large set or data equipment. The evaluation should be relatively fast because if the results indicate that an inspection needs to be repeated, the delay between inspections should not be excessively long, for example a whole year. This also applies in the case of the seizure of evidence showing anti-competitive conduct other than that which gave rise to the inspection itself.

4. Conclusion

In addition to the principles of legality and legitimacy of the intervention itself, on-the-spot inspections carried out in the field of competition law should also be proportionate in substance and purpose in terms of the reasons for the inspection and its own conduct. These limits apply to all three phases of the verification visit. The proper conduct of the verification visit leads to the maintenance of legal certainty for the parties to the administrative proceedings concerned. Dawn reids should be similar in all Member States and should respect the minimum common procedural standards in force in the European Economic Area. Inspection, as well as its actual scope, should be based on the principles of proportionality and proportionality.

When carrying out an inspection, competition authorities must take into account the right to enforce a defence against unlawful interference by the entities under investigation. On the other hand, the subjects under investigation are obliged to provide sufficient cooperation in the ongoing inspection. Breaches of good administrative practice or non-compliance by competition authorities with the limits laid down by law and judicial practice may lead to the frustration of the administrative procedure and thus to a breach of the legitimate expectations and legal certainty of competitors. In the event of a breach of procedural rules by the person under investigation, this leads to the imposition of a civil fine, which may also be imposed repeatedly, and consequently the sum of the amount of the procedural fines may be higher than any substantive fine for anti-competitive conduct.

A big question of future development is the modification of the existing rules for morning raids, whether at the level of international organizations or groupings in the form of the OECD, ECN, EU or individual nation states in the field of forensic tools for detecting anti-competitive conduct or the use of artificial intelligence means. The same will certainly apply in the case of a change in work behaviour and the way one works due to the higher level of existence of the home office and the solution of health risks during the pandemic.

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Bending traditional private international law towards more favourable private enforcement

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Abstract

This paper criticises the recent case law of the Court of Justice of the European Union, in particular some of its findings in *Volvo* (C-30/20), as well as in other earlier judgments concerning the rules on determining the international and local jurisdiction of the courts under Article 7(2) of the Brussels Regulation Recast. The Court clearly goes beyond the limits of traditional private international law in helping claimants (injured parties) to establish international and local jurisdiction of courts in the place of their establishment, irrespective of whether the damage actually occurred there, or only manifested itself there in the form of indirect or consequential damage. Although such an approach of the Court may have a noble intention behind it, e.g., promoting the private enforcement of competition law in Europe, it must not be forgotten that such interpretation of Article 7(2) will inevitably lead to unreasonable results.

Keywords: international jurisdiction, local jurisdiction, private enforcement, place where the harmful event occurred or may occur, actual damage

JEL Classification: K210

1. Introduction

In its recent judgment in *Volvo* (C-30/20), which fully follows the opinion of the Advocate General Jean Richard de la Tour, the Court of Justice of the European Union (the Court) offered an interesting interpretation of Article 7(2) of the Brussels Regulation Recast in matters relating to the private enforcement of competition law.

It follows from both the legal doctrine (Lein, E., 2015) and the Czech case law (e.g., the resolution of the Czech Supreme Court dated 29 May 2018, file no. 30 Nd 391/2017) that Article 7(2) of the Brussels Regulation Recast governs not only

international jurisdiction but also the local jurisdiction (national competence) of the courts. As a matter of fact, this is apparent from the literal wording of Article 7, which specifically refers to "*courts for the place*", where, for example, the harmful event occurs, as opposed to the wording "*in the courts of a Member State*" used by the general provision in Article 4 of the Brussels Regulation Recast. Therefore, Article 7 determines in which particular court of a Member State a defendant who is domiciled in another Member State may be sued, thereby, in essence, interfering in the judicial organisation of each Member State. This fact has been known for some time now.

Specifically in the field of private enforcement of competition law, the Court has so far only dealt with the question of which Member States have international jurisdiction (e.g., C-352/13 *CDC Hydrogen Peroxide*, C-27/17 *flyLAL-Lithuanian Airlines*, C-451/18 *Tibor-Trans*, and C-343/19 *Verein für Konsumenteninformation*). However, this is probably the first time it has ruled, on the field of competition law, that Article 7(2) of the Brussels Regulation Recast also directly governs the local jurisdiction of the courts on the basis of the place of a harmful event. This judgment thus plays a key role in identifying the courts of the Member States to which the injured parties may bring their claims for the infringement of competition law within the meaning of Article 7(2) of the Brussels Regulation Recast.

2. Factual circumstances of the Volvo case

RH was a Spanish company domiciled in Córdoba, Spain. Between 2004 and 2009, RH purchased five trucks from a Volvo Group España SA dealership for its road transportation business. The first of those trucks was initially the subject of a leasing agreement before being purchased by RH in 2008.

On 19 July 2016, the European Commission (the Commission) adopted the decision relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39824 – Trucks). By that decision, the Commission found that between 17 January 1997 and 18 January 2011 there was a cartel between 15 truck manufacturers, including AB Volvo, Volvo Lastvagnar AB, and Volvo Group Trucks Central Europe GmbH, concerning two categories of products. In particular, it concerned trucks weighing between 6 and 16 tonnes (medium trucks) and trucks weighing more than 16 tonnes (heavy trucks), whether rigid trucks or tractor trucks. The alleged infringement consisted of collusive arrangements on pricing and gross price increases in the European Economic Area (the EEA) for trucks, and the timing and the passing on of costs related to the introduction of emission technologies for medium and heavy trucks required by the emission standards EURO 3, 4, 5, and 6. The infringement was alleged to have spanned the entire EEA and to have occurred between 17 January 1997 and 18 January 2011. Consequently, the Commission imposed fines on all the entities

involved, including Volvo, Volvo Lastvagnar, and Volvo Group Trucks Central Europe, with the exception of one entity, which was granted immunity.

RH brought a follow-on action for damages against the Volvo Group companies, including their Spanish subsidiary Volvo Group España SA. It claimed that it had been damaged by having paid a higher amount in the acquisition of five trucks as a result of the cartel being sanctioned by the Commission than it would have paid if the cartel had never occurred. Although RH acquired the trucks in Córdoba, where it also had its registered office, it brought the action before the Juzgado de lo Mercantil No. 2 de Madrid (Commercial Court No. 2 of Madrid, Spain). In the proceedings, Volvo did not contest the local jurisdiction of that court, but rather the lack of international jurisdiction of the Spanish courts. It argued that the place where the fact giving rise to RH's claim within the meaning of Article 7(2) of the Brussels Regulation occurred or could have occurred was the place of the causal event. That place should be the place where the cartel relating to the trucks was concluded and not the place where the claimant was established. Since the cartel was concluded in other EU Member States and not in Spain, Volvo argued that the Spanish courts did not have international jurisdiction.

3. The Volvo judgment

In *Volvo* (C-30/20), it seems that the Court addressed, for the first time in the field of competition law, the question of whether Article 7(2) of the Brussels Regulation Recast governs not only international jurisdiction but also local jurisdiction, i.e., which specific court of a Member State may hear and determine claims for breach of competition law.

The Court first noted, with reference to the Commission's decision (Case AT.39824 – Trucks), that the Commission found that the truck manufacturers' cartel agreement, which gave rise to the damage claimed before the Spanish courts, covered the entire EEA market, and therefore distorted competition in that market. Accordingly, the place where the alleged damage occurred must, for the purposes of Article 7(2) of the Brussels Regulation Recast, be understood to be situated within the entire EEA market, of which Spain is a part. The international jurisdiction of the Spanish courts was therefore established.

The Court then proceeded to consider whether it was also possible, with reference to Article 7(2) of the Brussels Regulation Recast, to determine, in the case of a Member State so identified whose courts have international jurisdiction, the specific court of that Member State which is to have local jurisdiction. As I have already stated, the Court seems to have held here, for the first time in the field of competition law (and, for that matter, in the field of private enforcement), that that provision directly and immediately confers not only international jurisdiction but also local jurisdiction on the court of the place where the damage occurred. It

thus agreed with the suggestion made by the Advocate General, Mr Jean Richard de la Tour (see Opinion of AG de la Tour, para 46), who referred in that regard, *inter alia*, to the 1979 Report by Mr Jenard on the Brussels Convention of 1968 (see OJ EC C 59, 1979, p. 22).

In the same breath, however, the Court stated that the determination of the perimeter of the court, in which the place where the damage occurred is situated pursuant to Article 7(2) of the Brussels Regulation Recast, falls in principle within the organisational competence of the Member State to which that court belongs. For that reason, that provision does not preclude a Member State from deciding to entrust a particular type of litigation to a single court in its territory which will have exclusive (causal) jurisdiction to hear and determine those disputes, irrespective of the place where the damage occurred in that Member State. It is therefore the exclusive prerogative of the Member States to choose which court has exclusive (causal) jurisdiction in competition law matters. In support of that proposition, the Court stated that it may be justifiable, in the interests of the proper administration of justice, to concentrate certain types of litigation in a single specialised court. It also relied on a suggestion by the Advocate General, who argued that the technical complexity of litigation in the private enforcement of competition law may also argue in favour of the introduction of concentration in a single specialised court.

If a Member State whose courts have international jurisdiction under Article 7(2) fails to establish a specialised court with exclusive (causal) jurisdiction to hear and decide disputes arising out of an infringement of competition law, then it must determine which court of that Member State has local jurisdiction, considering the place where the damage occurred. Such a determination must, of course, be consistent with the objective of proximity and sound administration of justice. In that regard, the Court, relying on its previous judgment in the *Verein für Konsumenteninformation* case, ruled that the place where the damage occurred is the place where the goods were acquired (purchased). According to the Court, that rule must be applied irrespective of whether the goods affected by the anticompetitive practice were purchased directly or indirectly from the defendants, and irrespective of whether the purchase resulted in an immediate transfer of ownership of those goods or whether the transfer took place only after the lease contract had ended. The only catch in such a determination of local jurisdiction is that the goods had to be acquired (purchased) in the district of only one court. Otherwise, it would not be possible to identify only one place where the damage occurred in relation to the injured party, as there would be more than one such place and it would therefore not be possible to determine the court with local jurisdiction.

Finally, the Court concluded that if the goods affected by the anticompetitive practice were acquired (purchased) in different places in a Member State (within the jurisdiction of several courts), then it seems most appropriate to confer local jurisdiction on the court of the place where the injured party is domiciled. According to the Court, the application of this criterion both fulfils the objective of proximity and ensures that litigation is cost effective. Moreover, that criterion satisfies the requirement of foreseeability, which the Court has justified on the ground that the defendants, as parties to the cartel, must know that the purchasers of the goods in question (the victims) are located on the market affected by the anticompetitive practice (the cartel collusion).

In summary, in its Volvo judgment the Court introduced a cascade (cascading sequence) for determining local jurisdiction under Article 7(2) of the Brussels Regulation Recast. First, it should be examined whether the Member State has established the exclusive (causal) jurisdiction of the specialised courts to hear and decide disputes arising out of an infringement of competition law. If exclusive (causal) jurisdiction has not been established in the Member State, it must be established whether or not the goods affected by the anticompetitive practice were acquired (purchased) within the jurisdiction of only one single court and, if so, whether that court will have local jurisdiction to hear and decide the dispute. However, if the goods at hand were acquired (purchased) in several different places within the jurisdiction of several courts, it is then the court within whose jurisdiction the claimant (injured party) is domiciled that will have the local jurisdiction.

4. Analysis and Problem Solution

In a quick reaction to the *Volvo* judgment, the author of the paper expressed the view that the Court's conclusion regarding the power of a Member State to introduce exclusive (causal) jurisdiction in its national legislation seems, at first sight, paradoxical. This paradox was highlighted by the following counter-question: if the determination of the local jurisdiction of the courts in a Member State is already regulated by the Brussels Regulation Recast, how is it possible that national legislation can nevertheless determine the exclusive (causal) jurisdiction of specialised courts, even though the Brussels Regulation Recast does not empower Member States to do so (Berennes, M., 2021)?

However, I do not see any paradox here. In essence, it is merely a difference between exclusive (causal) jurisdiction and local jurisdiction. Moreover, the national legislature does not need empowerment from an EU regulation to determine exclusive (causal) jurisdiction (or a specialised court within its own judicial organisation), because the organisation of the judiciary falls within the exclusive competences of the Member States. In my view, the first and second criterion of the cascade in the *Volvo* judgment work symbiotically.

For example, if a Member State had allowed, in its judicial organisation, several courts with different territorial districts to have exclusive (causal) jurisdiction over competition private enforcement disputes, then only one of those courts would be able to hear and decide such disputes, whilst the local jurisdiction would be determined between them. Also, this would be done in line with the rules of Article 7(2) of the Brussels Regulation Recast, i.e., according to the place of the harmful event. Of course, if a Member State has designated only one single court with exclusive (causal) jurisdiction in these matters, with a territorial perimeter of the whole Member State, then, logically, such a court would be the only court with jurisdiction to hear and decide the dispute. This situation can be interpreted either as meaning that such a court is to be competent irrespective of where within the territory of the Member State the harmful event occurred, or that such a court is to be competent because its territorial jurisdiction covers the entire territory of the Member State, including the place of the harmful event. In any event, it is a symbiosis, not a paradox.

The second criterion of the cascade is somewhat peculiar in that it depends on whether or not the goods affected by the anticompetitive practice were acquired (purchased) in the district of only one court. However, if they were acquired (purchased) in the district of several courts, this criterion does not apply at all, and then the third criterion (the place of establishment of the injured party) automatically kicks in. In my view, it would work just as well if there were more than one court with local jurisdiction according to the place where the goods affected by the anticompetitive practice were acquired, and the injured party could choose which of those courts to bring the action before. Such courts would be equally well placed to make an assessment of the conditions in the affected market(s) and would have equal access to evidence. The objectives of proximity, proper administration of justice, and the economy of proceedings would therefore also be preserved.

The last criterion – the place of establishment (domicile) of the injured party – is somewhat unfortunate. The Court seems to have loosened the reins here. I am not convinced at all that it is a correct approach to base the local jurisdiction (or even the international jurisdiction) of a court on the place where the injured party is established (domiciled), especially if it is to depend only on whether the goods in question were acquired (purchased) in one or more places. As I said above, a better result would be for the place of jurisdiction to belong to multiple courts according to all the places where the goods were acquired (purchased). By introducing the third criterion of the cascade, the Court implicitly accepts that the place of the harmful event may be the place of the injured party's establishment (domicile) if the damage occurred in the districts of several courts, but regardless of whether it actually occurred also at the injured party's establishment (domicile) or only manifested itself there as indirect or consequential damage.

An even more extreme view can be found in the aforementioned reaction to the *Volvo* judgment (Berennes, M., 2021), where the author criticises the Court for not going further and argues that the place of the harmful event resulting from a cartel will in any event be the place of the victim's registered office, irrespective of whether the goods were acquired in one or more places, since the surcharge or loss of profit resulting from a cartel will always be manifested or suffered by the victim at the place of its registered office. That view cannot be accepted.

Imagine a situation where it is generally accepted that the place of the harmful event will also always be the place of the injured party's registered office, because the claimed damage will always be felt by the injured party at its registered office (e.g., because it will be reflected in its accounts or will affect its cash flow). Applying this interpretation, it would then always be possible to establish jurisdiction and venue in tort cases in the place where the injured party is established (domiciled). Such an interpretation, however, goes beyond the idea behind Article 7(2) of the Brussels Regulation Recast. The main rule of the Brussels Regulation is that the defendant is to be sued in the place of the defendant's domicile (Article 4(1)), and exceptions to this rule (Articles 7 and 8) are to be applied only if the exception makes better sense than the main rule. Article 7(2) must therefore be interpreted restrictively. The exception relating to the place of the harmful event makes better sense than the main rule only if the objective of proximity is preserved between the dispute arising and the court, and if the court which has to hear and decide the dispute will have better access to the evidence, which preserves both the sound administration of justice and the economy of the proceedings. If, however, as in tort cases, it were generally accepted that international and local jurisdiction would be based on the place where the injured party is domiciled because the injured party subjectively feels the damage there or has simply booked the damage there in its accounts, then, for example, in the case of a crash of a truck owned by a Slovak company, jurisdiction would always be established in the Slovak courts, even though the crash, the defendant and all the witnesses and all the evidence would be located in another Member State. That interpretation would therefore lead to unreasonable results. Of course, the injured party will always choose to sue in the place where it is domiciled, because there it has the advantage of the home environment, culture, and language and, naturally, lower litigation costs. It is therefore rather surprising that the Court has accepted the place where the injured party is domiciled as the third criterion of the cascade. There is obviously a desire to promote the private enforcement of competition law behind this, but it is not the most fortunate conclusion with regards to the traditional conception of private international law.

5. Conclusion

In any event, it should be emphasised that the Court's judgment in *Volvo* (C-30/20) provides useful guidance for injured parties as to the specific court in which they can bring an action for breach of competition law. It is clear that this guidance can also be used by the parties to the anticompetitive practice, allowing them to anticipate in which court they may be sued. It is thus undoubtedly another piece of the jigsaw puzzle that contributes to the predictability of the private enforcement of competition law.

The Volvo judgment established a cascade (cascading sequence) for determining local jurisdiction under Article 7(2) of the Brussels Regulation Recast. In the first place, it examines whether a Member State regulates in its legislation the exclusive (causal) jurisdiction of courts in disputes arising out of an infringement of competition law. If exclusive (causal) jurisdiction has not been introduced in the Member State, it must be established whether or not the goods affected by the anticompetitive practice were acquired only within the jurisdiction of one court and, if so, whether or not that court will have local jurisdiction to hear and decide the dispute. However, if the goods at hand were acquired in several different places within the jurisdiction of several courts, the court in whose jurisdiction the injured party is domiciled shall be the court that has local jurisdiction.

I must say, however, that I have serious doubts about the appropriateness of the last criterion of the cascade, as I explained in part 3 of the paper. The third criterion clearly bends the long-standing, traditional principles of private international law in the name of promoting the private enforcement of competition law in favour of the injured parties. I am of the opinion that this may lead to unreasonable results, generally in any tort disputes that are way beyond the field of private enforcement of competition law.

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Decision-making on the Authorization of Mergers of Competitors

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Abstract

The decision making process of regulators concerning mergers of competition is the main *ex ante* tool to regulate competition (in other words – to ensure the optimal structure on the market) in order to protect the market, as both abuse of dominant position and cartel law mainly deal with the harm being already done. The aim of this paper is to find out and further describe the key parts of this process, i.e., what is able to influence the decision-making process (and how) and compare what may be stronger arguments made by the competitors in terms of getting the respective merger successfully through the decision making procedure. This is in practice mainly shown by focusing on the main part of the assessment, being the substantive test and its distinctive elements. The secondary aim is to open discussion on the topic of a personal base on competition authorities, requiring to have the necessary economical insight into the potential consequences of a merger, then allowing the authority to effectively question proposals being presented by merging competitors and rationally assess the actual risk for competition.

Keywords: antitrust, authorisation, competition, mergers

JEL Classification: K210

1. Introduction

Competition law plays an important role in the Czech, European, as well as worldwide economics. Both national governments and international organisations (such as EU or UN) have created a framework aiming to level the playing field on the market. This can be in practice generally done by fighting against cartels and other forms of prohibited cooperation between competitors, by imposing specific rules for strong players, trying to keep their dominance in check, and last but not least, by coming up with rules concerning mergers of undertakings as well.

The purpose is simple – merger control is a "prior" (*ex ante*) tool, allowing the achievement of a certain amount of control over the market in advance, i.e., before the market is actually distorted by too strong of players created by an "uncontrolled" merger. To reach this goal, the authority assesses (aims to assess) hypothetic consequences of the merger in the future.

Therefore, the goal here is obvious, to assess if such merger can result in a threat to competition or not. In case the answer is yes, then to either forbid such merger at all or to impose various obligations on merging competitors – both effectively helping in keeping the market more balanced (ideally in the end bringing benefits not just to other competitors but also to the consumers – as they could also profit from healthy competition on the relevant market – typically by being able to get cheaper or more quality goods (Faull, Nikpay, 2007, pp. 467–468).

The authority is supposed to evaluate and compare the individual economic benefits of the intended transaction, the probability of their effects, longevity or short-term, identify their beneficiaries and, last but not least, compare the claimed benefits with the likely negative impacts (Bejček, 2010, p. 509).

The aim of this text is not to provide any sort of insight into the competition law in general, so (with some exceptions, please see below) it would not discuss basic definitions used in describing competition law topics (such as "*competitor/undertaking*" (Kindl, 2006, p. 339) or "*relevant market*"), nor provide a complex overview of the respective legal sources (such as Czech and EU laws). Also, the general assessment is mostly from the Czech (and rarely EU) law viewpoint, as for example US antitrust laws are still very different despite many recent changes towards greater unification.

The basic hypothesis of this paper is the fact, that assessment of mergers by the respective authorities are more based on "economics" which can be actually measured, assessed, and compared rather than "law", being often quite vague and depending on interpretation concerning important definitions.

2. Merger

First of all, it has to be mentioned, that in general, mergers are a standard corporate law practice, not necessarily automatically inducing any illicit behaviour, and as such, not all of them are subject to any sort of antimonopoly review.

The definition of merger under Czech law is being a significant and very important part of this text. The main types of activities (being defined as mergers), described by the Czech Act No. 143/2001 Sb., Antitrust Act, as amended, are as follows:

a) Merger of two or more previously independent competitors in the market (in the form of an absorption or amalgamation (UOHS, 2010);
b) Acquisition of another competitor's business or part of it (asset deal);

c) Gaining control over another competitor; or
d) Establishment of a jointly controlled company (joint-venture) – this also falls under authorization regime in case the new subject is capable of long-term activity as a separate economic unit and if it is jointly controlled by multiple competitors (i.e., "full-function" joint-venture).

The list above contains potential variations, but it is also necessary to account for the "negative" definition, meaning, that even some transactions which do fulfil one of these four types listed above, may not in the end under certain circumstances "qualify" as a merger (Raus, Oršulová, 2014, p. 285). These are listed in the last two paragraphs of Section 12 of the Czech Antitrust Act – mostly concerning banks/ investment service providers temporarily controlling corporations or activities performed by a liquidator or insolvency administrator.

This is, in practice, added as such control does not in fact distort the market, as it is usually quite short-term and does not have a stable and continuous business as its main goal.

Moreover, the definitions as listed above are less relevant for the actual decision-making practice, as more often used is dividing mergers to vertical (trying to get control over the whole market on its various levels), horizontal (i.e., between competitors on the same level), conglomerate (i.e., those lacking any of abovementioned characteristics) and mixed (having multiple characteristics).

3. Notification

As already mentioned above, not every merger has to be notified, and basically the only two main criteria are turnover and existence of an EU dimension. If there is no EU dimension, the merger is to be resolved by the Czech Authority for Protection of Competition (UOHS). In case of an EU dimension, the EU Commission shall be competent instead.

The Czech Antimonopoly Act stipulates an exact turnover limit for notification, however a full methodics has to be applied (in order to extract and obtain the "clean" turnover), depending also on the:

(i) timeframe (i.e., the last accounting period – this could be both calendar year or economic year (Neruda, 2008, p. 261) – in other words – 12 subsequent months;
(ii) geography (i.e., turnover generated at certain territory – by goods/services provided to consumers in the country where such consumer is located in the time of sale); and
(iii) currency exchange (using the average currency exchange rate issued by the Czech National Bank for the relevant period).

In case there is an EU dimension, i.e., EU conditions (including much higher thresholds for notifications) are filled, national authority loses competence here and (with certain exceptions – EU Commission can forward the case to the national authority), such a case is then being resolved by EU Commission.

In practice there is therefore no case which would subsequently be resolved by both the Czech Antimonopoly Act and the respective EU Regulation (Neruda, 2008, p. 210).

Before the merger is approved, the merged competitors may conclude any sort of agreement, but cannot exercise the newly acquired control (i.e., mostly influence decision making of the competitor).

4. A test of potential consequences of a specific merger

This chapter is one of the core parts, aiming to provide a greater insight into the actions and deliberations being taken by the competition authority before the decision in the matter is duly issued by such authority. This is in practice being assessed mainly by the "substantive test", trying to modulate potential impact of the assessed merger of competitors on the existing level of competition on the market in the future (Neruda 2008, pp. 385-393).

The test is tightly linked with the abuse of a dominant position, because it was created as a mixture (Bishop, Walker, 2010, pp. 309-312) between test of dominance and SLC test (substantial lessening of competition).

The result of the test cannot be a concentration that substantially breaches effective competition on the shared market or a substantial part, especially due to the commencement or strengthening of dominant position (under Czech law incorporated into the Section 17(3) of the Czech Antimonopoly Act) – such a consequence should then result in the merger being denied by the respective competition authority.

In fact, the test should be performed in a much "wider" sense, assessing:

(i) the current level of competition on the market and its evolution;
(ii) structure of all markets being affected by the merger;
(iii) shares of all merging competitors on these markets;
(iv) their economic and financial power;
(v) legal and other obstacles of entry;
(vi) possibility to choose suppliers / clients of the merging competitors,
(vii) supply and demand on the respective markets;
(viii) needs and interests of consumers; and
(ix) research and development, being beneficial for the end consumer (and are not obstructing effective competition).

This list is explicitly included in the Czech Antimonopoly Act in its Section 17(1), however it is just demonstrating various aspects and is definitely considered non-exhaustive, so the authority can apply also further (and quite different) conditions and criteria (Eliáš, Bejček, Hajn, Ježek, 2007, p. 509).

In practice, the abovementioned alternative division of mergers into horizontal, vertical, mixed, and conglomerate is also very relevant here, because the nine "areas" shall be assessed to a large extent depending on the type of merger (Kindl, Munková, 2012, pp. 339–360).

In other words – there are different areas being assessed in the case of a vertical merger than in a case of a horizontal one, due to the different influence of such area on the relevant market. For example, the condition of the possibility to choose suppliers is assessed differently in case of horizontal or vertical mergers, as vertical mergers can result in supply shortage for other competitors and therefore have severe anticompetitive effects.

It has to be noted, that in case of mergers of competitors having an aggregate market share below 25%, it is presumed that such mergers shall possess no threat for competition. That however does not mean that the authority cannot still decide (Neruda, 2008, pp. 385–393) that in a certain individual case the threat for competition exists despite this low market share.

5. Obligations imposed on competitors

Chapter 1 above, already very briefly noted that the authority can either forbid such merger at all or to impose various obligations on merging competitors. This is an extremely important and unique part of merger control, due to the fact, that such obligations are not suggested by the authority, but by competitors themselves (as they do that in attempt to overturn the originally negative decision of the regulator).

Originally the Czech regulator was the one to suggest the obligations, however this has been abolished by the Act No. 155/2009 Sb. (amending the Czech Antimonopoly Act in September 2009), and Czech UOHS cannot suggest these obligations anymore, regardless the fact that merging competitors do fully agree with such suggestion of a specific obligation/obligations being duly made by the respective competition authority.

Competitors are obliged to prove to the authority, that the suggested measures are sufficient to achieve an unrestricted competition, i.e., that the merger would not negatively influence competition on a relevant market.

There is indeed a great flexibility in types of such obligations (meaning there is no exhaustive list of all such measures), being mostly structural (i.e., sale of part of assets), behavioural, quasi-structural, control, or trying to break the current

personal links. Imposed obligations may be also purely on a commercial level, such as termination of various commercial agreements. The shared goal of all types of imposed obligations is obvious to ensure, that the result of merger is not going to distort competition in any way, either by allowing a very strong competitor to arise, consequently distorting the situation on the market or by creating less favourable conditions for end consumers.

6. Consequences of the actions performed against the merger ban

Various authors do not agree on the fact, if actions made against the merger ban issued by the respective authority can or cannot have further consequences in private law, i.e., if such actions create invalidity or not. Here the question is that if the underlying contract establishing merger is invalid or ineffective from the beginning, there could have been no valid transfer of the shares/assets in question, i.e., no need to cancel such agreement (Bejček, 1996, p. 263). The second group of authors believe, that the private law consequences can also be seen in the subsequent conduct after the merger (making not just the actions creating the merger but also subsequent actions invalid) (Raus, Oršulová, 2014, p. 402).

7. Court review of the merger decision

As the Czech merger control decision issued by the respective authority is considered a standard decision as issued per the Czech Act No. 500/2004 Sb., Administrative Act, it is therefore always possible to review this decision by a court. A competent court for this type of review is the District Court in Brno and this can be filed within two months from the delivery of the written decision of the competition authority. A potential subsequent step is filing a cassation complaint to the Supreme Administrative Court in Brno, within two weeks from the previous decision.

The downside of the court review is, that despite the District Court in Brno having specific allocated judges for these type of cases (i.e., people having the necessary expertise), they usually cannot sufficiently question the original results in full, i.e., they do rely quite heavily on the conclusion of the competition authority and facts presented by the merging undertakings.

8. Conclusion

The author believes, that from the text above it is clear, that the assessment of the consequences of a merger shall be mostly considered an economic issue, rather than a legal one. Legal terms used for a description of respective situations, such as "*substantial breach of effective competition*" are unfortunately rather vague and imprecise, i.e., can be used for a guidance but the whole decision should be

based on more stable basis. Therefore, the convincing justification of a merger for the competition authorities usually heavily relies on economic terms in the sense that there will be no or very minimal anticompetitive results of the merger. EU guidelines do include a large amount of very vague terms such as "*reasonable assurance*", "*sufficient increase*" or "*possible harm to the consumer*". The interpretation of the benefits of a merger can be almost impossible to quantify and always depend on the interpretation in given time using certain set of values and interests.

Also, in terms of obligations being imposed on merging undertakings, this is very much in control of the parties, so being able to present the authority with a convincing analysis provided by experts can very much outweigh the potential anti-competitive effects of the merger. As already suggested in the introduction chapter, it is therefore extremely necessary to equip competition authorities (both at the national and EU level) with a sufficient personal base of experts, being able to assess and question economic analyses provided by merging competitors, as these tend to underestimate risks for the relevant market and on the other hand overestimate benefits for such market.

A question therefore arises if the process should not be more levelled, in the sense of authority also having a possibility to propose various obligations to be fulfilled in order for the merger to proceed.

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Concurrent Enforcement of the DMA and Competition Law and the *ne bis in idem* Principle

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Abstract

The system of obligations set out in the DMA proposal are often referred to as the "New Competition Tool". These obligations are largely inspired by recent cases and decisions adopted in proceedings under Article 101 and especially Article 102 TFEU. Despite the existence of an apparent link between DMA rules and enforcement of competition rules, the DMA itself explicitly states that its regulatory aim is to protect legal interests different from the ones protected by Articles 101 and 102 TFEU. The declared difference of legal interests might rule out the *ne bis in idem* principle and allow for concurrent enforcement of DMA obligations and competition rules. Given the competence of NCAs in enforcement of the latter, this situation might lead to the fragmentation of decision-making in large platform related cases, contrary to the DMA's general aim of unified and efficient EU-wide approach. The paper defines and analyses questionable aspects related to concurrent application of both DMA and Articles 101 and 102 TFEU to contribute to the expert debate that follows the ongoing legislative procedure.

Keywords: DMA, abuse of dominance, ne bis in idem, enforcement, CJEU

JEL Classification: K210

1. Introduction

In the recent years, the European Commission (the Commission) has initiated multiple antitrust proceedings against various giant multi-sided online platforms i.e.,: Google Android (*Google Android*, 2018, AT.40099), Google Shopping (*Google Shopping,* 2017, AT.39740), Microsoft (*Microsoft (Tying)*, 2013, AT.39530), Amazon Marketplace (*Amazon Marketplace*, pending, AT.40462) and many others, which were often concluded only after several years of investigations into the potential anti-competitive conduct and its effects. These investigations were concerned mainly with breach of Article 102 TFEU.

Very simplified, the standard procedure of investigation of a potential breach of Article 102 TFEU follows the structure of: (i) establishing the existence of a dominant position of the undertaking on the relevant market(s), (ii) establishing a theory of harm, (iii) finding whether there is compelling evidence of harm to consumers, and (iv) assessing potential efficiencies. Considerable complexity stemming from the very nature of multi-sided digital platforms themselves and economic specifics related to them makes this procedure complex and time-consuming.

This inflexibility and slowness of the competition enforcement is a risk factor potentially enabling large digital platforms to create their own playing field, while distorting competition on the merits, hampering innovation, and harming consumers. The raising levels of dissatisfaction and concern regarding the unfitness of the ex-post competition rules (Articles 101 and 102 TFEU) for the digital markets finally led several Member States to adopt or at least consider the regulation of large online platforms (European Commission, 2020, Annex 5.4.), ultimately posing a risk of regulatory fragmentation within the EU.

To halt the further fragmentation of regulatory obligations addressed to large online platforms, and to allow competition law to react more quickly and in more flexible manner, the Commission proposed in December 2020 a new *ex-ante* regulatory tool applicable on the EU level – Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (the DMA). The DMA was formulated to, on the one hand, provide clarity to large online actors acting as gatekeepers with regard to the *ex-ante* limitations of their behaviour and, on the other hand, to provide the Commission with a range of new powers and tools to keep the markets contestable and fair. The DMA does this primarily by simplifying the procedure for prosecuting infringements because the gatekeepers will be designated by the Commission according to the rules set by Article 3 of the DMA. The focus of the proceedings will then be on whether the gatekeeper breached some of the obligations set under Article 5 and 6 of the DMA. Some of the elements of the obligations set in Articles 5 and 6 of the DMA directly recapitulate the conclusions of decisions under Article 102 TFEU or the corresponding national competition rules.

As a result, the question of whether, after the adoption of the DMA, a single offence might be prosecuted in concurrent proceedings under the DMA and under the competition rules, inevitably arises. The answer to this question lies in the application of the principle of *ne bis in idem* to such proceedings. The principle of *ne bis in idem* has also been under review recently, especially in two pending cases before the CJEU. This recent development needs to be properly understood to apply the principle of *ne bis in idem* to possible concurrence between the DMA and competition proceedings correctly.

2. Problem Formulation and Methodology

Principle of *ne bis in idem* stipulated in Article 50 of the Charter of Fundamental Rights of the European Union (the Charter) states that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

The interpretation of the *ne bis in idem* principle within the EU law has developed in CJEU decisions over more than 50 years with respect to each element of the definition above (i.e., what constitutes *criminal proceedings*, what constitutes an *offence* and when the person has been *finally acquitted or convicted in accordance with the law*). The scope of this paper does not allow for a detailed analysis of this development. Instead, it focuses on the issue which is most likely to arise with respect to concurrence of proceedings under competition law and proceedings under the DMA – the identity of the offence. The notion of the identity of an offence has recently been revisited by Advocate General (AG) Bobek in two parallel cases, *bpost* (C-117/20) and *Nordzucker* (C-151/20).

In his Opinions in *bpost* and *Nordzucker*, AG Bobek proposes a three-fold test to ascertain the identity of an offence: identity of the *offender*, of the *relevant facts*, and of the *protected legal interest*. Whereas the first two criteria, i.e., identity of the offender and of the relevant facts are applied universally in all legal areas (*van Esbroeck*, 2006, C 436/04; *Gasparini and Others*, 2006, C 467/04; *van Straaten*, 2006, C 150/05; *Kraaijenbrink*, 2007, C 367/05; *Mantello*, 2010, C 261/09), the third criterion of the identical protected legal interest has been developed specifically within the competition law case law (*Toshiba Corporation and Others*, 2011, C-17/10; *Aalborg Portland and Others v Commission*, 2004, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P; *Slovak Telekom*, 2021, C-857/19).

AG Bobek suggests that the three-fold test should be applied universally (Bobek, 2021, para. 164). Whether this approach is finally adopted as universal by the CJEU or not (both cases in which AG Bobek presented this suggestion are pending), application of the criterion of protected legal interest in the area of competition law is generally accepted (*Toshiba Corporation and Others*, 2011, C-17/10; *Aalborg Portland and Others v Commission*, 2004, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P; *Slovak Telekom*, 2021, C-857/19) and so is relevant for the question of whether concurrent enforcement of Article 101 and 102 of the TFEU and the DMA will be compatible with the *ne bis in idem* principle.

The DMA makes numerous references to competition throughout its text. Indeed, the DMA was at first presented for public consultations as a New Competition Tool (EU, 2020). Later the New Competition Tool has been combined with public consultations for Digital Services Act package: an *ex ante* regulatory instrument of very large online platforms acting as gatekeepers, and the two formed a single

legislative initiative to ensure a competitive Single Market for digital services and in particular fair and contestable platform markets (European Commission, 2020, p. 1), resulting in the draft DMA.

The DMA is clearly linked to the development of competition case law concerning big digital platforms, as is made clear in the Impact Assessment Report, which connects individual provisions of the DMA with the previous antitrust decisions and investigations. Because the DMA developed from competition case law, the issue of identity of protected principles will inevitably arise.

The DMA itself states that the concurrent application of its provisions (to minimise harmful effects of gatekeepers' practices *ex ante*) and proceedings under EU and national competition rules (*ex post* intervention) will be possible (European Commission, 2020, part 1). This is reiterated in the preamble of the DMA. Recital 5 states that Articles 101 and 102 remain applicable to gatekeepers, but their scope is "limited to certain instances of market power (e.g., dominance on specific markets) and of anti-competitive behaviour", whereas the DMA regulates challenges which are not effectively addressed by competition law, and also applies to gatekeepers who are not necessarily in a dominant position. Recital 10 claims that the DMA's objective is "complementary to, but different from that of protecting undistorted competition on any given market".

This raises concerns regarding the legal certainty as the essence of *ne bis in idem* principle seems to be rather neglected or overridden by formalistic approaches. To establish legal certainty about whether the principle of *ne bis in idem* applies in relation to competition law and the DMA, it is necessary to take a close look at the legal interests protected by the DMA and the EU and national competition law.

The next part of this paper first looks at the identity of an offence concept, as presented in recent AG Bobek's Opinions (focusing on the identity of the protected legal interest), and then applies these findings to potential concurrences between proceedings conducted under Article 101 and 102 TFEU and under selected provisions of the DMA.

3. Analysis and Problem Solution

3.1 Recent approach to the ne bis in idem principle in bpost and Nordzucker

In *bpost*, the *ne bis in idem* principle is applied when both the regulatory proceedings and the competition law proceedings are held against the same offender with regard to the identical facts. At first, bpost (the provider of postal services in Belgium) was fined by the national regulatory authority for postal services in Belgium for breaching a sectoral regulation by its rebate system, which supposedly discriminated against some of its clients. This decision was subsequently annulled

by the national court because bpost's actions did not amount to discrimination according to the legislation governing postal sector. However, bpost was fined again, but this time by the Belgian national competition authority for an alleged abuse of dominant position due to the application of the same rebate system in the same time period (Bobek, 2021, para. 4).

The legality of the second sets of proceedings before the national competition authority was challenged by bpost claiming the *ne bis in idem* principle. The CJEU was tasked with clarification of how the principle of *ne bis in idem* will apply, when regulatory proceedings are followed by the competition proceedings (with the same offender and under the identical facts). According to the Commission, which provided an amicus brief in the case, both sets of proceedings pursue different objectives:

a) The sectoral proceedings concerned infringement of sectoral rules – the prohibition of discriminatory practices and transparency obligation under Belgian law regulating the operation of universal postal service providers; and
b) The competition proceedings concerned prohibition of abuse of dominant position under Article 102 TFEU and Belgian national competition law.

Both objectives were seen by the Commission as "*distinct but complementary*", thus not precluding the second sets of proceedings by the virtue of *ne bis in idem*, as interpreted in the light of CJEU case law specific to the competition law area.

AG Bobek proposed to subject the matter to the above-mentioned three-fold test, with further elaboration on what constituted the protected legal interest under both sectoral and competition regulation.

Belgian sectoral law regulates formerly monopolistic universal postal services providers, and its aim is to achieve market liberalisation. Once liberalisation is achieved, the regulation will naturally cease to apply. Potential harm to upstream or downstream competition was not subject of the sectoral proceedings, among other things, because the sectoral regulator lacks competence in this area.

Belgian and EU competition law, on the other hand, penalised bpost's behaviour that was viewed as anticompetitive, potentially increasing barriers to entry, and excluding potential competitors of bpost. Thus, a possible distortion of competition is the crucial objective of competition law.

The conclusion of AG Bobek was, therefore, that

> the principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude the competent administrative authority of a Member State from imposing a fine for the infringement of EU or national law provided that the subsequent proceedings taking place before that authority are different

> from those that have taken place previously either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest the safeguarding of which the respective legislative instruments at issue in the respective proceedings pursue,

also noting that there is no difference between competition law and other areas of EU law in applying this conclusion.

The case of *Nordzucker* is different, as it concerns the application of the principle of *ne bis in idem* when two separate competition proceedings in two different Member States collide. In case of *Nordzucker*, firstly, the German national competition authority initiated the proceedings against Nordzucker and others and determined that they had infringed Article 101 TFEU as well as German national competition law by concluding anticompetitive agreements on sales areas, quotas, and prices. Subsequently, addressing the identical factual scenario and the same offenders, the Austrian national competition authority decided to initiate proceedings against Nordzucker and others for infringing Article 101 TFEU and Austrian national competition law by the virtue of the same anticompetitive agreements.

In this case, AG Bobek delves more deeply into the exact relationship and consequences of the three-fold test for the application of the principle of *ne bis in idem* in the area of competition law, and especially the issue of the identity of the protected legal interest.

Crucially, AG Bobek stresses that "the issue of the protected legal interest ought to be assessed with regard to a specific provision. It must focus on the specific interest or purpose that the provision being applied pursues, what that provision penalises and why."

From this, we can conclude that the legal interest should be specified for each individual provision applied in the specific case, rather than on the level of regulatory systems and declarations.

Applying this principle, AG Bobek found that Article 101 TFEU and national legislation prohibiting price cartels on the national level pursue the same interest. The national legislation applies only to the extent in which the issue is not covered by the TFEU (*Tele2 Polska*, 2011, C-375/09).

Because the national and EU competition law applied in both proceedings protected the same legal interest, AG Bobek concluded that the principle of *ne bis in idem* enshrined in Article 50 of the Charter "prevents a national competition authority or a court from sanctioning anticompetitive conduct which has already been the subject of previous proceedings concluded by a final decision adopted by another national competition authority." There are several conditions to this however: first, this prohibition applies only to the extent in which the scope of

the subject matter (temporal and territorial) is the same. Second, the application of the *ne bis in idem* principle requires that the national competition authority "took into account extraterritorial effects of a given anticompetitive conduct". Importantly, AG Bobek also extends the applicability of the *ne bis in idem principle* to proceedings which do not result in a fine, for instance if the offender files an application for leniency, thus departing from the CJEU position adopted in the *Menci* case law (*Menci*, 2018, C-524/15; *Garlsson Real Estate and Others*, 2018, C-537/16; *Di Puma and Zecca*, 2018, C-596/16 and C-597/16).

It is necessary to stress that the CJEU has not yet decided in any of the cases presented above. Nevertheless, the direction of case law in recent years suggests that the question of legal interest will need to be taken into account when applying the *ne bis in idem* principle to possible concurrence between competition rules and the DMA.

3.2 Application of the ne bis in idem principle to the possible concurrence between proceedings under Article 101, 102 TFEU and under the DMA

The draft DMA declares in its Preamble (recitals 5, 9, and 10) and in Article 1(6) the possibility of parallel application alongside Articles 101 and 102 TFEU. Accepting this declaration without further analysis risks rendering the *ne bis in idem* principle ineffective. It should also be ruled out that the mere fact that one potentially colliding regulation is *ex post* (Article 101 and 102 TFEU), and the other is *ex ante* (the DMA) automatically created a different legal interest. Further analysis is therefore required.

Our analysis presented in this paper has two steps. In the first step, we identify legal interests protected by Articles 101 and 102 TFEU and by the example of two DMA provisions (to satisfy the requirement of identifying specific interest protected, the identification needs to be done with respect to each provision of the DMA separately; nonetheless, such analysis concerning each of the obligations set out in the Article 5 and 6 DMA exceeds the scope of this paper). In the second step, we determine whether these identified interests might potentially be considered identical in the sense of the test proposed by AG Bobek. Based on these two steps, we can make the conclusion on whether the principle of *ne bis in idem* might prevent concurrent procedures under both sets of rules.

3.2.1 First step: Identification of protected legal interests

Interests protected by Article 101 and Article 102 TFEU are well documented by the existing competition case law of the CJEU.

With respect to Article 101 TFEU, the reason behind the prohibition of selected agreements and other practices amounting to cartels is the fact that "they have

adverse effects on competition or are in any event capable of adversely affecting competition" (Kokott, 2011).

With respect to the protected legal interest under Article 102 TFEU, the ultimate interest behind the prohibition of abuse of a dominant position is "consumer well-being" rather than a specific market structure which is protected only so far as the harm to the structure of the market may directly or indirectly affect consumers (Rantos, 2021). It is important to note that although Article 102 TFEU forms a part of the EU competition policy, the protected interest is not competition itself, but the beneficial effects that competitive markets have on consumers.

The DMA states the following specific objectives (European Commission, 2020, p. 59):

a) To enhance coherence and legal certainty in the online platform environment in the internal market;
b) To address gatekeeper platforms' unfair conduct; and
c) To address market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice.

Nonetheless, the DMA text does not expressly attribute the objectives above to specific obligations set out in Articles 5 and 6. While the first objective can be attributed to the DMA as a general goal, respective obligations for gatekeepers can pursue the objective of addressing unfair conduct, or of ensuring contestable and competitive digital markets for increased innovation and consumer choice, or both of these objectives in parallel.

For a closer look at how these objectives are manifested in the DMA text, we selected two examples of obligations – Article 6(1)(b) and Article 6(2)(d). Both articles are derived from previous case law formulated in proceedings under Article 102 TFEU, and as such represent a good example for analysis of differences between the two sets of rules.

Article 6(1)(b) of the DMA contains an obligation to

[A]llow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties.

Following Recital 46 and 47 of the preamble of the DMA, it may be presumed that Article 6(1)(b) aims to "To enable end user choice" as restrictions to end users' choice in terms of pre-installed applications are considered "unfair and liable to weaken the contestability of core platform Services".

In the Impact Assessment Report, the following example is given: "app stores/ operating systems preventing users from un-installing some of the pre-installed

apps, in particular where these are not essential for running the hardware". This provision is linked with cases *Google Android* and *Microsoft (Tying)*. The *Microsoft (Tying)* case is rather specific, because the fine was imposed for infringement of commitments made binding by the previous Commission Decision.

In the *Google Android* case, Google was found guilty of four separate infringements. Google's behaviour was found as helping to "maintain and strengthen its dominant position in each national market for general search services, increas[ing] barriers to entry, deter[ring] innovation and tend[ing] to harm, directly or indirectly, consumers" (*Google Android*, 2018, AT.40099, paras. 858, 971, 1139, 1142).

Article 6(1)(d) of the DMA contains an obligation to "refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking."

According to Recital 48 and 49 of the preamble of the DMA, Article 6(1)(d) of the DMA shall *inter alia* deal with situations where the gatekeepers favours its own service that is considered distinct from its core platform service by the end users by means of *"all forms of relative prominence".* This leads to the direct undermining of contestability of the relevant digital market.

In the Impact Assessment Report (European Commission, 2020, p. 57), the following example of this practice is given:

> a search engine preferring its own vertically integrated services in its search engine results (e.g., shopping or travel services are featured on top of search results); a social network ranking its own dating service more prominently in users' timelines than those of third-party dating services. Ability to misuse its intermediation position to its own competitive advantage.

This provision is linked with the *Google Search (Shopping)* case.

The ultimate breach of a protected legal interest by Google in this case was *depriving European customers of genuine choice and innovation* by restricting competition on the relevant markets for comparison shopping (European Commission, 2017).

3.2.2 Second step: Comparing protected legal interests

The objective of ensuring contestable and competitive digital markets for increased innovation and consumer choice is the protected legal interest under both Article 102 TFEU and Articles 6(1)(b) and 6(1)(d) of the DMA. As is apparent from the Commission's rulings in *Google Android* and *Google Search (Shopping)* cases, conducted in the existing competition law regime, the consumer well-being

(normally ensured by functioning competition structures) was at the centre of these cases, which is in line with the legal interest identified in Article 102 TFEU. The preamble of the DMA and its Impact Assessment Report both build a strong link between the respective DMA provisions and the legal interests recognized in Commission's rulings on which the respective provisions are based on. In case the CJEU upholds GA Bobek's suggestions on application of the three-fold test, the principle of *ne bis in idem* might preclude concurrent proceedings under these provisions (supposing, of course, that all the other conditions for applying *ne bis in idem,* as proposed by AG Bobek in *Nordzucker*, are met).

The objective of addressing gatekeepers' unfair conduct as a separate objective distinct from preserving innovation and consumer choice could be applied in concurrence with proceedings under Article 102 TFEU, because the protected legal interests in both cases are distinct (Article 102 TFEU does not apply unless consumers' well-being is directly or indirectly harmed). Especially if the enforcement is aimed at gatekeepers' engagement with smaller competitors (while at the same time not presenting harm to customers), such acts would not be covered by the protected interests under Article 102 TFEU. We can therefore conclude that, similarly to AG Bobek's proposal for decision in *bpost*, prosecution for unfair conduct under the DMA should not prevent subsequent competition proceedings under Article 102 TFEU or corresponding national legislation. Nonetheless, a detailed analysis of all suggested obligations set out in Article 5 and 6 DMA regarding whether they aim to address gatekeepers' unfair conduct and at the same time do not address the objective of ensuring contestable and competitive digital markets for increased innovation and consumer choice, exceeds the scope of this paper.

It is not excluded that gatekeepers' actions covered by several DMA obligations might also fall within the scope of Article 101 TFEU prohibition (namely restrictions in vertical agreements). Nonetheless, the objectives presented by the DMA do not protect the structure of competition itself, and the objectives of the DMA and Article 101 TFEU are thus different, so prosecution for unfair conduct under the DMA should not prevent subsequent competition proceedings under Article 101 TFEU or corresponding national legislation.

4. Conclusion

After applying the three-fold test for the application of the principle of *ne bis in idem* as has been proposed by AG Bobek (i.e., with respect to each specific provision and the legal interest protected by that provision), we conclude that this principle is likely to prevent concurrent application of the DMA and the competition rules (Article 102 and national legislation derived form it) in separate proceedings, in the extent that both sets of rules (i.e., Article 102 TFEU

and particular provisions of Articles 5 or 6 of the DMA) protect identical legal interest. This will be the case mainly for the provisions of Articles 5 or 6 of the DMA that aim to protect the objective to ensure contestable and competitive digital markets for increased innovation and consumer choice applied in concurrence with Article 102 TFEU, which aims to protect the same interest. In case of Articles 6(1)(b) and 6(1)(d) of the DMA, the result of our analysis showed the possible identity of such protected legal interest.

Shall the AG Bobek's suggestions be confirmed in respective CJEU decisions, the rule regarding concurrent application of the DMA and Article 102 TFEU expressed in Article 1(6) of the DMA must inevitably be reassessed. Such considerations (incl. potential exclusion of Article 102 TFEU application from cases prosecuted under several Articles 5 and 6 of the DMA) can take place in necessary detail only after the CJEU adopts its rulings in *bpost* and *Nordzucker* cases.

It is necessary to keep in mind that the test for the applicability of the *ne bis in idem* principle has multiple parts, and this paper only looked into one specific principle (the identity of protected legal interest). Future works might consider the other parts of the test, i.e., establishing identity of offender and of facts (especially the temporal and territorial scope of the conduct) in the area regulated by the DMA.

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Antitrust Limitation Periods in the Czech Republic in the light of recent CJEU case-law

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Abstract

This contribution focuses on the issue of the limitation of liability in Czech competition law. Its main aim is to find an answer to the question of whether the Czech statute of limitations is regulated in compliance with EU competition law or not. In doing so, the recent case law of the CJEU on the practical application of antitrust limitation periods, in particular the Judgements in Cases C308/19 and C450/19, will also be considered. The authors will specifically look at whether the starting point of the limitation period in Czech law as interpreted by the Czech Office for the Protection of Competition (OPC) and Czech administrative courts is laid down in accordance with EU law and the case law of the CJEU. Further, the authors will assess whether the grounds for suspending and interrupting the limitation period in Czech law are determined in accordance with EU law and whether the grounds for suspending and interrupting the limitation period are interpreted by the OPC and administrative courts in accordance with EU law and the relevant case law of the CJEU.

Keywords: antitrust enforcement, antitrust limitation periods, CJEU antitrust case law, Czech competition law

JEL Classification: K210

1. Public Enforcement of EU Competition Law

The creation of a highly competitive social market economy has been one of the fundamental aims of European integration since its inception (Article 3(3) Consolidated Version of the Treaty of European Union. (TEU). One of the key policy instruments of the EU for a competitive internal market is the effective functioning of legal rules that prohibit companies from distorting competition. These rules are designed to ensure that undertakings cannot restrict competition through any form of cooperation or coordination (Article 101 Consolidated Version of the Treaty of the Functioning of the European Union. (TFEU),

while undertakings with a dominant position are prohibited from excluding competitors and exploiting trading partners (Article 102 TFEU).

EU competition law enforcement has been traditionally divided into public and private, where the former refers to the enforcement actions of the Commission and the national competition authorities (NCA), whereas the latter refers to the enforcement conducted by courts, whose proceedings are initiated by private individuals (Frese, 2016, p. 4). Competition law enforcement in the EU focuses mainly on public enforcement, with private enforcement seen in many cases as a complement to public enforcement (Ioannidou, 2020, p. 847). Moreover, according to some authors, private enforcement of EU competition law is regarded as underdeveloped in most Member States (Malinauskaite, 2020, p. 109). The scope of this contribution focuses precisely on the area of public enforcement and the related issues of limitation periods for the imposition of sanctions for anticompetitive conduct.

In the early days of European integration, public enforcement of competition law was highly centralised with the European Commission (the Commission) leading all enforcement actions under Articles 101 and 102 TFEU (Frese, 2016, p. 1). Over time, however, this strong centralisation began to weaken and, particularly due to the enlargement of the EU in 2004, the role of the Member States in the enforcement of EU competition rules had to be strengthened. This change was achieved through the adoption of Council Regulation (EC) No 1/2003 (Regulation 1/2003), which replaced Regulation No 17 of 1962. The decentralisation brought about by Regulation 1/2003 has allowed parallel powers for the Commission and NCAs to apply and enforce EU competition rules.

1.1 Commission's power to impose sanctions for anticompetitive conduct

A central enforcement tool is the possibility for NCAs and the Commission to impose fines or penalties on companies that infringe competition law. "The purpose of fines is to punish companies which have violated competition rules and to deter the same and other undertakings from engaging in or continuing illegal behaviour" (Malinauskaite, 2020, p. 210). The Court of Justice of the European Union (CJEU or the Court) generally requires that the imposition of a sanction for infringements of Union law should be effective, proportionate, and dissuasive (C-68/88, *Commission v Greece*). In relation to sanctions in EU competition law, the CJEU specifically stated that the effectiveness of sanctions imposed by the NCAs, or the Commission was a precondition for the coherent application of the provisions of EU competition law (C-429/07, *Inspecteur van de Belastingdienst v X BV*).

As indicated above, a key innovation of Regulation 1/2003 was to empower NCAs to apply Articles 101 and 102 TFEU, together with national competition

law, in cases where anticompetitive behaviour may have a potential effect on trade between the Member States. However, Regulation 1/2003 deals only with a slight harmonization of national procedural rules, including rules on sanctions (Dunne, 2016, p. 4). As this part of the contribution is devoted to defining the EU rules on the imposition of sanctions for anticompetitive conduct, it will further focus mainly on the Commission's power to impose sanctions within the meaning of Regulation 1/2003, giving national legislation space in the next part of this contribution.

Regulation 1/2003 empowers the Commission to impose fines on undertakings and associations of undertakings both for substantive infringements (Article 23(2) of Regulation 1/2003) of the competition rules and for procedural infringements (Article 23(1) of Regulation 1/2003). Regulation 1/2003 allows only undertakings to be sanctioned, so it does not apply to natural persons such as company directors and executives (Jones, Suffrin, 2016, p. 959).

2. Limitation Periods for the Imposition of Penalties

> Limitation periods represent a legal safeguard for a person who has once broken the law in order not to be put at risk of sanctions and other legal liabilities for an indefinite amount of time (Blažo, 2012, p. 79).

Limitation periods for the imposition of penalties provided for in Article 25 of Regulation 1/2003 are three years in respect of procedural infringement (related to requests for information and the conduct of inspections) and five years in respect of all other infringements.

The starting point of the limitation period is linked to the commission of the infringement. However, in the event of a continuing or repeated infringement, the limitation period shall begin to run on the day on which the infringement ceases (Article 25(2) of Regulation 1/2003). Under Article 25(3) and (5), any action taken for the purpose of the investigation or proceedings in respect of an infringement starts the limitation period afresh, however being limited to a maximum limitation period of 10 years. Article 25(3) of Regulation 1/2003 also provides for a non-exhaustive list of cases where the limitation period is interrupted. These cases include: (a) written requests for information by the Commission or by the competition authority of a Member State; (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State; (c) the initiation of proceedings by the Commission or by the competition authority of a Member State; and (d) notification of the statement of objections of the Commission or of the competition authority of a Member State. According to Regulation 1/2003, the

limitation period is suspended only when the Commission decision is the subject of a decision by the CJEU (Article 25(6) of Regulation 1/2003).

2.1 Principles of Limitation Periods for the Imposition of Penalties in the light of Selected Case law of the CJEU

The CJEU plays a key role in interpreting EU legislation (Sehnálek, Týč, 2016, p. 18), including competition law provisions. In the following lines, the contribution will address two very recent Judgements in which the Court of Justice has clarified some problematic aspects of the limitation period for the imposition of penalties within the meaning of Article 25 Regulation 1/2003.

2.1.1 Case C-450/19, Kilpailu- ja kuluttajavirasto

On 14 January 2021, the CJEU issued a preliminary ruling in Case C-450/19, *Kilpailu- ja kuluttajavirasto* (*Kilpailu*) setting out guidelines on when an anticompetitive price-fixing agreement in the context of a bidding process is considered to have ended. This decision has important implications for the application of limitation periods for fines imposed by competition authorities.

The reference for a preliminary ruling in this case was made by the Finnish Supreme Administrative Court, which referred a single question to the Court asking when exactly the infringement of Article 101 TFEU in a bid-rigged tender procedure ceases.

In its ruling, the Court stated that an infringement of Article 101(1) TFEU lasts as long as the restriction of competition resulting from the conduct concerned persists.

> However, in the case of conduct prohibited by Article 10(1) TFEU, which consists in the manipulation of a tender procedure (…)the restrictive effects of the cartel on competition disappear, in principle, at the latest at the time when the essential characteristics of the contract (…), have been definitively determined, where appropriate, by the conclusion of a contract between the successful tenderer and the contracting authority (…) (para 35).

The Court further distinguished between the restrictive effects of a cartel on competition–which deprived the contracting authority of the opportunity to obtain the agreed goods, works, or services on competitive terms–and the wider adverse economic effects on other market participants resulting from the contract. According to the CJEU, only the first category of effects is relevant in determining the duration of an undertaking's participation in an anticompetitive agreement (para 37).

The Court further recalled that, since EU law recognises the principle that the actions available to the Commission and the national competition authorities, to prosecute and penalise infringements of Article 101 TFEU, are subject to limitation, the effective implementation of that provision cannot justify artificially extending the duration of the infringement period to allow its prosecution. The Court concluded that an undertaking's participation in an infringement of Article 101(1) TFEU ended on the date of signature of the contract concluded between the undertaking and the contracting authority on the basis of the concerted bid submitted by that undertaking.

This case provides valuable guidance as to the duration of the infringement in circumstances where a cartel participant has entered into a contract with a third-party producing obligations long after the date of signing. These guidelines are also important in answering the question of the starting point of the limitation period for the imposition of penalties within the meaning of Article 25 of Regulation 1/2003, which, in the case of a continuing or repeated infringement, begins to run on the day on which the infringement ceases.

2.1.2 Case C-308/19, Whiteland

On 21 January 2021, the CJEU delivered a preliminary ruling in Case C-308/19, *Consiliul Concurenței v Whiteland Import Export SRL* (*Whiteland*) on a question raised by the Romanian Supreme Court regarding the five-year time limit for the Romanian competition authority to impose a fine for an antitrust infringement. Under its national law, the limitation period starts to run on the day the antitrust infringements ceases and can only be interrupted by the Romanian competition authority opening an investigation; no subsequent acts of investigation can have the same interruptive effect. As a result, the possibility to impose a fine on Whiteland by the Romanian competition authority for infringement of EU and national competition law was deemed to be time-barred.

By its first question, the national court asked whether EU law must be interpreted as meaning that national courts are required to apply Article 25(3) of Regulation 1/2003 to a national competition authority's powers to impose penalties for infringements of EU competition law. Not surprisingly, the Court has ruled that the wording and purpose of Article 25(1) of Regulation 1/2003 relate exclusively to powers conferred on the Commission by Articles 23 and 24 of that regulation. Therefore, Article 25(3) does not apply to proceedings conducted by NCAs (para 36).

The second and more fundamental question referred to by the national court was whether Article 4(3) TEU and Article 101 TFEU must be interpreted as precluding the interpretation of provisions of national law in the sense that an act that interrupts the limitation period is only a formal act of initiating an anticompetitive practice, without the subsequent actions taken for the purpose

of such investigation falling within the same scope of the actions interrupting the limitation period.

The Court first recalled that that pursuant to Article 35 of Regulation 1/2003 the limitation periods applicable to proceedings by national competition authorities are not governed by EU law (para 44 of the Judgement). It is therefore for Member States to establish the rules on limitation periods, in compliance with the principle of effectiveness and without undermining the uniform application of EU law, as required under Article 4 TEU (paras 44–47). Referring to its previous case law (in particular Judgement of 7 December 2010, *VEBIC*, C-439/08; Judgement of 14 June 2011, *Pfleiderer*, C-360/09; and Judgement of 28 March 2019, *Cogeco Communications,* C-637/17), the Court further noted that national rules laying down limitation periods must be devised in such a way as to strike a balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient application of the competition rules (paras 48 and 49). To assess whether this balance is achieved, all elements of those rules must be considered including the specific features of competition law cases and of the fact that those cases require, in principle, a complex factual and economic analysis (paras 50-51).

Therefore, with a view to ensuring the full effectiveness of the EU competition rules, national rules on limitation must not constitute a systematic obstacle to the imposition of fines (paras 52-53). CJEU noted that a strict interpretation of the national legislation, totally prohibiting the limitation period from being interrupted by action taken subsequently during the investigation, appears likely to compromise the effective application of the rules of EU competition law (paras 54-56). In conclusion, the Court noted that it is for the national courts to determine whether the interpretation of the national limitation rules would violate the principle of effectiveness (para 57). The Court further indicated that disapplying of the legislation would not be required given that, based on the information provided by the national court, an interpretation of the Romanian competition act in conformity with EU law appeared possible (paras 58–65).

Whiteland is another landmark Judgement that confirms the key importance of the principle of effectiveness in the application of Article 101 TFEU. Most noteworthy, CJEU had already clarified in *Cogeco* (Judgement of 28 March 2019, *Cogeco Communications,* C-637/17) in the context of damages actions arising from competition law infringements that limitation periods which cannot be suspended or interrupted during proceedings before NCAs may violate (under specific conditions and viewed in the context of all relevant national provisions) the principle of effectiveness under Article 101 TFEU in conjunction with Article 4

TEU (Pereira, Brueggemann, 2021, p. 392). In *Whiteland*, CJEU extended this line of reasoning from private enforcement into public enforcement.

2.1.3 Summary

While the *Kilpailu* judgment provided important guidance on the starting point of the antitrust limitation period, the *Whiteland* judgment clarified certain aspects of the interruption of the limitation period. In *Kilpailu* the CJEU emphasised that the effective implementation of Article 101 TFEU cannot justify artificially extending the duration of the infringement period to allow its prosecution. In *Whiteland* the CJEU pointed out that national rules laying down limitation periods must be devised in such a way as to strike a balance between the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time and the effective and efficient application of the competition rules. The CJEU in this case further concluded that national statutes of limitations must not constitute a systematic obstacle to the imposition of fines.

3. Limitation Periods for the Imposition of Penalties in the Czech Republic

Since according to the relevant abovementioned case law, Article 25 of Regulation 1/2003 does not lay down limitation rules relating to the national competition authorities' powers to impose penalties, the Czech legislation (and legislation of any other member state) can provide for those limitation rules. In the Czech Republic, relevant limitation rules regarding the imposition of penalties are laid down by Section 23 of Act No. 143/2001 Sb., on Protection of Competition and on Amendments to Certain Acts, as amended (APC).

First of all, under the APC there used to be two kinds of limitation periods with the first being subjective and the second being objective. Nowadays, however, the regulation of the limitation period has been unified and there is only one limitation period that can be considered objective in view of its characteristics, which will be discussed below. According to Section 23(1) of the APC, the basic limitation period with regard to administrative offences committed under the APC is generally 10 years, with the exception of certain minor violations (e.g., failure to provide the necessary cooperation in the on-site investigation), where the limitation period is only 3 years. According to Section 23(6) of the APC, the maximum limitation period is 14 years and applies only if the basic limitation period was previously interrupted. Since the previous legal regulation of the limitation period is still applicable to offences committed before 1 July 2017 (see Judgement of the Czech Supreme Administrative Court (SAC) 7 Afs 14/2011 – 115, para 29), the issue of the subjective and objective limitation periods will

be also discussed below including further differences between subjective and objective limitation period.

3.1 Possible issues of the Czech statute of limitations

Unlike Article 25(3) of Regulation 1/2003, the APC provides an exhaustive list of reasons for the interruption of the limitation period. Section 23(4) of the APC specifically provides that the limitation period is interrupted (only) by:

a) notification of the initiation of the proceedings regarding the administrative offence;
b) notification of the statement of objections;
c) issuing a decision finding the perpetrator guilty of the administrative offence;
d) assigning the case by the Commission or by another NCA to the Office for the Protection of Competition (OPC).

This means that unlike in the proceedings conducted by the Commission, the limitation period cannot be interrupted on the basis of any other fact than those specifically stated by Section 23(4) of the APC and listed above. The OPC is thus realistically limited to only two kinds of actions it can take to interrupt the limitation period after it has already initiated the proceedings regarding the administrative offence since the administrative proceedings is initiated at the same time its initiation is notified (see Section 78(2) of Act No. 250/2016 Sb., on Liability for Administrative Offences and Proceedings Thereof, as amended (ALAO)) and since the OPC cannot decide on whether the case is assigned to it or not. Furthermore, both of these actions require the OPC to have already gathered substantial evidence to prove that an offence has actually been committed and to enable it to quantify the fine. That is because the notification of the statement of objections is according to Section 7(3) of the APC "a written notice in which the OPC shall state the essential facts of the case, their legal assessment and references to the main evidence contained in the administrative file" in which according to Section 21b of the APC the OPC "also informs the parties of the proceeding of the amount of the fine it intends to impose on the parties".

That means that in order for the OPC to be able to issue the notification of the statement of objections, it has to already have collected all the necessary evidence and other documents it needs in order to secure a conviction. It must have thus conducted all the necessary investigation the OPC needed to secure the evidence and other documents. This results in the fact that the OPC has no real way to initiate the interruption of the limitation period between initiation of the proceedings and finishing the investigation, which can in certain cases take many years in order to obtain the necessary evidence. The administrative offence can thus be time-barred even though the OPC properly conducts the

investigation and continually proceeds with the proceedings by taking actions that "constitute an important stage in the investigation and show that authority's willingness to prosecute the infringement" (*Whiteland*).

Moreover, the notification of the statement of objections directly precedes the only other action the OPC can take to interrupt the limitation period which is issuing a decision finding the perpetrator guilty of the administrative offence. Since according to Section 21b of the APC, after the notification of the statement of objections the OPC only give the parties to the proceedings an opportunity to get acquainted with the basis of the decision (all the documents and evidence that are present in the administrative file) and sets a reasonable period (of at least 15 days) within which the parties may propose supplementary evidence. After this time period, the OPC can issue the decision. The notification of the statement of objections and issue of the decision can thus only be separated, for example, by a month. Thus, it appears unreasonable and inefficient for the OPC not to be able to take an action during the course of the proceedings to interrupt the limitation period before it has gathered virtually all the necessary documentation and evidence, and once it has gathered that documentation, to be able to take two such actions in very short succession.

The above-mentioned facts concerning the current statute of limitations may fundamentally contradict the requirements set by the CJEU for the statute of limitations in the field of competition law as such, according to which, the

> national rules laying down limitation periods must be devised in such a way as to strike a balance between (…) the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time (…) and the effective and efficient application of Articles 101 and 102 TFEU (*Whiteland*, para 49)

as one of the facts that need to be taken into account in order to determine whether a national statute of limitations strikes such balance is "*the specific features of competition law cases and in particular of the fact that those cases require, in principle, a complex factual and economic analysis*" (*Whiteland*, para 51). From the description of the Czech legislation regarding the interruption of the limitation period it is thus evident, that this integral part of the Czech statute of limitations with regard to competition law does not take into account the need for a comprehensive factual and economic analysis and extensive and challenging gathering of evidence in the proceedings concerned.

The authors also note that under the current legislation the maximum limitation period cannot be subject to interruption and can be only suspended. But as the purpose of the objective limitation period is generally the same as defining the maximum length of the limitation period in Article 25(5) of Regulation 1/2003

which is also not subject to interruption, the authors do not deem that fact to be problematic.

As far as the previous, but still applicable, legislation containing subjective and objective limitation periods is concerned, these could not be interrupted in any way. This fact may be considered as being in direct contradiction to the conclusions of the *Whiteland* Judgement, but the authors determined that this is not the case due to the specifics of this previous statute of limitations. This is mainly because the limitation period was defined in such a way the subjective period applied only in the situation when the OPC didn't initiate the proceedings regarding a specific infringement in 5 years from the moment it learned that the infringement has been committed. After the OPC initiates the proceedings this subjective limitation period can no longer expire, and the specific infringement cannot thus be time-barred based on this subjective limitation period. In such a case, only the objective limitation period applies. The objective limitation period is then 10 years from the time the infringement was committed. From a substantive point of view, this means that the limitation period no longer needs to be interrupted once the proceedings have been initiated, since only the limitation period of 10 years from the date on which the infringement was committed applies, which corresponds to the legal regulation on the maximum length of the limitation period under Regulation 1/2003, if the case the limitation period under this Regulation has been interrupted. (see Article 22b(3) APC as amended until 30 June 2017).

Even though the current Czech legislation is not in direct contradiction with the conclusions of the *Whiteland*, (see *Whiteland*, para 66(2)), as under the APC, notification of the initiation of the proceedings regarding the administrative offence is not the only nor the final action the OPC can adopt to interrupt the limitation period, the authors believe that the provision of an exhaustive list of actions of the OPC which lead to an interruption of the limitation period contravening the principle of efficiency. It may also have a significant negative impact on the preservation of the useful effect of competition rules laid down by the TFEU or EU law in general, and thus be in direct conflict with EU law. From this perspective, this could be a situation where the Czech Republic, as a Member State, makes it virtually impossible or excessively difficult to apply EU law, although specifically in the area of competition law it must ensure that the rules it lays down or applies do not prevent the effective application of Articles 101 TFEU and 102 TFEU. Such a regulation would then be in direct contradiction with the constant case law of the CJEU, see for example *Whiteland*, paras 46–47 or Judgement of the Court of Justice of 14 June 2011, *Pfleiderer AG v. Bundeskartellamt* (C-360/09), EU:C:2011:389, para 24.

3.2 Methodology

As the CJEU states

> [I]n order to determine whether national rules on limitation strike such a balance, all elements of those rules must be taken into consideration (…), which may include, inter alia, the date from which the limitation period begins to run, the duration of that period and the rules for suspending or interrupting it.

In order to conclude that a national statute of limitations does not strike the necessary balance, it is thus not sufficient to conclude that the specificities of competition law are not respected by only one of the elements of the respective statute of limitations. In this case, in order to assess the possible above-mentioned conflict of Czech law with EU law, it is thus necessary to evaluate the statute of limitations system in Czech competition law as a whole with all its aspects, not just its specific parts in isolation.

The authors determined that in the context of enforcing EU competition law the best example of a statute of limitations that strikes the perfect balance between provision of, on the one hand, sufficient legal certainty and ensuring that cases are dealt with within a reasonable time and, on the other hand, the effective and efficient application of Articles 101 and 102 TFEU would be the EU law itself as Regulation 1/2003 comprehensively sets out the statute of limitations with regard to EU competition law and its individual aspects. This is because it would be completely illogical and disproportionate if a Member State could be accused of having an unbalanced statute of limitations in the above-mentioned sense if the statute of limitations was identical to the one inherent to EU law. It is thus only logical, that the benchmark for achieving sufficient balance should be EU law itself and the balance of national statute of limitations shall thus be compared to the balance which is inherent to the statute of limitations provided for in Regulation 1/2003.

Whether the national statute of limitations strikes the necessary balance according to the aforementioned CJEU case law should thus determined on the basis of a comparison of the national statute of limitations as a whole with all its individual aspects to the statute of limitations which is provided for in Regulation 1/2003. But as this would be almost impossible to do with the concept of the statute of limitations as a whole, for the sake of practicality, the author determined that comparison should be made first on the level of the individual aspect of each of those statutes of limitations. Only after comparing the individual aspect can both statutes of limitations be compared comprehensively as a whole.

In this context, it can be concluded that the deficiencies of one integral aspect of the statute of limitations may be compensated by the nature and specification of

another integral aspect of the statute of limitations. As the goal is to strike the balance between legal certainty which includes ensuring that cases are dealt with within a reasonable time and the effective and efficient application of Articles 101 and 102 TFEU, ways of achieving this goal can be illustrated by the following simplified example. We can imagine a virtual balance scale, where on one side we put the individual aspects of the statute of limitations (e.g., the legal regulation of interruption of the limitation period) which inclines more heavily towards the legal certainty and ensuring that cases are dealt with within a reasonable time and on the other side we put individual aspects of the statute of limitations (e.g., the basic length of the limitation period) which inclines more heavily towards the effective and efficient application of Articles 101 and 102 TFEU. For simplicity, the individual aspects of the statute of limitations (e.g., the rules for determining the date from which the limitation period begins to run) which strike the ideal balance on their own can be put aside. Then after putting all the individual aspects of the statute of limitations on the respective sides of the virtual balance scale, we can determine whether or not the statute of limitations as a whole (including all its individual aspects) strikes the necessary balance between the aforementioned principles.

Based on this, the authors have further assessed the statute of limitations system in the Czech competition law as a whole with all its aspects.

3.3 Analysis and Problem Solution

The authors believe that specifically the lack of consideration of the specificities of competition law enforcement by the rules for determining the grounds for an interruption of the limitation period (which the authors identified and described above) can be balanced out by the very length of the limitation period set by the APC. As mentioned above, the basic and general limitation period provided for in the APC is 10 years which is twice as long as the limitation period laid down in Regulation 1/2003. It is actually as long as the maximum length of the limitation period according to Article 25(5) of Regulation 1/2003 which determines the maximum length of the limitation period in the case it was interrupted (not including the instances where it was also suspended). It is evident, that the basic limitation period this long inclines more heavily towards the effective and efficient application of Articles 101 and 102 TFEU. The authors determined that the basic limitation period of 10 years is sufficiently long to ensure the effective and efficient application of competition law in order to compensate for all the negative effects of the OPC not really having an opportunity to take an action which leads to the interruption of the limitation period after it has initiated the proceedings and before it has gathered all the necessary evidence and other documentation. That is because a limitation period this long can even without

being interrupted ensure that the administrative offence can be punished when the OPC dully performs its duties under the APC and shows real willingness to prosecute the infringement. This means that when both aspects of the limitation period are placed on the virtual scale those two aspects balance out.

Moreover, we have to take into account that the limitation period gets interrupted at the beginning of the respective proceedings by the notification of the initiation of the proceedings regarding the administrative offence. This means, that after the initiation of each proceedings the limitation period of 10 years starts running afresh and can be according to Article 23(6) APC a maximum 14 years in total (not including possible suspension of the limitation period). This on the other hand means that should the basic limitation period be prolonged even further it would start to incline toward the effective and efficient application of competition law such heavily that it would be almost impossible to balance out by the other aspects of the limitation period. Prolonging the limitation period while keeping multiple opportunities (including the notification of the initiation of the proceedings regarding the administrative offence) to interrupt it or keeping this length of the limitation period and increasing the number of acts that interrupt it (or defining those acts using a non-exhaustive list) could, for example, result in the OPC negligently failing to prosecute administrative offences for prolonged time periods as it would be certain it could do so later (e.g., after many years). This could, in turn, lead to overall lower efficiency and effectiveness of the application of competition law as with the greater amount of time that passed from the instance the administrative offence was committed e.g., the availability, quality, and quantity of evidence start to decline rapidly. The authors are thus convinced that prolongation of the limitation period or broadening the possibilities for its interruption would only have a significant negative impact on the legal certainty and on ensuring that cases are dealt with within a reasonable time.

As far as the suspension of the limitation period is concerned Section 23(3) APC states that the limitation period is suspended for the duration of proceedings conducted in connection with an offence before an administrative court. This is very similar to the legislation contained in Regulation 1/2003 according to which the limitation period shall be suspended "for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice" (see Article 25(6) 0f Regulation 1/2003). From a material point of view, it could be argued that Czech and EU legislation regarding the suspension of the limitation period is identical. That is because the CJEU is the review body in regard to decisions on the fines and penalties issued by the Commission and Czech administrative courts are *inter alia* the review body in regard to decisions on the fines and penalties issued by the OPC. The authors concluded that legislation that provides only one reason for the suspension of the limitation

period which is that the proceedings regarding the review of the specific decision is pending before the relevant reviewing body should be determined as being neutral with regard to inclination towards legal certainty and on ensuring that cases are dealt with within a reasonable time and the effective and efficient application of competition law. That is because such legislation cannot adversely affect legal certainty or the reasonability of the length of the proceedings, as the review proceedings which trigger the suspension of the limitation period can come into play only after the decision on the administrative offence was already issued by the Commission or the OPC. For this reason, the authors concluded that the Czech legislation on the suspension of the limitation period with regard to competition law is neutral as it cannot upset the balance between, on the one hand, assuring a high level of legal certainty and reasonable length of the proceedings and, on the other hand, the effective and efficient application of antitrust legislation. The same was true for the previous statute of limitations where the limitation period was also suspended for the duration of proceedings conducted in connection with an offence before an administrative court but based on the provision of Section 41 Act. No. 150/2002 Sb., Administrative Procedure Code, as amended (see Judgement of the SAC, 5 Afs 7/2011–799, not in numbered paragraphs).

Determining the effect of the legislation regarding the date from which the limitation period begins to run on the aforementioned balance (as the last aspect of the Czech statute of limitations that the authors take into account with regard to this contribution) proved to be much more challenging compared to the other aspect of the Czech statute of limitations. First of all, in relation to the previous legislation, there is a difference between the beginning of the subjective limitation period and the beginning of the objective limitation period.

As it turns out, the start of the subjective limitation period has been interpreted inconsistently even by the relevant administrative courts including the SAC. Concerning the beginning of the subjective limitation period, the authors found out, that there were two lines of interpretation of the beginning of the limitation period which contradict each other. The first one deemed the limitation period to begin at the latest when the OPC became aware of at least the beginning of a violation of a prohibition or failure to comply with an obligation under the APC even in the case of continuing or repeated infringements (see e.g. Judgement of the SAC, 2 As 204/2014 – 71, paras 51, 54, and 57; or Judgement of the Regional Court in Brno, 62 Af 23/2016 – 272 (not in numbered paragraphs) which was later overruled by the SAC). The second one deemed the limitation period to begin with regard to continuing or repeated infringements when the OPC became aware of a violation of a prohibition or failure to comply with an obligation under the APC but not sooner than the continuing or repeated

infringement ceased. In order for the limitation period to begin running in the case of continuing or repeated infringements the second line of interpretation determined that the APC must necessarily be aware of the entire administrative offence, i.e., about the "commission" of the offence, and not only about its beginning or part of the offence, i.e., about it "being continuously committed" (see e.g. Judgement of the SAC, 5 Afs 7/2011–799, not in numbered paragraphs, or Decision of the President of the OPC of 3 January 2019, ÚOHS-R12,14/2017/HS-00023/2018/310, paras 190–194).

Moreover, according to relevant case law, the moment at which the OPC becomes aware an infringement needs to be interpreted as being based on objective facts or information and although they do not have to be particularly qualified facts or information, they need to be sufficient in order to allow a preliminary legal assessment that the infringement occurred. This means that the facts or information need to have a necessary degree of certainty and credibility to ensure that the administrative procedure is not initiated on the basis of information that is completely unverified, completely unclear, or clearly unreliable. (see e.g., Judgement of the Regional Court in Brno 30 Af 29/2016 – 262, not in numbered paragraphs). This results in a situation in which in order to determine the date from which the limitation period begins to run in a specific case it is necessary to assess the OPCs level of knowledge that the respective infringement has been committed on a case-by-case basis which could in turn negatively impact the legal certainty as nobody could precisely predict at which exact moment will the OPC gather enough information in order to obtain the necessary degree of certainty that an infringement could have been committed in each respective case.

On the other hand, there has been the objective limitation period, which begins from the day the administrative offence was committed, which is in the case of continuing or repeated infringements interpreted as the day on which the infringement ceases. This is generally accepted even by the SAC in the abovementioned Judgements that contradict each other in regard to the beginning of the subjective limitation period (see Judgement of the SAC of 14 April 2015, 2 As 204/2014 – 71, para 46, 47 and Judgement of the SAC of, 5 Afs 7/2011 – 799, not in numbered paragraphs). This corresponds to how the beginning of the limitation period is determined in the case of continuing or repeated infringements according to Article 25(2) of Regulation 1/2003 and thus can also be determined as having a neutral effect on achieving the balance between, on the one hand, providing sufficient level of legal certainty and ensuring that cases are dealt with within a reasonable time and, on the other, the effective and efficient application of competition law. The authors are thus convinced that in relation to the previous legislation the existence of the objective limitation period with starting date determined this way is a sufficient guarantee to maintain a high level of legal

certainty which means the abovementioned inability to precisely predict from which exact moment will the subjective limitation period start running should not be considered an issue.

Moreover, the above-mentioned discrepancy in the case lawconcerning the time of commencement of the subjective limitation period in the case of continuing or repeated infringements has hopefully been resolved once and for all by virtue of the recent case law which definitely states that the concept of the beginning of the subjective limitation period in the case of continuing or repeated infringements which determined that the limitation period started when the OPC became aware of at least the beginning of violation of a prohibition or failure to comply with an obligation under the APC is unsustainable (see Judgement of the SAC, 2 As 69/2018 – 53, paras 42, 43, 45). In this case, the SAC applied (according to the relevant case-law of the Czech Constitutional Court (CC) the basic legal principle according to which in the case of continuing or repeated infringements the legal relevance is only conferred in the moment of the end of the infringement (see Judgement of the CC, II. ÚS 635/18, para 31). This means that even in the case of continuing or repeated infringements the subjective limitation period can start running when the OPC becomes aware of a violation of a prohibition or failure to comply with an obligation under the APC but not sooner than the continuing or repeated infringement ceased. Continuing or repeated infringements cannot thus be time-barred before the respective infringement as a whole ceases. This corresponds to how continuing or repeated infringements are also dealt with by Regulation 1/2003 except there the limitation periods starts automatically when the infringement ceases and not at the time the relevant body obtains a sufficient level of knowledge that an infringement has been committed. Though as stated above, this difference should be not determined as problematic as the objective limitation period still applies.

To sum up, the authors would describe the issue of determining the beginning of the limitation period in the previous Czech legislation quite specific as to the existence of objective and subjective limitation periods both of which have the date of their beginning determined differently. That is because in contrast the relevant EU law only defines a limitation period which more closely resembles the objective limitation period as it also starts running from the date the infringement was committed. Despite the above-mentioned specifics, the authors concluded that the rules for determining the beginning of the limitation period (as a comprehensive institute of law) can be considered neutral in relation to achieving the balance between, on the one hand, providing a sufficient level of legal certainty and ensuring that cases are dealt with within a reasonable time and, on the other hand, the effective and efficient application of competition law. This is mainly because of the existence of the objective limitation period

the beginning of which is determined on the same basis as the beginning of the limitation period defined by Regulation 1/2003.

Under the current legislation, the beginning of the limitation period should be determined based on the provisions of Section 31 of ALAO. This act regulates, among other things, the bases of liability for administrative offences, including the general statute of limitations. Since the APC does not contain a special regulation for determining the beginning of the basic limitation period and since the use of the relevant provisions of this act are not excluded they should be fully applicable. This conclusion can be further supported by the fact that the changes in the APC statute of limitations were made by an Act No. 183/2017 Sb. which was adopted in accordance with the general change in the concept of administrative offences in the Czech Republic, which also changed and unified the regulation of the statute of limitations regarding administrative offences. Under the current legislation, the beginning of the limitation period is thus determined based on the date of the commission of the infringement and begins on the day after the infringement has been committed. In the case of continuing infringements, it is based on the date on which the infringement ceases and begins on the day after the infringement has been ceased. And in the case of repeated infringements, it is based on the date when last partial attack occurred and begins on the day after the last partial attack occurred (see Section 31(1) and (2) ALAO). The beginning of the limitation period under the current Czech law corresponds to the regulation of this issue in Regulation 1/2003 (except for the one-day difference). Based on this the authors determined that even the current legislation which determines the beginning of the limitation period is neutral and does not negatively affect the necessary balance between legal certainty and efficient and effective application of the competition law.

The authors then took into account the individual aspects of the limitation period under the current and the previous statute of limitations, comparing them to European Union legislation and assessing the statute of limitations in the Czech competition law as a whole legal institute. In the light of the above, the authors concluded, that the current and previous Czech statute of limitations can be considered as striking a good balance between, on one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time and, on the other, the effective and efficient application of Articles 101 and 102 TFEU. From this point of view, it can be concluded that the current and previous Czech statute of limitations complies with the requirements set out in *Whiteland*.

Although, the authors would like to explore in more detail the possibility of slightly shortening the current basic subjective (e.g., to 7-9 years) and objective limitation periods (e.g., to 12-13 years), which could result in an even better level

of balance of the institute as a whole when compared to the statute of limitations applicable under Regulation 1/2003. That is because shortening of the respective limitation period could result in a slight increase of the legal certainty and could also help to ensure that cases are dealt with within a reasonable time. Unfortunately, there is no further space in this contribution for the authors to elaborate on this possibility.

Considering the interpretation of the beginning of the limitation period with regard to the *Kilpailu* case discussed above, the authors (after thorough research) came to the conclusion that neither the OPC nor the relevant Czech Administrative Courts interpret the date at which the infringement was committed or in respect to continuing or repeated infringements the date at which such an infringement ceased contrary to the conclusions made by the CJEU in *Kilpailu*. The authors were unable to find any relevant case law from which it would appear that the OPC tried to directly or indirectly artificially extend the duration of the infringement period in order to allow prosecution of the respective offence. Even though no such case law was found the OPC should still bear in mind the conclusions of the above-mentioned Judgement of the CJEU. From this point of view, the current and previous Czech statute of limitations should be considered as consistent with the conclusions of *Kilpailu* case.

4. Conclusion

In conclusion, the authors discovered that the current and previous Czech statute of limitations strikes the necessary balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient application of the competition rules. This conclusion can be made even though the current rules for interruption of the limitation period can be determined to be contrary to the finding of the *Whiteland* judgement, as those rules upset the necessary balance at the expense of effective and efficient application of the competition rules. This is because this negative effect can be balanced out by the length of the limitation period itself, which is generally twice as long as the limitation period under Regulation 1/2003. The authors also determined that the other aspects of the current Czech statute of limitations including rules for the suspension of the limitation period and rules for determining the beginning of the limitation period have a neutral effect on the necessary balance. Concerning the previous Czech statute of limitation, the authors came to the conclusion that all its individual aspects have a neutral effect on the necessary balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient

application of the competition rules. This means also that the previous statute of limitations as a whole achieved the necessary balance and was regulated and interpreted in accordance with the relevant findings of the *Whiteland* judgement.

Concerning the *Kilpailu* case, the authors were unable to identify any cases where the OPC tried to directly or indirectly artificially extend the duration of the infringement period in order to allow prosecution of the respective offence. The authors thus came to the conclusion that neither the OPC nor the relevant Czech Administrative Courts interpret the date at which the infringement was committed or in respect to continuing or repeated infringements the date at which such an infringement ceased contrary to the conclusions made by the CJEU in *Kilpailu*.

Based on the summarisation of thorough research of the current and previous Czech statute of limitations applicable with regard to the imposition of fines and penalties in Czech competition law, the authors conclude that the current and previous legal regulation of the relevant statute of limitation in Czech competition law complies with the requirements of the relevant CJEU case law, in particular with the *Whiteland* and *Kilpailu* judgments.

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Again, on *ne bis in idem*: Do We Need to Rethink our Approach?

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Abstract

The interpretation of *idem* in the *ne bis in idem* principle is far from unambiguous; even though a decade ago, it seemed to be settled by the *Zolotukhin* judgement of the European Court of Human Rights, the doctrine has shifted (and clouded) since then. Still, one area of law seems to be subject to an entirely different approach by the Court of Justice –competition law. Even though the fact that the same principle is interpreted in a different way by the same court in the area of competition law, on the one hand, and everywhere else, on the other, has been repeatedly subjected to criticism, the Court has kept its stance. Currently, the Court has once again been asked to rule on this principle in the *Nordzucker and Sudzucker* case, in which the Advocate General Bobek has recently published his opinion. He calls – once again – for the unification of the interpretation of *idem* across the EU law, but in a completely different way than before, introducing the three-pronged test as a universal approach to *idem*. Is the Court likely to follow his advice? And what would that mean for antitrust enforcement?

Keywords: ne bis in idem, parallel antitrust enforcement, protected legal interest

JEL Classification: K210

1. Introduction

The modernization of EU competition law in 2004, based on the Regulation 1/2003, established, among others, the European Competition Network (ECN), a network consisting of national competition authorities (NCAs) and the Commission. Thus, a system of parallel competences was created, in which both the NCAs and the Commission can apply the EU competition law rules in particular Articles 101 and 102 TFEU (ECN Notice, para 1).

The rules according to which it may be determined which ECN member is to conduct proceedings in a specific case do not provide for exclusive competences; instead, they only set criteria to identify a *well-placed* authority (i.e., not the *best*

placed one). Thus, even though Regulation 1/2003 proclaims as its objective that each case should be handled by a single authority, it is possible that more authorities will deal with a single case (ECN Notice, paras 5 – 15).

Parallel proceedings, i.e., situations when the same case is investigated (and possibly, a fine is imposed) by multiple ECN members, are relatively rare in practice. Five years after the modernization, the Commission reported only a single case (CSWP Report, p. 66). Still, the saga of Booking.com, where the putatively anticompetitive vertical agreements of that undertaking came under review in several EU Member States (Report on booking sector), resulting in some countries in a prohibition decision and in others in a commitment decision, whereas in other countries, the proceedings were closed, demonstrates that parallel proceedings may constitute a real problem. In this case, materially the same conduct of the same company was investigated by 16 NCAs in parallel.

Apart from "practical" issues for the undertakings concerned, who need to concentrate on multiple proceedings instead of just one, parallel proceedings raise the fundamental question of whether they are in line with the *ne bis in idem* principle. This problem is exacerbated by the fact that the reasoning of the Court of Justice of the European Union (CJEU) on *ne bis in idem* in the area of competition law is arguably not in line with the jurisprudence of the European Court of Human Rights (ECtHR) and even the CJEU's own case law in other areas of EU law.

The CJEU has so far been avoiding this inconsistency issue. It has nonetheless been lately invited to revisit the question of parallel proceedings in the *Nordzucker and Sudzucker* case, in which Advocate General Bobek delivered his opinion in September 2021; the CJEU has not decided yet. Before the judgement will be passed, we would like to look at the issue of *ne bis in idem* anew.

2. Problem Formulation and Methodology

In this contribution, we will argue that the interpretation of *ne bis in idem* is inconsistent in the CJEU's practice and that the specific approach it adopted vis-à-vis antitrust cases is not justified. On the basis of this, and taking into account the opinion of AG Bobek, we will try to outline a new approach to *ne bis in idem* for the future.

In order to do so, we will first analyse the seminal case law on *ne bis in idem* of the CJEU in *Schengen* cases, followed by the ECtHR jurisprudence and the "general" CJEU case lawon the Charter of Fundamental Rights (Charter) and finally the specific judgements concerning competition law, taking into account the relevant literature. On the basis of this, we will propose recommendations for future practice.

3. Analysis and Problem Solution

The *ne bis in idem* principle constitutes a fundamental procedural guarantee in criminal proceedings; even though infringements of EU competition law do not technically constitute a crime, it is uncontested that the principle of *ne bis in idem* fully applies to them as well (di Frederico, 2011, p. 243). In the European Convention on Human Rights (Convention), it is defined in Article 4 of Protocol No. 7, whereas in the Charter, it is provided for in Article 50. The wording of these two provisions is practically identical, both of them prohibit repeated prosecution for the same offence (*même infraction*).

In addition to the Convention and the Charter, it is also important to mention the Convention implementing the Schengen Agreement (CISA), which also incorporates the *ne bis in idem* principle, though formulated in a different way: whereas the Convention and the Charter prohibit second proceedings concerning the same offence, the CISA refers to the same act (*les mêmes faits*). A similar formulation can also be found in the European Arrest Warrant.

3.1 Different Strands of Jurisprudence

The provisions on *ne bis in idem* have been repeatedly subject to interpretation. In this chapter, we will present the most relevant jurisprudence as it stands today.

3.1.1 The CJEU's Schengen case law

We shall start our analysis with the *Van Esbroeck* judgement from 2006. Mr. van Esbroeck, a Belgian national, was sentenced in Norway for trafficking narcotics into Norway. After he was released and escorted back to Belgium, he was sentenced there for trafficking narcotics out of Belgium. According to the CJEU, the fact that national criminal laws are not harmonized makes the legal criterion (same offence) inapplicable in practice, as it would vary from state to state. Therefore, the CJEU concluded that the only relevant criterion for the application of Article 54 of the CISA is the identity of the material acts [*l'identité des faits matériels*], understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together (*Van Esbroeck*, para 36).

The same interpretation was later adopted by the CJEU concerning the similarly-worded European Arrest Warrant (*Mantello*, para 40).

3.1.2 The ECtHR's case law

Four years after *Van Esbroeck*, the ECtHR reviewed its interpretation of the *ne bis in idem* principle in the *Zolotukhin* case in 2010. The facts of the case were rather complicated; in essence Mr. Zolotukhin, while drunk, was at different places verbally offensive to different police officers and threatened them with physical violence. He was first sentenced for an administrative offence, consisting

in swearing in a public place (police station) to the police officers who first interrogated him (Ms. Y and Captain S), and later in criminal proceedings. In that, he was convicted for swearing at a superior police officer (Major K), who was drafting a report on his administrative offence, physically insulting him (by spitting on him) and threatening him with violence (to kill him); the criminal court also investigated Mr. Zolotukhin's swearing at Ms. Y and Captain S, but it ultimately dismissed these charges.

The ECtHR admitted that the different interpretation of *idem* in its past judgements has produced legal uncertainty, and the Grand Chamber thus needed to harmonise the interpretation thereof. It concluded that only the identity of the facts (*faits identiques*) is decisive, not the legal qualification, and that *idem* arises from identical facts or facts which are substantially the same (*Zolotukhin*, paras 81, 82, and 84). Despite the different wording of the Convention and CISA, the ECtHR was clearly inspired by the *Van Esbroeck* judgement.

This re-interpretation seemed to have settled the question of *idem*, the practical issues at national level, that frequently delimit competences to apply specific pieces of legislation among different public authorities, nonetheless led the ECtHR to revisit this issue in the *A and B* case in 2016. According to this judgement, parallel proceedings concerning the same facts might be in line with the *ne bis in idem* principle, as long as they form a coherent whole so as to address different aspects of the social problem involved, provided that such parallel proceedings are the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice (*A and B*, paras 121 and 122); five requirements need to be met in order for such parallel proceedings not to constitute *bis* (*A and B*, para 132).

Thus, it seems that the ECtHR has lately abandoned its purely *faits identiques* approach.

3.1.3 The CJEU's case lawon the Charter

Inspired by its *Schengen* case law, the CJEU ruled in 2018 in the *Menci* case that it is prepared to interpret the Charter in the same way as CISA, putting emphasis on the facts and concluding that Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes (*Menci*, para 35). The CJEU thus arrived to the same conclusion as the ECtHR did in *Zolotukhin*.

Despite this unambiguous wording, the CJEU nonetheless also took into account the ECtHR's *A and B* judgement; it concluded that subsequent proceedings concerning the same facts are permissible under specific circumstances, not because they are not *idem* (as the ECtHR concluded), but rather because

a permissible limitation to the *ne bis in idem* principle may be applied according to Article 52(1) of the Charter (*Menci*, paras 40 – 63).

The *Menci* judgement thus seems to head in the same direction as the ECtHR does. Before concluding that the ECtHR and the CJEU interpret the *ne bis in idem* principle in practice in the same way, it is nonetheless necessary to examine the CJEU's specific approach, developed in antitrust cases.

3.1.4 The CJEU's antitrust case law

The CJEU originally developed its approach to the *ne bis in idem* principle in antitrust cases, specifically with regard to international cartels. In the seminal judgment *Aalborg Portland* of 2004, the CJEU proclaimed that *idem* is characterised not only by the facts but also by their legal qualification, or more specifically, by the legal interest protected by the infringed legislation; according to the CJEU, the application of the *ne bis in idem* principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected; under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset (*Aalborg Portland*, para 338).

This threefold condition is often described as the "three-prong test", and it is characteristic for all the subsequent *ne bis in idem* cases in the area of competition law. It was formulated well before the *Van Esbroeck* judgement, it is therefore surprising that the latter does not in any way refer to the former and that the CJEU did not interpret the same principal in the same way.

The CJEU returned to the *ne bis in idem* principle in antitrust proceedings a decade later in the *Toshiba* judgement of 2012. Not discussing the details of the case (Monti), the crucial question which was expected from the CJEU was how to deal with the *Zolotukhin* judgement, which clearly dismissed the relevance of the legal criterion for *idem*. Surprisingly, the CJEU did not give up its "three-prong test". Even though Advocate General Kokott argued to the contrary (AG Kokott, 2011, para 118), the CJEU concluded once again that in competition cases, the application of the *ne bis in idem* principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (*Toshiba*, para 97), not even mentioning the ECtHR's or its own *Schengen* case law.

The CJEU has kept the same approach up till today, most recently in 2021 in the *Slovak Telekom* case, three years after *Menci*, without referring to it or the *Zolotukhin* judgement.

3.2 Is antitrust so special?

It is clear from the outline of the case law above that the CJEU's interpretation of *idem* in the area of competition law is not only difficult to reconcile with the ECtHR jurisprudence, but also different from its "general" interpretation of the same principal enshrined in the Charter.

This has not gone unnoticed. It is submitted in scholarly texts that it is difficult to identify a theoretical basis that would justify a differentiated application of the *ne bis in idem* principle in the field of competition law and in all other areas of law; if the *ne bis in idem* principle precludes the repeated prosecution of the same act of drug trafficking, than it is not apparent why it should permit repeated prosecution of the same anti-competitive conduct (Peers, Hervey, and Ward, 2014, p. 1412). Several Advocates General have argued in the same way (AG Sharpston, 2006, paras 155 and 156; AG Kokott, 2011, para 118; AG Wahl, 2018, para 45; AG Bobek, 2021a, para 6).

Is this difference justified? Are there any intrinsic characteristics connected with competition law that call for a specific interpretation of the *ne bis in idem* principle? We do not think so (AG Bobek, 2021a, para 92).

It might be argued that antitrust enforcement is special because antitrust practices, in particular cartels, are frequently international, exceeding the state boundaries. A NCA would be able to investigate such a practice in full only if it was allowed to apply the competition law extraterritorially, i.e., taking into account its effects in other Member States; conversely, if the NCAs lacked extraterritorial jurisdiction, an international anticompetitive practice would be investigated in full only either by the Commission (having unlimited jurisdiction throughout the EU) or by all the NCAs involved, thus making the parallel proceedings inevitable.

In our previous papers on this topic, we have argued in favour of exterritorialy (Petr, 2020, p. 90), in line with some other scholars (Nazzini, 2015, p. 132) but admittedly contrary to others (Lenaerts and Gerard, 2004, p. 322). The CJEU has not yet delivered a judgement on this issue, Advocate General Bobek however opined that the EU law does not provide a legal basis for exterritorial application (AG Bobek, 2001b, paras 84 and 85).

Under such interpretation, parallel proceedings need to be accepted in order to secure effective antitrust enforcement. So yet again: may parallel proceedings be reconciled with the *ne bis in idem* principle?

3.3 The theory of "non-overlapping" effects

The *Toshiba* judgement made it clear that the CJEU accepts parallel proceedings not because different NCAs pursue different objectives (i.e., the "interest protected" criterion), but because the facts were different, specifically, because

the temporal and territorial scope of the investigations by several competition authorities did not overlap. According to the CJEU, whether the undertakings have adopted conduct having as its object or effect the distortion of competition cannot be assessed in the abstract but must be examined with reference to the territory in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect (*Toshiba*, para 99).

The CJEU therefore concluded – in line with the reasoning of the Advocate General (AG Kokott, 2011, para 131) – that as long as the decisions of different NCAs cover different territorial and temporal aspects of the same conduct, their jurisdictions do not "overlap" and the *ne bis in idem principle* cannot be breached, as there is no *idem* (*Toshiba*, para 98).

Thus, the CJEU does not "need" the three-pronged test to secure the compatibility of parallel proceedings with the *ne bis in idem* principle (Petr, 2017); it therefore remains a mystery why it keeps referring to it, despite its *Menci* case-law.

It is worth mentioning that the same interpretation of the identity of the facts in antitrust proceedings is suggested by Advocate General Bobek, claiming that the prohibition of Article 50 of the Charter applies only in so far as the temporal and geographical scope of the subject matter is the same (AG Bobek, 2021b, para 87).

It thus seems that the theory of "non-overlapping" effects makes parallel application compatible with the *ne bis in idem* principle, whether it is interpreted in line with the *Toshiba*-style three-pronged test or the *Menci*-style facts-only approach. From this point of view, there is nothing preventing the CJEU from abandoning the three-pronged test and adopting the universal approach, outlined in *Menci*, which is arguably more compatible with the ECtHR case law.

It is worth mentioning that Advocate General Bobek argues to the contrary, in favour of making the three-pronged test a universal benchmark for assessing *idem* according to the Charter; the facts-only approach shall be reserved for *Schengen* cases (AG Bobek, 2021a). Despite such a re-interpretation of *idem* would mean a "revolution" in EU law, it would – for the reasons stated above – have no direct effects on competition law enforcement; for that, the theory of "non-overlapping" jurisdictions is decisive.

This leads us to the final question: even though repeatedly endorsed by the CJEU, is this theory in line with the *ne bis in idem* principle?

3.4 Time to think again?

We put forward it is not. The ECtHR understands *idem* as a set of concrete factual circumstances which are inextricably linked together (*Zolotukhin*, para 84); so does the CJEU (*Menci*, para 35). The facts themselves are therefore decisive.

If the principal criterion for determining whether the *ne bis in idem* principle was breached was instead only the question whether the parallel proceedings are "non-overlapping", the assessment would not be based on the facts alone, but rather on the discretion of competition authorities to open proceedings (*Nazzini*, 2015, p. 146). Even the criteria in *A and B* are arguably not met.

It is therefore submitted that if specific conduct of the same undertakings constitutes a single continuous conduct under the competition law, it ought to be treated as a single case, as *idem*, and may be, as far as its effects within the EU are concerned, investigated only by a single ECN member, be it the Commission or an NCA. For this approach to be effective, the NCAs would need to be able to apply the EU competition law exterritorialy. Should the CJEU concur with Advocate General Bobek that the current EU law does not allow it, Regulation 1/2003 would need to be amended.

In order to achieve compliance with the *ne bis in idem* principle, interpreted in the way suggested above, further legislative changes would be necessary in EU competition law; in particular, Regulation 1/2003 ought to be amended in order to make sure that within the EU, only a single competition authority may be dealing with the same case, even when the anticompetitive conduct effects markets in more Member States. Corresponding amendments would have to be made in the ECN Notice.

It should also be discussed whether the rules determining the competence of a particular ECN member, contained in the ECN Notice, are sufficient. Admittedly, the criteria according to which a "well-placed" authority (which would need to be re-named in order to identify the "best-placed" one) may be chosen are rather flexible, it is nonetheless the case that they work well in practice, which may be demonstrated by the very low number of re-allocated cases (CSWP Report, para 220). In our opinion, it is thus not necessary to further refine these criteria.

4. Conclusion

Discussions concerning the *ne bis in idem* principle have so far been mostly focused on the three-pronged test and its compatibility with the ECtHR's jurisprudence. We argue in this contribution that a single standard for *idem* needs to be established throughout EU law, for the purposes of antitrust parallel proceedings, it is nonetheless immaterial whether it would be the *Toshiba*-style three-pronged test or the *Menci*-style facts-only approach.

The decisive argument allowing for parallel proceedings is the theory of "non-overlapping" jurisdictions; as long as different competition authorities are dealing with different territorial and temporal aspects of the same conduct of the same undertakings, there is no *idem*. We argue that such an interpretation does not

fulfil the requirement of legal certainty, inherent to the *ne bis in idem* principle, because the number of antitrust proceedings within the EU is dependent only on the willingness of competition authorities to open proceedings. We therefore put forward that the ECN system needs to be adapted to allow for only a single investigation of the same case in the EU.

At first sight, such amendments would completely overhaul the system of competition law enforcement in the ECN. It is put forward that primarily, they would dramatically increase the legal certainty of undertakings concerned. At the same time, they would not endanger the effectiveness of EU competition law enforcement, as parallel proceedings are already rare in practice.

Adoption of such changes presupposes a high level of mutual trust among the ECN members. After almost 20 years of creating and maintaining a common competition culture in Europe (ECN Notice, para 1), we may hope that such trust has been established and that the NCAs, now empowered by the ECN+ Directive, might be ready to support such changes.

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Judicial Review of Commission Decisions in Antitrust and State Aid Cases : C-160/19 P Comune di Milano and Beyond

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Abstract

This paper addresses the issue of the standard of review in EU antitrust cases vis-à-vis another area of EU competition law – specifically, that of state aid. The standard of review in antitrust cases *inter alia* presupposes that Union Courts, which are in principle tasked to carry out a full judicial review, cannot refrain from reviewing the Commission's interpretation of information of an economic nature and must establish whether the evidence relied on is factually accurate, reliable, consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it. This "antitrust standard" of judicial review could have been seen as a template for other areas of EU competition law. However, recent decisions of the Court of Justice, including the decision in C-160/19 P *Comune di Milano*, appear to limit the influx of antitrust case law into other areas of EU competition law, to the detriment of the quality of judicial review. Such a lessening of judicial review undoubtedly constitutes an important issue for private applicants, and thus merits further comment. Thus, this paper attempts to present the state of play as regards judicial review of powers exercised the Commission both in the area of antitrust and that of State aids.

Keywords: Judicial Review; Antitrust; State Aid; European Commission; Decisions

JEL Classification: K2, K3, K4, K210

1. Introduction

This submission presents the issue of judicial review of Commission decisions made in state aid cases vis-à-vis the standard of review in antitrust cases.

The latter may be encapsulated in the findings of the Court of Justice in *Infineon*, in that system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which a provision is made in Article 263 TFEU, which may

be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission.

Furthermore on the latter, the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the appellant and taking into account all the relevant evidence submitted by the latter (Case C-99/17 P *Infineon Technologies AG v European Commission*, paras 47–48, Case C-583/13 P *Deutsche Bahn AG and Others v European Commission*, para. 34, with reference to *Chalkor*). The scope of that review is in principle full (Case C-382/12 P *MasterCard Inc. and Others v European Commission*, para. 155)

Where there would be complex economic assessments made by the Commission, a review on part of EU Courts is confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (Joined cases *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Others*, paras 85 and 156). Nevertheless, that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. The EU Courts must, among other things, not only establish whether the evidence put forward is factually accurate, reliable, and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission*, para. 54). In my view, this naturally falls within the requirement that the review should include whether the facts have been accurately stated.

As regards to the former, the Court has been known to draw upon other areas of competition law to develop its jurisprudence in the area of state aid (cf. Case C-290/07 P *European Commission v Scott SA*, para. 65: Case C-12/03 P *Commission of the European Communities v Tetra Laval BV*, and mergers; Case C-303/13 P *European Commission v Jørgen Andersen*, para. 85: Case C-389/10 P *KME Germany* and antitrust).

Where that inspiration has taken us in the area of state aid is reviewed here – to check whether there is, as of now, any common ground between competition rules on state aid and antitrust law, as regards judicial review ("review of legality").

The law is stated here as it stood on 31 December 2021.

2. Problem Formulation and Methodology

Before *Comune di Milano*, the learned writing (Lenaerts *et al.*, 2015, p. 396) provided that Union Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a "comprehensive review" as to whether a measure falls within the scope of what is now Article 107(1) TFEU; that was posited while echoing a "comprehensive review as a general rule" in cases related to Articles 101 and 102 TFEU (cf. Lenaerts *et al.*, p. 389).

According to Kreuschitz and Nehl ([in:] Hoffmann and Micheau 2016, p. 433) in doing that, as in the "neighbouring field" of antitrust, the Union judge is obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts, although not to undertake a new and comprehensive investigation of the administrative file.

It could be further noted that the issue of the intensity of a review has been described prior to the case at issue by the learned writing as "varying according to the circumstances of the case, including the complexity of the decision (Bacon, 2017, p. 529)". Other authors have stressed that any "limitedness" as regards judicial review in competition cases "is only carried out as an exception". The General Court normally undertakes a comprehensive review of whether the conditions of Article 101, Article 102 or the merger regulation are met (Prek and Lefévre [in:] Vesna Tomljenović *et al.* 2017, p. 42). Thus, as an already contentious issue, this matter should be further reviewed here.

2.1 Problem Formulation

The problem at issue here, and thus the relevant research question, is whether C-160/19 P *Comune di Milano* amounts to severing the latent link between the various areas of competition law, especially between state aid and antitrust rules, and to overruling of earlier case law. This issue is significant for research due to the fact that it affects undertakings as prospective applicants, to their detriment – as the latent "common ground" from antitrust cases was more advantageous for any such applicants.

In addition, the GC has also held before *Comune di Milano* that the standard of judicial review and associated case law "relates to the review of the legality of decisions adopted on the basis of Articles 101 and 102 TFEU and not to the review of the legality of decisions adopted on the basis of Article 107 TFEU (Joined Cases T-479/11 RENV and T-157/12 RENV *French Republic and IFP Énergies ouvelles v European Commission*, para. 141)". Thus, the research problem to be named here has found its way to both levels of jurisdiction.

2.2 Methodology

The methodology applicable here falls within legal sciences (legal research, "jurisprudence") and doctrinal research. If one were to use the division between qualitative, quantitative, and mixed methods research (Creswell, 2018), this paper uses the first of the three.

3. Analysis and Problem Solution

3.1 Judicial review of Commission decisions in state aid cases before Comune di Milano

According to the Court in C-73/11 P *Frucona Košice*, in the context of the review conducted by the European Union Courts on complex economic assessments made by the Commission in the field of state aid, it is not for those Courts to substitute their own economic assessment for that of the Commission. The application of the MEOP (the "Market Economy Operator Principle") is an example of such an assessment (Case C-486/15 P *European Commission v French Republic and Orange*, para. 89).

However, as to the standard of review, the European Union Courts must, *inter alia*, establish not only whether the evidence relied on is factually accurate, reliable, and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (C-73/11 P *Frucona Košice*, paras 75 and 76). This standard of review was later reiterated inter alia in Case C-300/16 P *European Commission v Frucona Košice a.s.*, para. 64, having been taken originally from *Tetra Laval* and later competition law cases.

To the extent an interested party (e.g., a complainant or an aid beneficiary) may rely on self-standing procedural rights akin to rights of defence in an administrative procedure regarding state aid ("the right to be associated with it in an adequate manner taking into account the circumstances of the case at issue"), the Court has made a reference to case law on antitrust (specifically, to C-282/95 P *Guérin Automobiles*) when introducing the issue in C-521/06 P *Athinaïki Techniki AE v Commission of the European Communities*, para. 38; see also Case C-362/09 P *Athinaïki Techniki AE v European Commission*, paras 23 and 24).

In the context of appeals, it was not unknown for the Court to cross-cite its case law in antitrust cases while ruling on appeal in a state aid case, and vice versa (Case C-431/07 P *Bouygues SA and Bouygues Télécom SA v Commission of the European*

Communities, para. 148, referencing *Dansk Rørindustri and Others* v *Commission*; C-501/06 P *GSK and Others* above referencing C-431/07 P *Bouygues*, para. 155).

It is common ground that the rules on Articles 101 and 102 TFEU and those on state aid are subject to a common Chapter of Title VII of the FEU Treaty ("Rules on Competition"), and that there are certain overlaps between the "Rules applying to undertakings" and those on "Aids granted by States". This includes the concept of an "undertaking", common for the field of competition law in general (Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, para. 107).

As such, in particular, where a given issue was not explicitly decided in a purely "state aid" case, it was not unreasonable to expect a certain middle ground as regards the scope of judicial review between state aid cases and other cases in the field of competition law, especially those involving Articles 101 and 102 TFEU.

3.2 C-160/19 P Comune di Milano and issues raised thereby

The case at issue, C-160/19 P *Comune di Milano v European Commission*, which among other things involved the application of the "private investor" test (also known as a market economy operator principle) on appeal, was preceded by Case T-167/13 *Comune di Milano v European Commission*.

On the issue of review, the General Court found that

> [T]he Commission is required to make a complex economic assessment when it examines whether particular measures can be described as State aid because the public authorities did not act in the same way as a private investor. However, in the context of the review conducted by the European Union Courts on complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (…) and they must confine their review to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers (para. 107).

The GC added that "in order to establish that the Commission committed a manifest error in assessing the facts such as justifying the annulment of the contested decision, the evidence adduced by the applicants must be sufficient to make the factual assessments used in the decision in question implausible (para. 108)". This was complemented by a passage that

> [T]he European Union Courts must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also review whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (para. 109).

It should be noted here that the last paragraph above from the decision at first instance on what EU Courts are expected to do in the context of judicial review refers to the original dicta from C-12/03 P *Tetra Laval*, para. 39 – a merger case, which itself has been referred to in Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, para. 94, and later as regards antitrust, e.g. in Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission*, para. 54, and in C-295/12 P *Telefónica SA*, para. 54.

Arguably, a "review whether evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it" goes beyond manifest errors of assessment, and by virtue of e.g., C-295/12 P *Telefónica SA*, is exactly the thing EU Courts should do beyond checking whether there is any such error. In addition, those dicta have been provided on the "review of legality" as envisaged under Article 263 TFEU, outside instances of unlimited jurisdiction as regards penalties.

On appeal, the Court provided at para. 101 of the decision at issue that "the General Court did not vitiate the judgment under appeal through an error of law when it limited itself to verifying whether the Commission's economic assessments relating to the application of the private investor test were vitiated by a manifest error of assessment".

At para. 102, the decision continues to say that

> [C]contrary to what the City of Milan claims, no other conclusion can be drawn from the case-law resulting from the judgments of 8 December 2011, *KME Germany and Others v Commission* (C-272/09 P, and of 8 December 2011, *Chalkor v Commission* (C-386/10 P). As the Advocate General observed, in essence, in point 80 of her Opinion, that case law, which relates to the judicial review of decisions of the Commission finding infringements of Articles 101 and 102 TFEU and imposing, where appropriate, pecuniary penalties on the basis of those infringements, cannot be applied as is to the judicial review of decisions of the Commission on state aid matters.

AG Kokott to whom the Court referred has opined (paras 79–80) that

> [I]t is not for the Courts of the European Union to substitute their own assessment for that of the Commission and substantively they may examine only whether there has been any manifest error of assessment or

> misuse of powers. In addition, the European Union Courts may verify whether the rules on procedure and on the statement of reasons have been complied with and whether the facts have been accurately stated. This is not called into question by the appellant's reference to the case law on the review of cartel fines. The European Union Courts have unlimited jurisdiction in that field under Article 261 TFEU and the relevant regulations. For a review of State aid decisions, on the other hand, the standards of review described above are applicable.

3.3 Analysis

At the outset, the case law at issue which, according to the Court in C-160/19 P *Comune di Milano*, "cannot be" applied as is to the judicial review of decisions of the Commission on State aid matters, has in fact been applied thereto (cf. joined cases *C-214/12 P, C-215/12 P and C-223/12 P Land Burgenland (C-214/12 P), Grazer Wechselseitige Versicherung AG (C-215/12 P) and Republic of Austria (C-223/12 P) v European Commission*, para. 79; Case C-81/16 P *Kingdom of Spain v European Commission*, para. 70; Case C-114/17 P *Kingdom of Spain v European Commission*, para. 104; C-73/11 P *Frucona Košice above*, para. 76; Case C-290/07 P *Scott* above, para. 65; Case C-525/04 P *Kingdom of Spain v Commission of the European Communities (Lenzing AG)*, para. 57). As it follows from those cases, the standard of review referred to in *KME Germany* and in *Chalkor* has been in use in state aid cases, contrary to what the Court has held in C-160/19 P *Comune di Milano*.

On the point made by AG Kokott in that those cases, in the main, allegedly refer to "unlimited jurisdiction" and "relevant regulations", it should be recalled that the above dicta from *KME Germany* and *Chalkor* (themselves something that originally came from *Tetra Laval*) have been made on review of legality, based on Article 263 TFEU, as well as on the principle of effective judicial protection (now also enshrined in Article 47 CFREU). Thus, decisions on those cases have hardly been made exclusively on unlimited jurisdiction. In addition, as the law stands now, the area of state aid is also capable of featuring fines, penalties and unlimited jurisdiction as regards undertakings concerned (cf. Article 8(6) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union).

The directly preceding case referred to at para. 100 in C-160/19 P *Comune di Milano* on the market economy operator principle, C-244/18 P *Larko Geniki Metalleftiki kai Metallourgiki AE v European Commission*, stated at para. 41 that the applicant in a state aid case involving the MEOP is

> fully entitled to state that it was nevertheless for the General Court to establish not only whether the evidence relied on was factually accurate,

> reliable and consistent, but also whether that evidence contained all the relevant information which must be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it.

The decision in C-160/19 P *Comune di Milano* does not contain any dicta as to *why* that standard of review from KME Germany and Chalkor (and, by extension, from the original *Tetra Laval* and later antitrust cases adopting that standard) cannot be applied anymore. Apart from C-244/18 P *Larko*, C-160/19 P *Comune di Milano* was preceded by Case C-148/19 P *BTB Holding Investments SA and Duferco Participations Holding SA v European Commission*, para. 56, which did not expressly use this standard of review (limiting itself to "manifest errors of assessment") yet without express denial of applicability thereof.

It would then appear that the position of the Court in C-160/19 P *Comune di Milano* amounts to an attempt at overruling earlier case law.

Thus, the issue from the Court is not whether the standard of judicial review that has come to the area of state aid from other areas of competition law (esp. from *KME Germany, Chalkor* and *Tetra Laval*) can be used at all, but whether it can continue to be relied on as good law.

3.4 Problem Solution

It appears from later case law that the less stringent standard of judicial review professed by the Court in regard to the MEOP in C-160/19 P *Comune di Milano* has been followed by cases adopting a different approach to the matter.

In Case C-847/19 P *Achemos Grupė UAB and Achema AB v European Commission*, para. 41, after hearing the appellants who specifically relied on *Tetra Laval* (para. 34), the Court held that the lawfulness of a decision concerning state aid fails to be assessed by the EU judicature, not only in the light of the information available to the Commission at the time when the decision was adopted, but also information which could have been available to the Commission.

The Court added that the information 'available' to the Commission includes that which seemed relevant to the assessment to be carried out in accordance with the case law on the preliminary examination procedure and which could have been obtained, upon request by the Commission, during the administrative procedure; The Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (paras 42 and 43).

The above dictum from the Court has been made with reference to Case C-300/16 P *European Commission v Frucona Košice a.s.*, and as regards decisions of the Commission in general (not just those made in the context of the preliminary procedure). However, the Court added in the context of the above duties that it is not for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information in the public domain which might be connected with the case before it (para. 50). It would then appear, even if the Commission post-*Comune di Milano* has no obligation to seek "all information", that the Court has gone beyond mere manifest errors of assessment in its review as regards the legality of a Commission decision.

The Court added that the statement of the reasons on which the judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (C-847/19 P *Achemos Grupė*, para. 60). This development is welcome, as the issue of an adequate statement of reasons has been missing from the standard of review in *Comune di Milano*, notwithstanding its nature as an essential procedural requirement (Quigley, 2015, p. 744).

Most recently on MEOP and judicial review to be conducted by the General Court, in Case C-933/19 P *Autostrada Wielkopolska S.A. v European Commission and Republic of Poland*, the Court has reiterated that Courts of the European Union must, *inter alia*, establish not only whether the evidence relied on is factually accurate, reliable, and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (para. 117).

What is more, this dictum has been held in the context of economic assessments of the Commission and vis-à-vis a plea on appeal that the GC has gone beyond its scope of review (para. 115). The Court has referred in that regard to C-300/16 P *European Commission v Frucona Košice a.s.* which also reproduces the *KME Germany/Chalkor/Tetra Laval* standard, while at the same time omitting any reference to *Comune di Milano*. This is perhaps even more striking that the same judge has acted as rapporteur both in *Autostrada Wielkopolska* and in *Comune di Milano* (namely, Judge Arabadjiev).

Nevertheless, it follows that the standard of review going beyond manifest errors of assessment is still present in the case law of the Court on judicial review of state aid decisions.

4. Conclusion

The issue of the standard of judicial review is gravely important for any prospective applicants in the field of state aid.

As regards complex economic assessments, the standard of review so far has been incorporating features going beyond mere manifest errors of assessment (e.g., Case C-290/07 P *Scott*, paras. 65 and 66) to check, among other things, whether the facts have been accurately stated, and the standard having been complied with.

While it appears that there has been an attempt in *Comune di Milano* to cut away from the "general" competition law heritage, this standard of review going beyond the issue of a manifest error in assessment is still present in State aid (C-847/19 P *Achemos Grupė*, Case C-933/19 P *Autostrada Wielkopolska S.A*), having been successfully received from cases such as *Tetra Laval*, *KME Germany*, *Chalkor* and others, as in my view it well should be.

Thus, even where there would be complex assessments from the Commission in its decisions in the area of state aid, the Court (and the GC, for that matter) ought not to try to deny that those assessments are beyond review developed originally in other areas of competition law, but rather give the applicants their due – namely, effective judicial protection going beyond manifest error of assessment.

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Are the Fines Imposed to Cartel Participants in the Czech Republic Optimal?

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Abstract

The Office for the protection of competition of the Czech Republic issued new guidelines for imposition of fines for cartels in 2018. Since the fines imposed on the participants of cartel agreements before 2018 were set significantly below the efficient level, the new notice enables the Office to increase the fines for the most serious anticompetitive conduct. The aim of this paper is to find out if the fines imposed after the new notice was issued are finally set at the efficient level from the perspective of their preventive function. It means whether or not the fines imposed are sufficient to deter competitors from concluding anticompetitive agreement.

Keywords: fines, hard-core cartels, deterrence

JEL Classification: K210, K420 JEL code.

1. Introduction

The Office for the Protection of Competition of the Czech Republic (Office) declared that since 2015 the necessity to significantly increase fines imposed for anticompetitive behaviour. Especially, this includes competitors who participated in a so-called 'hard-core cartel' which is meant to be the most serious anticompetitive practice. For this purpose, in 2018, the Office issued new Sentencing Guidelines which enable the Office to impose higher fines for anticompetitive conduct than the fines imposed according to the Sentencing Guidelines from 2006.

Analyses of the fines imposed on competitors who participated in hard-core cartels between 2009–2016 in the Czech Republic established that the fines were imposed at the significantly sub-optimal level (Nováková, 2017, p. 57). Those fines were not only unable to create a deterrent effect considering the low probability of detection, but they were not even capable of taking away the profits made by the members of the cartel. In case of bid rigging, the analyses found out that the fines did not sufficiently take into account the harmfulness

of such actions since the base fine was derived from the relevant turnover of the competitor rather than the value of the manipulated public procurement.

The aim of this paper is to analyse the fines imposed on the participants of the hard-core cartels (especially bid rigging) according to the new Guidelines from 2018 and consider if fines today are able to strengthen the deterrent effect and thus prevent competitors from anticompetitive conduct. A comparison with the fines imposed by the European Commission on cartelists will also be included in the paper.

2. Are the fines for price fixing optimal? Methodology.

The aim of this paper is to consider if the fines imposed on the cartelists who participated in the most dangerous anticompetitive practices have a deterrent effect. In other words, I am going to consider if the fines are set at such level that they are able to prevent competitors from concluding a cartel contract. To determine the optimal fine in case of standard cartels (not bid rigging), I built on the model developed by Buccirossi a Spagnolo (Buccirossi, Spagnolo, 2007, pp. 1–55) according to which the optimal fine is a function of margin, overcharge, demand elasticity, and probability of detection. I will analyse the cartel cases in which the fine was imposed according to the new Sentencing guidelines. In case of bid rigging, for which we have data most often, the calculation of an optimal fine is easier since it is calculated as an overcharge of the value of the public procurement divided by the probability of detection of the cartel. I will analyse the cartel cases (both, the normal ones and bid rigging) in which the fine was imposed according to the new Sentencing guidelines. Subsequently, I compare the optimal fine with the fine which was actually imposed by the Office.

2.1 Theoretical grounds

Gary Becker's economic theory of criminality will help us understand how to prevent competitors from anticompetitive conduct. According to Becker, potential criminals will not commit crimes if they think that it will not pay off (Becker, 1968, pp. 19–20). Of course, he presumes rational criminals who count the potential costs and benefits of crime and commit only such crimes the profits of which will be higher than their costs. Thus, to deter cartelists from anticompetitive conduct, the expected fine together with other potential penalties multiplied by the probability of detection and punishment of cartel members must exceed the expected cartel gain. It is thus necessary to take into account all the potential punishments even the non-financial ones since the non-financial sanctions that concern personal freedom or reputation can have an even stronger deterrent effect (Kahn, 2012, pp. 100–102). Both, too little and too much deterrence are harmful, as the second leads to the so called type

I. mistake meaning that competitors even avoid conduct which is in compliance with competition law for fear of a potential penalty.

Wiliam Landes, however, building on Becker's economic theory, interpreted the optimal antitrust fine to be the fine which equals the net harm caused to the persons other than the offender. (Landes, 1983, p. 656). This corresponds to the fact that even Becker did not intend to deter all crimes but only the inefficient ones. Only when the gain of crime for the offender was less than net harm for the rest of society, such crime was supposed to be deterred. Becker thus presumed a certain positive (efficient) level of criminality (Polinsky, Shavell, 1993, p. 2). According to Landes, the optimal fine for antitrust offences should therefore be derived from the amount of damage caused by anticompetitive conduct and if the anticompetitive conduct was held efficient (profit was higher than net damage), it should not be deterred.

In this paper, I take a deterrent approach according to which all anticompetitive conduct (excluding the justified exceptions) should be deterred, not only the inefficient ones (Hylton, 2005, p. 5). This corresponds to the aim of antitrust law which is to eliminate the transfer of wealth from the consumers to competitors. Moreover, if we aim at the prevention of cartels, we have to limit incentives to enter into cartel contracts (Hylton, 2017, p. 23). And of course, a rational competitor who counts profits and costs of their behaviour will compare their expected cartel profit with the expected costs of such behaviour rather than the damage caused to consumers, other competitors or competition itself. Moreover, the damage caused by cartel is a broad concept not limited to a mere overcharge and thus the estimation of all damage caused by cartel is almost impossible (DG Comp, 2010).

2.2 Model of optimal fine

The model of optimal fine developed by Buccirossi and Spagnolo distinguishes between optimal compensatory and deterrence fines. The first does not consider the probability of detection being lower than 1. Such an optimal compensatory fine aims only at taking all the cartel profit from the cartelists away so that the anticompetitive conduct does not pay off. The deterrence fine takes into account that in reality only a minor portion of cartels is detected and punished and that the potential cartelists are aware of that. Thus, the compensatory fine must be multiplied by a probability of detection which is lower than 1 to prevent anticompetitive conduct. Compensatory fine can be mathematically expressed as follows:

$\mathbf{CF^*} = \triangle \pi$,

Where $\triangle \pi$ is the profit increase reached as a result of cartel,

whereas the optimal deterrence fine can be expressed as follows:

$\mathbf{DF^*} = \triangle \pi / \alpha$

Where $\triangle \pi$ the profit increase reached as a result of cartel and α is a probability of detection and punishment.

To give an example, if the cartel profit was 15 % and the probability of detection and punishment was 20 %, the optimal deterrence fine is 75 % of the relevant turnover reached for the duration of the cartel. The optimal compensatory fine would equal to the cartel profit, i.e., 15 % – a big difference. Therefore, in the following text, I focus on the deterrence fine which has a potential to play a significant role in the prevention of anticompetitive conduct.

The model uses the following parameters:

p is a market price of the relevant goods

c is marginal cost

m is a margin when m = (p-c)/c

k is an overcharge in %, when cartel price $p^K = p(1 + k)$

q is goods quantity demanded for the market price in the relevant period of time

ε is an absolute value of demand elasticity when the price is at market level

α is a probability of detection of cartel

And the optimal deterrence fine can be mathematically expressed as follows:

$$\mathbf{DF^*} = \triangle \pi / \alpha = k \frac{((1+m)(1-\varepsilon k)-\varepsilon m)}{\alpha(1+m)(1+k)(1-\varepsilon k)} S,$$

To be able to determine of the cartelist's increased profit, it is necessary to estimate the overcharge of goods or services on the relevant market. The overcharge cannot be determined precisely because if we know the cartel price, we do not know what the market price would be and the other way around. Connor (Connor, 2014, pp. 50–52) collected 2044 estimations of such cartel overcharges and found out that the median overcharge is 18.2% for domestic cartels and 25.1 % for the international ones. The total median was 23 %. These results are similar to what Boyer and Kotchoni (Boyer, Kotchoni, 2014, p. 28) concluded with a median overcharge of 16 %. Most interestingly, Laborde (Laborde, 2017, pp. 36–42) analysed judicial decisions in private damages actions (23 judgements) in the EU and found out that overcharges in individual cases differed significantly, from 1 % to 59 %. The average overcharge was then 16 %. For the purpose of this paper, I estimate the overcharge (here *k*) in the range of 5 % – 20 %.

Margin is also considered to be in the range of 5 % – 20 %.

The optimal fine also depends on the demand elasticity, indirectly. The less elastic the market is, the more susceptible to cartels it is. I determine the optimal fine in the non-elastic market e=0, for elasticity of 1 and 2.

Finally, the probability of detection plays an important role in deterrence. Even draconian punishments will have a limited deterrent effect if the potential offenders know that the probability of their detection and the imposition of a penalty is close to zero. Again, this parameter is unknown because most cartels stay unrevealed. Therefore, we have to estimate it. There are several empirical studies that developed stochastic detection models. For example, Combe and Monnier (Combe, Monnier, Legal, 2008, p. 17) found out from the European sample of cartels that the annual probability of detection is approximately 13 %. Ormosi, using a capture-recapture analysis, finds the annual probability of detection between 10 % – 20 % (Ormosi, 2012, p. 566). Therefore, I set the probability of detection in this paper at 15 %.

2.2.1 Bid rigging

In case of bid rigging, I have argued elsewhere (Nováková, 2017, p. 53) that the baseline for fines should be the value of the manipulated public procurement rather than turnover of the cartelist which can be reached lawfully. The current practice of the Office respects that and it really takes the value of the respective procurement as a baseline. The question, however, is, what value of the public procurement should be taken into account – the value stated in the tender documentation, or the price offered by the winner? This question was hotly debated even at the Svatomartinská competition law conference in Brno held on 10 and 11 November 2021 where approximately half of the participants voted for the value stated in the tender documentation and the other half for the price offered by the winner. I suggest the second. I assume that the price offered by the winner is the one manipulated by the cartel members and therefore this price includes the cartel profit which must be taken away as a deterrent. The optimal fine for bid rigging cases can be then mathematically expressed as follows:

$DF^* = 0{,}2xV/ \alpha$

where V is the value of the procurement (the price offered by the winner). I have calculated with 20 % of overcharge of the procurement since the Office repeatedly estimates such an increase in the value of procurements as a result of bid rigging (Annual report of the Office, 2015).

3. Are the current fines optimal?

The Office imposes the fines for anticompetitive conduct on the basis of sec. 22a subs. 2 of the law 143/2001 Sb, on the Protection of Competition. The fine imposed shall not exceed 10 % of the total net turnover of a competitor reached in the last completed accounting period before the I. instance decision was issued (Supreme Administrative Court, 24 June 2014, no. 7 Afs 57/2011-1234).

The law on the Protection of Competition states that the Office shall, when imposing fines, take into account the seriousness of the anticompetitive conduct, the behaviour of the competitors during the proceedings before the Office and their efforts to remedy consequences. Thus, the discretion of the Office when imposing fines for anticompetitive conduct is broad and it would be difficult for competitors to estimate the consequences of their conduct. To increase foreseeability, the Office issues guidelines which give the competitors a rough insight of what fine to expect. This is also desirable for the prevention of anticompetitive conduct because the competitors can at least roughly calculate the costs of their actions and consider if they pay off or not. Of course, this means that to achieve deterrence, the costs must be higher than profits and that the fines must be imposed efficiently.

The new Sentencing Guidelines which came into effect on 24 April 2018 and apply to proceedings commenced after this date, take into account mainly the seriousness of anticompetitive conduct and the duration of it. Horizontal cartel agreements (e.g., price-fixing, market sharing, bid rigging) belong to the most serious anticompetitive conduct for which the fine of 5 % – 15 % of relevant turnover can be imposed. In comparison with the previous guidelines from 2006 which enabled the office to impose a fine of up to 3% of the relevant turnover for the most serious anticompetitive conduct, the new guidelines represent a significant increase.

Also, the new guidelines consider the individual seriousness of the anticompetitive conduct, for example if the anticompetitive agreement was actually implemented or not. This enables the Office to really determine, case by case, what is the optimal fine, taking into account the individual circumstances of each case.

Further, the duration of anti-competitive conduct matters because it directly influences the seriousness of such an action. Time coefficient is set as follows:

$T = f(x) = x/12$,

where x is the number of months for which the cartel lasted. In case that x is less than 1, T equals to 1. The maximal value of T is 10 even for cartels lasting for more than 10 years. Again, this means a significant increase in imposed fines compared to the previous guidelines which limited a coefficient of time to 3 as a maximum for the longest cartels. We see that the Office is currently entitled to impose a base fine up to 150 % of the relevant turnover for very serious and long infringements whereas according to the previous guidelines the base fine was limited to 9 % of the relevant turnover. By comparison the EU sentencing guidelines (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)) set the basic fines up to 30 % of the relevant turnover for the last finished accounting period which is further multiplied by number of years for which the infringement lasted. The EU Commission can thus impose a fine up to 300 % of the relevant turnover in case of the most serious infringements lasting 10 years. This suggests that the fines

calculated according to the new Sentencing Guidelines could finally get closer to those imposed by the EU Commission.

3.1 Data

The dataset includes five bid rigging cases and only three vertical cartel agreements because all the other cartel decisions issued in the last three years related to proceedings initiated before the new Sentencing Guidelines came into effect and therefore are not applicable. Moreover, one of the vertical cartel cases (*BABY DIREKT s.r.o.*) must be excluded from the data set since all relevant turnovers, the basic fine and even the percentage of fine set according to the New Sentencing Guidelines was hidden as being a trade secret. I must add one disclaimer as to the data relating to the vertical cartels. Since I need to know the amount of sales achieved by the cartel members during the whole cartel existence and these data were unavailable due to the trade secret, I have counted is as a mere multiplication of the relevant turnover achieved in the last year of the cartel existence and the number of months for which the cartel existed. This simplification distorts the data results but there was no better way to calculate it.

The charts below show the ratio of the optimal fine for cartel members (not bid rigging) and the relevant turnover achieved during the whole period of the cartel's existence. The probability of detection was considered at 15 %.

Tables 1-3:

ε=0,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,31746	0,766962	1,111111
m=0,1	0,31746	0,766962	1,111111
m=0,2	0,31746	0,766962	1,111111

ε=1,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,301548	0,724982	1,044974
m=0,1	0,287081	0,686819	0,984848
m=0,2	0,261766	0,620034	0,87963

ε=2,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,283867	0,668254	0,934744
m=0,1	0,253327	0,578519	0,774411
m=0,2	0,199882	0,421483	0,493827

We see that in case of a relatively elastic demand (ε=2), high margin (m=20 %) and little overcharge (k=5 %), the optimal deterrence fine should amount to almost 20 % of the relevant turnover achieved during the cartel's existence. If the demand elasticity equals to 1, the optimal fine amounts to 26 % – 104 % depending on the overcharge (direct dependency) and the margin (indirect dependency). If the demand is non-elastic, the optimal fine amounts to 31 % – 111 % of the relevant turnover, again depending on the margin and overcharge.

By comparison the fines imposed by the European Commission, in 2007–2009 on cartels were 76 % of the relevant turnover on average (Connor, 2010).

The optimal compensatory fine which assumes the probability of detection of 100 % would then amount to 3 % – 16 % depending on the margin, overcharge and demand elasticity. The exact values can be found in the chart below.

Tables 4-6:

ε=0,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,047619	0,115044	0,166667
m=0,1	0,047619	0,115044	0,166667
m=0,2	0,047619	0,115044	0,166667

ε=1,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,045232	0,108747	0,156746
m=0,1	0,043062	0,103023	0,147727
m=0,2	0,039265	0,093005	0,131944

ε=2,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,04258	0,100238	0,140212
m=0,1	0,037999	0,086778	0,116162
m=0,2	0,029982	0,063223	0,074074

The basic amount of the deterrence fine which was calculated by the Office according to the new Sentencing Guidelines can now be compared with the optimal deterrence fine. In the chart below we see that today's fines for the most serious anticompetitive conduct reach 4 % – 25 % of the optimal fine depending on the demand elasticity, margin and overcharge. These numbers are double those imposed according to the previous guidelines (Nováková, 2017, p. 56). Even though today's data have limited relevance since we have not had enough cases yet, we can already conclude that the fines imposed increased significantly. In the *BABY DIREKT* case (which was excluded from the data set because of trade secrets), the Office imposed a fine of more than CZK 40 million which was the statutory limit of 10 % of net total turnover of the competitor. The fine calculated according to the new Sentencing Guidelines was thus even higher than that.

Tables 7-9:

e=0,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,158479	0,065597	0,04528
m=0,1	0,158479	0,065597	0,04528
m=0,2	0,158479	0,065597	0,04528

e=1,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,166842	0,069396	0,048145
m=0,1	0,175249	0,073252	0,051085
m=0,2	0,192198	0,081142	0,057195

e=2,α=0,15	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	0,177234	0,075287	0,053823
m=0,1	0,1986	0,086965	0,064966
m=0,2	0,251702	0,119366	0,101879

If we assumed the probability of detection to be 100 %, the imposed fine would get close to the optimal compensatory fine able to at least take the cartel gain away from the cartelists. In the charts below we see that for overcharge k=0,05, the imposed fine was equal or even above the optimal level (probability of detection = 1). In case of k=0,2 the imposed fine amounted 30 – 67 % of the optimal compensatory fine depending on the margin. Again, the numbers are double the fines imposed according to the previous guidelines (Nováková, 2017, p. 56).

Tables 10-12:

e=0,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	1,056525	0,437316	0,301864
m=0,1	1,056525	0,437316	0,301864
m=0,2	1,056525	0,437316	0,301864

e=1,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	1,112279	0,462639	0,32097
m=0,1	1,168327	0,488345	0,340565
m=0,2	1,281318	0,540946	0,381302

e=2,α=1	**k=0,05**	**k=0,13**	**k=0,2**
m=0,05	1,181558	0,501913	0,35882
m=0,1	1,324	0,579765	0,43311
m=0,2	1,678011	0,795772	0,679195

In case of bid rigging, which dominated in our data set, the imposed fine was way below optimal level (the imposed fine amounted to 6.66 % of the optimal fine on average) which results from the presumed very low probability of detection (15 %). If we presumed probability of detection to be 100 %, the fines imposed

were set at almost 50 % of the optimal level. It is obvious that the new Sentencing Guidelines enable the Office to impose a basic fine for bid rigging as 15 % of the value of the procurement as a maximum, whereas the optimal fine is calculated as 20 %. This makes the gap between the imposed and the optimal fine as well. However, if we look at the final fines which were actually imposed by the Office, we see in some cases (e.g., *SUDOP Praha, a.s.*) that the Office significantly increased the calculated fine because it had an insufficient deterrent effect. In the case of *SUDOP Praha, a.s.*, this increase meant a fine of more than CZK 9,000,000 instead of CZK 2,000,000. If we compare the final fine with the optimal one, we find out that the Office imposed fines amounting 13.3 % of the optimal fine on average. This number is influenced by two "extremes" when the fine amounted to 35 % of the optimal deterrence fine. Again, if we assumed the probability of detection 100 %, the imposed final fines for bid rigging were on average optimal.

4. Conclusion

The Office issued the new Sentencing Guidelines in April 2018, the aim of which was to significantly increase the fines imposed, especially for the so-called 'hard-core cartels'. The optimum to which the Office is heading is to set fines at such level that anticompetitive conduct does not pay off. The fines are intended to have both repressive and preventative functions. If we compare the new Sentencing Guidelines from 2018 with the previous ones from 2006, we see that the new Guidelines enable the Office to impose much higher fines for the same conduct. For the most serious and long-lasting hard-core cartel, a fine up to 150 % of the relevant turnover achieved by the cartel member in the last finished accounting period can be imposed, whereas the old sentencing guidelines limited the fines for such cartels to 9 % of such turnover. The data analysed data confirm that today's fines imposed for hard-core cartels were in most cases at least able to take the cartel gain from the cartelists away and thus we can say that the Office is broadly imposing the optimal compensatory fines. Of course, if the probability of detection is very low, the fines imposed need to be much higher to have a deterrent effect. Presuming 15 % as the probability of detection, the fines imposed amounted to 4 % – 25 % of the optimal fine depending on the demand elasticity, margin, and overcharge. We get similar results for bid rigging cases as well. The Office moreover is willing to increase the calculated fine significantly if it thinks that it does not have a sufficiently preventive function. We found that such individually increased fines achieved close to optimal deterrence.

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THEORY, CORE VALUES, AND GUIDING PRINCIPLES OF COMPETITION PROTECTION

Antitrust's response to the conflict of goals in the disarray of some current trends

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Abstract

The political nature of antitrust (AT) has manifested itself in recent years, particularly under the influence of globalisation, digitalisation, and a range of secondary political and ideological objectives, and more recently under the influence of the pandemic. AT agencies must respond to these challenges even without an adequate normative basis and using insufficient classical toolbox. In addition, further demands for the promotion of broader societal objectives falling outside the authorities' competence occur. The paper critically assesses these attempts to extend the scope of AT to areas which do not relate to the protection of competition as a result of market failure and recommends to vigorously resist them. Competition law must actively face new challenges, particularly technological ones, that traditional approaches cannot deal with effectively. However, it must always be about protecting competition and consumer welfare, not about foisting a political agenda on the AT authorities under the guise of significant social change.

Keywords: conflict of goals, market failure, policy failure, competition, and social regulation

JEL Classification: K210

1. Competition Law in the "Grey Area" between Traditional (Natural) and Assigned Goals?

Competition is one of the two basic types of shaping social relations in the production and distribution of economic value and output (alongside planning and organisation). According to this theory, the market in which competition takes place is an anonymous, autonomous, and decentralised coordination mechanism, allowing each individual to make their own plans without first setting a common goal. AT law has primarily been developed as a protection against abuses of market power and collusion harming workable competition.

AT protects the competitive environment as a public good and thus consumer welfare, and it also provides protection against some market failures, since the market obviously doesn't possess a mystical and reliable autocorrective capacity (Galbraith, 1967, p. 76). It is clear that no branch of law or legal regulation has any "natural" tasks or goals, they are all set (assigned) by the legislature and we can talk about rather traditional and majority accepted goals.

Antitrust is thus traditionally assigned the task of protecting competition and consumer welfare. The dispute is whether this is the only objective or only the main objective, accompanied by a number of collateral objectives, or even whether it is a differently composed interplay or contest between a number of parallel goals imposed on the AT according to the political order of the day.

The question is whether AT law intervention should be limited to the protection of competition (when competition fails) and possibly in cases of other market failures (existence of public goods, externalities, incomplete markets, lack of and asymmetry of information, unemployment etc. – Stiglitz, p. 22) or whether it can also pursue specific sectoral or broader societal goals. The answer to this question cannot be "right or wrong", but only consistent or inconsistent with this or that value premise and stance. The value base correlates with the political direction that is currently in power. AT is not the only area of law that is instrumentalized to achieve extraneous goals. It also sometimes happens even in private law, which might be required to be a vehicle for pioneering progressive values that may not be in tune with its main protective purpose (cf. private corporate law "enriched" by corporate social responsibility considerations, mandatory participation of employees´ representatives or mandatory female quotas for statutory boards, etc.).

AT deals with the protection of competition mainly in the course of cooperation of private companies. They naturally act in their own interest. The performance of society-wide tasks is difficult to delegate to them. Nor can the decisions of a cartel authority or a court substitute for an authoritative and legitimate countervailing decision by the legislature on how the conflict between the interests of protection of competition on the one hand and the objectives of the public good on the other hand should actually be resolved (BKA, p. 14). AT was not created – and thus should not be used – as an all-purpose tool for dealing with and treating all the ills of modern society. To widen its inherent goals may be tempting but endangering its enforcement, while it may not even benefit those added (expanded) goals.

The ideology of competition as a governing principle of a market-based economy is, in general, no worse or better than the ideology of targeted regulation of central assurance of general welfare. The superiority of the former is, of course, backed up by convincing empirical evidence, and the latter too, but with the opposite sign. Therefore, I confess at the outset that I am a proponent of the

ideology of competition as an indispensable self-regulatory tool and that I am value-biased. This is not cynicism – rather, I see cynicism it in the opposite approach – in obscuring value bias.

AT, which is supposed to protect competition, has the misfortune of being highly political in nature. But despite that – AT is equipped to deal with one type of specialised market failures only – distortion of competition. However, this does not qualify it to step in to solve completely different market failures or to solve policy assignments.

Adding "sustainability" aspects to the AT is an example of purely political decision, that should, if at all, only be made on the basis of a thorough discussion and evaluation (Studienvereinigung, p. 25). Despite being enshrined in legislation, fluctuations in value orientation manifest themselves in the interpretation of legislation, which is sometimes functionally comparable to amending legislation. Even independent civil servants and independent judges carry value ideas, professional opinions, and biases, and can shift the de facto meaning of legal norms. This is particularly striking in the case of competition law rules, which are characterised by vague and undefined (and usually also undefinable by law) concepts, allowing for considerable restriction and expansion in administrative and judicial discretion.

AT is already facing unprecedented challenges related to the digitalisation of the economy and the rapid developments in information technologies. These in themselves pose major questions on the rationale, content, and methods of application of AT, which has emerged and evolved in fundamentally different conditions; it is even argued, that we are facing the end of competition as we know it. The big question is whether the objectives of AT should be changed or supplemented in the context of digitalization (for example, adding privacy and data protection), or whether the objectives remain the same but only the analytical tools used by AT will change (Koehler, p. 200).

This "information-digitisation" challenge is being tackled in theory and responded to by legislation – most recently by the European Commission's draft Digital Markets Act (DMA) and Digital Services Act (DSA) (Ezrachi, Stucke, p. 203; Bejček, 2018, p.VIII; Bejček, 2020b, p. 399; Podszun, p. 104 ff; Eifert *et al.*, p. 988) or the regulation in § 19a of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB), according to which a conduct is prohibited without having to prove that the platform concerned is dominant on a given market and without having to resort to proven abusive conduct (Haucap, Schweitzer, p. 1). In addition to this unprecedented challenge, we can observe increasingly strong pressures to expand the catalogue of broader societal goals that – as some activists believe – AT should pursue and support. We are witnessing a fundamental rethinking of AT that will include an assessment of the relationships between it and media, sustainability, human rights, gender, privacy (Capobianco, p. 387). Even in the USA, as the cradle

of economic and consumer approach to AT, we can observe attempts to include growth of wages and employment and reduction of income inequality in the catalogue of goals. Thus, AT is in danger of eroding under the "crossfire" from these two directions, of losing its coherence and, above all, its proven functionality. Traditional target conflicts (Bejček, 2007, p. 663 ff.; Zimmer *et al.*) have been joined in recent years by new and perhaps even more controversial conflicts than before.

2. Issues Falling under "genuine" AT Scrutiny and the "Rest"

The competition issues arising from economic, social, and technological developments ("endogenous", or "internal", "inside", possibly "own" challenges) that I address here include, among others, the evaluation of digital platforms and their operators, pricing algorithms, killing acquisitions, and one particular topic, the appropriate AT response to the COVID-19 pandemic. I only briefly describe and summarize whether and how the traditional AT-toolbox could be used or changed in these areas.

I deal in some detail with the second area of so-called "exogenous" (or "imported", "external", "outside", possibly "foreign") challenges, which in my opinion threaten the essence and very functionality of AT more than endogenous challenges. In contrast, the burden of "imported", "external", or "exogenous" challenges is put on the shoulders of AT inorganically. They arise as if outside the scope of the AT, or affect its scope only marginally, or they are artificially imposed into the remit of the AT.

The AT should take them into account only marginally, if at all, as they are an inorganic tool for achieving broader political and ideological goals only artificially "grafted" onto protection of competition. Among these, I include in particular the so-called sustainability, gender considerations in competition assessment, and privacy protection.

Sustainability is a very broad word that hardly might be labelled as a true concept because of its fuzziness, its ability to opportunistically draw in (or, on the contrary, exclude) almost anything that just fits or doesn't. Far from being just about environmental issues, it has a much broader scope, which in some conceptions has directly social engineering ambitions that cannot remain without impact on competition law.

Even AT law has apparently not escaped the attention of the gendered "intellectual fashion" that has already permeated many areas of life. The question is how to distinguish between the attractive and short-lived efforts to be "in" and the really relevant aspects with an impact on competition law and how not to contaminate AT scrutiny with disparate and inappropriate aspects instead of addressing them at the general-policy level by legislative means.

The need for increased privacy protection is actually indirectly triggered in today's urgency by digitalization and the dominance of the "Big Four" in the marketplace ("GAFA" – Google, Amazon, Facebook, Apple) but is being used to attempt far-reaching changes not only in the AT field but in the entire economy (Ohlhausen, p. 14 ff.).

3. Some endogenous challenges

I shortly refer to group of several topical influences, which AT has to deal with because they fall *within its remit* and which simply must be dealt with them in pursuit of its (and not wider societal) objectives. They can therefore be named as endogenous influences. I consciously touch on several of these issues only superficially and briefly, knowing that many thick books could have been (and have been) written on each of them.

3.1 "Digitized" Competition

The digitized economy is based on the processing of huge amounts of data and their interconnection. Digital platforms have become synonymous with the digital economy. Some of the huge digital platforms (especially GAFA) have gained so much power that they have become gatekeepers with the potential to stifle competition, especially through self-preferencing, killer acquisitions, leveraging their power into other markets, etc. Some GAFA members may, in parallel, be guilty of both unfair trade practices and abusive exclusionary conduct due to their bottleneck position (Geradin, Katsifis, p. 503). A global consensus is rapidly merging, that Big Tech companies cannot anymore be left alone. A lot of classical economic wisdom is being modified or denied in the digital economy and the law must respond to this. This includes recognising a single global or pan-European market for online services and harmonising consumer protection in online contracts. So, the aim of EU competition law is to take back control over the digital economy and self-determination of those who depend on the biggest digital platforms (de Streel, Larouche, p. 63), though without endangering or reducing network effects.

A justifiable and understandable fear of the great power of gatekeepers, which can also be pre-emptively secured by acquiring promising would-be competitors by incumbent undertakings, even gives way to somewhat bizarre ideas about retroactive divestiture. This would mean the total destruction of legal certainty and security not only for the merging parties but also for third parties trading with them. Stronger *ex post* regulation is proposed as an alternative to the need for new *ex ante* regulation. *Ex post* supervision of mergers should depend on an assessment of a possible anticompetitive plan and could even take the form of a challenge to a legally cleared consummated transaction. (Hemphill, Wu,

p. 1879 ff., 1908). The DMA presupposes a. o. that gatekeepers will be required to inform the Commission of an intended concentration involving another provider of core platform or any other services provided in the digital sector, irrespective of whether the transaction is notifiable in terms of merger regulation.

There is widespread scepticism that AT cannot meet this challenge without additional special regulation (incl. creating new regulatory body) and that "using the regulatory approach is much better than using the AT process as a form of quasi-regulation" (Moss, p. 2). This approach is implicitly confirmed by the European Commission (EC) with its proposals for the DSA and the DMA. These go beyond the existing AT standards and lay down special rules of conduct (inter alia self-preferencing, leveraging, use of data preventing interoperability/ portability) for a specific group of actors, effectively regulating their behaviour *ex ante* (Guersent, p. 69). In doing so, they are clearly based on many years of experience with GAFA's established practices and are in fact a casuistic response to this behaviour, which led to an apparent market failure. It may be reminiscent of "preparations for the last war". However, this is certainly a more appropriate approach than anticipating and misjudging future developments in information technology and committing overregulation. Yet the objectives of these proposals are more ambiguous, aiming mainly at fairness or transparency and accountability (Eifert *et al.*, p. 1025). Even if they are adopted, it is questionable whether the desired global standard will emerge (ibid, p. 1028).

Some commentators have even spoken in this context of the emergence of "hybrid competition law", which has gone beyond the existing supervision of abuse of market power (shifting to stand-alone approach distinct from an established competition law frame of reference – Haus, Weusthof, p. 318) and which relies rather on classical regulatory approaches; it should only be a complementary tool to competition policy and not a substitute for it (Steinberg *et al.*, p. 416); it could however turn into a double jeopardy overlapping with Article 102 TFEU (Haus, Weusthof, p. 324). There is also the problem of the enumerative list of prohibited conduct, which will have to be updated, and the fact that the possibility of justifying prohibited conduct is not allowed, so that the direct applicability of the prohibition also covers innovative and pro-competitive conducts (Mecklenburg, p. 206).

Experience with digital multinational giants and (perhaps well-intentioned) efforts to harness them have also motivated ideas for more far-reaching changes to AT. Thus, for example, Senator Klobuchar's proposal (The Competition and Antitrust Enforcement Act of 2021) included the idea of banning mergers that "may create an appreciable risk (!) of materially lessening competition" and of enacting a presumption that would have to be rebutted by the parties (Ohlhausen, p. 9). Given the difficulty for even an expert antitrust authority to establish credible positive evidence of a substantial competitive harm as a result

of a merger, shifting the burden of proof of credible negative evidence to the parties could effectively block mergers. This proposal might really be a kind of "firing squad". Similarly remarkable is the suggestion that the exclusionary conduct is anticompetitive regardless of market power. The presumption could be rebutted by its addressee, which is a firm or group of firms that have over 50% market share or otherwise have (only) "significant market power" (not inevitably dominant position – ibid, p. 10). We need to monitor the discussion of these proposals closely, as they may be important and maybe fatal for the development of AT worldwide.

3.2 Pricing Algorithms

These are one of the most visible manifestations of the digitalisation of the economy and also one of the most dangerous, because they blur the distinction between the forbidden conscious collusion (meeting of minds) and the silently suffered tacit collusion (parallelism), which is not and cannot be prohibited because it would undermine the essence of market interaction. Algorithms undermine the category of intent or mutual understanding underlying the classic cartel doctrine. They can contribute to open collusion because they act as information intermediaries between conspirators and speed up the exchange of relevant information necessary to maintain a cartel for mere moments. Algorithms can also facilitate collusion made tacitly, due to the negligible cost of information and of responding to it immediately. Even if tacit (unintentional) collusion is not punishable by law, this does not mean that it is desirable (Ezrachi, Stucke, p. 66). Algorithms in general can also be pro-competitive (OECD, p. 14). On the supply side, they increase transparency, which leads to product improvement and new product development, so they increase competitive pressure. On the demand side, they support consumer demand and provide information on non-price parameters (quality, consumer preferences).

Given that it is practically impossible to distinguish the outcome of a spontaneous price following (parallel behaviour) from conscious understanding, regulation in the form of a rebuttable presumption of knowledge of such consequences of pricing algorithms (Salaschek, Serafimova, p. 14) that would force competitors to insert coordination-preventing mechanisms into algorithms has also been considered. The burden of proof of intent or purpose to collude otherwise will be on the competition authority.

There is also a view that certain types of pricing algorithms that support supracompetitive prices (such as self-learning price-setting algorithms) should be banned automatically (*per se*), and that perhaps the time is ripe to ban any conduct with a potentially anticompetitive tendency that does not have a corresponding pro-competitive offset, even if such conduct does not meet the characteristics of an agreement in the traditional sense (Gal, p. 116 ff.).

A more aggressive approach to obtaining new competition authority powers and seeking to intrude beyond existing competition authority powers into algorithms may have a chilling effect and may hinder the development of technologies, including their undeniable positive impacts on the market and competition and ultimately on consumer welfare.

Conventional wisdom suggests that if one doesn't know (for sure) whether to do something, one simply shouldn't do it. The Hippocratic maxim of "do no harm" should also apply in AT authorities' responses to the still little explored phenomenon of pricing algorithms; the most important intervention may be the one that is not implemented. Unless regulatory humility prevails over regulatory paranoia, activism, and arrogance, the fear of throwing the baby out with the bathwater will be misplaced. Regulatory interventions should be limited to clear-cut cases or cases where there are overwhelmingly clear negative impacts (analogy to *per se* bans of the hardcore cartel type). Indeed, pricing algorithms can not only be a tool for cartelization, but also allow for a setup for price fighting with competitors, leading to lower prices and higher consumer welfare.

Premature interventions in the possibilities of algorithms could lead to a somewhat schizophrenic situation (Kupčík, p. 544): undertakings should monitor the market in order to avoid price parallelism, which would indeed increase the transparency of the market, but which they would not be able to use because they are supposed to act independently. However, increased transparency can lead to unpunishable tacit collusion. A possible regulation of the frequency of price changes could in turn artificially freeze competition for prohibited periods. Thus, the focus can be partially freed from the "fixation on price fixing" and, thanks to perfect and previously unprecedented information, the focus can shift from price competition to differentiation of goods and services. "Competition can carry on, as a totally homogeneous market does not exist in reality" (Kupčík, ibid, p. 545). On the other hand, this radical proposal could lead to the legitimisation of cartel agreements under the pretext of using alleged monitoring algorithms. The law should not be construed as to equate the collusive equilibrium with a cartel violation (Thomas, p. 75). The possibility of prosecuting price fixing, regardless of the form in which it takes, must be maintained despite the increased evidentiary difficulties. Such conduct should be attributable to the operator running the algorithm, which has the potential to infringe Article 101 TFEU (Bejček 2020b, p. 391; Sonderegger, p. 225).

However, it is hardly possible to distinguish between collusion caused by algorithms and collusion due to human action (as Sonderegger does; ibid, p. 225). I am convinced that in fact, even the forbidden agreement resulting from the algorithm is only a mediated human action consciously postponed and shifted to the robot in order to hide its illegal essence. The letter acrobatics of

Article 101 TFEU would already be rather old-fashioned if it were to make it impossible to be interpreted in a way that it did not matter whether the "meeting of minds" was achieved by natural human beings or by their programmed technical assistants, even if they were hiding behind the veil of artificial intelligence (similarly Greenhalgh, p. 534). Moreover, even self-learning algorithms can and should be tested before deployment in real market conditions (risk assessment) and the consequences of deployment can be modelled (harm identification; Descamps *et al.* p. 39).

3.3 Competition Distorted by Pandemic?

Quite recently, the COVID-19 pandemic has become a new challenge and a test of the resilience and functionality of the AT toolbox in extraordinary economic and social conditions. The world had to face calls for more generous exemptions from cartel law in order to solve scarcities through cooperation instead of rivalry. Producers and distributors were faced with unprecedentedly excessive demand for scarce goods, which they had to deal with in some way; the trend towards crisis cartelization is usually associated with a reduction in excess supply (Schinkel, Ailly, p. 1).

What is more, pandemics have strengthened the already exceptionally strong position of digital gatekeepers and increased the dependence of consumers and the public sector on their services. Online platforms have become indispensable even for ensuring the functionality of public administration and state power and they have de facto performed services of public importance and helped to mitigate the adverse effects of the pandemic. This too has provided the impetus for the design of regulation in DMA and DSA. It is even suggested (Šmejkal, p. 23) that this combination of influences will lead to a shift of AT towards *ex ante* regulation. The willingness to make exceptions has been and is extremely high in the current pandemic. Necessary and temporary "above-standard" cooperation between competitors in order to ensure the necessary production and distribution of hygiene products, medical devices and pharmaceuticals is accepted at the level of the ICN, the ECN, the Commission and the national authorities. More lenient and helpful approach may be observed towards cooperation between competitors which, under "normal conditions", would be regarded as an infringement of competition. Other measures such as informal "comfort letters" and extended "competition advocacy" for anxious competitors are also being adopted. In the same breath, however, it is confirmed that competition rules remain in force.

Thousands of state aids have been approved during pandemics for they were motivated by saving businesses, industries, or regions suffering from pandemics and the "lockdown of society". Competition became in some extent a "luxury good" in times of crisis. On the other hand, if there are "business saving mergers" (cf. the failing firm defence doctrine), why not actually allow temporary

saving cartels in times of crisis? After all, mergers are generally something like structural institutionalised long-term cartels. And we know from history the phrase "cartel as child of distress". I mean nonetheless that reasonable but strict applying the rules for the statutory exception to the cartel prohibition is needed, especially in a crisis. Because of the health emergency, one can only expect a more accommodating and expansive interpretation of the general cumulative conditions for exempting agreements from the prohibition under Section 3(4) of the Czech AT law or Article 101/3 TFEU (Bejček 2020, p. 5).

Thus, e.g., it might be considered a more lenient approach to joint purchasing ensuring a more reliable supply of key commodities with lower transaction costs; to cooperative joint ventures; to the exchange of commercial information to the extent necessary to cope with an emergency situation; the "capping" of prices of key products or services for consumers (but it is also about the absolute level of the cap); the sharing of technology, know-how and standardisation for the sake of production and smooth distribution of key commodities; a more lenient approach could be applied more generally, but perhaps selectively for the health sector only, etc. In addition to a more generous approach to the application of exemptions from anticompetitive agreements, the so-called prioritisation under Section 21(2) of the Czech AT law can legitimately be applied, as the impact of nominally (typically) anticompetitive behaviour on competition in times of crisis and in the short term can be considered negligible. Increased vigilance is needed to ensure that predators who prey on consumers and public budgets do not prey on exemptions justified by the crisis (Kianzad, p. 250 ff.).

However, some simplistic and mechanistic approaches to excessive pricing (such as providing a "safe harbour" in the form of a maximum allowable deviation between the price of a product and the cost of its production of 20% – Frank, p. 321) have met with criticism (Ridyard, p. 481). The opponent does not consider it possible to regard price increases as proof of market dominance and argues that the application of dominance laws whenever prices and margins rose significantly during the COVID-19 crisis could pose more of a threat to consistent competition law enforcement than they solve (ibid, p. 486).

Any reduction in AT standards must be convincingly justified for the time necessary and proportionate to the potential harm to competition. AT law cannot be sacrificed for the sake of a crisis, despite a possible and convincing (populistic) "explanation". Exceptions to it must be temporary, narrow, and inevitable and cannot become the *de facto* "new norm". Competition is a social good with long-term strategic value, and it is not to be trifled with.

4. Some Exogenous challenges

The number of out-of-competition normative goals that can be taken into account in the competition law assessment is practically unlimited (Thomas 2021b, p. 10). However, they practically oscillate around a few ethically and media attractive topics, the solutions to which are offered at the cost of weakening (or at least risking) the self-regulatory effect of competition. I will only touch on some of the most topical ones.

4.1 So called Sustainability

Competition policy – just because it is policy – is about weighing different interests and optimising them. Competition policy cannot be pursued under the slogan "competition above all" because, as a type of policy, it must weigh the interest in protecting competition against other values and interests, the weight and ranking of which are the result of political will-making. An example is the "service function" of competition rules laid down in the primary EU law to the creation and functioning of the internal market. The ongoing debate is conducted under a strong value bias. Proponents of so-called Chicago School argue that the only goal of competition law is economic efficiency leading to increased consumer welfare. The goals of EU competition law are, however, much more plastic. They include the creation and functioning of a common market but they promote consumer welfare by increasing economic efficiency, too (Stucke, p. 27 ff.; Fuchs, p. 53 ff).

However, the objective of protecting effective competition clashes in practice with a number of more specific objectives of a non-competitive (and sometimes rather ideological) nature, the pursuit of which sometimes justifies the need for exceptions to the competition rules. I believe that "such objectives are just reflexes or beneficial side effects", rather than "immediate goals that ought to be achieved directly by a specific government intervention in antitrust cases"(Fuchs, p. 58). The relevant state authorities should limit themselves to protecting the efficient functioning of the competitive process while avoiding overregulation (type I errors), since functional markets tend to be self-correcting. One of the recently most preferred attractive challenges seems to be the buzzword of so-called sustainability. Even this word has not escaped its use as a mere label, which is undeserving of the respectable value it implies and denotes.

First of all, it is not at all clear what is meant by "sustainability". It is far from being just a question of environmental sustainability, which is inherently dynamic. Some relevant and otherwise systematic sources (OECD 2021, p. 5) even speak of some vague and arbitrarily adaptable "green quality improvements", "green investing direction", "carbon-neutrality targets". The experience with the once-famous "more economic approach" to the law of competition is instructive. It

was the evergreen of conferences and publications around the world. and a bit of a fashion. However, the tendency to see things "more economically" led, among other things, to the removal of the section on environmental agreements from the Horizontal Guidelines on the application of Article 101/3 TFEU (Mayer, p. 259). It is now apparently going to be reintroduced again, and probably as a very important issue. (However, environmental protection has been included in Article 3(3) of the European Treaty since the very beginning, so it is by no means a new goal. Removing environmental considerations from the Horizontal Guidelines and their envisaged revival 10 years later demonstrates the purpose-driven nature and political volatility of the out-of-competition goals). In addition to the general proclamation in Article 3/3, the TFEU refers to the environment in Article191, but this is aimed primarily at the EU institutions (and therefore the legislature) and not at private individuals or undertakings (BKA, p. 20).

In this context, the representative groups of practitioners also point to the questionability of extending the exemptions under Article 101/3 TFEU (Studienvereinigung, p. 9 ff) and argue that if their narrow definition in relation to competition were abandoned, the exemptions could be extended to broader sustainability objectives such as full employment and social progress. However, if the exemption's requirements to "promote technical and economic development" were to be extended in this way, it would no longer be about genuine economic efficiencies. Moreover, such externalities would be difficult to quantify and thus to apply practically. Extending exemptions from narrowly economic objective and quantifiable efficiencies to nebulous aspects of benefit to society cannot be supported by a credible benchmark. Some proponents even talk about incentivising to "compete on the future of humanity" (OECD 2021, p. 15, referring to Polman, Winston). It sounds like a borderline of hard-to-operate social engineering and religion.

If similar vague terminology were to be adopted, it would undermine legal certainty and would draw the competition authorities into areas where they have neither formal nor professional remit nor political legitimacy. In this context, the suggestion (Studienvereinigung, p. 14) that the EC should set up a special office to better deal with the topic of sustainability, the environment, and the link between the Green Deal and AT seems somewhat counterintuitive. Paradoxically and parabolically, we could also consider funding two antitrust agencies adequately, so that they have the personnel and expertise to keep pace with the increasing size and complexity of the economy (White, p. 9); one might be responsible for the "classical" competition and the other for the "residual" issues of "common welfare".

I believe that the Commission's intention to allow exemptions to be granted in a different relevant market than in which the agreements in question operate would be a departure from competition considerations. A "trade-off" for a worsening of

competition in a given relevant market (in exchange for benefits provided to those consumers in that market) makes sense. The applicability and shifting of benefits to other markets and other consumers under Article 101/3 TFEU means further redistribution of benefits and goods and distortion of competition in the relevant market – I don't think we should slip into it.

The term sustainability also might include aspects such as fair trade or even the welfare-being of animal in the farms has been considered as a new possible theory of harm (Dreyer, Ahlenstiel, p. 79) in this context of sustainability. The 2019 European Green Deal does not foresee AT being at the forefront or the main instrument for its enforcement. Rather, it is about applying existing rules in a way that supports policy objectives in favour of environmental protection. There is no objection to this, as long as it is complementary to the objective of protecting competition, it will not amount to the "green washing" of anti-competitive conduct. Changes are foreseen in some block exemptions from the prohibition of agreements under Article 101/1 TFEU. For individual exemptions from the prohibition of agreements, possible positive but non-market effects have not been taken into account so far. The possible policy of not allowing mergers that are disproportionately burdensome on the environment, even if they would not lead to a significant impediment of effective competition and should therefore normally be cleared (green-killer acquisitions), would mean a step on somewhat thinner ice of a new and broader theory of harm. This "more holistic" approach has a strange flavour of sectoral regulation outside the remit of the competition authority (so the proposal that the Commission might also be willing to look at sustainability aspects to actually justify a clearance decision for a merger that would otherwise negatively affect competition and so to admit out-of-market "green efficiencies", such as cleaner water or air that not only the customers of the merging parties would profit, but society at large; Geisel, Uwago, p. 7). Traditionally, such considerations of out-of-markets effects are fundamentally incompatible with the nature of the competitive assessment (OECD 2021, p. 18, referring to Peeperkorn, Schinkel, Veljanovski). The "crystal ball" normally inevitably being used in merger analyses would be even more opaque due to challenges of the probability of such alleged efficiencies, their quantifying, and the time framing.

AT built on the achievement of using the rule of reason in a graspable sense in relation exclusively to competition benchmarks should not give up this methodological advantage. Sustainability can be achieved primarily through appropriate environmental protection policies and legislation. There is no fundamental contradiction between the public interest objectives (which include the protection of the environment and the sustainable development of society) and the objective of protecting competition. As a rule, competition will also lead to the achievement of public welfare goals (BKA, p. 6). Within a well-designed

ecological framework, competition works in favour of environmental protection, leads to efficient use of scarce resources, and prevents waste (Heinemann). This can be demonstrated by the example of so-called green mergers. Traditionally, abstract industrial policy and regulatory considerations should not be a criterion in the assessment of a merger. Rather, merger control aims to maintain competitive market structures and, in particular, to prevent the emergence of market power.

It is an instrument of market structure control and not of market design. Consumers reflexively benefit from effective competition for it leads to low prices, product variety, high quality and innovation. This is as true for sustainable and environmentally friendly products as it is for any other product category… Purely political sustainability considerations, which cannot be assessed using competition law categories, should not find their way into merger control. Such an examination would carry a great risk of being discretionary (Studienvereinigung, p. 17, 19).

It is generally true that consumer welfare does contain and take into account a variety of values that it can optimise, unless these values are protected by direct public instruments outside the market. Because if consumers internalize these values, they are also willing to pay for them. But if such normative values are imposed on consumers against their will in the market, it means that someone else knows better than they do what the market should properly look like which is … "the opposite of what competition is supposed to do. Ultimately, antitrust authorities could become subject to undue influence by political stakeholders. This could eventually undermine their role as impartial competition watchdogs" (Thomas 2021b, p. 10).

So that even environmental issues and other considerations related to "sustainability" could therefore also play an important role in competition law, but without weakening the current mechanisms in terms of clarity and predictability through the addition of further, partly political, categories (Dreyer, Ahlenstiel, p. 81). Competition authorities are busy enough with the protection of competition and it is questionable whether they can at all intervene (not only formally in terms of remit but also substantively and with their professional staff) in environmental protection and other matters of general welfare (Mayer, p. 259). We can also encounter a broader than narrowly ecological concept of sustainability, which is even harder to operationalise, e.g., in addition to the environmental issues, the progressive Dutch Competition Authority includes biodiversity, health, animal welfare, fair trade, fair working conditions including the protection of child labour and the right to form trade unions and human rights among its sustainability objectives (ACM Guidelines).

This is clearly an over-ambitious goal, which places demands on the Authority at the level of the government or perhaps a modern-day "Committee for the Public Good", but certainly higher than is desirable.

4.2 Gender related competition?

I consider the so-called gender aspects that are beginning to creep into the competition policy agenda as an inorganically instrumentalised "vehicle" for broader policy objectives (a kind of exogenous, imported challenge), which have hardly any competition law relevance, or their relationship to competition is rather artificially construed in the interests of fashionable "political correctness." Competition policy has traditionally been gender blind. The so-called "gender inclusive competition policy" is a novelty, but one that is looking for content in addition to its name.

The view that monopolies and oligopolies disproportionately harm female workers (Hubbard, p. 2), for example, appears to be related to competition. This alleged influence of monopolies is not excluded, as is similarly, for example, their adverse impact on the country's political system (for economic power obviously brings political power that might be oligopolised) and other social evils caused or supported by them; but this does not still make these factors relevant from the viewpoint of competition law. Supposed income inequality between men and women for the same work is undoubtedly a social problem worth solving. But on the one hand, it is not causal to market power and can occur even for a small employer, and on the other hand, AT law does not have any appropriate tools to address it (or even to take it into account). This is a broader problem of social equality and inequality and their proportions that must be addressed with policy instruments. The ambitions of competition law should remain tied to its own inherent objectives.

We can read calls for competition authorities to intervene against gender inequality that leads to a reduction in consumer welfare (Long, p. 267). It has been suggested that competition authorities, "as bastions of consumer welfare", should even intervene in questions of how household work was divided including labour saving devices (ibid, p. 267). In my opinion, this does not fall within the remit of the competition authorities, even in cases where their statutory mandate is also to protect consumers. Without defining how gender inequality is actually recognised (and whether it is equality or inequality of opportunity or of outcome), it is presumed that these inequalities can cause market distortions or effect consumer welfare (ibid, p. 268). The relationship of these certainly interesting questions, which can be subject to sociological and economic research, to AT and its legal toolbox, is highly unclear.

Even a noble intention can be harmed if it becomes shrouded in a veil of clichés and meaningless concepts that are purposefully grafted onto whatever comes within reach. Some of the prejudices, phrases and the way questions are asked in this context are embarrassing (such as "less efficient male entrepreneurs", "predominantly-male owners of the firms", "are firms that are led by women more or less likely to fail?", "would they be more or less likely to lead the firms

to apply for leniency?" etc. – OECD 2108a, p. 2). These questions are irrelevant from a competitive analysis perspective and should remain so. Moreover, they introduce the seeds of artificial gender-based segregation into the social discourse. If, for example, some gender-related price discrimination occurs, it should be addressed by consumer protection means and not by competition law. Attention is drawn to a novel but startling proposal that, in assessing abuse of dominance, it should be examined whether a particular market feature or behaviour would negatively affect women's welfare rather than the consumer welfare as a whole (OECD 2018a, p. 4). Ad absurdum, one could segment into senior welfare, welfare of ethnic or racial groups, etc. I don't think that's the way to go. Proposing ways for competition policy to integrate gender consideration (OECD 2018b, p. 6) is highly controversial and ambitious and may result in overregulation. It consequently could (along with other attacks on the very nature of AT) lead to a dilution of competition law as a tool to protect competition and to its gradual recasting as an instrument to help achieve overarching social goals.

This topic, like many others, deserves special attention, and I am only commenting on it as one of the challenges for contemporary AT. My hypothesis is conservative and relies on the traditional division of labour between different government agencies and between different branches of law. If, for example, it is argued that women pay higher prices for a range of similar products (OECD 2018b, p. 39; Haucap *et al.*, 2021a, p. 409).), the same can be said of any group of consumers, including men, the retired consumers – regardless of their gender, and members of various ethnic, cultural, sexual, and other minorities. However, it is not clear why and how competition law should deal with this fine (albeit competitively irrelevant) distinction. Similarly, it has also been argued that the perpetrator of anticompetitive conduct should not traditionally be seen as the unit to which the conduct is attributed, but that a distinction should be made as to whether the conduct was caused by one or the other gender-specific individuals within the undertaking concerned (Haucap *et al.* 2021a, p. 410). The fact that women are allegedly less prone to collusion (if proven) may be interesting from a social psychological or criminological point of view and may have implications for competition compliance measures, but it hardly has an outward impact and AT relevance. I consider such research to be comparably (ir)relevant from the viewpoint of AT, as if we were investigating the unlawful tendencies of other arbitrarily defined groups, e.g., according to their ethnicity, race, religion, political orientation, etc. Not to mention that attributing selected *individual* personal characteristics (e.g., less inclination to cartelisation) to members of certain groups as *statistical* units is politically and ethically very controversial and methodologically dubious and has been tragically discredited repeatedly throughout history. I don't think it's worth attempting, despite the attractive prospect of being "progressive" and simply "in".

Because I don't want to be too unpleasant, I won't go into the further paradox of this "gender-related" approach, but only point out its considerable hypocrisy; are the arguments asserted there to be associated with (socially and psychologically conditioned and subjectively felt) *gender*, or with (biologically determined) *sex*? Are these supposedly different competitively relevant characteristics attributed to women only associated with "traditional" and majority biological women, or do they also apply to "declared" women because of gender opt-in, even though their biological nature and hormonally influenced psychology corresponds to "biological" men, who in turn are denied these different group characteristics? Leaving aside other possible gender and other minority variations.

If (however vaguely defined) gender is to be declared a public good (ibid, p. 40), it must also be protected (after the goal has been properly defined) by adequate political and legal means. There is no doubt that functional competition is a public good indispensable to the functioning of the market. Attempts to take into account not only gender but any other aspects of identity in competition analyses (ibid, p. 39) may result in eroding and confusing the protective purposes of both laws and authorities. Balancing and trade-offs of different societal goals is a prerogative of politics and should not be addressed by specialized regulation to the detriment of its own purpose.

4.3 Privacy and Antitrust

Privacy has come to be counted among the aspects of competition that can negatively affect it (OECD 2021, p. 16 and cases referred to there: *Facebook/WhatsApp and Microsoft/LinkedIn*). Privacy has become particularly important with the development of digital platforms that use data provided for free by their users to transact business. This is considered to be a kind of market failure that should be remedied by law. Niether has the AT been forgotten, which should perform specific tasks in addition to specialised data protection legislation. Market-powerful companies can afford to provide less privacy protection to customers than in a competitive environment. Therefore, it is also considered whether privacy protection can be ignored from a competition perspective and should not be considered only as a consumer protection issue. This is to some extent a logical consequence of the promotion of a rather wide-ranging consumer welfare standard in competition law; after all, privacy protection also forms a qualitatively important part of "consumer welfare" in the broad sense, similarly as feeling of gender related satisfaction or of alleged sustainability. But it is not sufficient substantiation for AT authority to overtake the tasks of guarding it instead of others. We can also observe an implicit criticism of the too broad "consumer welfare dogma", which should also include user privacy, which indirectly tempts to expand the boundaries of competition law (Robertson, p. 189).

Privacy is a factor in non-price competition. However, harm to privacy is not identical to harm to competition. AT rules are not tailored to deal with consumer protection problems. The relevant authorities (leaving aside the public law remit problem) are not equipped to do so either in terms of personnel or methodology. Competition law is not destined to solve privacy harms caused by pervasive information asymmetry, but it is about efficient markets. Consumer protection or special protection of private data are better suited to privacy protection. If the mixing of competition and privacy protection continues, it may mean a de facto doctrinal and jurisprudential intertwining of the protective purposes of the respective laws. One can also speak of an expansion, but also of an overlapping of protective purposes, or the addition of the protective purpose of so-called consumer welfare. Some commentators talk (in connection with well-known German *Facebook* case) even about an abuse of competition law and subverting competition rules which should not take over the role of better contractual regulation and action against unfair commercial practices (Bergh, Weber, p. 52). Similarly, it is argued, that AT should not be applied automatically to abuse of another branch of law and the AT control should always examine the potential harm to competition (Lypalo, p. 197).

Information about market behaviour and privacy is hardly economically calculable as a consideration for free digital services, even though it is already of enormous economic value today. An extensive approach to privacy protection and broadening the content of "consumer welfare" raises a number of questions. First of all, the all-encompassing regulatory expansion and blurring of boundaries of AT is dangerous. AT is not able to address all kinds of inequalities in size, power, and wealth, or even the mere threat of such inequalities without any relation to competition, but has only a very narrow scope. AT is able to solve only competition problems, or at least it has mostly done so far.

Not only economic growth but also consumer welfare will be at risk if undertakings fear fierce competition and breakthrough innovation activities that could put them in conflict not only with AT law but also with privacy law. The optimal compromise (regulation) must not only be counterproductive but should be pro-competitive. Appropriate, precise, targeted, and predictable regulatory instruments should be used. Attempts to use antitrust to address non-competitive issues could backfire. In this context, it is aptly argued by an analogy with the relationship of the contract law and the law of intellectual property rights to the AT: for instance, some refusals to license are perfectly legal under intellectual property law but objectionable from a competition law point of view. A decision on an infringement of EU competition law is not based on an infringement of intellectual property rights or contract law. This should be no different in cases involving data protection rules (Robertson, p. 188).

The sober statement should be followed, that we do not need to look to competition enforcement to fix *privacy* problems, which doesn't mean ignoring *genuine competition* issues just because they have a link to data (Vestager, 2016). In line with this position, the European Court of Justice adheres to more competitive considerations and, unlike German practice, abstains from normative considerations (Weck, Reinhold, p. 706). The view that the German BGH managed in the *Facebook* case to "integrate other objectives besides purely anticompetitive behaviour, namely the right to informational self-control and data protection" ... and that AT, therefore, "remains a suited tool within the legal competition for how to regulate social media" (Lepsius, p. 569) is rather dissenting in the literature, which tends more to the view that "Far from uniformly mutually reinforcing, AT law and privacy law are often a cross purposes" and that "markets, and therefore AT, cannot address the failure of policy makers to provide legal protection for privacy rights or address the public interest in personal privacy" (Alexander, p. 5, 7). Hardly anyone will downplay consumers' concerns about how their personal data is being handled. There is no denying that digital players should be held accountable for privacy breaches. But "AT laws are not an appropriate vehicle for that social goal" (Harkrider, p. 43).

It is neither reasonable to view AT as a privacy tool, nor to promote the separatist approach that data protection should play no role in AT and competition policy. Rather, "to the extent that market power or harm from anticompetitive conduct takes the form of data exploitation and privacy degradation, AT and privacy law should recognize them (Alexander, p. 15). AT law cannot be burdened (as in the case of other "exogenous" influences) with the task of performing all sorts of "public interest" tasks according to a political will that never existed in AT and for which AT was not intended.

AT law cannot pursue (similarly as in the case of other "exogenous" influences) such public interest tasks (according to political or media and populist orders) that never existed in AT and for which AT was not intended to perform. If other considerations and interests outweigh the interest in protecting competition, they should be addressed by the legislature as part of the balancing of public interests, not by ad hoc "cannibalisation" of another public interest. AT agencies and courts are supposed to focus on assessing the competitive impact of the conduct under investigation and it is not up to them to balance privacy and antitrust considerations.

5. Conclusions

AT is able to face the contemporary "endogenous" challenges of today, caused mainly by technological development, and to adapt organically while preserving its essence. It is not a revolution, but an evolution, albeit perhaps a rapid one. AT is capable of developing the necessary tools for its enforcement. It is a difficult task,

but its performance perhaps does not compromise its essence. Some externally imposed "exogenous" challenges for competition policy are more dangerous, as they may strike at the very heart of the AT and threaten its core function for which it was created, and which gives it its purpose: to protect competition and consumer welfare.

The statement that competition policy is nothing but a policy is trivial, but it implies a certain lesson (some commentators note that AT is becoming a policy with a small "p" – Waller, Morse, p. 92). It must, from time to time, be opportune by its very nature. Opportunism may, however, be only an exception and not a rule. To being conceptually opportunistic, policy must, of course, be subject to lobbying pressures (also conceptually). While it has always been political in nature, the degree to which AT has re-entered the political arena has changed. Competition, as a conflict of interests, takes place in a broad moral, social, and governmental context in which regulation is given only a limited role. After all, the political power of competitors (direct or indirect) is a more effective tool to influence the competitive environment than market power, as it is superior to the creation of a legal environment for the development and protection of competition. We have mostly moved out of "legal romanticism" and know that some undertakings can (within a certain framework) create a comfortable legal environment for themselves, including antitrust regulation (Etzioni, p. 185) or at least more "appropriate" sectoral regulation. However, the functionality of AT can be undermined or threatened not only by competitors, but also by the (perhaps well-intentioned and noble) efforts of socially responsible and ethical people for the "social good for all". However, we must be very cautious about them from the AT viewpoint without necessarily calling into question the broader societal goals themselves or the values that underpin them.

Also, behind the lofty-sounding values to which competition considerations should be aligned, there may be a vested interest that is better promoted than an undistorted competition environment would allow. AT is unable to deal with societal tasks aimed at "citizen welfare" instead of "consumer welfare", such as "low incomes and marginalised communities", "structural racism", "press freedom" etc., the fulfilment of which should condition mergers and could even break up longstanding merged companies for similar reasons (Ohlhausen, p. 11 ff). Competition is an agnostic principle (Thomas 2021b, p. 14) serving consumer welfare. Society at large and the legislature may, of course, be interested in various outcomes arising in a competitive environment. But not through antitrust, but perhaps through environmental, labour, social, and other regulation. That is, through linear instruments that pursue other normative goals besides competition. The anonymous parametric influence of competition should not be conflated with the pursuit of other direct normative objectives.

The evaluative considerations then confuse and contradict each other, leading to arbitrary (and ultimately political) decision-making. Paternalistic control of societal wellbeing, even if it pursues worthy goals to which nothing can be objected, must not deprive the consumers of the ability to finally decide about the outcomes; and precisely this ability is guaranteed by the undeformed AT (Thomas 2021b, p. 15, 23).

I also recommend that competition law sticks to its mission to protect a self-correcting functional competitive environment. It should not be "changed" and instrumentalised to achieve extra-competitive objectives that can be better addressed by direct regulation, and certainly not to comply with various vague mainstream slogans hiding interests that are not consistent (complementary) with the protection of competition. AT is neither a "collection basket" nor a "lamb of God" that takes away the sins of the world.

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Bypassing Competition Law, Bypassing through Competition Law

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Abstract

The paper will assess the flexibility of concepts of competition law to cover unexpected spheres of societal goals and limits thereof and also the flexibility to cover areas that are claimed to be uncovered by competition law. There is understanding of competition protection as an economic concept and link to requests for legal "purity". On the other hand, competition law can serve as an effective tool for solution of social and legal problems that were not originally aimed to be covered by competition law (e.g., data protection, foreign direct investment, development, and environmental agenda). And finally, in some areas it is claimed that competition law is not effective enough to protect the social purpose of market mechanism, e.g., B2B unfair trade practices, and therefore it is bypassed by specific legislation. The main risk of these type of bypasses is possible violation of *ne bis in idem* safeguard. Enforcement of non-competition policies via competition law confirms flexibility of competition law and its ability to accommodate other policies, such as horizontal policies or international trade defence

Keywords: competition law, European Union law, horizontal policies, purpose of competition law, unfair trade practices

JEL Classification: K210, K420, K320

1. Introduction

Although the European Union (EU) competition rules as well as national competition rules of the EU Member States deal with the same notions of agreements restricting competition, abuse of dominance or merger control and shall safeguard functioning of market economy, their actual legal and constitutional context can be different. Thus, the protection of competition is not a self-serving goal, it is rather a means to achieve social goods which can be differently described in economic constitutions in EU Member States or are not stipulated at all.

In this context, competition law can face challenges. On the one hand, there is understanding of competition protection as an economic concept and link to requests for legal "purity". On the other hand, competition law can serve as an effective tool for a solution of social and legal problems that were not originally aimed to be covered by competition law (e.g., data protection, foreign direct investment, development, and environmental agenda). And finally, in some areas it is claimed that competition law is not effective enough to protect the social purpose of market mechanism, e.g., B2B unfair trade practices, and therefore it is bypassed by specific legislation. The paper will assess the flexibility of concepts of competition law to cover unexpected spheres of societal goals and limits thereof and also flexibility to cover areas that are claimed to be uncovered by competition law.

2. Bypassing Competition Law

Optimistically, EU competition law is considered flexible enough to accommodate the changing character of economy, including digitalization (Ezrachi, 2018, p. 21). There are not so many areas of EU law (and indirectly law of the Member States) that can benefit from more than five decades of legal development, practice of the European Commission (EC) and case law of the Court of Justice of the European Union (CJ EU notwithstanding its name in different periods). However, competition law is facing "shortcuts" by recent regulatory legislation and proposal introduced to cover areas that are not covered properly by competition law (at least claimed) or *ex-post* competition solution are not effective enough.

Unfair business-to-business (B2B) practices fit into the first group. EU legislation as well as the legislation of the Member States are developing a system *per se* prohibited clauses in business relations to counterweight unbalanced bargaining power in cases of "substantial market power" of one of the parties. The rationale of such a legislation is stemming from the narrowness of the concept of abuse of dominant position at relevant market that does not cover "*inter-partes*" abuses (i.e., not abusive practice vis-à-vis the whole relevant market).

The second type of a "bypass" of EU competition law by specific regulation can be identified in current proposal related to digital market regulation that introduces some regulatory duties and prohibitions to so-called gatekeepers in order to avoid distortion of fairness of competition on EU digital market.

2.1 Unfair B2B practices

Regulation of B2B unfair trade practices can be split into two groups: EU-level regulations and transposition thereof into legal orders of the Member States and purely national regulation. These two groups must be analysed separately because of their different legislative position vis-à-vis EU competition law. While

EU-law backed the regulation of B2B unfair trade practices shall be confronted "internally" within the framework of the EU primary law, i.e., relation of several policies of the EU, purely national rules may be confronted not only to national competition law and EU competition law but other EU law policies as well, e.g., free movement on internal market, in particular.

2.1.1 Member States' legislative laboratory

The Members States developed a multitude of approaches to regulation of unfair trade practices by sub-dominant undertakings. Moreover, the legislation has not been stable as well, e.g., in Slovakia the regulation of B2B unfair trade practices several times introduced and repealed with different *ratione materiae* (Blažo, Kováčiková, & Patakyová, 2019). Or its introduction has not been systematic or consistent worth the rest of the legislative and competition framework, e.g., in Czechia, its introduction was objected even by the Government and the national Competition Authority (Bejček *et al.*, 2019, p. 91). Position of these rules is different in legal orders, it is a part of private rules, e.g., Hungary (Papp, 2019), mixture of public law and private law rules (e.g., France, Code de commerce, L442-1). In other countries, e.g., Estonia (Pärn-Lee, 2019, pp. 130, 133), specific regulation on B2B unfair trade practices was not developed and they rely on private law enforcement on unfair trade.

Without going into further details, map of approaches of the Member States to B2B unfair trade practices is multi-coloured (cf, Daskalova, 2018, pp. 6, 8–9) stemming from individual national legal traditions, cross-border inspiration, as well as the whims of waves of populism aimed against retail networks (Blažo, Kováčiková, & Patakyová, 2019, pp. 248–249). Aim of this paper is not to evaluate these legislative approaches as such but assess them vis-à-vis competition rules. Indeed, they can also cause other impediments to internal market if they are construed discriminatory; the typical case of discrimination can occur when such rules are applicable merely in relation to an undertaking with certain level of turnover or number of employees and none (or almost none) of domestic undertakings fulfil such criteria.

Conflicts of national regulation of B2B unfair trade practices with competition law can be twofold. The first conflict can appear vis-à-vis national competition rules. This conflict is stemming from completely different approaches to market regulation – on the one hand, protection of competition that rely mainly on liberal or ordoliberal theories aimed to maintain and protect free (or workable competition) or to maintain consumers' welfare (Deutscher & Makris, 2016), on the other hand, protection of one party of contractual B2B relations that is deemed to be "weaker", i.e., protectionist approach based on decision of law-maker that can simply lead to overregulation (Bejček, 2019, p. 59). Hence, the

regulation of B2B unfair trade practices solves market failure not by removing such a failure and "re-introduction" of market conditions, but by introduction by another type of non-market measure. Depending on the type of national B2B business, the encroachment into national competition rules can be different – either integrated, parallel, or contradictive. If B2B trade practices are somehow integrated into general rules of unfair commerce, then can create coherent system. However, a multitude of elements of national rules on B2B unfair trade practices tend to bypass competition law.

First, they are developing different notions for a description of a firm that is not in dominant position in terms of "classic" competition law, such as "significant market power," e.g., under Hungarian law it is a market situation, as a result of which the trader becomes or has become a reasonably indispensable contractual partner for the supplier in the course of delivering products and services to buyers and, due to its share in trade, it is able to influence the market entry of a product or product group at national or regional scale" (Papp, 2019, p. 148), or "superior bargaining power" under Bulgarian law shall be "shall be determined in view of characteristics of the relevant market's structure and the particular transaction involving the undertakings concerned, also taking into consideration the level of dependence between them, the nature of their business and the difference in the scale thereof, the likelihood of finding an alternative trade partner, including the existence of alternative supply sources, distribution channels and/or customers" (Dinev, 2019, p. 50). Indeed, all these definitions, are in fact an attempt to define a dominant position that is not a dominant position under competition law. However, even venerable judgment in *Hoffmann-La Roche* case the CJ EU defined dominant position for the proposes of application of Article 101 TFEU "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers." Due to the flexibility of the application of the EU competition rules, concept of dominant position (and its abuse), and concepts of significant market power or superior bargaining power (and their abuse) can overlap.

The second form of bypass of competition law (and possible interference with competition law) can arise from different types of *per se* or *quasi-per se* prohibited unfair contractual clauses. Two situations must be distinguished. If they are linked so sort of market power of one of contractual parties (superior bargaining power, significant market power), it can be still as a form of specific extension of market regulation. On the other hand, in the case of no abusive enforcement, to link to the market power (absolute or relative) it can fully fall into the scope of market-neutral private law and thus possible encroachment with competition law.

French legislation is specific in this context since its directly labels its legislation covering B2B unfair trade practices with title "Practices restricting competition" (Code de commerce, Article 442(1)-(8) and reference to specific abuse of market power is enshrined directly in the "spirit" of those provision, e.g., creation of a "significant imbalance" between rights and obligation of the parties.

The EU competition law partially acknowledges these forms of regulation of B2B unfair trade practices by Article 3(2) *in fine* of Regulation 1/2003 that allows "adopting and applying on their territory stricter national laws which prohibits, or sanctions unilateral conduct engaged in by undertakings" (while prosecuting bilateral activities outside of the prohibition by the EU competition law on agreements restricting competition, i.e., allowed by EU law, is contrary to EU law). Thus "anti-competitive" B2B unfair trade practices based on national law can become contrary to EU competition law insofar they are not unilateral.

2.1.2 Unfair B2B practices arising from the EU law

Although some Member States extent business-to-consumer (B2C) protection against unfair trade practices (Directive 2005/29/EC), such an extension falls outside the scope of the EU law, as CJ EU noted in C-304/08, *Plus Warenhandelsgesellschaft*:

> As is evident from recital 6 in the preamble to [the UCPD], only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope. 40. […] that is quite clearly not the case with the national provisions [that] refer expressly to the protection of consumers and not only to that of competitors and other market participants.

In the context of Directive 2005/29/EC its legal basis is relevant since it refers to the harmonization provision of Article 114 TFEU as well as high protection of consumers under Article 169 TFEU. Thus, the aim of the directive is both, protect consumers and avoid the segmentation of internal market due to diverse national approaches to consumer protection. On the other hand, even though national B2B unfair trade rules fall outside of the directive, they apparently cannot infringe on internal market rules by creating obstacles. If certain protective measure does not create barrier to internal market in B2C relations, the same rule must apply in relation to B2B practices. In a confrontation with competition law, the tension between consumer protection (even in the broader sense when undertakings are considered "consumers" as well), the tension is not high. Directive 2005/29/EC aims to countervail information and experience asymmetry rather than market power [cf. Article 5(3) Directive 2005/29/EC].

Contrary to Directive 2005/29/EC, in the sphere of B2B unfair trade practices, there is no comprehensive EU law legal framework. Directive (EU) 2019/633 covers merely relationships in the agricultural and food supply chain. The legislative road to adoption of Directive (EU) 2019/633 was quite long (Piszcz, 2019, pp. 112–113; Schebesta *et al.*, 2018, pp. 690–691) and manifestly departed from the concepts of competition law (the word "competition" does not occur in the text of the directive). It does not employ flexible concepts of bargaining power, its abuse or unfairness (Piszcz, 2019, p. 125) for the most part aims to address enforcement gaps in already existing legislation such as the late payments directive, the common agriculture policy regulations, the trade secrets directive, national contract law, and national stricter unilateral conduct rules, thus enforcement architecture is seen as the main legal added value of the directive (Daskalova, 2019, p. 296).

Does Directive (EU) 2019/633, however, bypass competition law? It deals with vertical business relations and competition law already well-developed and settled legal framework based on Article 101 TFEU and protection against exploitative practices can rely on Article 102 TFEU. There are several overlaps between competition law and B2B in the agriculture and food sector and if related to market power, the scope of the directive can be considered competition regulation. However, it was completely carved out of competition rules and its legal basis lies in common agricultural policy, in particular, in Article 43 (2) TFEU. This legal basis was chosen, even though it covers food not covered by agriculture policy and therefore it can be contentious (Schebesta *et al.*, 2018, p. 293). On the other hand, it can cover relations that fall completely out of the scope of competition rules under Article 42 TFEU.

Summing up, Directive (EU) 2019/633 is a double bypass of competition law, since it applies in the area where derogation from EU competition rules established by the rules on common agricultural policy may apply and at the same time it directly prohibits some behaviour that can be normally handled by competition law.

The question is whether EU rules on B2B unfair trade practices are expandable to all sectors. While in agricultural sector, the EU has a specific competence, including stabilising markets, "ensure a fair standard of living for the agricultural community" and kind of price regulation (Article 39 TFEU) it does not have such a protectionist competence in other areas of economy. In such a situation it can have two options – enforcement rules on application of Articles 101 and 102 TFEU or harmonization of national rules creating barriers to internal market under Article 114 TFEU.

2.2 Regulation of the gatekeepers

More than year ago, the European Commission presented its legislative initiative for digital markets the Digital Markets Act (DMA) and the Digital Services Act. In the context of competition law, the DMA is understood as a complement to current regulatory framework set by competition rules. Under the Draft DMA, Article 114 TFEU is its only legal basis and therefore it does not rely on the possibility to expand enforcement of competition rules under Article 103 of Article 352 TFEU. Comparing to directive on B2B unfair trade practices, the concept and notion of the Draft DMA refer to concepts of protection of competition (the title refers to "contestable and fair markets"). On the other hand, the concept of a "gatekeeper" under the Draft DMA resembles network operators under sector regulations (Larouche & De Streel, 2021, p. 544), i.e., regulation of sector is failing or still non-existing.

The closer the EU law regulation bypasses competition rules, the more awareness it needs. If the overlap is accidental and regulation regimes manifestly follow different goals, invoking possible violation of *ne bis in idem* is less probable. However, if regulations follow the same, or similar goals, *ne bis in idem* can be violated. The Draft DMA resembles the competition rules in too many instances, including procedural rules or level of fine for infringement are drafted based on Regulation 1/2003 and obligations of gatekeepers reflect the main antitrust investigations vis a vis digital platforms during the recent years (Botta, 2021, p. 504). The necessity of *ex-ante* regulation (comparing to *ex-post* evaluation of Articles 101 and 102 TFEU) is not a convincing argument for removing the DMA from the scope of competition rules because merger control is also *ex-ante* competition measure.

The aim of this paper is not to challenge the necessity or suitability of the DMA and to prefer *ex-ante* regulation at such dynamic market, as digital markets are, over *ex-post* evaluation via traditional enforcement measure based on Articles 101 and 102 TFEU. The Draft DMA seems to be an unnecessary bypass of competition law because it bears apparent features of pro-competitive regulation, thus it can rely on firm exclusive competence of the EU, rather than contestable harmonisation legal basis.

3. Bypassing through Competition Law

3.1 Horizontal EU policies and competition law

Competition law, as other EU policies shall accommodate all so-called horizontal policies of the EU, such as environment protection or protection of human rights (Blažo, Kováčiková, & Mokrá, 2019; Corvaglia, 2016, p. 608; Majcher & Robertson, 2021, p. 13). Thus, these policies must be integrated into competition law enforcement, both public and private. Traditional way of

protection of environment can be seen in exemptions under Article 101(3) TFEU, i.e., exempting from prohibition agreements contributing to the development and economic efficiencies, including saving sources. From this point of view, the position of competition law is quite passive, and it is rather "not-interfering" horizontal policies than foster them. Majcher and Robertson suggest more proactive approach when competition law sanctions anti-competitive behaviour that has negative impact on environment as a specific kind of harm (2021, pp. 23–24). This concept is really intriguing and can raise a deterrence effect of both forms of enforcement. In public law enforcement the concept of harm can be expanded to all types of harm, not merely economic harm and can have consequences in the setting of fines or accepting settlement. Since private enforcement of competition law is aimed to retrieve damages linked to individual harm, there a new type of private enforcement can developed. GA Kokott in the *Otis* case presented her thoughts on "political damage" in the case of bid rigging, i.e., harm caused to public good with possible *parens patriae* action.

On the other hand, this enforcement of other policies via competition law resembles *Facebook* saga at German Federal competition authority which linked violation of data protection (Mazúr & Patakyová, 2019, p. 230; Petit, 2021, p. 535). This approach of punishing violation of other branches of law via competition law was not left without criticism (Sousa Ferro, 2017, p. 169). Indeed, the general clause of Article 102 TFEU is neither linked to certain type of form abuse nor harm, however, it shall still follow the ultimate goal – protection of internal market.

3.2 International trade defence via competition law

In May 2021 the EC presented its proposal of the "Regulation on foreign subsidies distorting the internal market" that plans to protect the EU's internal market against foreign subsidies. This new proposal includes three so-called modules: a set of measures of general application that governs the *ex officio* review of subsidies (Module 1), specific rules on concentrations (Module 2) and specific rules in public procurement in the EU (Module 3). Thus, it does not use "traditional" measures of defence in international trade but imposing additional obligations of beneficiaries of such subsidies, in particular in the context of merger control and public procurement (Nagy, 2021). This measure can prevent beneficiaries of foreign subsidies to participate in economic activities within the internal market, not merely import subsidized goods, as traditional international trade law does. Without proper disclosure of foreign subsidies and removal or countervailing its harmful effect on internal market, the company cannot successfully comply with rules on merger control. Therefore, the internal market, EU industry, and domestic undertakings are indirectly protected against foreign subsidies by two types of competition scrutiny. First, it can block the merger,

i.e., measure preventing expansion of such undertakings on internal market via acquisitions, and at the same time, scrutiny of foreign subsidies under EU law rules, i.e., review similar to state aid assessment.

4. Conclusion

Current competition law faces several challenges. It shall answer to dynamic development of digital markets, greening EU policies, value-cantered policies of the EU, including strong protections of right of individual, etc. Along with these challenges, there are challenges on the position of competition law in the system of legal regulation, in the system of "economic constitution". There is not only a question, what shall be protected, but also how shall it be protected. As Janus, competition law shows two faces. One is complex with plenty of economic theories and time-consuming public measures and private litigations. The other one has effective measures that can overlap to other policies. Several examples of bypassing vis-à-vis competition were identified: bypassing competition law by specific regulation that are carved out of the flexible body of competition law, in particular, national and EU law backed regulation of unfair trade practices and the Draft DMA. The main risk of these type of bypasses is possible violation of *ne bis in idem* safeguard, i.e., threatening one of the values of the EU. Moreover, there is also a threat of fragmentation of EU legal order and proliferation of EU legislation based purely on Article 114 TFEU, even it is linked to competition law, rather than on solid basis of Articles 103 and Art. 352 TFEU. On the other hand, the second group of attempts, i.e., enforcement of non-competition policies via competition law confirms flexibility of competition law and its ability to accommodate other policies, such as horizontal policies or international trade defence

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Considering worker welfare? A capability assessment of antitrust

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Abstract

Conduct of competition law under the consumer welfare standard is under attack. In the United States (US), some have requested considering worker welfare in the day-to-day application of antitrust and merger rules. By contrast, similar calls are weaker in the European Union (EU) in spite of it being a "social market economy" (article 3(3) TEU). This article asks "why?". To address this question, it compares antitrust's capabilities to protect worker welfare in both regions. It concludes that while American ones are both structurally and contextually stronger, European capabilities exist. This finding provides insights on how to reform the tools and methods of EU competition law if enforcers decide to step up intervention. Considering social impacts in antitrust could strengthen its legitimacy.

Keywords: antitrust reform, comparative law, institutional capabilities, worker welfare.

JEL Classification: D43, J42, J53, J81, K21, K41, L40, L41, L42

1. Introduction

Antitrust is under attack for its narrow focus on the consumer welfare. A subset of those critiques lies in the neglect for labour markets and workers (Baker, 2019). Puzzlingly, while European Union (EU) competition law is more regulatory than its American counterpart (Fox, 1997), the United States (US) have granted more consideration to worker welfare in recent years. How can such a situation be explained?

For a start, let us clarify what "worker welfare" means in this paper. Despite the intuitive association of the "welfare" terminology with broad social policies (education, health…) and state intervention, the concept shrinks in the antitrust context. Just as consumer welfare synthetizes levels of outputs and levels of prices, worker welfare synthetizes levels of employment and levels of wages. The difference is that workers supply while consumers demand. While seller power and monopolization weaken consumer welfare, it is buyer power and

monopsonization that weaken worker welfare. Restrictive agreements do not fix the price or level of outputs, they do so with inputs. No-hire, non-poaching, wage-fixing, information exchange… these conducts restrict wages and limit the free flow of labour on the labour market (Marinescu and Posner, 2020).

Intuitively, Europe being a social market economy (article 3(3) TEU), one would expect stronger concern about those restrictions on our side of the Atlantic. Why is American antitrust enforcement fiercer then? I hypothesize that antitrust capabilities to protect worker welfare are stronger in the US than in the EU.

The capability of a legal tool corresponds to its potential to achieve a specific outcome. The fittest it is to do so, the more capable. Here, the outcome is to "protect worker welfare". What does this mean? Let us run the analogy with the more traditional goal of antitrust: protecting consumer welfare. Simply put, it covers two elements. First, preventing or ending restrictive conducts for consumers to benefit from improved products, at lower prices, in maximized quantities. Second, compensating harm. "Protecting worker welfare" thereby clarifies: it includes preventing or ending labour restrictive conducts (thus maximizing wages and employment) and compensating workers' antitrust injury.

In this paper, I investigate the respective capabilities of American and European antitrust towards worker welfare. I include Federal and State provisions when mentioning American antitrust. When it comes to worker cases, there is little difference. Correspondingly, European competition law covers both the EU level and National Competition Authorities. Enforcement being decentralized, it makes sense to investigate both levels at once.

I leave aside the question of antitrust's capabilities to *prevent* harm to workers. While they exist (labour markets could be considered *ex ante* in merger reviews (Naidu *et al.*, 2018)), they have never been used so far. On the contrary, restrictive conduct cases exist in both the EU and the US. As this paper seeks to identify whether antitrust capabilities shrink, expand, or stay still when workers – not consumers – are harmed, performing a case study is particularly enlightening and supports narrowing down the focus.

While worker welfare has received attention in antitrust literature (Hemphill and Rose, 2018; Posner, 2021), the comparative approach of this paper is original. By identifying the strengths and weaknesses in each legal regime, it provides European enforcers with a roadmap for improvement if they were to step up on this question.

In Part 2, I present the analytical framework and specify that antitrust capabilities are shaped at the mobilisation, operationalisation, and remediation levels. I then compare antitrust's capabilities in each forum with respect to each criterion (Parts 3, 4 and 5). I conclude that the American advantage over the European framework mostly builds on private enforcement capabilities and identify how Europe could catch up if it wanted to (Part 6).

2. Evaluative framework

The capabilities of a tool hinge upon three core aspects. First, how accessible is it, how can it be mobilized? Second, how is it concretely enforced? How difficult is it for a litigant to win a case and for an enforcer to characterize an infringement? Last, how does remediation work? Is it effective, generous, or rather restricted? I rapidly present elements that influence capabilities at each level.

2.1 Mobilisation capabilities

A tool's accessibility depends on both its theoretical and practical availability. Theoretically speaking, what is the scope of its legal capacity and who can action it? Besides, concretely, is its use facilitated or inhibited by procedural and practical characteristics (cost, time, proof thresholds…)? The level of public interest for an issue can also boost mobilisation capabilities. First, as public enforcers generally set their priorities, a topic becoming notorious can incentivize finding and prioritizing cases. It may also spur private litigants to come forward.

2.2 Operationalisation capabilities

Operationalisation capabilities depend on the level of requirements at trial (burdens of proof, strictness of standards of review), the clarity of theories and tools and the degree of outcomes' predictability. When antitrust can expand coherently to encompass new considerations, legal certainty increases. Antitrust capabilities improve when judges clarify what they require from litigants to be convinced. Legal certainty is also shaped by a purely quantitative dimension: the more cases, the more incremental knowledge arises from repetitive adjudication.

2.3 Remediation capabilities

Remediation is the last component of antitrust capabilities. What are its means and conditions? Is it effective to put infringements to an end? Is compensation generous? Can litigation stop effectively and fast? The nature and effectivity of available remedies, the existence of alternative modes of conflict resolution and the levels of compensation are all relevant.

Let us move on to the comparative case study: it enables to identify the core elements restraining European enforcement.

3. A structural and contextual combo: American antitrust is more easily mobilised to protect workers

At the mobilisation level, the strengths of a framework depend on what it is legally allowed to deal with, the range of actors who can seize it, and the practical ease with which it can be set into motion: time, costs, strictness of admissibility requirements. We analyse in turn the labour exemption, public and private

enforcement capacities, and the degree of interest for worker welfare cases in both regions. Overall, Americans are more likely than Europeans to turn to antitrust for both structural and contextual reasons.

3.1 The labour exemption is irrelevant to worker welfare.

In both the US and the EU, the labour exemption is irrelevant to worker welfare cases. It leaves antitrust mobilisation capabilities unaffected.

By its very nature, workers' collective action restricts competition. First, collective bargaining skirts the competitive process by which wage settle to their market price. Second, unions' boycotts and strikes impact production, reduce output, and impede the natural flow of commerce (*Loewe v. Lawlor*, 1908). To prevent antitrust enforcement in such contexts, both regions adopted a labour exemption. In the US, statutory (Clayton Act, 1914 and Norris-La Guardia Act, 1932) and non-statutory (*Meat Cutters v. Jewel Tea*, 1965) provisions shield negotiated collective decisions on terms and conditions of employment from antitrust scrutiny. In the EU, despite different legal basis in national frameworks, member states converge in this exemption. It is sometimes understood *a contrario*, based on workers' Constitutional rights (Articles 39 and 40 of the Italian Constitution). It can also be stated in case law (*Département de la Marne*, 2004) or be included in competition acts themselves (Article 16 of the *Dutch Competition Act*). At the EU level, the shield arose when judges refused to assimilate "workers" to "undertakings", sole subjects of competition law (*Becu*, 1999) and refused to make collective agreements illegal under antitrust, for this would prevent the EU from pursuing its social policy objectives (*Albany*, 1999).

The restriction is thus narrow: antitrust cannot be enforced on collective bargaining agreements. This is basically it. *A contrario*, everything else can be tackled with antitrust, even when dealing with labour and conditions of employment. Courts have repeatedly refused to exempt agreements when they were concluded solely among employers (not employers and employees (*Hockeyligan*, 2012), or when they were wrongly presented as extending collective bargaining negotiations (*Anesthesiemedewerkers*, 2010). Put simply, the labour exemption is concerned with "the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer" (*Cordova v. Bache Co.*, 1970).

3.2 European citizens can trigger public enforcement procedures more easily

Systems of public enforcement differ in both regions. European citizens can more easily constrain enforcers to initiate a case, which improves mobilisation capabilities.

In the US, private parties can whistle blow, but they can't lodge formal complaints. Agencies have discretionary power to start an investigation.

On the contrary, in the EU, a natural or legal person with legitimate interest can lodge a formal complaint. The Commission must rule on it and its decision can be appealed before the General Court (Notice on the handling of complaints, 2004). At national levels as well, agencies are generally compelled to investigate the complaints lodged by interested parties. This increases victims' possibilities to turn to antitrust, but we still lack judicial precedents on workers' standing. Do they have a legitimate interest to act? They should, but we can't conclude definitively on this question. This slightly impedes mobilisation capabilities.

3.3 The American private enforcement system facilitates mobilisation

3.3.1 Structural and contextual elements benefit American mobilisation capabilities

European workers have little incentive to mobilize antitrust. First, private enforcement is still in its early days in the EU: only recently did Directive 2014/104/EU facilitate private action. While rising, it remains proportionally weaker and less common than in the US (Jones, 2016). Second, this structural imbalance is heightened in worker welfare cases: the status of harmed workers and the conditions of claims' admissibility under article 101 lack clarity. From a theoretical perspective, Articles 1 and 3 of Directive 2014/104/EU seem to grant workers a right of action. Yet cases are scarce and unclear. In the old *Bosman* case (1995), the plaintiff complained that regulation of players' transfers violated competition law. Besides restricting competition among clubs, he argued that the rule kept "players' wage at a lower level than would otherwise be the case". The advocate general had "great doubts as to whether the considerations [were] relevant" to enforce article 101, players being workers, not service providers (Conclusions of the Advocate General in *Bosman*, 1995). Does this imply that as workers, individuals cannot suffer from antitrust harm? The Court never ruled on this issue. Focusing on freedom of movement, it did not reach the antitrust investigation. Despite this dissuasive analysis, the case is older than the directive and at least one counter example exists. Dutch hospitals had concluded no-poach and price-fixing agreements (*Anesthesiemedewerkers*, 2010). The suit was brought by labour unions – private litigants – and judges accepted the case. They granted standing to workers under 101 and corresponding national provisions. The situation thus remains blurry, and the CJEU is yet to clarify it.

In the US, the position is clearer. Case law explicitly recognizes that harm to worker welfare is an antitrust injury for which workers have standing. This was not originally the case. In *Radovich v. National Football League* (1956), the Court of Appeals considered that the litigant had failed to state a claim on which relief could be granted: the "no-switching" clause preventing football players to change teams were not *"calculated to prejudice the public or unreasonably restrain interstate*

commerce". The Supreme Court disagreed (*Radovich v. National Football League*, 1957), albeit with an unclear reply: the claim was not entirely frivolous and could be tested under the general prohibition on restraint of trade. While Justices clearly affirm the right to private action, the reason for standing seems to lie in the restriction of outputs rather than in players' harm as such. Case after case however, the reasoning has clarified. Courts now recognize antitrust injury (*Jacobi v. Bache & Co.*, 1974; *Nichols v. Spencer International Press, Inc.*, 1967) and antitrust standing (*In re High-tech employee antitrust litigation*, 2012; *Roman v. Cessna Aircraft Co.*, 1995) on the sole basis of labour market restrictions' harm.

A European worker is less certain than an American one that her claim will be admissible absent a restriction on outputs. Yet the imbalance is more contextual than structural: standing has already been granted in the past. It is the scarcity of case law that makes it difficult to predict legal outcomes, thereby impeding antitrust mobilisation capabilities. Besides, European litigants have little procedural facilitators to initiate cases.

3.3.2 Procedural mobilisation boosters: a structural asset for American workers

Two procedural mechanisms structurally boost American antitrust's mobilisation capabilities.

First, antitrust suits often resort to the contingent fee device. The plaintiff pays only if the case is won or settled. On the contrary, litigation costs can disincentive action in the EU (McCarthy *et al.*, 2007). The losing party generally pays the costs of trial, which represents an enormous threat for an individual worker suing her employer. It may prevent the procedure from ever starting at all.

What's more, worker welfare cases make class-actions procedures particularly valuable. First, restrictive agreements are used against many employees at once. Second, workers typically share a position where litigating alone against their employer is costly, time consuming, and extremely risky. Class-actions' availability thus fosters antitrust enforcement. On our side of the Atlantic, collective redress mechanisms only sporadically exist and vary from Member State to Member State (Heaton and Holt, 2019). Those devices are not specific to workers' cases but the context makes them particularly relevant. Both financial incentives and collective redress mechanisms unlock antitrust's potential to address workers' harm.

This advantage slightly pales considering how difficult certifying a class becomes in worker welfare cases. Litigants might stumble twice upon formal requirements made factually similar by the context: showing that antitrust injury and damage can be predominantly proven by common evidence (art. 23(b)(3), Fed. R. Civ. P.). To prove an antitrust injury requires to show an antitrust violation. To that end, workers may need to delineate a relevant market and thus identify interchangeable employers. This assessment must be common to

the class, which is challenging. Despite being all affected by a unique restrictive provision, each worker has a specific set of skills making her singular as compared to others. This impacts employers' interchangeability from workers' perspective, and Courts regularly refused to characterize a common relevant market (*Deslandes v. McDonald's U.S., LLC*, 2021; *In re Compensation of Managerial, Professional, and Technical Employees Antitrust Litig.*, 2003). If workers surmount this difficulty, their intrinsic heterogeneity strikes again shortly after: they need to prove class-wide damage. Again, damage hinges upon their respective wages, job positions, and experience. Courts have already ruled out predominance of common damage (*Fleischman v. Albany Medical Center*, 2008; *Fleischman v. Albany Medical Center*, 2010; *Weisfeld v. Sun Chemical Corp*, 2004),

The outcome is paradoxical. On the one hand, class-actions boost antitrust mobilisation capabilities for workers because of their broadly shared situation and lack of incentive to come forward alone. On the other hand, since workers intrinsically present unique sets of skills and occupy specific job positions, classes are difficult to certify.

3.4 American capability booster: public awareness and enforcers' determination

More anecdotal, but no less real, American capabilities currently benefit from a contextual capability booster: enforcers repeatedly denounce labour-restrictive conducts and largely advertise their will to intervene. The topic is high in the public debate. Enforcers face time and budget constraints and need to prioritise infringements. They have discretionary power to investigate and must leave aside certain cases. As a result, how "hot" a topic is shapes prioritisation strategies.

In the US, labour restrictive conducts are top of the list. This increases public enforcement and incentivizes private enforcement. When enforcers repeatedly clarify that certain conducts are illegal (Department of Justice Antitrust Division and Federal Trade Commission, 2016), litigants can mobilise antitrust more easily.

Such a phenomenon is weaker in the EU. Despite increasing discussion of the issue (Vestager, 2021), the topic is less central. This is a self-sustaining process: the more a topic is discussed, the more likely enforcers will prioritise it, thereby increasing again the conversation's intensity. While the EU may reach this point soon, public interest is not yet a capability booster.

Overall, it is easier to mobilize antitrust in the US, mostly because of structurally stronger private enforcement capabilities. Clarity of case law and the degree of public interest also grant a contextual advantage to American antitrust. The latter could disappear if levels of enforcement increased in the EU. Current scarcity of cases also impacts operationalisation capabilities.

4. Rules guiding enforcement are clearer in the US

Operationalisation capabilities of antitrust are stronger in the US, mostly because they are clearer. The possibility to focus exclusively on labour markets is explicit, and standards of reviews are almost stabilized. However, just as in the EU, worker welfare is not protected against all odds: it is balanced with consumer welfare. While this reduces antitrust capabilities, it does so equally in both fora.

4.1 American explicit focus on the labour market

Operationalisation capabilities are stronger when there is no need to show downstream harm to characterize an infringement. Proving an impact on the labour market only is easier than showing an impact on both the labour and the downstream output market. Harming workers thus becomes illegal as such, even absent effects on end-consumers.

American judges used to require outputs' restraints to characterize an antitrust violation (*Anderson v. Shipowners Assn.*, 1926; *Union Circulation Company v. Fed. Trade Com'n*, 1957), but litigants now only need to prove the labour market restriction, even absent downstream harm (*US v. eBay, Inc.*, 2013). This sharpens antitrust capabilities. Recently, in *National Collegiate Athletic Association v. Alston* (2021), the Supreme Court characterized a horizontal price fixing scheme in a monopsonized market without searching for a restraint "*in the seller-side*" or "*consumer facing*" market. Defendants had not argued this should be done so Justices did not explicitly address this question. Yet, they did not require such a showing.

In the EU, case law is confusing. It is hard to say whether labour market restrictions suffice in and by themselves to characterize antitrust infringements. Different elements blur the framework. First, most cases present both input and output restrictive dimensions. While infringements are characterized, it is hard to say whether wage-fixing conducts only would have led to similar outcomes. The reasoning is global: labour restrictive elements are mentioned as part of the overall restrictive scheme, they are not characterized as illegal as such (*Pratiques mises en œuvre dans le secteur des revêtements de sols résilients*, 2017). Second, even in "labour-restrictive only" cases, enforcers often consider output markets to characterize the infringement. In *Travail temporaire de l'Isère et de la Savoie* (1997), a wage-fixing case, parties to the agreement were promoted to end-consumers. The authority only considered the output market: since competitors compete on price, pricing strategies must be determined freely. Besides, non-participants to the scheme were excluded from the market. Thus, competition was restricted. Impacts on the labour market and workers are not even mentioned. Elsewhere, the no-hire agreement of hockey players was held illegal because it eventually affected clubs' product, thereby affecting consumers, sponsors and media companies (*Hockeyligan*, 2012). Equally, the

lifetime ban of athletes participating in unauthorized competitions, clear labour market restriction, was only investigated under the product market lenses. The Commission (*International Skating Union's Eligibility rules*, 2017) and the Court (*International Skating Union v Commission*, 2020) considered how organizers were prevented from entering the market of sporting events, and ice-skaters' harm is not mentioned.

Yet the problem is mostly one of clarification and concrete implementation: European antitrust could be fit to protect workers. First, the Commission has already hold input restrictions to be illegal by object, without considering downstream effects to characterize the infringement (*Car battery recycling*, 2017; *Ethylene*, 2020). It also stated that no-poach agreements "are likely to fall under the prohibition of article 81 as hard-core restrictions" and "could amount to a market-sharing agreement regarding the supply of the workforce" (Spidla, 2007). The CJEU also strengthened antitrust's potential for workers' harm: in *T-Mobile Netherlands BV* (2009), it denied that article 81 only prohibited "*practices which have a direct effect on the prices paid by end users*". And at national levels, authorities have sometimes characterized an infringement based only on the labour market restriction (*Anesthesiemedewerkers*, 2010). In *SZTMSZ* (2021), hiring agencies had concluded non-poaching and no-hires. They also regularly exchanged wage information. The Court characterized labour market restrictions to be illegal as such, whatever their consequences on the downstream market. Such agreements allocate markets, impede working conditions, restrict information flow for workers, suppress wages and reduce job opportunities. The angle is explicit: what matters here is that "on the labour market, [employers] compete".

All in all, European competition could deal with labour market restrictions. Tools exist and can be used – some institutions have acknowledged that. Yet such recognition is so sporadic and inconsistent that antitrust operationalisation is unpredictable. This situation may also impede follow-on actions. In this context, infringement decisions either bind courts or constitute prima facie evidence (art 9, Directive 2014/104/EU)). But what if the infringement is characterized on the output market and not on the labour market? Will a worker need to prove, again, the restriction on the market she acts on? If the conduct is illegal mostly (only?) because effects eventually reached the output market, then the legitimacy of workers' claim could be questioned. This is speculative, but it would highly diminish private enforcement capabilities.

4.2 A clearer approach to standards of review in the US

While the issue of standards of review is almost stabilized in the US, most cases are settled or dismissed at an early stage. Decisions on the merits are thus scarce. Initially, when downstream effects still mattered, judges used the rule of reason

(*Union Circulation Company v. Fed. Trade Com'n*, 1957). The existence of effects on the downstream market required investigation. Today, the theoretical setting can be summarized this way: a naked horizontal market restriction (such as wage-fixing or non-poaching) is illegal *per se*. On the contrary, the rule of reason is adequate when the restraint is ancillary (necessary to pursue a procompetitive activity), in specific contexts such as regulated activities (*Jacobi v. Bache & Co.*, 1975) or sport activities (*Mackey v. NFL*, 1976), or when the conduct was information exchange (*Todd v. Exxon Corp.*, 2001). The real remaining puzzle lies in the treatment of franchises: first, are they not a single entity, making it impossible for them to collude? This hinges upon a factual assessment and has led to divergent outcomes (*Arrington v. Burger King Worldwide, Inc.*, 2020; *Yi v. SK Bakeries, LLC*, 2018). If antitrust is considered enforceable, the issue of the standard of review jumps in. The question is controversial (AAI, 2019; DOJ, 2019; Slaughter, 2019) but case law seems to dismiss a *per se* approach (*Deslandes v. McDonald's U.S., LLC*, 2021). In *Conrad v. Jimmy John's Franchise, LLC* (2021), judges mentioned the *NCAA v. Alston* case. A "fuller review" is appropriate in industries in which "some horizontal restraints on competition are essential if the product is to be available at all" (typically, franchise agreements). Case law is not yet entirely consistent, but most questions have been tackled.

In the EU, the question is framed under the by object/by effect dichotomy. Three main situations can be characterized. First, when both inputs and outputs are restricted, enforcers generally characterize by object restrictions (*Agenzie di modelle*, 2016; *Conduct in the modelling sector*, 2016; *Pratiques mises en oeuvre dans le secteur des prestations réalisées par les agences de mannequins*, 2016; *Transitarios*, 2010) and tend to mention the possibility to also characterize effects. Yet, once again, it is hard to say what the outcome would have been absent a traditional output prices' fixing scheme. Second and third, when the restriction affects inputs most directly, the position of judges is unsettled. They have sometimes rejected a by object approach: in *Hockeyligan* (2012), litigants argued that the agreement aimed at ensuring fair proceeding of competitions, which precluded a by object approach. The Authority doubts it in passing, does not rule on the issue, and moves on to the by effect analysis (ran on the output market). Equally, in *Anesthesiemederwerkers*, both first instance and appellate judges preferred an effect approach: hospitals were trying to guarantee the quality and continuity of care, not restrict competition. Still, the agreement eventually limited "anaesthetists and surgery workers [possibilities] on labour markets". This by effect approach may be explained by the context: the specificity of sports where fair progress of competition depends on teams' stability and the importance of continuity of care in the health sector. On the contrary, enforcers have accepted the by object characterization in other cases. This is true for inputs that are not labour (*Car*

battery recycling, 2017) but the Hungarian authority has extended this analysis to labour cases specifically. While defendants argued that "novelty" precluded the by object approach, the authority disagrees. The infringement is certainly not new: price fixing, input restriction, market supply and client allocation are illegal. The object of the conspiracy is anticompetitive.

Once again, the conclusion is mixed. Case law is inconsistent, but capabilities do exist. As the Hungarian competition authority puts it, those agreements are not new and their impacts on markets are well-understood. The problem is one of inexperience and lack of coherence.

4.3 Consumers v. workers: a lost cause for workers?

In both regions, litigants mention downstream effects (*i.e.* consumer welfare benefits) to justify restrictions on labour markets. This may be legitimate, but it certainly impedes antitrust capabilities to protect workers. Such protection is not done against all odds and workers rarely win the consumer/worker battle.

In the US, brokerage firms had collectively set the commission paid to agents (*Jacobi v. Bache & Co.*, 1974). The Court validated the provision for it enabled "financial stability" (the banking sector was facing a crisis at the time). Put differently, the agreement guaranteed output supply. In *NCAA v. Alston* (2021) again, the agreement was found to improve consumer choice by creating a unique product: amateur sports, in contrast to professional sports. The same approach is adopted for franchise agreements: they increase the quantity of outputs (*Deslandes v. McDonald's U.S., LLC*, 2021).

The situation is comparable in the EU. In an ancillary restriction case, enforcers investigated the legitimacy and proportionality of the clause. It considered that overall, it enabled providing programming services (output) more efficiently (*Koios*, 2018). In *Anesthesiemedewerkers (*2009), worker welfare is also balanced with quality of care (consumer welfare). The divergence between workers and consumers' interests is sometimes even more explicit. In *Travail temporaire de l'Isère et de la Savoie* (1997), defendants argued that the wage-fixing scheme benefitted end-consumers by lowering prices. For the Authority, "*supposing even*" that this favoured economic progress, litigants had not proven the passing-on reduction nor the impossibility to achieve it through alternative means. But what if it had? If workers' loss is a direct gain for consumers, does a restriction to worker welfare become legitimate? This would be surprising, and the Hungarian authority seems to have ruled against such an approach. To characterize a 101(3) exemption, litigants claimed that mobility-restrictive clauses lowered their labour-costs by preventing them from losing investments in human capital. This improved output quality and reduced costs. The Authority is clear: only objective gains matter. When companies agree to fix prices and allocate markets, cost

reduction is the direct result of a reduction of production's volume and value. This certainly does not have procompetitive effects on the market and cannot qualify as a gain.

Since enforcers balance worker welfare with output considerations, antitrust capabilities slightly pale. Intuitively, even if passed-on to consumers, restrictive conducts towards workers seem illegitimate. On the other hand, some restrictions seem to pursue the public interest (as in the hospital case, but does this fall within the ambit of competition law?) or to facilitate the existence of a product (sports cases). Where should we draw the line? This is still an open question, and a crucial one if labour markets were to enter merger reviews.

Overall, American antitrust is easier to operationalise for workers. Let us now turn to remedies.

5. Structurally stronger American remediation capabilities

Two elements particularly benefit American remediation capabilities: the efficiency of alternative dispute resolutions and the generous level of compensation.

5.1 Alternative dispute resolution is widely used in worker cases

Settling disputes is common in the US, and most worker cases have ended this way. Their benefits are clear: they reduce uncertainty, expenses, time, and guarantee some remediation. They also have weaknesses: first, companies never admit to having violated the law (*Final Judgment US v. Knorr and Wabtech*, 2018; *U.S. v. Adobe*, 2011). Follow-on procedures therefore require a fully-fledged investigation all over again. Besides, certain settlements can be very lenient towards companies (Chopra, 2019). Still, I believe that settlements improve antitrust capabilities for workers. First, they can lighten the procedure not just once, but twice. Often, not only is the public enforcement part settled, but so is the private enforcement one (*Final Judgment US v. Knorr and Wabtech (*2018) followed by *Order granting final approval of class action settlements In re Railway (*2020)). Moreover, classes are easier to certify for settlement purposes. In *Re Railway*, Courts refused to certify the class at the litigation phase (*In re Railway Industry Employee No-Poach Antitrust Litigation*, 2019) but later agreed to do so "*for settlement purposes only*" (*Order granting final approval of class action settlements In re Railway* (2020)). A ruling on the merits appeared unpromising for workers but they still got compensation as a group, capitalizing on the collective action facilitator and the benefits of a settlement. This boosts the remediation capabilities of antitrust. Third, the DOJ has sometimes joined a private action to be able to enforce injunctive reliefs (*Order granting the United States of America's unopposed motion to intervene in Seaman v. Duke University*, 2019). This benefits workers: they get compensation, litigation ends and enforcers monitor compliance with the settlement.

In the EU, such procedures are more recent. Their functioning differs from one Member State to the next but they generally imply admitting liability. This helps victims in follow-on actions but can disincentivize companies from entering the agreement at all. Besides, settlements are generally less negotiated, and companies can mostly hope for a fine reduction. Settling is thus less attractive for a European employer than for an American one. To the best of my knowledge, no worker case was ever settled in the EU (neither in private nor public enforcement).

5.2 More profitable remedial outcomes for American workers

In both systems, private actions can grant victims compensation and injunctive relief. When it comes to putting the conduct to an end, capabilities are equal in both fora. This is also true for public enforcement: enforcers can equally stop infringements and monitor compliance.

A core difference lies in the availability of treble damages in the US. This increases antitrust capabilities by creating a strong incentive for victims. The EU rather follows a full-compensation rule: no-more/no-less than the harm (art 3, Directive 2014/104/EU). This difference, to which can be added the already mentioned absence of collective redress mechanism, grants American private enforcement a strong advantage over its European counterpart.

Overall, the US benefit from structurally stronger remediation capabilities. They facilitate dispute resolution and increase compensations' probability and levels.

6. Conclusive take-aways: a roadmap to boost European enforcement

I must first clarify that the weak level of antitrust enforcement in the EU does not imply that workers are neglected. First, those questions are approached from other angles: labour or commercial courts have ruled on non-poaching agreements based on non-antitrust legal basis (*Reuters Financial Software*, 2011; *Société Somado*, 2021). Second, in the EU, the competition-labour nexus is currently reversed and rather focuses on how to *shield* gig-workers from antitrust enforcement (Schmidt-Kessen *et al.*, 2020). Yet, given the rising interest for worker welfare, it is worth asking how Europeans should proceed if they were to step-up on antitrust enforcement.

The case study illustrates that European private enforcement is structurally behind. Workers have little incentives to litigate because mobilisation and remediation capabilities are weak. Absent deep reforms, antitrust enforcement in worker welfare cases thus requires public intervention. Mobilisation and remediation capabilities exist. The Commission, alongside competition authorities, need to look for cases, prioritize them, clarify their reasonings and communicate about their decisions. Enforcers must also clarify whether workers have standing to stimulate the

lodging of complaints. To that end, they should confirm the legitimate interest of workers.

As for operationalisation capabilities, they exist despite being blurry. Legal uncertainty, caused by the inconsistency and unclarity of case law, is what impedes antitrust capabilities the most. To strengthen them, enforcers need to clarify three elements. First, they must recognize that workers can be harmed by labour market's restrictions as such, even absent downstream effects. This may unlock private enforcement's potential: naming workers as direct victims of the infringement could facilitate follow-on actions. When the focus remains on consumers, the benefits of an existing binding decision pale. Second, they should decide when and why labour restrictions are anticompetitive by object or by effect. Third, they should identify the market(s?) on which effects and exemptions will be assessed.

To wrap up, European competition law could meet the worker welfare challenge. While private enforcement capabilities are limited, public enforcers have leeway to step-up intervention. Interest for the question is rising, and European competition law is probably at the dawn of clarification and evolutions. For enforcers, the goal is clear: their decisions must be affirmative and clear-cut. Litigants need clarity and predictability.

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Antitrust and protection of employees

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Abstract

It is often said that antitrust protects competition, not competitors. And what about employees? Is it not the employees who concentrate the burden of balancing the obligations resulting from operating in a competitive free market, however limited by certain state restrictions?

The aim of the Article is to present workers' rights and compare them with the social market economy system functioning in the EU, Poland, and other individual European countries. The author hypothesizes that employees are protected in accordance with national law and international regulations, but in a situation where enterprises compete on the market and they must have an increasingly advantageous offer, it may be at the expense of employees. Such a situation may take place especially in the case of monopsony in the labour market.

Keywords: economy, employee, labour, market, protection

JEL Classification: K210, K310

1. Introduction

The antitrust law is somewhat in conflict with market freedom and is designed to protect the interests of the weaker parties in market relations by preventing inequalities that could destabilize the economy. Most often it will focus on legislation protecting consumer rights and such regulations are already well developed at the European level.

At this point, however, it is also necessary to protect employees, who are undoubtedly the weaker party on the market. The principles of labour law derived from state constitutions, which are reflected in the acts regulating the labour law, are used for this purpose.

The author will try to juxtapose the principles of labour law protecting employees as general human rights with the dysfunctional market and the situation of employer dominance. Are workers really protected from employers or from a completely free and soulless market?

2. Principles of labour law protecting the employee

There is a dispute in the doctrine whether labour law belongs to the family of private or public rights. In this respect, one should agree with A. Musiała's view that labour law is *res publica* (Musiała, 2020), as it is regulated by the state. The state creates employment policy, ensures decent working conditions, and protects the rights of employees. Therefore, it is the state that is obliged to ensure and exercise the law and policy.

The principles of labour law, like the principles of other branches of law, are not, in principle, the basis for a substantive decision in employment matters, but nevertheless constitute an interpretative guideline that is so important when interpreting individual provisions of labour law. The rules define the general policy, the direction to be taken not only in jurisprudence, but also in the overall creation and application of law. According to the integral concept of R. Dworkin's law, there are principles and policies of a specific branch of law.

In this perspective, it is worth considering the principle indicated in the first place of labour law, namely the right to work. Although the times of the People's Republic in Poland are long gone, and with them the obligation to work, the right to work is still the principle in force in labour law. It is also included among the constitutionally guaranteed economic, social and cultural freedoms and rights. As is clear from the provisions of Art. 65 sec. 5 of the Constitution of the Republic of Poland, public authorities pursue a policy aimed at full, productive employment by implementing programs to combat unemployment, including organizing and supporting vocational counselling and training, as well as public works and intervention works. This regulation was also repeated in Art. 10 § 3 of the Labour Code, where the legislature indicated that the state pursues a policy aimed at full productive employment (Szok, Terlecki, 2021, pp. 16–17). The law defined in this way is not, in principle, a law that protects the employee, but the labour market, which puts the goal of full or the greatest possible employment in the first place, and not providing every willing individual the right to take up a job that corresponds to their interests, opportunities, perceptions, etc.

Similar provision, i.e., the right to work is also included in Art. 26 of the Czech Charter Of Fundamental Rights And Freedoms.

Article 24 of the Polish Constitution states that every work is protected, which means that all work, regardless of the legal basis for its performance, must be protected by the state, and the obligation to ensure safe and hygienic working conditions applies to every citizen who performs work.

The human right to decent working conditions and the human right to remuneration or even decent remuneration are two different subjective rights that are directly coherently related to each other.

Decent working conditions for a person are directly related to human dignity. It is possible to search as early as in the ancient world for various normative or philosophical indications concerning the conditions of human work. In a systemic way, this issue was not dealt with until the end of the 19th century. This was undoubtedly influenced by Catholic social doctrine, largely initiated by the encyclical Rerum novarum (Leo XIII 1891). In turn, John Paul II in the encyclical Labourem exercens (John Paul II, 1981) wrote about the human dimension of work, i.e., about its subjective dimension. Therefore, work cannot be treated only as a means of economic development, but also the man himself and his various powers should be taken into account.

Article 30 of the Constitution states: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities." The essence of human dignity is the subjectivity and autonomy resulting from the fact that a man, as the only living being, is endowed with reason and free will. Human dignity understood in this way, defined as personal, belongs to every human being, therefore also to every employee and employer (being a natural person). An employer is obliged to respect the dignity and other personal rights of an employee. The dignity of an employee, like their other personal rights, belongs to the employee as a person in general. Article 11 (1) of the Labour Code shows that an employer infringing an employee's personal rights violates the obligation to respects the dignity and other personal rights of every human being, as well as the additional obligations set out in Article 11 (1) of the Labour Code, which is universally binding on all entities.

Currently, the doctrine indicates that decent working conditions include, *inter alia*, factors such as: appropriate sanitary and epidemiological conditions, protection against unwanted negative effects of work, appropriate working hours established by law, appropriate exposure to light, and providing the employee with appropriate conditions, including mental conditions. Therefore, provisions were introduced to combat mobbing, discrimination and marginalization of an individual. Moreover, the introduction of forced labour, which took place in both totalitarian systems of the 20th century, is forbidden. An element of decent working conditions is enabling the employee to improve their qualifications.

Working conditions undoubtedly depend on the financial capabilities of the entrepreneur and the state itself. This is how to justify the existing differences in this respect between different countries or parts of the world. However, it is not acceptable for entrepreneurs to differentiate the level of wages of individual employees in the same positions or to lower the level of wages using their stronger market position. When it comes to remuneration for work, it is obvious that every person should be remunerated for their work. Currently, the conditions

of remuneration are established by means of statutory regulations, but also by collective agreements, e.g. with teachers, or by means of pay regulations that are used in many workplaces.

The abovementioned is called the principle of equal treatment, or the principle of equal rights, meaning that employees who perform the same duties must be treated equally. This applies in particular to the equal treatment of men and women in employment. This principle applies to equality in the material sense. This means that the employer should not treat all employees identically, it is possible to treat differently employees who perform different duties or the same duties, but in different ways. It is also possible to differentiate employees' rights depending on their personal characteristics, such as predispositions, education or qualifications, or differences in work performance and length of service. It is important that the criteria for differentiating employees are not discriminatory. The principle of non-discrimination means that an employee is not treated inferiorly because of non-work-related features or properties listed in Article 11 (3) of the Labour Code, important from the social point of view, such as, for example, gender, age, religion, disability, or because of the type of employment, e.g., temporary or permanent employment. Employment discrimination means unacceptable differentiation of the legal situation of employees according to these negative and prohibited criteria. Discrimination will be the unlawful deprivation or restriction of employee rights, or the granting certain workers fewer rights than those enjoyed by other workers in the same situation.

In Poland, there are still a few cases of violation of employee rights. The most common allegations relate to hindering or restricting trade union activities, such as an employer's failure to provide trade union organizations with premises and technical equipment, failure to provide notice boards, or removal of information from them, employer's refusal to provide information necessary to conduct trade union activities, refusing to release an authorized trade union activist from the obligation to perform work (the dismissal may take place in various working hours) with the retention of the right to remuneration in order to perform an ad hoc trade union activity, when this activity could not be performed during leisure time. There have also been cases of seizure of union property and violation of union correspondence (Szymonek, 2011 online).

3. Social market economy as a principle of the economic system

The concept of a social market economy was implemented by L. Erhard, the German Minister of Economy in the government of K. Adenauer. Its aim is to operate in a free-market economic system in such a way as to maintain high economic growth, low inflation, and low unemployment, while ensuring decent working conditions, a system of social security, and the provision of high-

quality public goods. According to A. Müller-Armack, its aim is "on the basis of a competitive economy to link free initiative with social progress already secured by the achievements of the market economy". The main assumptions of social policy are equal opportunities and justice. In order to implement this concept, the state may intervene in the economy with an appropriate policy of competition and market supplementation in order to counteract its ineffectiveness (Biliński, Żurawik, 2018, pp. 20–21).

As pointed out by Smejkal and Saroch, the Treaty on European Union (TEU) in Art. 3 para. 3 requires the EU to pursue the goal of a highly competitive social market economy. Both the authors highlight that the stress is pointed at a socially-oriented market rather than market-oriented economy (Smejkal, Saroch, 2014, p. 393). The aim of the social market economy is to "order a balancing test between the economic and the social at any occasion when rights arising from either economic freedoms or social protection come into clash. (…) Social market economy means a compromise between free markets and protected social rights." (Smejkal, Saroch, 2014, p. 407).

Also in the Polish Constitution, a social market economy is a constitutional principle of the economic system. While implementing the principle of the social market economy, the state must pay attention to the principle of social justice (Art. 2) and the principle of inviolability of human dignity (Art. 30). By using various instruments (not only of a legal nature, but also using subsidies, taxes, etc.), it should ensure the observance of social justice in the course of economic development and should properly steer economic processes so that it is possible to achieve the social goals defined by them. At the same time, it must guarantee, but only within the framework of the law it enacts, the basic elements of a market economy. Their catalog may be defined in various ways, but on the basis of the literature on constitutional law, it can be stated that it certainly covers the minimum, which include: private property, economic freedom and the related freedom of contract, free competition, price formation through market mechanisms, freedom of work and free movement of workers, capital and services, freedom and independence in making economic decisions (Banaszak, 2012).

Freedom of economic activity determines the framework of employee rights, requiring, *inter alia*, taking into account the contractual nature of the employment relationship. Partnership and solidarity require balancing the interests of employees and employers. It is necessary, in particular, to take into account the economic situation of the employer and balance it with the obligatory scope of employee benefits. The function of the state should be, *inter alia*, creating "a social structure of the enterprise, which recognizes the dignity of an employee as a human being and collaborator, gives him the right to co-decide without limiting the initiative and responsibility of the entrepreneur". The juxtaposition of these elements shows

that the state's economic system is to be based on the combination of two ideas: the market economy and the social state. Pursuant to Art. 20 and 22 of the Constitution of the Republic of Poland, the legislature may limit contractual freedom by shaping the remuneration of employees or authors in the form of minimum wages. It is related to their weaker economic position (Safjan, Bosek, 2016).

However, the question arises whether the social market economy model protects workers' rights sufficiently? Is there a balance between the requirements of the free market and securing the needs of employees? It is also worth mentioning the principle of sustainable development, which is also guaranteed by the supreme law in Art. 5 stating that the Republic of Poland "shall ensure the protection of the natural environment pursuant to the principles of sustainable development". Thus, there is a third element of the socio-economic system: economy understood as a free market, ensuring social security and environmental protection. The state must therefore ensure the balance between three aspects: economy, society, and ecology. This issue was also taken into consideration by other competition authorities to evaluate applicable business sectors or assess the level of competition between companies/institutions. The problem is that the current tools are difficult to use or inadequate to assess competition issues between biological systems in the digital world: "Further economic thinking and an understanding of the business models of ecosystems are required to allow competition authorities to make informed and relevant decisions about competition on digital markets" (Jenny, 2021).

4. The position of employees and labour market power

As mentioned above, the economic system influences the position of employers and employees on the labour market. In the area of labour law, the antitrust clauses aim at reversing the weakening of antitrust enforcement, the extent that it relates to, and has reinforced the power that employers have to set wages and working conditions for their workers, without countervailing power on the part of workers who have limited capacity to leave for another job in order to increase their compensation.

The worst situation is for the employees of the labour market monopsony, i.e., when there are few potential employers, when the process of finding another job is expensive, or an employee is attached to their present place of employment, or by family commitments, or the need for health coverage or other job-related benefits. Under such circumstances, employers are able to profitably pay their workers less than what their contribution to production is (marginal productivity): while some workers quit because of such abuse, enough workers stay to make wage suppression beneficial.

On the basis of the monopsony power in labour market, American scientists have formulated recommendation for the policy makers (Azar, Marinescu, Steinbaum, 2019):

- Policy-makers should make clear that the antitrust laws protect competition in both labour markets and product markets, and that documenting increases in consumer prices is not necessary to prove harm to competition within the meaning of the antitrust laws.
- Reductions in wages, wage shares (as a percentage of company revenue), employment, hiring, or job quality should be prima facie evidence of harm to competition within the meaning of the antitrust laws and cannot be traded off or weighed against price or output effects in antitrust analysis.
- Policy-makers could consider extending the antitrust labour provisions and protection over employees/workers who lack traditional employee status under the national laws. As Maggiolino suggests: "antitrust legislators and policy makers could aid gig workers and other under-protected self-employed workers by excluding them and their collective agreements from the scope of application of competition law" (Maggiolino, 2022). In USA this topic has already been discussed, and in 2016 the soft law document "Antitrust Guidance for Human Resource Professionals" was issued, and in 2020 a document that takes under consideration the pandemic situation: Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets.

In all cases it should not be allowed to: lower wages below what would be charged in a competitive market, to wage-discriminate (i.e., to pay similar workers working in the same market significantly different wages), to impose disadvantageous nonwage contractual terms on workers without compensation, to restrict sharing information about wages and working conditions among employees or job applicants, to persuade or command employees to change employment contract into civil contract, to include arbitration or abusive clauses in employment contract.

5. Trade unions and protection of workers

The right to collective bargaining is an example of one of the basic social rights recognized as such in the international, EU, and national legal systems of many countries. At the same time, it is the law that seems to best show the divergence of interests of entities involved in its implementation, i.e., employees and employers. Collective actions taken by employees to, for example, increase the level of remuneration in relation to the duties performed, are usually associated with inconveniences, often including economic losses on the part of the employer. On

the other hand, in order not to cause these actions, an important role is played by collective bargaining conducted between social partners, which may result in the adoption of legal regulations protecting the above-mentioned interests in the least conflict-prone manner (Ryszka, 2018).

The new EU strategy, Europe 2020, compared to the Lisbon Strategy, marginalizes the importance of trade unions. Recommendations on labour market deregulation, labour law reform, increasing the flexibility of work organization, decentralization of collective bargaining, or the reform of social security contribute to the weakening of social models, of which trade unions are an important entity. The labour market in Poland is changing, which is manifested, *inter alia*, in the increasingly common part-time work, employment by temporary employment agencies, and the promotion of self-employment. Currently, the problem is the scale of non-standard forms of employment that deepen the wage differences, increase the level of social insecurity and, consequently, reduce welfare (European Trade Union Institute, 2012).

Additionally, it should be borne in mind that the labour market is subject to constant, dynamic changes, and the so-called task work that results in a departure from typical full-time forms of employment. The current system of economic governance of the European Union with its mechanisms, sanctions and intensified coordination has led to a new European intervention in wage policy. This system changes the paradigm from accepting free collective bargaining to direct political interventionism in national collective bargaining processes. The economic situation affects the conduct and effects of social dialogue, and the crisis or economic slowdown are not conducive to concluding collective labour agreements more favourable than statutory regulations. In recent years, there has been a trend towards limiting the scope of benefits granted to employees, and the main goal of the negotiations is to maintain the level of employment by the unions (Stachowski, 2015, p. 132).

It should be noted that the representation and collective defence of the interests of workers and employers fall under the competence of the EU pursuant to Art. 153 paras. 1 and 2 of the Treaty on the Functioning of the European Union. In its judgments *C-348/05 Viking* and *C-341/05 Laval,* the CJEU expressly stated for the first time that "the right to collective action should be recognized as a fundamental right which forms an integral part of the general principles of Community (now EU) law, compliance with which is ensured by the Court". He further emphasized that it was not, however, absolute and could be subject to limitations, for example if it would interfere with the implementation of the freedoms of the internal market (in this case, respectively, the freedom of establishment and the freedom to provide services). Therefore, a strike action could only be undertaken if it would be justified by overriding reasons of public interest, such as the protection of employees. The Tribunal found no reason why

such activities should be excluded from the provisions of the Treaties governing the abovementioned freedoms of the internal market (Ryszka, op. cit.).

The Court ruled that the right to engage in collective action to protect host country workers against possible social dumping practices may constitute an overriding reason in the public interest capable of, in principle, justifying a restriction of one of the fundamental freedoms (including the freedom to provide services).

The Tribunal noted, however, that collective action of trade unions aimed at protecting employees by guaranteeing posted workers a higher level of working and employment conditions does not justify restricting the freedom to provide services, as the entrepreneur is obliged to comply with the most important mandatory minimum protection standards in the host Member State.

6. Conclusion

Antitrust and competition laws have developed. However, it is worth putting more emphasis on the protection of workers' rights, as excessive or overstated competition conditions force companies to become more and more efficient. Managers push for higher productivity, often by exploiting employees who, on the other hand, are also consumers of products and services provided by enterprises.

Antitrust law interferes with the free market, i.e., it is, in a way, a tool of state intervention. It protects the market against excessive appropriation of the market position by one market player, so that it does not use its dominant position in relations with customers by imposing the offer, price, and features of the product offered. This means that the purpose of antitrust law is to protect the weaker market participant. Thinking in this way, we should also protect the weaker people within the organization, i.e., employees.

There is no doubt that an employer is obliged to respect the provisions of the labour law. However, in addition to what is required by law, organizational culture in enterprises should also be developed. It is worth mentioning here the important role of the labour inspection in assuring that civil contracts meet the conditions of an employment contract.

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The Interpenetration of the Branches of Public Law and Private Law on the Example of Possibly Illegal State Aid to Sports Clubs

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Abstract:

The subject of this Article is presenting the author's view on the interpenetration of the branches of public law and private law on the example of potentially illegal state aid (in the light of European Union law) for sports clubs. The main purpose of the Article was to answer the question whether the support provided by public authorities to sports clubs constitute illegal state aid and to present that the support instruments used are a good example to demonstrate that it is necessary to distinguish a new concept in the legal doctrine – border law. Exemplary legal solutions regarding the law of the borders were presented and an attempt was made to assess whether there is illegal state aid in the case of support for sports clubs by the public authorities.

Keywords: state aid, border law, sports law, public law, sponsorship

JEL Classiffication: K210

1. Introduction

Sport has always been a subject of general public interest. As an area of rivalry for various interest groups, it was also of interest to public authorities. The involvement of public authorities in sports activities was influenced, among others, by the fact that the value of the sports market increases significantly every year – according to 2018 data, the global value of the sports market is estimated at US $ 488.5 billion (Polish Economic Institute, 2019, p. 4). The relationship between sports activities and financing, also from public funds, is inseparable and significant, as sport is treated as an economic activity.

Sport is – also in the European Union – perceived as an extremely important element. The EU recognises professional football as economically, socially, and culturally vital; thus, in the highly politicised arena of state aid, enforcement is far from straightforward. This overlooked tension between EU law and sport provides

a new and interesting angle from which to view the EU's policy on sport, and the relationships between global actors, the Commission, UEFA, Member States, and professional football clubs. The area also makes visible a dynamic interaction of interests, engaging the EU internal market, the societal role of sport, UEFA financial fair play, and Member State autonomy (Craven, 2014, pp. 205–217).

Public authorities' support for sport is an excellent example of the interpenetration of two traditionally perceived branches: public law and private law. It is argued in the literature that these two branches interpenetrate each other. The support instruments used and the legal measures used to grant support are of an unusual nature–they combine elements characteristic of private law (equality of parties) and public law (sovereignty). Scientists who are part of the research on the border law present positions in favor of a departure (or at least wide changes) from the classical division of branches of law into public law and private law.

2. Problem Formulation and Methodology

2.1 Research problems

The basic research problem is the attempt to answer the question whether the support granted by public authorities to sports clubs constitute unlawful state aid and whether this aid should be returned as unacceptable (incompatible with the internal market of the European Union). The admissibility of the aid was subjected to detailed tests, taking into account the normative basis of its granting. The conducted research was aimed at analyzing the mechanisms, legal support instruments, and the scale of support. The fundamental question therefore comes down to whether the state aid granted to sports clubs meets the criteria of legality, purposefulness, and proportionality provided for in legal regulations at the EU level, and whether the support granted to sports clubs constitutes unlawful state aid referred to in Article 107 of the Treaty on the Functioning of the European Union. The preliminary assumptions made show that such support in fact (in most cases, in particular regarding professional sports clubs) constitutes illegal state aid referred to in the Treaty on the Functioning of the European Union.

It should also be noted that the described topic brings together hybrid legal solutions–both in the field of public law and private law. Thus, the second important research problem is to determine whether the legal solutions used in the support of sports clubs by public authorities constitute an example of legal solutions from the border law (where the branches of public law and private law meet). It is a topic that raises a lot of controversy both in the doctrine and in the practice of applying the law – it carries significant consequences, which only emphasizes the importance of the problem.

2.2 Research methods

The research methods used by the author were:

a) dogmatic legal research (interpretation of the norms of applicable law) through a critical analysis and linguistic analysis, as well as using the rules of formal logic of relevant legal acts in terms of the analysis of current regulations and reminiscence of European Union law on the financing of sport, as well as judicial decisions in terms of verifying the legality of resolutions adopted by the relevant organs. Complementarily, in the course of the research conducted by the author, the empirical method was also used;

b) comparative legal methods through critical analysis and linguistic analysis, as well as using the rules of formal logic of legal acts of foreign law in terms of comparing the provisions on financial support for sport in various legal systems of European Union countries and European literature on public aid and financing of sport in selected European Union countries;

c) historical legal research by analyzing the functioning of legal elements related to the evolution of methods of granting state aid in the legal system, including, in particular, support by public authorities granted to sports market entities over the years. The Article also attempts to use the historical legal research in the system version to analyze the state aid law in the field of sports law and the impact of state aid law on the development of this field.

3. Analysis and Problem Solution

3.1 The concept of illegal state aid

The basic prohibition on the grant of state aid is contained in Article 107(1) Treaty on the Functioning of the European Union. That Article also defines the concept of state aid. It states:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

So, it is necessary to show cumulatively that the measure is a «*state measure*» and that it has been granted through state resources. It is also important that provision a measure must satisfy the following four criteria (Bacon, 2009):

1) there must be aid in the sense of a benefit or advantage;
2) which is granted by the state and through state resources;

3) which favours certain undertakings or the production of certain goods (selectivity); and
4) which is liable to distort competition and affect trade between Member States.

State aid which follows all the above criteria should be considered unlawful and prohibited in the light of Treaty on the Functioning of the European Union. However, on of the derogations contained in Article 107(2) and (3) of Treaty on the Functioning of the European Union may apply.

Doubts may arise from the concept of "affect trade". It was explained in the judgment of the Court of Justice of the European Union of 17 September 1980: "Where state financial aid strengthens the position of an enterprise in comparison with other enterprises competing in intra-Community trade, these other enterprises must be considered to be affected by this help".

At this point, a legitimate question arises, which concerns the relationship between the definition of state aid (the concept of state aid) and the support of sports clubs by public authorities. It should be noted that, at the professional level, sports clubs operate primarily in legal forms that are characteristic of entrepreneurial status. Therefore, it is necessary to consider whether (and above all when) it is permissible to support their activities with public funds and in which cases aid granted to such entities by public authorities loses the status of legality.

The exact procedure for notifying state aid is not the subject of this article. However, it should be mentioned in order that the authority of the European Commission (the body responsible for monitoring state aid) to recognize the aid as admissible (compatible with the internal market) is very broad. It includes an assessment of an economic and social nature against the background of the objectives and tasks of the European Union. As indicated by the Court of Justice of the EU in its judgment of 12 December 2002, C-456/00, *French Republic v Commission*:

> The Commission enjoys a wide discretion in the application of Article 87(3) of the Treaty establishing the European Community (currently the Treaty on the Functioning of the European Union), which requires economic and social assessments in the intra-Community context. When examining whether the discretion has been exercised lawfully, the Court cannot substitute its own assessment for that of a competent authority but must confine itself to examining whether that authority's assessment is not vitiated by manifest error or a misuse of powers.

It is also important that in Article 108(3) of the Treaty on the Functioning of the European Union, the *standstill* clause, i.e., the obligation of a Member State to refrain from implementing the proposed measures, until the procedure

of notifying the aid to the European Commission is completed (Kurcz, 2012). The scope of the *standstill* clause should therefore be summarized as follows: notifiable aid shall not be put into effect until the Commission has taken a decision authorizing such aid or until such a decision has been deemed taken by the Commission.

State aid to enterprises (including sports clubs) must meet the *de minimis* exemption. Legislatures s provide some criteria which can help in determining if the agreements between economic units are of minor importance and the Treaty on the Functioning of the European Union is the main legal act directly applied in European Union Member States (Puksas, 2012). He also states that as the basics for the application of *de minimis* exemption were set, notice to the European Commission and its provisions are not obligatory. The current thresholds are included in the Commission Regulation (EU) No 1407/2013 of 18 December 2013. Pursuant to the regulations in force, the notification is not subject to public aid in the amount not exceeding € 200,000 within 3 consecutive years.

In order to supplement this discussion, it is also necessary to mention the necessity for the public authority to control whether the conditions of support or cooperation are determined on the basis of market principles. The tools used to achieve this goal are the Private Investor Test (would the entrepreneur receive support from a public entity on the same terms as from private entities?) and the Private Creditor Test (would the reliefs/facilitations in repayment of liabilities applied by the public entity be accepted by a private, rational a purely commercial creditor?).

3.2 Reflections on the border law

New legal regulations (and even philosophies of action) at the interface between public law and private law, causing difficulties in their legal qualification, should not be mixed, and which inevitably have participated in the legal organization of social life for centuries; the scope of participation of legal systems is also the result of non-legal conditions – social and economic conditions as well as legal culture (Jeżewski, 2012).

This is another voice in the discussion on the phenomena defined as the widening of the application of civil law in the sphere of public administration or even the definition of the occurring phenomena as displacing administrative law with civil law. While it will certainly be possible to find arguments in support of such a position, it cannot be considered completely accurate.

It is undoubted that the activities of public administration are dominated by its one-sided forms – administrative bodies have administrative powers. Public administration is thus equipped with a superior position over the other party to the legal relationship. However, it is impossible to ignore the fact that views in this area have evolved over time – it is clearly visible in the doctrine of Polish

law. As indicated by Kiczka, the education of public law, and in particular of administrative law, was connected with a specific behavior of the legislature, as it was associated with the replacement of the consensual mechanism of shaping legal relations in society on the basis of an individual – a public authority body in favor of a one-sided model of establishing legal norms (Kiczka, 2008, p. 67).

For example, changes in Polish doctrine began to be noticed at the beginning of the 1970s. As Jaworska-Dębska points out, it was then that the issues of bilateral forms of operation of the administration began to be of interest. Initially, however, the research focused on the so-called administrative agreement and its public-law nature, and rarely applied to classic civil-law contracts such as, for example, a loan, rent, or lease. Today, they have a significant share in the functioning of modern public administration (Jaworska-Dębska, 2008, p. 13). Currently, the most popular forms of action in the science of public law are the ollowingg: classic civil law contracts, administrative contracts, settlements, or public-private partnerships.

It seems that the dominant view is the rising need to use contracts by public administration, especially that legislation in individual countries introduces legal solutions enabling action in this area. In particular, it is worth distinguishing contracts used in public procurement procedures or contracts used in procedures of entrusting tasks to public benefit organizations. These agreements do not constitute a homogeneous form of action by public administration – they are classified as bilateral forms of action of a heterogeneous legal nature, and at the same time defined in various ways: administrative contract (referring, though not always, to the structure of the contract used in broadly understood Western countries), civil law contract dominated by the regulation of public law or separate, normatively, types of unnamed contracts (Kokocińska, 2020, p. 184).

However, it should be remembered that the reflections presented in this paper concern the concept of border law. Despite the fact that public authorities use classic civil law instruments in their activities, from the point of view of the basic values of the civil law relationship, it may not always be considered that these values are met. It is indicated in the literature that a civil law relationship can be called a relevant relationship on the basis of substantive law, between equal and autonomous entities (Partyk, 2015). A public administration body cannot fully use the freedom to shape civil law relations, because the field and scope of concluding contracts is often strictly delineated by statutes; There is also no freedom to shape the content of the contract and choosing the other party.

Exceeding powers by a public administration body or failure to protect the public interest may result in certain consequences for persons acting on behalf of public administration bodies, as well as for the validity or effectiveness of the contracts themselves. As a rule, the effect of invalidity is a consequence of a lack of competence or exceeding it. As Machnikowski pointed out, however,

there is a fluid boundary between the prohibition of using competences in whole or in part and the situation in which this competence is limited or absent (Machnikowski, 2005). The doctrine argues, however, that the effects of lack of competence or exceeding it may be different. Under the law, various solutions are possible – for example, despite exceeding the competences, the legislature may, in order to protect certain values (trust of a citizen in public authorities, certainty of legal transactions, protection of acquired rights), order that the contract be treated as valid, despite the fact that a legal act has been performed by an entity that does not have the appropriate competences In the light of the relevant legal provisions (Wronkowska, 1994).

At the same time, the author of this text points out that the provision of aid by the competent state authorities for sports clubs in light of the provisions on state aid may also be regarded as exceeding the competences. If the aforementioned threshold of *de minimis* aid is exceeded, the requirements of the Private Creditor Test and the Private Investor Test are not met, as well as the inability to apply the exemptions provided for in the Treaty on the Functioning of the European Union, the action will be considered as exceeding the granted competences or even as failing to maintain these competences by the competent public authority. Under European Union law, it is not permitted to support sports clubs that are entrepreneurs, due to the possibility of distorting competition. Competition is one of the most important values protected by the European Union, which is even confirmed in the preamble to the Treaty on the Functioning of the European Union, which indicated: "removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition", as well as in Article 3(1)(b) of the Treaty, in which it was indicated that The Union shall have exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market.

3.3 Examples of legal instruments used as support for sports clubs – border law instruments

Selected examples of legal instruments supporting sports clubs, which – in the author's opinion – are a good example of border law instruments, will be presented below.

3.3.1 Support based on sponsorship agreements between the club and the state

The sponsorship agreement can be defined as follows: through the sponsorship agreement, the entrepreneur (sponsor) undertakes to provide a specific cash benefit to support the activities carried out by the sponsored person or to achieve the general goal desired by them, in return for which the sponsored undertaking

undertakes advertising and marketing activities (benefits) or other activities supporting the economic activity of the sponsor.

It is an agreement the boundaries of which are most often determined by the principles of social coexistence and by the agreed resolutions of the parties. However, it should be remembered that public authorities must comply with the relevant provisions of the acts on public finances and therefore do not enjoy the full freedom that is characteristic of typical civil law relations. In particular, they are related to the provisions on public procurement – for example in Poland it is the Act of 11 September 2019 – Public Procurement Law, and in Germany it is Verordnung über die Vergabe öffentlicher Aufträge (Regulation on Public Procurement Participation).

Agreements concluded by public authorities with sports clubs most often concern the implementation of specific promotional services. When concluding them, it is argued that sports clubs are often the best economic entity that can provide advertising during sports events that enjoy significant audience interest. This allows for the circumvention of stringent public procurement requirements.

3.3.2 Support by subscription of shares or stocks in sports clubs

The method of financing by subscribing for shares may differ depending on the particular legal order. Due to its nature, it can only be applied to entities that are able to create shares or issue shares. However, an appropriate legal basis is necessary for such activities.

An example is the Polish Act on the Municipal Economy of December 20, 1996. Pursuant to its provisions, local government units (i.e., one of the public authorities) may establish limited liability companies or joint-stock companies, and may join such companies, and selected restrictions indicated in in this act. In this case, we are dealing with a kind of liberalization of the requirements that are imposed on public authorities. Usually, the economic activity of public authorities is effectively limited by the relevant provisions of public law.

3.3.3 Support based on a loan agreement

A loan agreement can be defined as a document between a borrower and lender that details a loan repayment schedule. In other words, by the loan agreement, the lender undertakes to transfer a certain amount of money or items marked only as to the species into the property of the taking-owner, and the taking party undertakes to return the same amount of money or the same number of things of the same species and quality (Zinbarg, 1975). The remuneration of the competent public authority for granting the loan can be determined in any way. It generally takes the form of an interest expressed in money. It also happens, however, that a public authority resigns from its remuneration for using the capital.

In practice, a public authority often requires the conclusion of a surety agreement as security for the repayment of the loan. It is also possible to use a declaration of patronage, which is known in the legal orders of Germany, Austria, Switzerland, France, or Italy. The content of such a declaration may take the form of a non-binding declaration of goodwill (soft patronage declarations) or be similar to a surety or include an assurance of payment of compensation in the event of failure to meet a secured claim (hard patronage declarations) (Heropolitańska, 2018). Such a declaration or surety agreement are intended to increase the debtor's financial credibility.

4. Conclusions

The above considerations concerning the support of sports clubs by state authorities clearly confirm that the issue of supporting such entities is both interesting and extremely complex from the legal point of view. This is because it is related to the specificity of the issue of public aid, its multifaceted legal regulation and the tools it consists of – examples of the interpenetration of public law and private law (border law).

The Member States of the European Union are obliged to comply with very complex and rigorous provisions of law in the field of state aid, acting in accordance with the procedures for granting financial support to entities (in particular those operating for profit – enterprises). If the *de minimis* aid threshold is exceeded and the Private Investor Test and Private Creditor Test are not met, there is a real risk that the European Commission will impose a decision ordering the refund. The European Commission has extensive powers of a controlling (and even supervisory) nature. It supervises the application of EU law in the area of state aid (under the control of the Court of Justice of the EU) – having extensive powers to control its granting by Member States to certain enterprises or the production of certain goods, as well as taking appropriate decisions in these matters (Stankiewicz, 2016).

The provisions of European Union law allow for the application of appropriate legal remedies – an appeal against the decision of the European Commission to the Court of Justice of the EU. As the Commission is empowered to exercise imperative measures, it must comply with the obligation to provide detailed explanations of all factual and legal circumstances. The use of presumptions is in fact unacceptable, and they are often a decisive factor in a court's decision to annul a decision.

State aid granted by the state to sports clubs requires an in-depth analysis in any event, including: whether it does not affect trade between Member States and whether it does not strengthen the company's position compared to other competing undertakings. In assessing the support in the light of the provisions

on unlawful state aid contained in the Treaty on the Functioning of the European Union, the European Commission is bound only by not exceeding its powers and by thoroughly explaining the circumstances of each case. However, it should be remembered that European Commission has extensive powers in this area.

Therefore, it seems reasonable to consider that the thesis put forward at the beginning of the Article is true. In most cases, public support for a specific group of entities (in this case sports clubs) most often constitutes illegal public aid referred to in Article 107 of the Treaty on the Functioning of the European Union. Support for sports enterprises obviously affects trade–it has been repeatedly emphasized in the jurisprudence of the European Commission and the Court of Justice of the EU that professional sports clubs are considered enterprises and are subject to state aid control, which in itself implies an impact on this exchange. It is also obvious that a detailed analysis of an individual case is necessary each time, which is required by the very detailed and strict European Union and national legal regulations in force. The granting of a specific amount of support or relief may not constitute compensation for state actions.

Equally important are the considerations to why the legal instruments used by public authorities to support sports clubs are an example of border law. Undoubtedly, the issue of applying private law in the public sector requires undertaking interdisciplinary research. We are dealing here with issues on the border of various legal disciplines, and we should not, a priori, be limited to the achievements of one of the legal disciplines (Szczepaniak, 2016). In the case of the support methods discussed in this paper, we are dealing, among others, with instruments that are characteristic of civil law, administrative law, or European Union law. In the opinion of the author of this text, it is impossible to precisely delineate the boundaries for each of the instruments used, which justifies the statement that legal solutions used by public authorities in support of sports clubs are an example of legal solutions from the border law (the border between public law and private law).

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Significant Impediment of Effective Competition – an old tool and unresolved doubts

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Abstract

The process of merger control by antitrust authorities requires the examination of all negative effects of the transaction, both from the structural and behavioural point of view. For this reason, the "significant restriction of effective competition" test (the SIEC test) was implemented. However, it is difficult to define what "significant" actually means. This concept is vague and may give the competition authorities a large margin of discretion in assessing the transaction. For that reason, it raises fears about excessive interference of administration bodies in the market structure. It is difficult to clearly define when the economic effects of a merger should be considered "significant" within the meaning of Article 2 of the Regulation 139/2004. In the Guidelines on horizontal mergers, the EU Commission stated that a horizontal mergers harm competition in that it may result a significant increase in prices within the relevant market. The EU Commission is of the opinion that the closer the competition between the merging parties, the more probable is price increase after the transaction. However, it does not indicate when the price increase should be considered significant. Therefore, it is not known when this standard is met.

The article focuses on horizontal mergers and formulates the hypothesis that the notion "significant impediment of effective competition" in merger control means ineffective from structural and behavioural points of view. As a result, merger assessment encompasses different economic effects of a merger as the creation or strengthening of a dominant position, coordinated and unilateral effects, the proximity of competitors in the relevant market, potential competition, and efficiency. All these elements, except domination, are difficult to verify *ex ante*, especially considering that their evaluation is based mainly on qualitative tools. The article indicates that the main tool of merger assessment should be the market position of merging parties as the other elements of the significant impediment of effective competition are too blurred to be decisive.

Keywords: horizontal mergers, merger control, significant impediment of effective competition.

JEL Classification: K 2, K21, L4, L41

1. Introduction

Mergers between undertakings are one of the tools for their development and restructuring. The main purpose of purchasing a company is to create shareholder value beyond the sum of both companies. This happens when a merger (or acquisition) presents an opportunity for a new or acquiring company to increase revenues or reduce costs. In order to ensure that such reorganization of cooperation does not cause lasting harm to competition, it is important to control concentrations (mergers or acquisitions) that significantly impede effective competition within the market. The purpose of merger control by competition authorities is to detect mergers and acquisitions that may have a negative impact on market structure and in consequence on competition.

The article is divided into five parts, and it successively discuss: the essence of the significant impediment of effective competition test (further: the SIEC test), merger assessment tools, the unilateral effects and competitors' proximity in terms of the negative impact on the relevant market. Later it will discuss the core of the coordinated effects and the effectiveness of concentration, which should balance the negative effects of the transaction. As a result of a merger, competitive pressure decreases as there is one competitor less on the market, but the existing degree of competition may mitigate the tendency to raise prices. The same effect occurs when market entry restrictions are small, and the risk of new entry increases the competitive pressure among existing competitors. For this reason, when analysing the distortion of effective competition after a merger, the effectiveness of the transaction should also be assessed. It is not specified what the efficiency requirement means, but it is obvious that this concept should be related to the anti-competitive effects of the planned merger on the relevant market. However, it can be assumed that in order to assess effectiveness of a merger, the impact of the transaction on consumers must be examined also. The post-merger restriction of competition can therefore be considered significant if the analysis of the coordinated and unilateral effects and the closeness of competitors confirms the risk of distortion of competition.

The article is a contribution to the discussion on the notion of a "significant impediment of effective competition". It is based on the method of analysing legal acts, documents, literature, and jurisprudence.

2. Merger assessment tools

Under Council Regulation No 4064/89 on the control of concentrations between undertakings, the key tool for assessing a merger was the creation or strengthening of a dominant position (Council Regulation, 1989). However, it did not cover other forms of distortion of competition that could result from the

transaction. On 1 May 2004, Council Regulation 139/2004 on the control of concentrations between undertakings entered into force and one of the key issues covered by the new regulation was the establishment of a different construction of substantive law assessment of a merger (Council Regulation, 2004).

Under the first Merger Regulation dominance was the main criterion for assessing a concentration (Council Regulation, 1989). The transaction was allowed as long as it did not create or strengthen a dominant position, as a result of which effective competition in the common market, or part of it, would have been significantly impeded (Case *United Brands v Commission*; case *BA v Commission*). However, in 2004 the Council implemented a new test (Council Regulation, 2004). Currently, Article 2(2) of such Regulation provides that "concentration which would not significantly impede effective competition in the common market, or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market".

This change in the substantive law test, which was the basis for merger control in the EU for the first 14 years, was implemented to eliminate a gap in the previous legislation. The idea was that certain mergers which caused anti-competitive effects but did not result in the creation or strengthening of a dominant position, would not be covered by the previously applicable dominance test (Case *Airtours v Commission*). However, it is currently doubtful whether such a gap has actually been eliminated (Heimler, 2008).

On the basis of the first Merger Regulation (Council Regulation, 1989), the dominance test was interpreted by the Court of First Instance (CFI) (cases *Kali und Salz*; *Gencor v Commission*; *Airtours v Commission*) and it noted that not only individual dominance was important, but also collective dominance (when more than one undertaking jointly maintain a dominant position). The CFI proved that the dominance test was applied in cases where the combined enterprise will not be a market leader but will be part of an oligopoly. The currently used test of "significant impediment to effective competition" fills the previous gap, but it does not eliminate the use of dominance as a key evaluation criterion. Therefore, the size of the market share (over 50% according to the European Commission), the level of Herfindahl Hirschman Index and its change after concentration are important. In addition to these quantitative indicators, merger assessment requires a qualitative analysis to predict whether the transaction will lead to coordinated and/or unilateral effects and in consequence will significantly distort competition. Moreover, to the extent that the aim or the effect of the concentration is to coordinate the competitive behaviour of undertakings that remain independent, such coordination is to be assessed in accordance with the criteria of Article 101(1) and (3) TFEU, in order to determine whether this action is (or is not) compatible with the internal market (Council Regulation, 2004, Article 2(4)). This mean

that the assessment of concentration includes various forms of anti-competitive practices that should be analysed both in a behavioural and a structural context, and thus should include uncoordinated (unilateral) and coordinated effects.

3. Unilateral effects

One of the arguments justifying the introduce of the SIEC test was that merger provisions should cover unilateral effects of the concentration in oligopolistic markets (Council Regulation, 2004). These effects did not fall within the scope of the previous dominance test, as they do not result in the emergence or strengthening of a dominant position of the merging parties. They mainly occur after a merger, but they are not dependent on the creation or strengthening of a dominant position of a combined company (Werden, 2008). They can be generated in the absence of individual domination of the undertaking. According to The European Commission, they may take place primarily within the oligopolistic market, even if there are no coordinated effects (or tacit collusion), if the merger eliminates the competitive pressure (*EDF/Segebel*). As a result, the market power of enterprises participating in the merger is strengthened which is conducive to raising prices (European Commission, 2004). The most direct effect of the merger will be the loss of competition between the merging parties (Faul, Nikpay, 2017). In other words, the EU Commission may prohibit a concentration which does not create or strengthen individual or collective dominance if, by eliminating one undertaking from the market, competition may be significantly distorted (Thomas, 2017). Unilateral effects will therefore be defined as a change in the market structure resulting from a concentration that has an adverse effect on the buyer.

A detailed analysis of such effects was undertaken by the EU Commission e.g., in the case *INEOS/SOLVAY/JV*. The Swiss producer of petrochemicals, chemicals, and oils – Ineos AG and the Belgian producer of alkali metal chlorides, Solvay SA have formed a joint venture (*INEOS/SOLVAY/JV*). As INEOS was the largest supplier in the S-PVC market and Solvay was the second largest company in the relevant market, The European Commission was concerned about the risk of unilateral effects after the transaction. It decided that the competitive pressure would be limited and, as a result, the market power of the parent companies would increase. There was a risk that the parent companies would give up mutual competition. For example, they could raise the prices of their products. This would initially cause customers to switch to products manufactured by their competitors, but in the long run competitors could also raise prices. Such a reaction from the rivals could act as an incentive for the joint venture to raise its prices further. As a result, the market power of the joint venture would increase. The European Commission noted that INEOS had acquired several competitors in the past and thus gained a considerable opportunity to expand its portfolio.

As a result, after the acquisition prices increased by approximately 10% (Case *INEOS/SOLVAY/JV*). The creation of the joint venture aimed to merge the assets of INOES and SOLVAY. The joint venture would have a market share of around 50–60% and its largest competitor 10–20%. There was, therefore, no counterbalance from the existing competitors. The EU Commission's analysis showed that competitors had no incentive to either increase production or to pressurize the prices in the relevant market. It was, therefore, likely that the joint venture would hold a dominant position and would raise prices or reduce production volume. The transaction would also create a market leader in sodium hypochlorite with a market share of 60–70%. The second largest company was AKZO with much smaller market share (20–30%) and would not exert any competitive pressure (*T-Mobile/Telering*).

One of the first cases in which the new merger assessment method was applied was *T-Mobile Austria/tele.ring*. In this case, the takeover of tele.ring (10–20% market share) by T-Mobile Austria resulted in the second largest provider in the relevant market with a market share of 20–40%. The leading company was Mobilkom, with a 35-45% share (case *T-Mobile Austria/tele.ring*). In light of the structural approach based on the dominance test, no dominant position emerged or strengthened. After the merger, T-Mobile would not become a market leader, but nevertheless, according to The European Commission, the concentration would have negative effects as it caused the risk of unilateral effects (Schwalbe, Zimmer, 2010). Importantly, such effects are not included in the domination test in the light of Article 2(1) and (2) of the Regulation 139/2004 because by definition they are below the market power threshold but fall within the scope of the SIEC test in the light of Article 2(3) of that Regulation. From a theoretical point of view, this has two consequences for the economy. It is not about the practical execution of the test, but about the basic economic concept. Unilateral effects cause a change in the behaviour of an individual undertaking in an oligopolistic market due to the mitigation of competitive pressures as a result of concentration. For this reason, the theory of unilateral effects should be supplemented with the concept of close relations between competitors.

3.1 Close competitors

A helpful tool for the assessment of "significant impediment of effective competition" is also the proximity of competitors. Here the decisive factor is the distance between competitors participating in the merger and other rivals, i.e., how close substitutes are the products they produce. In markets where products are not homogeneous, the decisive factor is the distance between the merging competitors and the remaining competitors. The closer the relations of two competitors (i.e., the more substitutable are their products), the faster they can

raise prices after the merger. Close relations between competitors may constitute the decisive criterion in the merger control procedure, especially if the parties involved are undertakings with a high market share. The lack of close relations can be demonstrated when the merger does not lead to a significant limitation of effective competition. When close relationships between competitors are a good indicator of potential harmful effects on competition, the question arises as to how such proximity between competitors should be established. A comparison of the physical similarity of the products is insufficient to assess competition between products. However, apart from assessing the subsidiarity of products, there is no proper method of measuring close relationships between competitors. Economic methods of assessing close relationships between competitors include mixed demand elasticity, diversification opportunities, market growth, as well as gains and losses, and procurement market pricing (European Commission, 2004). The most important factor is the mixed elasticity of demand used by the European Commission when determining the relevant market. It is used to define the range of products that are perceived by consumers as substitutes. It needs to check whether customers will immediately switch to available substitutes, or to services of suppliers located elsewhere, in response to a hypothetical small (in the range of 5–10%), non-transitional increase in relative prices of products and areas under consideration. If the substitution was sufficient to prevent any benefit from a price increase due to a drop in sales, additional substitutes and areas are brought into the relevant market. If two products are close substitutes, customers will buy more of the latter if the price of the former increases. The importance of mixed elasticity comes down to the fact that an increase in the price of one product results in an increase in demand for another. Low elasticity means that the products are not close substitutes. The mixed elasticity of demand shows, therefore, the extent to which products are substitutable (Johensen, 2013).

When two competitors exert strong competitive pressure on each other, they also exert price pressure on each other. In assessing the proximity of competitors, the supply side is also important. If competitors of the combined companies were unable to increase their supply, the combined entity could reduce the volume of supply and thus lead to higher prices in the market.

The European Commission indicated in the Horizontal Merger Guidelines that where market conditions were such that rivals had sufficient production capacity and found it profitable to expand production, The European Commission was unlikely to be inclined to argue that the concentration strengthened a dominant position or significantly impeded effective competition (European Commission, 2004). Therefore, when competitors have the resources to invest and expand their businesses – even if these competitors are currently small – there is less risk to competition. This is the case where there is an opportunity to increase efficiency

in the market so that these competitors are ready to supply the customers of the combined entity if that entity increases prices or restricts competition (Rosenthal, Thomas, 2010).

The simulations of competition processes raise many doubts. It is not possible to explain it under general considerations as each model is based on specific outputs. Building a model and using specific data requires knowledge about competition processes in the relevant market. The use of quantitative tools leads to serious data problems. This is the main barrier to the analysis of unilateral effects. Companies are reluctant to share their market strategies and, therefore, there is an information asymmetry between them and the antitrust authorities. Due to the lack of information, the decisions of these authorities carry a high risk of error. This means that, in practice, it would be difficult to prohibit a merger that does not create or strengthen a dominant position, but there is a likelihood of unilateral or coordinated effects.

4. Coordinated effects

The assessment of whether the merger will lead to a significant impediment to competition also requires the examination of coordinated effects, in addition to unilateral effects and close relations between competitors. It includes the effects of a merger which are caused by a change in the strategic interactions of all market participants, which facilitates the coordination of all companies in the market and the price level is higher than in the absence of concentration. The merger may change the structure of the market in such a way that it will facilitate the coordination of all companies in the market. At the same time, it can eliminate competition and allow for a coordination that corresponds to the monopolistic structure of the market (Rosenthal, Thomas, 2010). To assess the risk of coordination, specific structural factors as, for example, the degree of market concentration, homogeneity of products, market transparency, and symmetry of undertakings are helpful. If few companies are in the market and they produce similar goods at similar costs, it is easier to agree market strategies. However, coordination is not stable. Each company may unilaterally opt out of coordination in order to maximize its own profits individually and for that reason such analysis of potential merger effects is also doubtful (Kostecka-Jurczyk, 2017).

If the volume of supply in the market is reduced, all companies will tend to raise prices. Each undertaking may be willing to reduce its own production even more and thus increase its own profits. If other companies notice these trends as well, it will lead to retaliation. The expansion of production by all companies will lead to a price decrease for all (Budzinski, 2006). In such dynamic competition, companies can make their behaviours dependent to some extent on whether or not other companies maintain the similar (agreed) strategies. These types of

cooperation can stabilize collusion between companies as each of them anticipates that a one-sided deviation is only profitable in the short term. For the stability of coordination, the profitability of coordination, the benefits of breaking away, and the benefits of retaliation, are theoretically important. Coordination is the more stable the greater the benefit of coordinated behaviour and the lower the benefit of breaking away.

Practically every merger weakens competitive pressure, and it is therefore more difficult to find cases of retaliation. A breakthrough judgment regarding coordinated effects was the Court of First Instance (CFI) judgment in case of *Airtours v Commission* in 2002. In its judgment, CFI stated that an oligopolistic market

> [S]tructures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice (*Airtours v Commission*, 2002).

For this reason, when assessing the merger, competition authorities examine the possibility of the emergence of collective domination. The definition of a collective dominant position is therefore based on tacit coordination between companies and not on a structural or economic relationship between them. The determination of a collective dominant position facilitates certain factors:

- mutual awareness of the colluding parties as to the implementation and execution of the common policy,
- balance, meaning that there must be a retaliatory mechanism to ensure consistency within the oligopoly and to prevent members from deviating from their common policy in the relevant market,
- no competitive constraints that allow companies within the dominant oligopoly to operate independently of their current and potential customers and consumers.

It should be noted that companies in the oligopolistic market are, on the one hand, independent from each other and, on the other hand, interdependent. If one of them raises prices, the others do the same. Also, any actions increasing its share in the relevant market, e.g., by significantly lowering prices, will result in similar actions by competitors. Therefore, undertakings in the oligopolistic market know that they will not receive any benefits from such behaviour because they will all bear the costs of collective price reductions. In order to ensure high profits, they are aware that they should not take any decisions affecting a change of the situation in the relevant market. However, this is not sufficient to establish a violation of Article 102 TFEU; therefore, the other conditions set out in the judgment in *Airtours v Commission* must be met.

Based on the existing case law, it can be said that the conditions laid down in the *Airtours* judgment are seldom applied. The CJEU overturned The European Commission's decision in this case due to the fact that The European Commission did not have convincing evidence to support the thesis that the planned takeover of First Choice by Airtours would result in a collective dominant position of three companies: Airtours/First Choice, Thompson Travel Group, and Thomas Cook on the market of short-term holiday trips from the UK. In subsequent decisions, the European Commission, following serious allegations by the CJEU regarding the Airtours/First Choice decision, cautiously applied the definition of a collective dominant position set out in this case.

The concept of a collective dominant position has the same meaning in the light of Article 102 TFEU and the provisions of the Regulation 139/2004. An abuse of a collective dominant position may imply some form of coordination, which may also fall within the scope of Article 101 TFEU. Breach of Article 101 TFEU, as a result of an agreement concluded by entrepreneurs, does not make them collective dominants. On the other hand, an agreement or concerted action between multiple entrepreneurs does not necessarily prove that there is a collective dominant position. Moreover, the possibility that the collectively dominant companies implement a common policy in the market implies and even requires that competition between them is significantly limited but coordinated behaviour does not in any way require that competition between undertakings be completely eliminated. Rivalry between the parties does not preclude the statement of a collective dominant position.

The CFI explained how the economic theory of an oligopoly can be applied in the law of mergers by specifying the criteria necessary for assessing whether in the future merger will facilitate the coordination. In particular, the CFI explained that the market structure must be conducive to the coordination of market behaviour, and that the factors facilitating cooperation include, among other things, homogeneity of products, price transparency, constant demand, and a mature technology. Such market conditions provide two pieces of information: first that price competition is debilitating because no one gains much from a price war and will not fight rivals if costs cannot be reduced by efficiency improvements, and secondly, cooperation is relatively easy because competitors are able to compare prices with each other. Coordination is therefore possible (*Nestlé/Perrier)*. Moreover, the CFI also insists that once implemented, the strategy must be demobilizing for any third party to move away from it. This is a factor that the European Commission did not consider in earlier decisions but as the CFI points out it is a necessary feature to prove that a quiet agreement (i.e., a collusive outcome) is durable because only if there is a likelihood of permanence, the merger will have anti-competitive effects (Nikpay, F. Houwen,

2003). However, if there is competition, it will limit the propensity to raise prices. The same effect occurs when market entry barriers are small, and the risk of new entry increases the competitive pressure among existing competitors. For this reason, in order to determine the impact of a merger on competition in the common market, it is appropriate to take into account potential competition (European Commission, 2004).

5. Potential competition

Potential competition means that a company, not present in the relevant market, but which may enter it in a relatively short time and thus puts pressure on another company (European Commission, 2004). Potential competition is important in analysing the competitive effects of a merger for two reasons. First, if the merging parties are potential competitors prior to the concentration, the merger will eliminate competition and the likelihood of coordinated or unilateral effects will increase. If the merger leads to the restriction of potential competition – it may significantly distort effective competition within the meaning of the Regulation 139/2004. Second, potential competition (for example, where entry is likely) can have the ability to limit anticompetitive behaviours of merged companies and may reduce the concerns of the competition distortion. These are considerations that may indicate that there will be no restriction of competition. If the market is protected by entry barriers, the level of competitive pressure from a potential entrant is limited. The higher the entry barriers, the less potential for competition.

Potential competition refers not only to the possibility of a new undertaking entering the market, but also to the prospect of new competition from undertakings already competing or operating in closely related product markets, e.g., companies offering the same product or service in a different geographic market or current competitors with the ability to increase production.

Potential competition may limit the market power of merged entities. This manifests itself in the ratio of the probability that the potential competition will become the actual competition (*Mannesmann/Vollourec/Ilva*). The European Commission in its assessment of the viability of a potential competitor on the market, examines whether a potential competitor is likely to enter, whether it would be significant from the competition point of view and whether it would be effective, and it examines the timeframe for such entry. Potential competition must enter the market quickly enough to discourage others to use market power. There is no specific time limit within which entry must take place, but the European Commission normally specifies a period of two to three years. In the *Google/DoubleClick* case, the European Commission concluded that the elimination of DoubleClick as a potential competitor would not adversely affect

competition in the online advertising market as other competitors were likely to exert significant competitive pressure after the merger (*Google/ DoubleClic*).

Certain mergers, e.g., those in the market of everyday goods, need to be analyse not only from the supply side, but also from the demand point of view. It means that the assessment of if the merger will significantly distort effective competition, it should be checked whether the power of buyers will be strengthened (Argentesi, Buccirossi, Calvano, Duso, Marrazzo, Nava, 2020). The European Commission may examine the countervailing power of the merging parties' customers. Buyers are assumed to have sufficient strength to counterbalance the market force of merged entities, especially if there are options to change supplier. The idea to evaluate countervailing buyer power arose in the 1988 *Coca-Cola/Carlsberg* case when the European Commission considered whether there was sufficient customer purchasing force to counteract the parties' market power (case *Enso/ Stora*). However, in this case it found no such force.

The countervailing power of buyers was, however, the decisive factor in the European Commission's decision in the *Stora/Enso* case. The merger resulted in the creation of the world's largest manufacturer of packaging for liquid products, with a market share of over 60%. However, 60–80% of market demand came from one company – Tetra Pack. The European Commission accepted that Tetra Pack's countervailing power forced the combined entity to maintain its prices at least for Tetra Pack at the current level in order to prevent Tetra Pack from switching to another supplier. Despite other factors showing a dominant position of the combined entity, the European Commission agreed the merger provided that the combined companies did not raise prices for other customers above the level established for its main customer, Tetra Pack. In addition, in the *ABB/BREL* case, the European Commission allowed the merger despite high market shares partly because of the significant power of the customers (case *Alstom/ABB*). This decision concerned the railway equipment market where products were particularly tailored to buyers' specifications. Moreover, demand was volatile due to large contracts and the tendency of buyers to switch supplier from year to year. There was no risk of price raise and other negative economic effects on the market. The transaction did not adversely affect economic efficiency either. Because of these factors transaction was allowed.

Potential competition is seen as an element of effective competition if potential competitors could exert significant competitive pressure after the merger. However, a full assessment of the merger also requires an examination of the effectiveness of the transaction.

6. Efficiency

Any horizontal merger can lead to an increase in prices. However, it is difficult to assess to what extent prices may increase. It should be noted that as a result of the merger, the competitive pressure decreases because there is one competitor less on the relevant market. Analysing the competitive effects of a transaction, it should be checked whether it generates efficiency that offsets the negative effects (e.g., higher prices, reduced portfolio, etc.). If the answer is negative, then competition may be distorted. However, the merger could be not blocked. The European Commission can approve the transaction. For that reason, the most important question here is to what extent the efficiency would mitigate the negative effects of the transaction. There is no one answer as each case is different. In practice, it would not be reasonable to assume that the positive effects of a merger must always exceed the negative ones (Levy, 2010). Commission guidelines on the assessment of horizontal mergers allow for the identification of not only static but also dynamic efficiency. However, the initial competition assessment should only focus on static efficiency. Dynamic, on the other hand, should be taken into account in the final phase of the study. This type of efficiency is more difficult to prove and quantify and raises the question of if it is justified to limit the initial assessment of static efficiency as a potential determinant of such concentration, which aims to achieve only dynamic efficiency (Kokkoris, Shelansky, 2014).

Although the European Commission Guidelines indicates the grounds for considering efficiency in merger control, there are concerns about its marginalization due to the lack of a solid basis for its assessment (European Commission, 2004). The guidelines do not specify what the efficiency requirement means, but it can be deduced that this concept is directly related to the issue of anti-competitive effects of the planned merger. Attempting to authenticate the achievement of effectiveness is associated with the problem of the need to prove it. The guidelines indicate that efficiency must be achieved in a timely manner and the European Commission does not require that it must be achieved immediately. Efficiency that may be materialized in the future is not taken into account. It is because the later the expected results can be achieved, the more its weight is lowered. However, the European Commission does not set an absolute bar on the timeframe over which efficiency is to be achieved (Johnes, Surfin, Dunne, 2016). The guidelines follow the line of reasoning adopted, *inter alia*, in in the case of *Aerospatiale-Alenia / de Havilland* and require that efficiency passes to consumers. However, how much it affects consumers depends mainly on the competitive pressure on a given market and the possibility of entering the market (case *Aerospatiale-Alenia / de Havilland*). It is worth mentioning that meeting the efficiency requirements paradoxically undermines the consumer's welfare, for example by discouraging to a merger (Maier-Rigaud, Parplies, 2009).

Efficiency may limit the risk of coordination effects on the relevant market, as confirmed by the European Commission in the *Airtours/First Choice* decision. The core issue is that efficiency relates to the future, and unpredictable events are extremely difficult not only to estimate but also to prove (*Airtours/First Choice*).

7. Conclusion

Horizontal mergers are not prohibited *per se*, although they may restrict competition in the same way as cartels. Article 2 of Regulation 139/2004 is based on the assumption that horizontal mergers are allowed if they do not distort effective competition. If the evidence collected in the course of merger proceedings allows antitrust authorities to conclude that the merger will significantly impede competition in the relevant market, such a transaction should be prohibited. It means that merger causes or strengthens dominance or leads to harming competition in a way of unilateral or coordinated effects. It results in lower competitive pressure and in consequence generate e.g., price increases in the relevant market, reduced portfolio products of merged companies, lower innovation rates etc. The theory of unilateral effects shows that any horizontal merger will lead to higher prices in the relevant market when there is no competitive pressure. However, not all price increases significantly distort competition. In this respect, it is important for all parties to the merger control proceedings to have tools to predict or simulate the effects of a merger and its diffusion on the relevant market. An essential role in assessing unilateral effects is played by relationships between competitors; however, the very theory of such effects is not precise, and it is difficult to find unambiguous results of the analysis. Similar problems accrue when assessing coordinated effects.

One of the assessment tools is the efficiency of a merger that should offset negative effects. The question again remains of to what extent the efficiency would mitigate the detrimental effects of the transaction. In practice, it would not be reasonable to assume that the positive effects of a merger must always exceed the negative ones.

One of useful tools seems to be the SSNIP test, used not only to assess the relevant market but also to verify mixed demand elasticity in that market and then to predict price changes. However, the SSNIP test is based on the *ceteris paribus* principle, and it does not examine current competitors price movements as a response to expected price increases of the combined entity. Therefore, merger assessment needs to be based mostly on well-known quantitative tool as Herfindahl Harshman Index. It would not be appropriate to base the merger assessment on qualitative criteria, as due to the difficult access to data, there is a risk of an erroneous result and, consequently, unjustified blocking of transactions.

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Digitalisation and firm's own price elasticity of demand in dominant position analysis

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Abstract

The finding of a dominant position in the EU is still predominantly based on market shares and, consequently, on relevant market definition. It is argued that despite differing views of the legal concept, a dominant position is a function of market power in a regular economic sense. Therefore, economic theory provides more direct tools for its assessment, namely quantification of price elasticity of demand after the product in question (firm's own or product specific price elasticity of demand). The idea is not new, but it has been rejected in the European framework mainly due to its link with an attack against the concept of market definition. It is argued that most of the arguments against it are avoided if it Is accepted that elasticity would be only used for the assessment of market power, not excluding market definition in other steps of an analysis. Impacts of digitalisation may address other arguments against a product specific price elasticity of demand. Namely, it increases the possibility of necessary data for calculations (prices and quantities) being collected and archived. Second, it diminishes the legal certainty and self-assessment functions of the approach assessing dominant position by market definition and market shares. Pre-research confirms that full research would be worth trying. Product specific price elasticity of demand could serve as a valuable tool for a dominant position analysis in certain cases, including cases in digital markets.

Keywords: dominant position, elasticity of demand, market power, relevant market

JEL Classification: K21, K42, L12, L13, L41

1. Introduction

The ongoing digitalisation is undoubtedly one of the most important factors influencing the current state of EU competition law. Competition law has always been linked to economic developments and has had to be prepared to follow the latest economic trends to ensure balanced competition even in emerging

markets. However, the question is whether there has ever been a factor as strong as digitalisation in the history of modern European competition law.

The impact of digitalisation has been attracting the interest of competition authorities around the world for several years. Likewise, various aspects of the digital economy and the need to adapt competition law are very often discussed in academic circles. Subjectively assessed, it can be said that most attention is focused on whether the instruments of competition law used so far are sufficient, they need to be adapted to some extent, or it is necessary to create completely new tools.

The current enforcement tendencies point to a larger importance of Article 102 TFEU. It seems that for many current or future Article 102 cases, an element of a dominant position could be central. A dominant position has been analysed predominantly through market shares on a defined relevant market. This long-standing approach evolved in the early years of the Court of Justice and has, without much hesitation, survived until current days. However, the facts of Article 102 cases have likely shifted substantially, especially with regard to levels of substitutability of products. The pattern of competition in so-called new industries differs from the "old" ones, competitors' positions are often unstable, and their turnovers do not have to always be a good proxy of their market power.

This paper aims to point out something, which, according to the author, is not yet fully reflected in the academic discussion. As early as the first seminal judgments on dominant position were rendered by the Court of Justice, Richard Posner warned that only practical difficulties drove us to a market definition when assessing market power and claimed a more precise economic approach will be found (Posner, 1976, p. 125). Few years later, a firm's own price elasticity of demand (individual price elasticity of demand) was suggested for the first time (Landes and Posner, 1981, p. 939). However, it has not yet been applied (and, if so, exceptionally and outside the European Union) with references to impossibility or complexity of its practical application (Sousa Ferro, 2019, p. 332).

As long as these objections may remain valid in certain cases, it is argued that their general truthfulness is doubtful. The main reason is digitalisation. The availability of applicable data has clearly significantly increased in the last 40 years. From the other side, digitalisation also casts shadow on the probability of market shares being an accurate proxy for market power. This is particularly true in dynamic markets and for products with partial or one-sided substitutability.

Thus, a firm's own price elasticity of demand, which is an elasticity of demand relating to the pricing of a specific product to which the conduct in question relates (below described as a product specific price elasticity of demand), shall be theoretically analysed in the light of ongoing digitalisation and it shall be discussed, whether it can be helpful in some cases for a measurement of market power. This contribution should serve in particular to establish further directions

of the necessary research, at the end of which could be practical use of the product specific price elasticity of demand by competition authorities within the European Union in cases concerning possible abuse of a dominant position.

The contribution first describes what position market power has in Article 102 TFEU. Second, it links market power to product specific price elasticity of demand. Third, digitalisation impact to a product specific price elasticity of demand applicability and usefulness is discussed. Fourth, brief pre-research regarding self-assessment of market position by start-up firms is presented. Final part identifies further required research and concludes.

It builds on previous works of the author, exploring alternative measures of market power and a product specific price elasticity of demand in general (Kupčík, 2020; Kupčík, 2021). Unlike the previous papers, its aim is to specifically observe the impact of digitalisation and present results of pre-research.

2. Market power in EU competition law and current approach to dominant position analysis

2.1 Dominant position is a function of market power

The existence or non-existence of a dominant position is a function of market power. This is *de facto* confirmed by the *United Brands* judgment from the point of view of European competition law (*United Brands*, [1978]) and is also emphasized in the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (European Commission, 2009, para. 9). For Czech national law, this is explicitly stipulated in Article 10(1) of the Czech Act on Protection of Competition. However, it is sometimes disputed that the market power notion in *United Brands* is meant to have its original economic sense.

The argument about the difference between the legal concept of market power and its economic "twin" is unconvincing. If, in some cases, the decision-making practice of the competition authorities or the case law of the courts suggests otherwise, these are rather excesses in which, in any case, no connecting line can be traced, and rather evidence of special aspects of specific cases (Kupčík, 2020, p. 54). The unity of the legal and economic meaning of market power should also result from the so-called more economic approach promoted by the Commission in recent years and, somewhat later, by some indications adopted by the Court of Justice (*Post Danmark* [2012]; *Post Danmark II* [2015]; *Intel* [2017]).

2.2 Lerner index

The classical economic concept considers market power to be the ability to set a price above the level of marginal costs. Economic (and therefore legal) market

power can be quantified using the so-called Lerner index, which determines the relationship between product price and marginal cost. The Lerner index has been known since 1934 (Lerner, 1934) and is, at least the economic part of the literature, accepted as a theoretically correct expression of market power (Elzinga and Mills, 2011). A. Lerner based the index, which was later named after him, on basic economic models, including not only the net monopoly model, but also other models with a greater than zero concentration of market power in several companies, e.g., the so-called Cournot oligopoly (Saving, 1970; Cowling and Waterson, 1976; Holt, 1982). Below, a monopoly model is used for illustrative purposes, but it shall be accordingly applicable in other specified models, at least in short term (Varian, 2005, pp. 481–498). In these models, price is not only determined by market mechanisms, but can to some extent be determined by firms, which in principle can set prices above marginal costs. Economically rational company decides on a premise that that its marginal revenue from the last piece sold equals the marginal cost. Thus, unlike in perfect competition, the price can be set above the marginal cost level, because the price of a given piece does not equal the marginal revenue. It can be, in simplicity, illustrated in the following table:

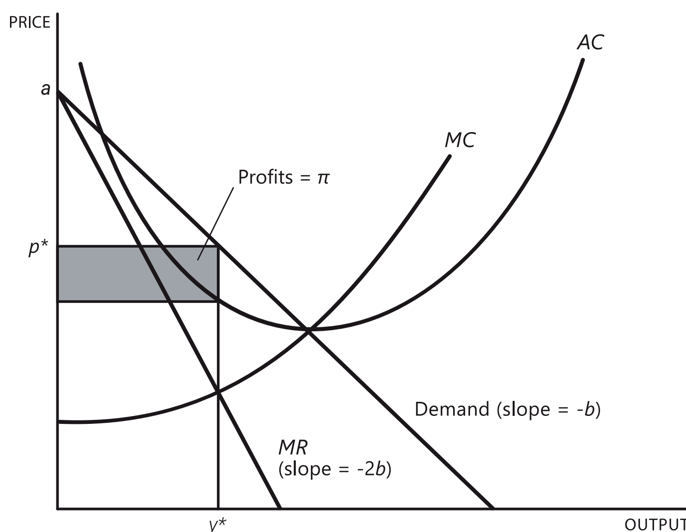
Table 1: Imperfect competition example

Piece no.	Price	Total income	Marginal income	Total cost	Marginal cost	Total profit
1	10	10	10	1	1	9
2	8	16	6	3	2	13
3	6	18	2	6	3	12
4	4	16	-2	10	4	6
5	2	10	-6	15	5	-5

Source: Own

It stems from the table above that it will be most advantageous for a monopolist to sell only two pieces of product. In such a case, its total profit will be the highest, which is a situation where the marginal revenue still exceeds the marginal cost. Even if it sold three pieces, the marginal income would still be positive (which means higher total income), and even four pieces would make a profit. From the point of view of overall welfare, it would then be best if the company sold four pieces, because the fourth buyer will also have access to the product and in such a case the total surplus will be the highest. A similar situation (more precisely theoretically) is illustrated by the following figure:

Figure 1: Monopoly



Source: Varian, 2005, p. 426

The figure shows, in particular, that a monopoly will sell just the quantity in which the marginal revenue curve (MR) intersects the marginal cost curve (MC), but the monopolist sets the price for this quantity at the point where the vertical line of the quantity sold intersects the demand curve, thus higher than where the equilibrium would be in perfect competition, and with less output (i.e. the intersection of the demand curve and the marginal cost curve).

The Lerner index is calculated as follows:

$$L = \frac{P - MC}{P}$$

where P is price and MC marginal cost.

The idea behind the Lerner index can be paraphrased as follows. In perfect competition, where a company has no market power, the price equals its marginal cost. The higher a company can set a price above this point, the more market power it has, as it can better influence the market to its advantage (for the benefit of its profit). To eliminate absolute numbers (so that the index is not higher just because the unit price is higher), A. Lerner suggested dividing the difference by price, so the result can be expressed in percentages.

For the purposes of the Lerner index, it is then clear that in the potential equilibrium according to the chart above, its value would be zero, because the price (P) equals the marginal cost (MC). However, since the monopolist will set

the price at a higher level (and according to the table above, marginal costs will usually be lower), the value of the Lerner index will be usually positive.

Since its suggestion in 1934, the Lerner index has been the one technically and conceptually correct expression of a degree of a market (monopoly) power in economics. If it is accepted that there is no difference between legal and economic understanding of a market power, as is argued above, the Lerner index shall be in theory the right toll for assessing a market power.

There are, however, issues that are considered in competition law and not in the Lerner index. It is only applicable to monopolies and high market power firms downstream, not upstream (monopsonies and alike). The results may be influenced by a lack of dominant's firm efficiency (increasing its marginal costs). If increased marginal costs due to inefficiency of the firm are not reflected in its decision making, it may lower the Lerner index and making (false) impression of a lower market power.

Most importantly, however, the Lerner index requires the identification of marginal costs. The actual marginal cost of the firm is, in fact, rather a mythic figure, which is extremely difficult to measure or even estimate with enough accurateness (Odudu, 2006, p. 109; Breshanan, 1989). It cannot be regularly measured, which, however, does not exclude its occasional use.

3. Market power and product specific price elasticity of demand

It is an interesting twist that foundations of Lerner's work were analyses of a curve of demand for a specific product (an individual demand curve) in a monopoly by E. Chamberlin and J. Robinson (Chamberlin, 1933; Robinson, 1933). As already discussed above, a monopolistic firm aims to produce the quantity at which marginal revenue equals marginal costs (i.e., MR = MC). In addition, monopoly's marginal revenue is a function of price and price elasticity of demand, expressed as $MR = P(1 - 1/\varepsilon)$ (where MR are marginal revenues, P is price and ε price elasticity of demand). The same holds for any other firm (Varian, 2005, p. 425). These two equations may be combined and reshuffled in the following one:

$$\frac{1}{\varepsilon} = \frac{P - MC}{P}$$

An observant reader may identify that the right side of the equation is, in fact, the calculation of the Lerner index. Hence, the Lerner Index is an inverse function of a product specific price elasticity of demand.

Fortunately, a product specific price elasticity of demand has its own definition. It explains how a demand for a specific product varies when its price changes. Mathematically, it is a relative change in quantity divided by a relative change in price, i.e.:

$$\varepsilon = \frac{\Delta Q/Q}{\Delta P/P} = \frac{P}{Q}\frac{\Delta Q}{\Delta P} = \frac{\Delta Q \text{ (in \%)}}{\Delta P \text{ (in \%)}}$$

(where Q represents quantity of a product, P its price and Δ (capital delta) represents a change in a given factor). The elasticity is usually noted as an absolute value, i.e., always as a positive number. The same approach is adopted below. It can be applied to any level of specificity of a product. It can be measured for mobile phones, for Apple phones, iPhone 12, iPhone 12 Black, iPhone 12 Black sold in Prague etc.

As a product specific price elasticity of demand is the inverse value of the Lerner index, it therefore expresses correctly, like the Lerner index, market power.

The advantage of both the Lerner index and a product specific price elasticity of demand lies in the fact that it allows market power to be determined directly. This eliminates the need to define the relevant market, quantify market shares in such a market and, in theory, eliminates the need to examine other factors which, according to decision-making practice, may be relevant for the assessment of a dominant position (barriers to entry), market structure, purchasing power, etc.). A product specific price elasticity of demand always only applies to a specific product. If the conduct under assessment relates clearly to a given product (there is no dispute as to which product the company applies the investigated conduct), it does not pose a problem to determine what data a product specific price elasticity of demand be used to calculate it.

Unlike the Lerner index, it does not require marginal costs to be measured or estimated. It works with data on prices and quantities only and requires, in its most simplistic form, only one change in price in time.

4. Digitalisation and product specific price elasticity of demand

For about 40 years, in which the possibility of using a product specific price elasticity of demand for market power analysis has been known, it has been used in practice rather sporadically and only in the American environment. There are several reasons why it was not applied in the European environment. As a product specific price elasticity of demand allows to work without a market definition, it has been claimed that it cannot be used in EU competition law, which arguably requires that a relevant market is defined (Werden, 1998, p. 729; Sousa Ferro, 2019, p. 332; Glasner and Sullivan, 2020; Coate and Simons, 2012, p. 682).

However, using the product specific price elasticity of demand does not eliminate a possibility to consider the markets concerned in other steps of the analysis.

Market definition and market shares as a mean for dominant position analysis are preferred also due to alleged legal certainty and simplicity of self-assessment. Other arguments reject a product specific price elasticity of demand with reference to the complexity of collecting the relevant data.

Digitalisation affects the applicability of a product specific price elasticity of demand in two directions, addressing the last two sets of argument against its use. First, and this applies to virtually all businesses, sales data for a particular business product are much more available and easier to track than before. Businesses are motivated and forced by digitalisation requirements, sometimes even transposed into legislation, to record data on each individual piece of a product sold, and this data is usually stored centrally, in a single information system. Finding information about the quantity sold at a specific price, even a few years back, should not be a major problem now in most cases. This also applies in cases where the delivered product is a service or an intangible product, for which it is more complicated to quantify the delivered quantity. This data is also usually monitored by companies, which is also related to the ongoing digitalisation.

The second aspect, from which digitalisation (but also globalization) impacts applicability and usefulness of a product specific price elasticity of demand, mainly applies in digital economy. Digitalisation complicates the establishment of clear boundaries between products that are (sufficiently) substitutable and those that are not. In other words, the relevant market cannot be simply defined by "common sense" approach, which econometric methods (such as the SSNIP test) would just likely confirm. Interchangeability between some services can only be one-sided and services are often interchangeable only to a certain extent.

Although the main impact can be seen within digital economy, the same is also related to the supply of tangible products, which, however, take place online. E-commerce expands geographical boundaries. By way of example (competition law history experts will certainly recognize the similarity to the real case), it is no longer clear whether there is one relevant cellophane market in the US or whether Chinese bubble wrap, which American consumers can order at AliExpress, is interchangeable. These issues did not need to be addressed at all 40 years ago.

We can therefore state quite convincingly that digitalisation has significantly complicated the analysis of market power based primarily on the assessment of market shares. Increasing complexity of the assessment is illustrated well by the extent of the assessment of Google's dominant position in the Commission's decisions in the *Google Search / Shopping* case (more than 65 paragraphs) and *Google Android* (almost 300 paragraphs). At the same time, digitalisation likely

improved the availability of the data needed to calculate a product specific price elasticity of demand.

However, digitalisation has not directly changed the position of the relevant market definition in European competition law. It does not exclude its need - the relevant market can still be defined and used for other purposes in the competition law analysis. A product specific price elasticity of demand analysis does not rule out the possibility that competition authorities may also assess market shares and other relevant aspects in parallel, which would only add more validity to their conclusions about the existence or non-existence of a dominant position.

5. Pre-research in self-assessment of market position in dynamic industries

As mentioned above, there is also a tendency to defend a market definition for the analysis of a dominant position with a reference to legal certainty. A market definition is presented as a common-sense approach, which the addressees of antitrust rules are capable of performing and which does not require an understanding of economics (Eben, 2019, p. 35; Carlton and Israel, 2010). On the other hand, it is claimed that with current globalisation and digitalisation trends, a market definition is very often far from an easy task for lay persons (European Union, 2012, para. 29). To test these conflicting hypotheses, the author performed brief pre-research among a small number of start-up companies. As a part of the pre-research, the author also tested whether the companies would be able to calculate their product specific price elasticity of demand. The pre-research involved only eight participants. Hence, it is necessary to take the below information with caution. However, it provides an argument for further research.

First, the responses show that the companies are confident in a "common sense" approach to market definition. All of the respondents estimated their ability to assess substitutability of their product on a 1-10 scale with 7 or higher (average 8.75). Nevertheless, only three out of eight respondents would be able to estimate what a small but significatory (10%) price increase would do to their own turnover (let alone the turnover to other potentially competing products). This shows that there might be a gap between a belief to define markets with common sense and actual ability to do so with quantitative measures (SSNIP test).

Second, even if the respondents were able to define a relevant market correctly, they would not necessarily be able to estimate their market shares. Although seven of eight respondents were confident in estimating their market share, five respondents admitted that they would not be able to estimate total market size (in terms of turnover), which is needed for a standard market share calculation.

Third, seven respondents confirmed that they collect data on all prices since their establishment or at least in last two years, while six of them collect data on quantities. Seven of eight respondents have previously changed prices. Hence, these respondents would be able to calculate a product specific price elasticity of demand (in its simplest form).

The pre-research may be interpreted in a way that it does not hold the theoretical hypothesis presented above about applicability of a product specific price elasticity of demand as unlikely. With the important reservation about the insufficient number of respondents to generalize, the pre-research shows that the legal certainty argument in support of market definition and market shares approach may not be convincing. A product specific price elasticity of demand is not incalculable.

6. Conclusion and further research

The above general analysis suggests that there could be scope for a wider use of a product specific price elasticity of demand in market power analysis. However, these theoretical assumptions should be confirmed by more extensive research, concerning the comparison of ability to self-assess through the current approach (i.e., in particular the definition of a relevant market and market share analysis) and through a product specific price elasticity of demand. If such research were to confirm the applicability, and possibly greater predictability, of a product specific price elasticity of demand compared to the market shares analysis, it would be necessary to set a basic threshold for a product specific price elasticity of demand, which should distinguish between the existence and the non-existence of a dominant position. This is, of course, a very delicate question. If there is a consensus that current decision-making practice and case law is a good guide for the future, it would be ideal to analyse previous borderline cases and, if possible, to set a product specific price elasticity of demand value in these cases, according to which that basic threshold could be set.

This contribution is not intended to be a complete rejection of the current approach to market power analysis. However, digitalisation suggests that the time is right to reconsider the applicability of a product specific price elasticity of demand. The conclusions above show that this is at least a direction that should be further explored and verified. Further necessary steps are indicated in the previous paragraphs.

For the product specific price elasticity of demand being workable in reality, it needs to be simple enough to be applicable not only in a negligible number of cases, but in a wide variety of cases that are likely to include incomplete data. The results would, of course, be more accurate if large datasets of historical prices and quantities were available and if regression analyses were applied to mitigate external impacts to the demand. However, the basic requirements for

the calculation of a product specific price elasticity of demand should not be positioned too high. In certain situations, even a simple dataset reflecting few price changes in past years could be meaningful. It is likely that such real data would be available in most cases. Alternatively, the product specific price elasticity of demand may be estimated from questionnaires addressed to the customers of the investigated firm, which would ask about hypothetical reactions to a price increase, similarly as the SSNIP tests are performed nowadays in practice.

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Appendix – Pre-research responses

Q1: Does your company record the sales prices of all products and services sold / provided to customers in the last two years (or since the establishment of the company, if it was established later)?

Q2: Does your company record the number of products and services sold / provided to customers (in the case of services such as hours, man-days, etc.) in the last two years (or since the establishment of the company, if it was established later)?

Q3: Have you ever changed your pricing policy (increasing or decreasing prices) in relation to any of your products / services?

Q4: Imagine that you would consider increasing your prices by 10% for each product / service. Would you be able to competently estimate what impact this will have on your turnover?

Q5: How are you able to differentiate with which products or services of other companies your products or services are interchangeable / substitutable for the customer?

Q6: Are you able to estimate your market share?

Q7: Do you have an idea of the turnover of competitors operating in the same market?

	Q1	Q2	Q3	Q4	Q5	Q6	Q7
1	Yes	Yes	No (we have never changed prices)	No, we are not currently ale to estimate it	10	I have no idea	Yes, I have an idea of the turnover of some competitors, but not about the total turnover of the market
2	Yes	Only par-tially	Yes (we have changed prices in the past)	Yes, based on turnover chang-es after price increase in the past	7	Yes, 0 - 5%	No, I have no idea
3	Only partially	Yes	Yes (we have changed prices in the past	Yes, based on turnover chang-es after price increase in the past	10	Yes, 0 - 5%	Yes, I have an idea of the turnover of some competitors, but not about the total turnover of the market
4	Yes	Only par-tially	Yes (we have changed prices in the past	We do not have data, but likely none because our product is irreplaceable for customers	8	Yes, 0 - 5%	No, I have no idea
5	Yes	Yes	Yes (we have changed prices in the past	No, we are not currently ale to estimate it	9	Yes, 0 - 5%	Yes, I have an idea only of total turnover of the market
6	Yes	Yes	Yes (we have changed prices in the past	No, we are not currently ale to estimate it	9	Yes, 0 - 5%	Yes, I have an idea of the turnover of some competitors, but not about the total turnover of the market
7	Yes	Yes	Yes (we have changed prices in the past	Yes, based on turnover chang-es after price increase in the past	8	Yes, 0 - 5%	Yes, I have an idea of the turnover of the vast majority of competitors and the total turnover of the market
8	Yes	Yes	Yes (we have changed prices in the past	No, we are not currently ale to estimate it	9	Yes, 0 - 5%	Yes, I have an idea of the turnover of the vast majority of competitors and the total turnover of the market

The Importance of Competition Policy for European "Digital (End) Consumers" in a Digitalized Society

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Abstract

The major elements of the paper consist of finding answers on following questions: Why is competition policy important for the European consumers regardless of whether it is the digital world or not? What are the threats to competition in the digital economy and how are digital (end) consumers affected? What are the European Commission and national competition authorities doing to defend competition and consumers in the digital world? Following the first part, examples of recent cases are given, including ongoing investigations in the Apple cases, Facebook, Amazon, and several Google cases. The final part of the paper is dedicated to the regulatory role, namely of future Digital Markets Act (DMA) and the Digital Services Act (DSA), for competition enforcement.

Keywords: European consumers. Competition policy. The Digital Markets Act (DMA). The Digital Services Act (DSA).

JEL Classification: K210

1. Introduction

The term "consumer" has played an important role since the creation of the European Economic Community in 1957. From the beginning, the founding Treaties contained two different approaches to the concept of 'consumer'. The first one can be read as a combination of a consumer as an economic unit in the form of aggregated consumer welfare combined with an individual or final (end) consumer approach. The other as a pure end consumer approach. The first definition is enshrined in today's Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which provide the European "constitutional" basis for the enforcement of European competition law. The second definition is incorporated in the TFEU in the section dealing with the protection of (end) consumers. Article 12 TFEU provides that consumer protection requirements must be taken into account when defining and

implementing other Union policies and activities. Article 169(1) TFEU is devoted to promoting the interests of consumers and to ensuring a high level of consumer protection by protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. Another specific legal instrument, the 2004 Merger Regulation, which allows for effective control of certain concentrations in terms of their effect on the structure of competition, also underlines the importance of consumers in the assessment of such mergers (Merger Regulation, 2004).

For decades, these two approaches have co-existed without significant convergence. This has changed with the rapid development of digital end-consumer services provided over the internet (online intermediation services) in digital markets. Due to the fact that online providers of these services 'fight' for the attention of a digital (end) consumer, this market is sometimes referred to as an "attention" market.

Official EU documents use the term an (end) user instead of the term used in this paper – a digital (end) consumer.

Another relevant legal concept, "digital asymmetry concept" which emphasizes a unique position of digital markets and threats to digital (end) consumers. This term first appeared in 2020 research study for the European Consumer Organisation's (BEUC) (Helberger [online], 2021).

Competition and consumer laws are coping with these new digital challenges in two ways – by shifting priorities to the digital area and at the same time strengthening the European Commission's (EC) regulatory framework. The digital economy has brought competition law into the limelight as a kind of last resort and safety net so as to deal with possible anticompetitive practices of the GAFAs (Google, Apple, Facebook, Amazon) in the form of data privacy policies, standard contract terms or commercial practices (Helberger [online], 2021).

As far as digital competition cases are concerned, this paper quantifies them without ambition to analyze each separately.

The paper is also based on a direct participation in ongoing evaluations and critical analysis of some of the documents mentioned in this paper. Thus, the author does not hide the fact that he is using his own experience from application practice from more than ten years in DG Comp.

As to the new EC's regulation approach, within less than half a year, the EC published four proposals that will shape the digital market in the EU for the years to come. These are, in chronological order:

- The Data Governance Act (DGA) (European Commission DGA [online], 2020);

- The Digital Market Act (DMA) (European Commission DMA [online], 2020);
- The Digital Services Act (DSA) (European Commission DSA [online], 2020); and
- The Artificial Intelligence Act (AIA) (European Commission AIA [online], 2021).

Two further initiatives have been announced but have not yet led to a proposal for legislative action:

- The proposal for a Data Act including the review of the Directive 96/9/EC on the legal protection of databases; and
- An AI Liability Act.

Concerning legislative regulatory proposals, this paper will focus only on two proposals – the DMA and the DSA.

2. Problem Formulation and Methodology

This paper analyses the changes that this "digital revolution" has brought about in terms of a more direct access to digital (end) consumers in the digital sector, using a special term "digital end consumers", both from the point of view of European competition law and from the point of view of European consumer law. The paper tries to find the answers to the following questions: Why is competition policy important for the European consumers regardless of whether it is the digital world or not? What are the threats to competition in the digital world and how are consumers affected? What are the European Commission and national competition authorities doing to defend competition and consumers in the digital world?

The goals of this paper were achieved using different scientific methods. The most widely used methods are analytical method, logical method, and comparative method. Due to the length of this paper, the nature of the work is necessarily selective. The paper also involves a study in the library of the EC and the library of Directorate-General for Competition (DG Comp).

This paper is based on the legal status as of 31 December 2021.

3. Analysis and Problem Solution

3.1 Consumers in the context of competition before online platforms

The definition of consumer in the relevant TFEU competition chapter does not contain the definition of consumer but indicates the existence of at least two groups of consumers — the consumer as an economic unit and the end consumer. Under Article 101(3) TFEU, an agreement, which contributes, *inter*

alia, to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may be exempted from the prohibition of such agreements. Article 102 b) TFEU prohibits abuse of a dominant position consisting, inter alia, of restricting production, markets, or technical developments to the detriment of consumers. Article 107(2)(a) TFEU then considers compatible with the internal market these forms of aid of a social character, which are granted to individual consumers based on non-discrimination origin of the products. The later EC soft-law, in line with the then "more economic approach", has defined the consumer in the context of competition law as an economic unit.

The most comprehensive approach towards consumers can be found in a still valid 2009 Guidance on enforcement priorities in the application of Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary behaviour (European Commission, 2009). In its footnote 15, the EC defined the concept of 'consumer', which includes "all direct or indirect users of the product concerned by the conduct in question, including producers of semi-finished products which use the products as an input, as well as distributors and final consumers of the direct product and of the products provided by the semi-finished producers."

On the other hand, in the same document, the EC has provided with a second type of abuse of a dominant position, the so-called exploitative behaviour, which is directly to the detriment of (end) consumers, such as charging excessive prices.

With a growing importance of cases dealing with digital giants, the question arose whether the well-being of consumers (and the whole consumer welfare concept) suits for these cases. A price-centric approach to consumer welfare may be ill-suited to a digital economy in which 'free' has become the norm and digital (end) consumers provide value through engagement and data. In the digital environment, where the price is often set at zero, quality forms an important dimension of competition. For example, degradation of the quality of services or product characteristics can result in harm to consumer welfare, despite the absence of price effects. A price-centric approach in such a setting fails to identify consumer harm. Enforcers need to adjust their metrics to identify fully effects on competition. The digital landscape will increasingly require enforcers to consider a range of variables that impact on welfare, even when these are not easily quantifiable (BEUC, 2019). However, so far, DG Comp and national competition authorities at least rhetorically still apply consumer welfare standard.

In contrast to competition law, the regulation of end-consumer protection is detailed in case law and legislation regulate in detail and statically the various indirect subjects of consumer relations (consumer credit, travel tours, time-shared ownership of immovable property, etc.) or selling techniques (distance,

non-permanent establishment, etc.) and are intended to ensure continued legal certainty for all end consumers (Šmejkal, 2012).

3.2 Threats in the digital sector and what are the regulators doing to defend digital end consumers

The rapid development of consumer services provided via the internet in digital markets has become an important milestone in rethinking the relationship between competition and the protection of end consumers. Providers of these services ('online platforms') collect and process a huge amount of personal data of end consumers, who do not have control (and sometimes the need for control) over their personal data and become increasingly dependent on online services. These developments have shifted the focus of competition law to the end "online" consumer in the digital field. In particular, the collection, processing, and subsequent use of the vast amount of personal data of end consumers are in the focus.

Overall, the digital landscape cumulates negative characteristics that differentiate digital market from other markets. These negatives include excessive big data collection and processing, abuse of network effects, platform exclusionary practices, self-preferencing, exploitation of upstream providers, discrimination, and some others.

As a response, the EC and national competition authorities have responded in two ways – with increased efforts to investigate cases of abuse of dominant position in the digital sector and with preparation of *ex ante* regulation of the digital sector.

On the national level, one of the first competitive decisions in this area was the 2019 German *Bundeskartellamt* decision (Bundeskartellamt [online], 2019, p. 27) prohibiting Facebook from making the private use of Facebook's social network subject to the collection of data from private users. This makes the private use of Facebook's social network conditional on the aggregation of information stored on Facebook's social network user accounts with information collected on websites visited or on third-party mobile applications used through programming interfaces and using that data without the consent of users (Musil, 2019, p. 13).

Germany has also adopted several amendments to its anti-monopoly law with a view to tackle anticompetitive practices in the digital sector (Bundeskartellamt [online], 2021, p. 31).

The EC has gradually opened investigations against possible anticompetitive practices of all the GAFAs (Google, Apple, Facebook, Amazon). In 2020, the EC has opened three cases against Apple: Apple mobile payments in case of potential abuse of dominance of Apple pay practices (European Commission Apple mobile payments [online] 2020) and two cases of a potential abuse of dominance of app store practices (European Commission Apple e-books and Apple music streaming [online], 2020).

In July 2020, the EC launched the sector inquiry in the field of Consumer Internet of Things with preliminary findings published in 2021 (European Commission [online], 2021).

In November 2020, the EC sent the Statement of Objections to Amazon in case of abuse of dominance for abusing non-public independent seller data opened an investigation for a possible abuse of dominance in the field of e-commerce (European Commission Amazon [online], 2020).

In April 2021, the EC sent the Statement of Objections to Apple in case of a potential abuse of dominance of Apple music streaming app store practices (European Commission Apple [online], 2021).

In June 2021, the EC opened an investigation against Facebook for abuse of dominance in the context of misuse of data received from external advertisers (European Commission Facebook [online], 2021) and also in 2021 against Google for a potential abuse of dominance in the online advertising technology sector (European Commission Google [online], 2021).

In September 2021, EU General Court hearing took place on Google for imposing illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search, following the 2018 EC decision (European Commission Google [online], 2018).

Finally, November 2021 can be celebrated as the EC's so far greatest success in the fight against the GAFAs thanks to the EU General Court ruling in the 2017 *Google Shopping* case (European Commission Google [online], 2017).

The General Court fully upheld the EC's decision that Google broke EU antitrust rules by abusing its market dominance as a search engine by unfairly promoting its own comparison shopping service in its search results, and demoting those of competitors (General Court, 2021).

The General court finds that, by favoring its own comparison-shopping service on its general results pages through more favorable display and positioning, while relegating the results from competing comparison services in those pages by means of ranking algorithms, Google departed from competition on the merits, namely:

(i) The importance of the traffic generated by Google's general search engine for comparison shopping services;

(ii) The behavior of users, who typically concentrate on the first few results; and

(iii) The large proportion of diverted traffic in the traffic of comparison shopping services and the fact that it cannot be effectively replaced, the practice at issue was liable to lead to a weakening of competition on the market. The General Court also notes that, given the universal vocation of Google's general search engine, which is designed to index results

containing any possible content, the promotion on Google's results pages of only one type of specialized result, namely its own, involves a certain form of abnormality. A general search engine is infrastructure that is, in principle, open, the rationale and value of which lie in its capacity to be open to results from external (third-party) sources and to display those sources, which enrich and enhance the credibility of the search engine (General Court, 2021).

Concerning *ex-ante* regulation of the digital sector on the European level, the EC has for a long time taken a conservative view that digital markets should be treated as any other relevant market because each of them has its own specificities without necessity of a specific regulation.

This was reversed in April 2020, when the EC Executive Vice-President Margrethe Vestager announced a new strategy to tackle big tech firms for the benefit of consumers (Coonnor, 2020).

There are at least two factors behind this EC's U-turn:

(a) Competition investigations in digital markets (typically Google cases) are very lengthy due to the need to demonstrate the effects of anti-competitive behaviour on the relevant market and/or consumers. *Ex-post* intervention comes therefore often too late (*Google* case, *Intel* cases, *Microsoft* case, and others).

(b) The unique position of EC's Executive Vice-President Margrethe Vestager, responsible for the European Digital Market, entrusted with both competition enforcement tools (DG Comp) and industry regulation tools (Directorate-General for Communications Networks, Content and Technology).

The three-pillar strategy has been based on

(1) A new *ex ante* regulation – Digital Markets Act

(2) An amendment of the existing Directive 2000/31/EC on electronic commerce (European Commission, 2010) – Digital Services Act and

(3) A consistent enforcement of Articles 102 and 102 SFEU in competition investigations in the digital sector.

The EC uses the term "act". However, in terms of the type of legislation, the proposals are regulations.

Initially, the EC's "new competition tool", intended to help identify structural problems in digital markets, while at the same time extending the EC's current powers beyond existing sectoral investigations, with an emphasis on the behaviour of undertakings which are not (provisionally) in a dominant position in a market to which they are about to enter or are entering aggressively. The ex-ante follow-up intervention supposed to go beyond the existing 'cease and desist' with a possible fine but would take the form of a 'market order' along the lines of the powers

available to e.g., the British Competition and Markets Authority (CMA). The DSA and DMA legislative proposals have been prepared by the EC since April 2020.

3.3 Digital Markets Act and Digital Services Act and potential benefits for digital end consumers

It should be pointed out that both legislative proposals are still "work in progress" due to the ongoing legislative process and to the intensive work of the EC's Task Force, which continually collects information on its first proposal so that the resulting legislative acts are as appropriate as possible to the needs of the present.

The main differences between the DSA and DMA lie, *inter alia*, in the following facts. While the DMA focuses on restricting competition in access to digital markets and can therefore be regarded as a public standard with a strong spill-over effect towards the well-being of a digital end consumer, the DSA seeks to balance the rights and obligations of consumers, online platform operators and businesses offering their goods and services on platforms. DSA is therefore a matter of regulating horizontal relations and can be understood as a rule of private law. For example, the DSA addresses the issue of the legal standing of an online platform for sharing illegal third-party content (e.g., an advertisement offering drugs or a pirated copy of a film). Furthermore, the DSA deals with the removal of harmful content from social networks (child pornography, bullying, racism, etc.) and the protection of consumer rights (elimination of accounts, mechanisms for reviewing social network decisions, etc.) (Musil, 2021).

Originally, the DMA was meant as a "competition tool" to create harmonised competition rules ensuring contestable and fair markets in the digital sector. The current version of the DMA insistently pursues an objective complementary but different from that of competition law, as laid down in Recital 10. Thus, in my opinion, the DMA is a more consumer protection instrument than competition law. From the beginning, critics pointed to a lack of vision: Which ultimate goal is the DMA meant to serve? Consumer welfare? Internal Market integration? Promoting European small and medium sized enterprises (SMEs)?

It has been clear that the DMA shall contribute to the proper functioning of the Internal Market. This pledge to the legal basis (Article 114 TFEU) is well known. The avoidance of Internal Market fragmentation through diverging national rules for platforms was included in the EC's draft already. Additionally, the compromise amendments add two goals: to foster innovation and increase consumer welfare. Consumer welfare, including innovation, is a trusted friend for (many) competition lawyers. The DMA seems to aim to achieve fairness as a means to promote consumer welfare (D'KART, 2021).

At this stage, and after a huge success in the General court in case *Google Shopping*, most competition enforcers do not consider the future DMA as part of EU competition law.

The DSA was first mentioned by the future Commission President Ursula von der Leyen in her 2019 candidate speech "A Union that strives for more" (European Commission [online] 2019). She announced the early adoption of a "new digital services act", which will strengthen liability and security rules for digital platforms, services and products and complete the completion of the digital internal market'.

This was not so surprising. While the last two decades were characterised by the rapid rise of new technologies and the development of digital services, EU legislation regulating the online environment has barely changed. The latest major piece of legislation in the digital world was Directive 2000/31/EC on electronic commerce, which laid the cornerstone of the digital single market. The directive has not changed much since 2000, although the digital environment has changed radically – for example, of the four most powerful technology GAFA companies today, one did not exist at all 20 years ago and the other three were only at the beginning of their steep growth.

The Commission has also never met its ambition to set global regulatory standards (as it succeeded with the GDPR years ago (European Commission, 2016) where the EC harmonised the rules on personal data protection) and it was therefore only logical that it would try to come up with an ambitious reform of the digital environment.

The legal basis for both proposals is Article 114 TFEU, which allows for the introduction of measures to ensure the functioning of the internal market. The EC was concerned that if no action was taken at EU level, the situation would be exacerbated by the adoption of new initiatives in individual Member States (which is already happening to a certain extent), while others would remain unaddressed. Due to the inherent cross-border nature of core platform services, regulatory fragmentation could seriously disrupt the functioning of the single market for digital services as well as the functioning of digital markets as a whole. Harmonisation at EU level therefore appeared necessary.

As regards the DMA, Article 103 TFEU was also taken into consideration, allowing the scope of application of Articles 101 and 102 TFEU, including sectoral adjustments, to be defined in detail. Finally, this proved problematic because *ex ante* regulation is not fully compatible with the scope of these "constitutional" competition articles.

One of the major goals of the DSA is to reform the responsibility and liability regime of providers for intermediary services. What matters is that the proposed regime aims at full harmonisation. The DSA focuses on creating a safer digital space for digital users and companies, by protecting fundamental rights online. Digital services include a large category of online services, from simple websites

to internet infrastructure services and online platforms. The rules specified in the DSA primarily concern online intermediaries and platforms. For example, online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.

In mid-December last year, the European Parliament (EP) voted on the text of the DMA before entering the so-called "trialogue", where the final text will be resolved. Among others, the EP's amendments:

- Ensure consumer choice of social network and instant messaging services by obliging big platforms to allow competitors' services to work seamlessly with their own, just as e-mail and telephone services work perfectly regardless of the operator;
- Explicitly prohibit gatekeepers from circumventing their obligations through the use of 'dark patterns' (behavioural techniques) and interface design to distort consumers' choices;
- Allow the consumer's voice to be heard in procedures for the implementation and enforcement of the DMA;
- Be enforceable in Member States' courts, including through consumer organisations' collective actions;
- Extend the scope of DMA rules to cover digital assistants like Amazon's Alexa and Apple's Siri; and
- Ensure the European Commission is adequately resourced to carry out its enforcement functions under the DMA, as regards both the number of staff and the types of expertise required (BEUC [online], 2020).

4. Conclusion

The digital economy has become a central driver to future prosperity. It has stimulated a shift in market dynamics, paving the way for the emergence of platforms, networks, and the proliferation of multi-sided markets, connecting companies with millions of consumers across Europe (BEUC, 2019, p.25).

In addition to these positives, the rapid development also brings with new challenges to competition policy and to a "new" consumer – a digital (end) consumer.

As far as competition policy is concerned, many questions have arisen especially over the concept of consumer welfare. DG Comp and national competition authorities at least rhetorically still apply consumer welfare wording, used for example by the former Director General Johannes Laitenberger: "We must take an empirically driven view of consumer welfare and recognise that some consumer harm is not readily visible in price and output effects" (Laitenberger, 2018, p. 1).

To ensure the effectiveness of the competition regime, agencies should still consider the implications of actions on the full spectrum of consumers.

The EC and the Member States responded to the wave of problems related to the sharp rise in the influence of digital giants (including a sprawling pandemic COVID – 19 that tied consumers even more to online tools) in two ways. Both DG Comp and national competition authorities gradually opened investigations against possibly anticompetitive practices of all the GAFAs and at the same time they began to quickly prepare ex-ante legislation that would tackle main problems in the digital sector.

Concerning competition investigations, this paper particularly focuses on 2021 EU General Court's ruling in the *Google Shopping* case. The General Court upheld the European Commission's 2017 decision, that Google broke EU antitrust rules by abusing its market dominance as a search engine by unfairly promoting its own comparison shopping service in its search results, and demoting those of competitors.

Despite this victory, critics have long argued that experience in recent years has shown that EU competition law alone is not able to effectively address many of the challenges that arise in digital markets, mainly due to the characteristics of these markets and the time needed to investigate them. Therefore, regulation that can prevent problems that arise before harming consumers should become essential for competition and enforcement of consumer law.

For these reasons, hard work on new ex-ante regulation instruments has started at the level of the EC. As to new EC's regulation approach, within less than half a year, the EC published four proposals that will shape the digital market in the EU for the years to come – the Digital Governance Act (DGA), the Digital Market Act (DMA), the Digital Services Act (DSA) and he Artificial Intelligence Act (AIA). Two further initiatives have been announced – a Data Act and an AI Liability Act.

This paper analyzed only two legislative proposals in more detail that were published in December 2020 – the DMA proposal and the DSA proposal. During the year 2021, due to many hundreds of comments from the Members of the European Parliament (MEP), both proposals underwent huge changes, and to a certain extent, their original character and purpose changed to a certain extent.

Still, the DMA, together with the DSA, are essential to ensure that the digital world works for the benefit of digital end consumers and to prevent the behaviour of strong platforms that harm European consumers and citizens. The DMA and DSA should lead to more predictable markets for new entrants, which should lead to a greater choice of service providers for consumers.

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Concept of Undertaking in the Light of the Contemporary Economy

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Abstract

After some hesitancy in the 1960s and 1970s, the concept of undertaking went beyond the boundaries of legal subjectivity and became independent from the concept of legal subject. Thus, a single undertaking can contain multiple legal entities and, conversely, a single entity can be part of multiple undertakings. Infringements of primary competition law rules are identified at the level of the undertaking (thus defined) and only secondary consequences (liability) are attributed to the entities identified as having participated in the offending undertaking. With the way the dynamics of the economy evolved at the beginning of the twenty-first century, however, questions began to arise which this concept could not provide a satisfactory answer: to the question of the internal relationship among the joint and several debtors (thus identified), or the question of the imputability of private liability to persons who, although part of the undertaking, did not participate in the infringement. The Court's decision in *Sumal* attempted to resolve the problem by personifying the undertaking, but this only raises new questions and leads to solutions incompatible with other parts of the law. If the notion of undertaking is to be a satisfactory basis for competition law even in today's dynamic economy, it is necessary to abandon not only this attempt but also the two-stage analysis that preceded it: even the primary rules of competition law do not in fact address the undertaking but the legal entities that create the undertaking, while the notion of undertaking as an economic concept merely defines what conduct is permitted from those legal entities and what is not.

Keywords: undertaking, single economic unit, competition law

JEL Classification: K21

1. Introduction

Undertaking, a term used by the authors of the founding Treaties for lack of a better option rather than with any clear conceptual intent (Bebr, 1961, p. 454), very conveniently allowed the Court of Justice to narrow or broaden the scope of the rules in competition law as it saw fit in each case (but not only in competition law; indeed, the first case law on this concept did not originate in competition law, but related to scrap compensation in the ECSC system; see *Mannesmann AG v ECSC High Authority*, 1961, p. 357; on this, see, e.g., Forcione, 1970, p. 1419.). Even after seventy years, however, its content is not clear. On the contrary: without a sufficiently firm theoretical idea of the concept, not only in its initial use but also in its successive case law refinements, the concept has gradually taken on contradictions which, taken together, appear to be an insurmountable obstacle to any uncontroversial theoretical construction.

The changes taking place in the economy, and, consequently, in competition law itself, at the beginning of the twenty-first century throw up fresh questions to which the existing case law does not provide direct answers and even reveals its hidden weaknesses. Will it be possible to maintain the existing understanding of the concept in this new context, or will it have to be redefined in some way? Or will it be necessary to resign ourselves to concluding that there is no such thing as a single content of the concept and that as many different contents of the concept must be constructed as there are contexts of its use, as Jones (2012) suggests? In what follows, I will first recall the current prevailing understanding of the term. I will then discuss examples of actual situations that remain insufficiently addressed and examine whether the prevailing understanding offers satisfactory solutions. The limited scope of the paper will allow me to discuss only two such situations (for other issues raised by today's economy, see e.g., Šmejkal, 2020 or Akman, 2019, p. 209). These will concern the internal relationship among joint and several debtors to a fine imposed for a competition law infringement, and the liability of the members of an undertaking for the private law consequences of a competition law infringement. In the conclusion, I will then draw on this background to suggest possibilities for the further development of the concept of undertaking.

2. The usual understanding of the concept of undertaking

It is a generally accepted fact that *Undertaking* in European law is not primarily a legal but an economic concept. It is therefore not a thing in the legal sense (and must therefore be distinguished from the same or similar-sounding concepts of national commercial law denoting an *universitas* created by an entrepreneur for the exercise of their business activity, such as *Unternehmen* or *Fond de commerce*), nor is it a subject of legal relations (a legal or natural person) or an association

of such subjects (such as *Societas* or *Konzern*). It is an economic unit acting uniformly in economic relations on the supply side (as regards the exclusion of units acting only on the demand side of competition, see *FENIN v Commission*, 1999, pp. I-6295).

At first sight, this basic statement manages, in very practical terms, to avoid the limitations that defining competition rules with reference to legal concepts would bring: if competition law constructed its hypotheses according to the boundaries of legal entities, it would not be able to adequately respond to situations where their boundaries are defined only in formal terms within a single economic unit (the most straightforward case is a 100% subsidiary) and would be, depending on the situation, either overreaching or underreaching. The same would then be true if it took as its basis a thing in the legal sense, an *universitas*, since this is conceptually always owned by a specific legal entity and its boundaries cannot be satisfactorily overpassed in this way (the solution would seem to be to use the institution of co-ownership and to state that the undertaking as a collective thing so understood is subject to the co-ownership of all the subjects together forming the relevant economic unit; this is, however, incompatible with other areas of law, in particular corporate law: such co-owners would have to decide on the thing jointly and would have to settle among themselves as to the costs and benefits of the operation of the thing, etc.; such a solution is completely unviable..

However, the joy of an elegant solution is short-lived. Despite its unusually close connection to the underlying economic reality, competition law remains law: it imposes obligations, and these are inconceivable except as obligations of *legal* entities. Who, then, are these obligations actually imposed on if the underlying norm says that something must or must not be done *by an economic* entity? The pressing issue of the relationship between economic and legal reality has therefore not been resolved by declaring the concept of undertaking to be an economic concept but is merely pushed into the background for a moment, only to return with even greater urgency in the next stage.

In the *Mannesmann* decision (1961), already cited, the European Court of Justice dealt with this question in a legally traditional manner, stating: "The creation of every legal entity in the field of economic organisation involves the establishment of a separate undertaking; a particular economic activity cannot be regarded as forming a single unit in law when the legal effects of that activity must be separately attributed to several distinct legal entities". The Court lent serious consideration to the question of whether to exceed the boundaries of the legal entity by reference to economic unity, since this would certainly lead to a fairer solution in the case at hand (in the present case, the obligation to pay a compensation payment when purchasing scrap did not apply to cases where the scrap was processed within the same undertaking – if two companies from the

same group were found to be part of the same undertaking, they would not have to pay the compensation payment, which would certainly be fair). However, it perceived the danger this would involve:

> It is true that the applicant company might have found the use of a different criterion, taking account of the differences between the various types of industrial groups, more favourable to it. However, in view of the infinite variations, actual and possible, in group relations and the difficulties which would arise in many cases in making a hard and fast classification of groups in different categories, it must be admitted that a system of this kind might have given rise in practice to serious uncertainties, would have hindered the smooth working of the equalization scheme and would have provided a source of possible discrimination.

Further developments showed, and still show, how clear-sighted European judges were at the time.

As late as the 1970s, the European Court of Justice attempted to preserve the link between the concept of undertaking and legal personality by exempting agreements between a parent and an economically dependent subsidiary from the impact of then Article 85 (now 101), using as basis for its reasoning the lack of impact on competition, not the fact that the agreements were not between different undertakings (*Béguelin Import v G.L. Import Export*, 1971, p. 949; *Centrafarm BV and others v Sterling Drug*, 1974, p. 1147). By the 1980s, however, the Court had become considerably bolder. In the *Hydrotherm* decision it stated: "In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal." (*Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.,* 1983, p. 2999, para [11]; note that this was a decision concerning Regulation 67/67, where the argument of no impact on competition was not available) The process of separating the concept of undertaking from legal personality was thus complete.

The question of the legal attribution of an obligation that has thus been deprived of its primary legal anchor (when it is imposed on something that is not a legal entity) is then resolved by means of a two-step reasoning: the primary obligation is directed at an *economic* unit (the undertaking), only if its breach is established, will be in the *second step* sought the *legal* entity or entities that constitute this economic unit and to which the penalty for the breach of the primary obligation will be attributed (see e.g., *Akzo Nobel and others v Commission,* 2008, pp. I-8237, paras [54] *et seq*. and the case law cited therein).

At first glance, this approach seems unproblematic, and indeed, for many years it seemed to have found a way of satisfactorily integrating the *economic* concept into

law, surprising as it may have seemed from a theoretical perspective. The inherent problematic nature of this solution only began to become apparent when the need to integrate it into other areas of law, particularly corporate law, arose.

3. Private law consequences of competition law infringements

3.1 Attribution of fines

As can be seen from the foregoing, the European Commission does not overly concern itself with the issue of the rapport of individual legal entities to offending conduct subject to sanctions, since the two-step reasoning described above does not even allow it to do so: in considering whether there has been a breach of a primary obligation, it examines only whether the undertaking in question has breached the obligation and not whether the obligation has been breached by any particular legal entity. It is only in the second step that the legal entities come into play and the question of their *belonging to the* undertaking in question is addressed.

What this *belonging* means legally is entirely unclear: Is it a liability based on *control of the conduct of the* economic unit in question (similar, for example, to vicarious liability)? Or is it based on *participation in the benefits* generated by the economic unit (similar to liability for damage caused by a thing)? The prevailing doctrine does not offer an answer, instead confining itself to stating that all entities belonging to the undertaking are jointly and severally liable for the sanction. But this only addresses the external relationship and not the internal relationship between them: how are they to settle with each other?

This is an important question in terms of other areas of law, in particular corporate law. Even though they are parts of a single economic unit, they are still *legally* separate entities which also have their own spheres of interest and their corporate bodies are required by corporate law to guard these interests even against other members of the same economic unit. In other words, if a company from the group is forced to pay a fine that has been imposed on the group (or part of the fine), its corporate directors must ask themselves, as a matter of law, whether the company has paid that fine to the extent of its own liability or whether it has in fact paid it on behalf of another group company from which it would have to claim it in such a case. While this question remains rather theoretical in the case of an economically sound wholly-owned subsidiary, it may become more acute in a number of other situations: if there are minority shareholders, if the company goes bankrupt and the interests of creditors have to be defended, or if, in the intervening period since the offence was committed, part of the group has been separated into the hands of another economic owner (for the purposes of imputing a fine, it is the companies that were part of the undertaking at the time

of the offence being examined, not the companies comprising it at the time the fine was imposed).

This issue arose (*inter alia*) in *Siemens e.a. v. Commission* (2011). However, the Court of Justice (contrary to the General Court's opinion) concluded that it was not for the European Commission to decide, but that it was a question for the national judge (see para [58]: "While it follows from Article 23(2) of Regulation No 1/2003 that the Commission is entitled to hold a number of companies jointly and severally liable for payment of a fine, since they formed part of the same undertaking, it is not possible to conclude on the basis of either the wording of that provision or the objective of the joint and several liability mechanism that that power to impose penalties extends, beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship."). Rather problematically, however, it also stated that "neither Regulation No 1/2003 nor EU law in general contain rules for the resolution of such a dispute, which concerns the internal allocation of the debt for the payment of which the companies concerned are held jointly and severally liable" (para [61]).

This is a remarkable conclusion: if both the primary obligation and the sanction for its breach have their exclusive source in European law, how could the question of the relationship between the debtors for the payment of this sanction be resolved anywhere else? The law of the Member States does not, of course, contain any rules for dealing with this question.

This attempt to dodge the question by referring to national law must therefore be rejected, at least for the time being. The answer to the issue of the individual shares of the fine must be found in the only thing we have at our disposal, namely the concept of undertaking and how to work with it as this is the source of liability of any of the fined persons. Only if we understand grounds on which any individual sanctioned party is liable for the competition offence, may we then search the national law for rules for similar cases of joint and several liability.

If we look more closely at the case law in the area of the imputation of fines, we may see a hint of a solution. When the case law justifies that a parent company may be liable even if it has not 'participated' in anticompetitive conduct, it states:

> [I]nfringement of the competition rules by a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (*Areva e.a. v Commission,* 2011, para [30] and the prior case law cited therein).

But this is a somewhat surprising reasoning: as we explained above, the prevailing understanding is that the reason a company is fined is not that it has used another company (a subsidiary) as a kind of living instrument, but that it is – or was at the time of the offence – part of the same undertaking. It is not necessary, however, for one of them to be deprived of any autonomy and reduced to a mere living instrument for them to form part of a single undertaking. Rather, it comes down to the long-term unity of economic interests and the resulting joint action on the market. Why, then, is this condition imposed?

If we look at the history of this line of jurisprudence, we find that it has its origins in the *Imperial Chemicals*decision (*Imperial Chemical Industries Ltd. v Commission*, 1972, p. 619, paras [132] *et seq.*). However, this decision dates back to a time when the concept of undertaking had not yet overstepped the boundary of legal personality. It did not therefore apply the two-step test described above, but looked at whether the parent company, as a *separate* undertaking in the prevailing understanding of the time, was involved in the conduct found (in this case a concerted practice, which facilitated the test) *in addition to* the undertaking-subsidiary that operated directly in the market in question (see para [141], where the ECJ refers to this company as "*the applicant undertaking*"), and whether it should therefore be fined.

The persistence of this line of jurisprudence may offer us a solution. Let us recall again that an undertaking is an economic concept, not a legal one. This means, however, that it is incorrect to say that the primary obligations of competition law are directed at *the undertaking* and that only fines for breaches of them are directed at the legal entities belonging to them. This is conceptual nonsense – an obligation, as a purely legal phenomenon, must by definition be directed at *a legal* entity as the only possible point of its attributability, not at an economic entity. If I were to attribute an obligation to an economic entity, I would be depriving it of its extra-legal nature and I would instead be drawing it into the law as a new kind of legal entity.

A correct understanding of the economic nature of the concept of undertaking must therefore lead us to the conclusion that it is in fact the relevant legal entities that are obliged by the primary norm to behave in such a way that the undertaking formed by them does not act in competition in a manner contrary to the rules of competition law.

Thus, legal entities do not actually make an appearance at the stage when fines are imposed. They are there from the outset; they are – of course – direct actors in the competitive relationship. The concept of undertaking only tells us the extent of their obligations in those relationships.

This will then allow us to answer, without any major theoretical problems (which certainly does not mean that it will be easy in practice), the question of how far is each of the individual persons forming a single undertaking ultimately liable

for the fine imposed: this is not a derivative liability for conduct of the whole in which the subject participates, but the subject will bear its own liability for the way in which *its conduct, within the autonomy if its will,* has caused or contributed to the violation of the primary norm. This question, particularly as regards the extent to which, for example, controlling persons will be required to have actively participated in defective conduct or whether knowledge of the controlled person's conduct or lack of control will suffice, can then really be left to the legal rules governing that person to answer. (In this context I must note that I find it regrettable that Regulation 1/2003 is explicitly addressed to undertakings and not to legal entities, even though these are procedural rules. I am convinced that this is a mistake, even though it has positive pragmatic consequences, since it makes it possible to impose and enforce fines even against persons who, in the light of the principles just described, may not ultimately be liable for them. On the highly problematic question of the compatibility between this consequence and fundamental rights, see e.g., Thomas, 2012, p. 11)

However, we will see in the next chapter that this understanding and this conclusion may not be accepted in future jurisprudential developments. In fact, another line of case law develops a completely different understanding founded in genuine collective liability for the conduct of *undertakings* on the market.

3.2 Imputation of private liability

The most recent jurisprudential contribution to the debate on the concept of undertaking was provided by the Court of Justice in *Sumal* (2019). Here, it was the new context of private liability that illuminated a situation that had always been inherent in the problem but remained hidden: the European Commission never conducted its sanction proceedings with all members of a given undertaking but, pragmatically, usually chose only the parent companies of the groups involved. Even if these companies were not directly involved in the conduct, it was clear that they had at least benefited from it, and it did not appear problematic from a fairness point of view that they were also being sanctioned for the outcome. By contrast, the *Sumal* case no longer concerned the Commission decision directly, but concerned a private enforcement action, and the plaintiffs, using the doctrine of undertaking, chose to sue a subsidiary not because it had participated in the conduct, but because it was based in their country and, therefore, could establish the jurisdiction of the local courts. For the first time, then, the question being asked was whether the subsidiary was jointly liable for damage which it had not itself caused but which had been caused by an infringement of competition law by its parent company, which was part of the same undertaking.

The Grand Chamber's decision is based on a very different concept from the one I presented in the previous section. Here, the Court found:

> [W]hen an economic unit infringes Article 101(1) TFEU, it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement. In that regard, in order to hold any entity within an economic unit liable, it is necessary to prove that at least one entity belonging to that economic unit has committed an infringement of Article 101(1) TFEU, such that the undertaking constituted by that economic unit is to be treated as having infringed that provision (paragraph 42).

The two-step reasoning introduced earlier is here carried to remarkable consequences. Indeed, in this concept, the subjects of the primary competition rules are not natural and legal persons, but really the undertaking (economic unit), which is defined here as follows:

> [I]n targeting the activities of undertakings, enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition. The concept of 'undertaking', therefore covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several persons, natural or legal. That economic unit consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in Article 101(1) TFEU (point 41).

Here, the personification of the undertaking is complete. So directly is the undertaking defined as being the target of the primary norm that the Court even speaks of it being *liable* for its breach "in accordance with the principle of personal responsibility"! Undertaking is therefore no longer an economic concept at all. It is a legal concept: it is a person (how else could it be *personally* liable), a nascent legal person.

That is why the Court of Justice does not seem to have minded that the particular subsidiary in respect of which private law liability was invoked was not even a party to the proceedings in which the European Commission found a competition law infringement (although the basis for liability was thereby established): in actual fact, the party to the proceedings was another part of the same undertaking, and therefore the same legal person in that sense:

> [B]y contrast, the principle of personal responsibility does not preclude the possibility, in the circumstances described in paragraph 56 of this judgment, that a finding of such an infringement should be definitive with regard to a subsidiary company since, as has been recalled in paragraph 42 of

this judgment, it is for the economic unit which constitutes the undertaking that has committed the infringement to answer for it. para 58).

Such a view reduces the question of a particular company's liability in an undertaking to one of complete automatism: it is the company's very *membership of* the undertaking that makes it liable - its personal involvement in the tort or the benefit it did or did not derive from it is irrelevant.

Bringing the doctrine to this conclusion is more revolutionary than it might at first appear. The legal systems of all Member States insist on the idea that a group of companies does not have legal personality; only the individual companies of which it is composed have legal personality. This is true even in those jurisdictions in which a group of companies (or some kind of group) is a positive legal concept and shows some rudimentary indications of personality, as in the case of German contractual *Konzerns*.

On the other hand, it must be admitted that, from a theoretical point of view, it is not unthinkable for a group to be accorded subjectivity: the very subjectivity of its members is not an obstacle to this (after all, a company as a legal person is also composed of members who are themselves legal or natural persons), and the fact that the group itself has neither the capacity to own nor the organs by which it can act is not insurmountable either. For example, in many countries a partnership is no different in this respect. It would, however, be necessary to construct rules that not only transfer the obligations of such an entity onto its members, but also ensure that those members participate in forming its will and in its benefits (on a theoretical level, I dealt in more detail with the possibility of constructing the subjectivity of a group of companies in my earlier work Legal Subjectivity, see Pelikán, 2012). It is, however, worth asking whether competition law is really so exceptional as to merit this solution alone – should such subjectivity not then be inferred in other cases where the protection of the public interest and the interests of the injured party would require it, such as environmental or consumer law? And would such an extension of group subjectivity not eventually lead rather quickly to the disappearance of the basic advantage that groups of companies represent in the form of a possible limitation of business risks?

But without going into such far-reaching speculation, let us ask ourselves to what extent the Court's personification of undertaking is compatible with other parts of the law and, ultimately, with other branches of the doctrine of undertaking.

It can be rightly argued that there may well be a conflict with corporate law in particular, including the doctrine of preservation of registered capital, which is part of European law. The fact that a company is part of an undertaking certainly does not mean that it is able to influence its conduct. It may well be that it ends up being liable for something that it did not cause, did not benefit from, could not have prevented and may not even have known about.

The basis of corporate law, and in particular the law of capital corporations, is, however, the thesis that a company is not owned by its shareholders. Its legal autonomy is not a mere formality; it is an expression of the fact that it has its own sphere of interest, which its corporate bodies are obliged to defend, even against its own shareholders. This fundamental rule is also coupled with the ownership autonomy of the company: the company may use its property only to promote its own interests, not those of its members, and is liable only for its own debts. The shareholders are entitled only to profits, distributed in accordance with strict rules for the distribution of own resources. This concept is crucial to maintaining the confidence of the company's current and potential creditors and thus to enabling capital corporations to participate in legal and economic life in general.

It is in direct contradiction with this concept to use the company's assets, without any limitation, to compensate damage caused to someone by a breach of competition law rules by its shareholder, albeit the sole one. The company could not do so *voluntarily*, nor could it be validly compelled to do so by that shareholder. Even a contract in which it bound itself to a third party to do such a thing would be declared void without hesitation.

These limitations result from norms of the same formal legal force as competition norms, and I dare say they are more serious in terms of their content. It is futile to try to eschew this contradiction by arguing that it is not the damage caused by the shareholder that is at issue, but that caused by the corporation itself, because it was part of the undertaking that caused the damage. The most that can be inferred is that the damage was caused by that undertaking, if we grant it legal personality, but, as indicated above, that cannot lead its members to become liable without the existence of a series of rules governing the functioning of such an entity.

But even worse, it is necessary to recall that in other competition law contexts, the concept of undertaking is defined more broadly than just groups of wholly-owned subsidiaries. In particular, in addressing the question of which agreements between which entities are subject to the prohibition on anticompetitive agreements, the concept has been used, for example, to exclude agency agreements when it has been held that both the agent and the principal are part of a single undertaking (*Bundeskartellamt v Volkswagen and VAG Leasing*, 1993, pp. I-3477). The same applies to agreements with employees (*Suiker Unie and others v Commission*, 1973, p. 1663). Should we therefore conclude that such an agent or employee will also be subject to this collective liability regime by virtue of his or her participation in the undertaking of the principal?

Furthermore, in the area of merger control in particular, there are frequent cases of *joint* control of a joint venture which result in the joint venture and the entities jointly controlling it being part of the same undertaking. If, as is common, each of the controlling entities is also itself part of a group, the collective liability

of the undertaking may expand unexpectedly. The limitation expressed by the Court in *Sumal*, when it recalled that for there to be participation in the same undertaking there must be participation in the same economic activity, often does not help, but on the contrary only introduces new ambiguities into the system (for example, it is not clear how broadly these activities are to be conceived – it certainly cannot be limited to participating in the same relevant market).

Let us also ask whether, in this case, the individual members of the undertaking are to bear the consequences of their liability themselves or whether, and if so to what extent, they are to take recourse against other members. Unfortunately, the idea that collective liability exists based merely on participating in an undertaking does not imply any rules for recourse between those jointly and severally liable.

One could perhaps consider an analogous application of the rules on *societas*. The definition of undertaking on which the Court based its decision is similar to that of *societas* in that it emphasises the uniform pursuit of a specific economic aim. However, this is insufficient for the analogy to be applied. The second key feature of a *societas* is the (voluntary) association of persons to pursue that aim. This is a very different process from the way in which groups of companies are formed and gradually grow: here, the original will to pursue the aim is present only in the central company of the future group, and from there it is projected onto the other gradually incorporated members in the form of a definition of the company's purpose. At the end of this process, all the other companies involved do indeed want to achieve, together, a common aim just as in a *societas*, but only because their parent company has given them the impetus to do so when they were founded and has therefore founded them for this very purpose. This different way of forming an organisation makes the analogy with a *societas* impossible in my opinion, since the rules governing its internal relations (which are what we are concerned with here) are a consequence of precisely that voluntary association of *societas* members that is absent here, not of the sharing of a common aim.

So perhaps we can finally return to the idea presented above and examine, at least for this purpose, the extent to which individuals are involved in the malpractice of the undertaking? For several reasons, this is not quite so simple.

In the first place, we should recall that we based this conclusion above on a reinterpretation of the primary competition norms, in which we "pierced the veil" of the undertaking and imputed directly to its "members" the obligation to behave in such a way as not to create a conflict with these norms at the level of the undertaking. This then allowed us to examine individually, for each "member", whether it had breached the obligation thus defined. If, however, we hold that the primary duty is indeed the true duty of the undertaking itself, then there are no duties at the level of its mere members which could be breached and thus serve as a criterion for the internal division of responsibility. Thus, as the Court says: the

members are liable by virtue of their membership, not by virtue of their wrongful conduct. Although the Court draws this conclusion in relation to third parties, it does so on the basis of the only rule available to us. There are no specific legal rules for the internal relations in undertakings under European or national law, and it is therefore difficult to see where else we should look for a different conclusion.

But even if we get past this problem, a practical question arises. As I have already mentioned, for as long as public enforcement remained the quasi-exclusive method of competition law enforcement in Europe, the questions examined here were asked with much less frequency and urgency: essentially only in cases where, in the intervening period between the commission of an offence and the imposition of a sanction, the group was reconfigured in such a way that the 'accomplices' originally co-existing in a single undertaking split into multiple undertakings, leading to a dispute as to which of the new undertakings should ultimately bear the sanction. Even if such a dispute had already arisen, it was a dispute between the few entities that were parties to the original Commission proceedings.

If private enforcement plays out in the way that the Court's decision in *Sumal* opened the door to, we are looking at a very different picture. Different plaintiffs in different countries will turn to different sets of companies within the same undertaking and seek compensation for 'their' damage. It is quite common for an undertaking to consist of several dozen companies. Is it conceivable that a kind of 'final settlement proceedings' could be organised and conducted, in which the damages paid by the individual companies belonging to the undertaking at the time of the tort would be redistributed according to the degree of fault of each of the members? It is my view that such a thing is entirely unrealistic, not only because of the potential number of parties to such proceedings, but also because of the practical difficulty of examining and measuring the degree of participation in wrongful conduct.

Therefore, I am afraid that in the current state of (a lack of) rules, the consequences of liability will ultimately be borne by those that primarily fall victim to the sanctions for that liability, regardless of whether and to what extent they participated in the illegal behaviour or even in the functioning of the undertaking. I do not think that this state of affairs is satisfactory.

4. Conclusion

In two recent examples, we have seen how what appeared for many years to be a seamless application of the doctrine of the economic concept of undertaking presented unexpected problems when it came to incorporating the doctrine into other areas of law. As long as the "two-step reasoning" was used only to justify parent companies being fined instead of those directly involved in the wrongdoing, no particular problems were apparent. However, when we tried to apply the outcomes of this reasoning to infer other legal consequences, such as

in the internal relationships among joint and several debtors or in identifying the persons responsible for damage caused, the assertion that undertaking is an economic and not legal concept turned out to offer no guidance.

In its most recent decision (*Sumal*), the Court attempted to find a solution by personifying the undertaking, that is, in essence, by redefining this concept as a legal concept. This, however, has only exacerbated the problem: if the concept of undertaking is to play the role not only of a descriptive (i.e., describing which competition relationships are covered by competition law rules) but also of a constitutive concept (i.e. establishing relationships of liability based on membership in the undertaking), then it must become a real legal entity, even if only for competition law purposes. This would, however, first require the adoption of rules governing the internal functioning of such an entity (at least as regards how the consequences of its activities would be shared among its members) and, second, it would force us to define the criteria of such membership much more precisely. Presently, the rules contain a number of grey areas (joint control, negative control, majority control, agency, and other forms of coordination such as platforms - for the most recent, see Akman, 2019, p. 209) that would be unacceptable if such serious consequences were attached to membership. At the same time, this would quickly lead us to recognise the unsustainability of a uniform understanding of the concept: many of the types of interconnection sufficient for entities to qualify as a single undertaking in matters such as determining the scope for prohibiting anticompetitive agreements or merger control, clearly constitute unacceptable grounds on which to impute joint liability for competition law offences (see e.g., Jones, 2012, p. 301 or Odudu and Bailey, 2014, p. 1721). It would therefore be necessary either to accept the injustice in the area of liability (which would, of course, run up against the limits of the protection of the constitutionally guaranteed rights of those so affected) or to abandon the gains that the doctrine of undertaking has brought in other areas. Neither of these options seems very appealing.

In my view, the only way to safeguard the achievements made by the doctrine of undertaking for the future is to return to a *truly economic* understanding of the concept. That is, to consistently attribute all legal consequences (including the existence of primary obligations) only to legal entities and to use the concept of undertaking only to define the scope of those legal consequences. Only such a conception will allow the concept of undertaking to retain its flexibility, which is increasingly necessary with the growing diversity of organisational forms in the modern economy.

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Comparing and Contrasting the EU and the US Approach in Competition Law: So Close but So Far

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Abstract

It is of great academic interest that the two main representatives of the Western world, the EU and the USA, have developed antitrust and competition law approaches and policies that have certain significant similarities but also quite a few crucial differences. The paper deploys a functional comparative analytical model in the first place but also a more contextual approach, in the second instance, by taking into account historical and economic arguments and theories as to the development of antitrust laws in the USA and the EU. The paper's comparative analytical model otherwise proceeds both on a macrocomparative and a microcomparative basis. For instance, the author initially concentrates on the broader differences and similarities between the two comparables. Thereafter, the paper's focus is on key specific substantive differences and similarities, especially ones that would have arisen out of contextual reasons. Furthermore, the paper explores the differences between the American and the European approach as ones that range from procedural matters, semantics and historical reasons to resolution mechanisms, substantive matters and the involvement or not of political considerations. This is a paper that aims to provide an up-to-date comparative analysis as to the points of divergence and convergence between the two major systems of competition law in the Western sphere by taking into account legal, historical and economics matter as well as latest developments.

Keywords: antitrust law, comparative law, competition law, EU, USA

JEL Classification: K210

1. Introduction

This paper explores and compares the two main schools of legal thought and practice in the Western world, when it comes to competition and antitrust law: US antitrust law and EU competition law. The purpose of the paper is to offer a comparative analysis of certain of the main differences and similarities between

the US and the EU approach in the area. It does so by way of a macrocomparative type of analysis but also through indicative microcomparisons.

1.1 One Ideology – Two Schools

In the essence of the matter, there is one ideology that defines the Western world's legal systems: economic liberalism and/or economic neoliberalism. It is this ideology that also acts as the fundamental basis of the world of globalisation in one way or another. For most intents and purposes, in the danger of stating the obvious, both the EU and the USA, as poles of economic and legal power, would be Adam Smith's economic offspring. One can certainly observe this in the strong sense of economic individualism that is found in the USA or even in the Four Freedoms of EU law and so on. Thus, government is, ideally, both in the US and in the EU, not the regulator but the supervisor of economic activity, unless, of course, it would be of the essence for the government to intervene. In Europe, especially through the advent of the School of Ordoliberalism, the state would have to take a somewhat more active approach in building the right regulatory frameworks for market players to operate in an environment of economic freedom. As a matter of fact, the position here would be that such an approach would offer legitimacy to the ordoliberal thesis, the thesis crystallising into a form of a regulatory system with the public interest in mind (Megay, 1970, p. 432). This public interest ordoliberal thesis seems to form the core of EU's approach by also emphasizing *inter alia* the welfare of the consumer in a market of free competition that would also accommodate the legitimate interests of market players. When compared to the EU approach, the US approach has traditionally tended to be more hands off in intervening in the markets. Indeed, American competition law theory, moving away from ordoliberalism, would be informed by such schools of economic thought as the Chicago School, the Post-Chicago School and the Harvard School (Crane, 2009; Horton, 2012; Yoo, 2020). However, in the essence of the matter, both the US and the EU legal and economics orders are otherwise broadly similar. Here one speaks of the same genus of legal and economics systems but of different species. The fact that the EU is a different legal species to the US in competition policy matters emanates also from a reality wherein the overwhelming majority of EU Member States are civilian, whilst the overwhelming majority of the United States are common law systems (with the partial exception of the State of Louisiana, the private laws of which combine both common law and civilian elements). In any case, both the EU and the USA are indeed liberal economics orders, orders that largely comply with the ideas of formalism, the laissez faire laissez passer doctrine and the idea of individualism and freedom of one to pursue their goals subject to minimum external legal restraints. As the analysis that follows will show, the comparison of

these two broadly similar worlds comes with both differences and similarities in competition and antitrust matters.

1.1.1 Comparing Antitrust Schools of Legal Thought

To compare the EU and the US approach in the area of antitrust matters is like comparing much of the legal soul and heart of whole economic and legal systems, namely that of the two main representatives of the Western world, the EU and the USA. Indeed, a comparative examination of the quintessential characteristics of the EU and the US antitrust mentality and their competition systems is ultimately about their respective pictures of the markets world. The image of competition laws in the EU and the US mirrors the very economic soul of the EU and the US. Furthermore, legal thought and policy in this area have clearly been the result of economic thought to a considerable extent but slight 'twists and turns' of the legal approaches and policies of the US and the EU in the area make them intercommunicable but not necessarily wholly compatible. On the surface, the comparables here would point to similar approaches. Practically, however, especially on closer examination, significant differences seem to prevail, despite efforts for harmonisation and the continuous cooperation of EU and US authorities in relevant matters.

1.1.2 The Context of Globalisation & Regulatory Competition

Moreover, both schools operate in the context of globalisation. However, what seems to be an interesting consideration is that US antitrust law seems to come somewhat closer to a classic (neo)liberal economics analysis, in that the consumer *stricto sensu* is not a key consideration as opposed to the EU approach where the effect of unfair competition on consumers forms part and parcel of relevant key considerations. Of course, this is mere theory. In practice, the US model, especially through its more sophisticated analysis and compliance with strict economic theory might result in greater benefit to the consumer. Furthermore, one notes here the legal race between the EU and the US to spread their antirust regulation and enforcement models around the world. A legal peculiarity, which seems to favour however the spread of the EU model to a greater extent than the US model currently, is the fact that the EU model comes with a simpler administrative template to the US one, even if the substantives of EU competition law tend to be more convoluted and more open ended than those of US antitrust law. As a result, the EU's administrative template in the area is taken to be simpler and, therefore, easier to emulate in jurisdictions around the world, which is also attested by the partial retreat of the US approach around the world, with more systems adopting the EU approach (Bradford *et al.*, 2019, p. 761).

For instance, the EU competition model has been emulated in one way or another in such leading jurisdictions as Argentina, China, India, Turkey, Indonesia and Mexico, whereas the US antitrust model has been by and large followed in Canada, Australia and New Zealand (Bradford *et al.*, 2019, pp. 751–752). The comparatist also notes here the fact that, even though the EU competition has effectively derived from the civilian legal tradition, it has flourished also in the leading common law jurisdiction of India (Bradford *et al.*, 2019, p. 762). The US antitrust law model, on the other hand, does not currently find fertile ground in any of the civilian jurisdictions, especially after the rewriting of the Laotian competition law of 2014, which combines mostly competition law ideas from Vietnam and, to a more limited extent, competition law ideas from the EU (Van Uytsel & Hongvichit, 2020, pp. 4–5). One, therefore, readily concludes from all the above, that the greater exportation of the EU model of competition to both common law and civilian jurisdictions is a fact of life, whilst the US antitrust model seems to be more readily embraced by common law jurisdictions currently.

1.1.3 Convergence, Divergence & Cooperation

The two major schools of antitrust law may have converged to a certain limited extent. Both of them hover between classical liberalism and more regulated forms of liberalism (as opposed to neoromantic narratives that would perceive modern competition laws in the West as the midway between capitalist ideal and socialist ideal). Moreover, as one would reasonably expect, the American antitrust authorities and the European Directorate General for Competition frequently cooperate (Abbott, 2005, p. 2). Nonetheless, the precise legal position here would be one in which one speaks of fundamentally different approaches with a small number of points of limited convergence. However, an important consideration would be the fact that these limited points of convergence detract one's analysis from deeper comparative understandings (Fox, 2014, p. 130). Furthermore, as Manne put it, even though 'the EU's approach to competition policy appears close to that of the US, it is fundamentally at odds with the sound economics that under-pins much of US antitrust law in several crucial ways' (Manne, 2018, p. 3). An aspect of the practical divergence of the two regulatory systems is also the fact that EU regulators tend to take a more aggressive approach in the area of enforcing antitrust matters than US regulators (Bradford *et al.* 2019, 734). The point as to the divergence between the two regulatory systems otherwise becomes most apparent, when it comes to them dealing with similar antitrust matters: it is often the case that the EU and the USA 'often find themselves at odds in high-profile investigations of anticompetitive conduct' (Bradford *et al.*, 2019, p. 732).

Another point of divergence has to do with the very remit of central antitrust provision in the US and the EU. For instance, monopolistic practices in the US

under section 2 of the Sherman Act would fall under Article 102 TFEU, the European provision on abuse of dominance. However, a clear point of divergence is noted between the comparables here, in that an abuse of dominance in the US would not fall under the remit of Section 2 of the Sherman Act (Fox, 2014, p. 150). Greater are the divergences still between the US Supreme Court and the Court of Justice of the European Union, when it comes to the jurisprudential essence of their decisions. The situation becomes even more interesting by reason of the fact that competition agencies *per se* in the US and the EU seem to become somewhat convergent in their approaches (Fox, 2014, p. 151).

2. Comparison

This part of the analysis will be dedicated to a direct comparison of the US and EU competition law and policy approaches allowing for a contextual analysis where appropriate. The analysis is divided into a macrocomparative element and a microcomparative element.

2.1 Functionalism & Context

The EU and the US are the two main representatives of the Western world in matters economic, legal and political. Concurrently, they are also two of the main pillars of the world economy, other economic powers of great significance being the United Kingdom, Russia, China and Japan. Historical and ideological reasons have resulted in certain divergences in antitrust laws and practices between the US and the EU. In comparative legal studies, the main test when comparing two or more legal realities would be the school of functionalism (Zweigert & Kötz, 1998, p. 34). However, comparative law as a subject has evolved in recent decades by involving contextualism in its analysis. As such, a comparative analysis can proceed through combining the forces of functionalism with the so-called 'contextual why' (Platsas, 2008, pp. 4–5). With regard to an indicative comparative chart as to differences and similarities between the US and the EU approach in the area of competition law, Table 1 below offers an overview.

Table 1: Comparative Chart

	US Approach in Antitrust and Competition Matters	**EU Approach in Antitrust and Competition Matters**
Macrolevel: Independence of Antitrust Authorities	Independent from political interference	Open to political interference
Macrolevel: form of settlement	Judicial – administrative	Administrative – judicial
Macrolevel: relevance of question of fairness per se	Less relevant than previously or largely irrelevant nowadays	Less relevant than previously or largely irrelevant nowadays

Macrolevel: overall ethos	Law and Economics	Law and Politics
Macrolevel: degree of centralisation	Less centralised than its EU counterpart	More centralised than its US counterpart
Macrolevel: key character	Prioritisation of antitrust intervention costs	Prioritisation of competition as a process
Macrolevel: regulatory competition	Less exported model than its EU counterpart (mainly in the common law world)	More exported model than its US counterpart (both in civilian and common law jurisdictions)
Microlevel: doctrine	Both differences and similarities to the EU model are observed	Both differences and similarities to the US model are observed
Microlevel: goals and objectives	Largely similar, albeit not always; certain divergences in underlying economic theories	Largely similar, albeit not always; certain divergences in underlying economic theories
Microlevel: precautionary principle	Considerable divergences in the area	Considerable divergences in the area
Microlevel: interference of political authority	Unlikely	Likely
Microlevel: procedure per se	Divergent	Divergent
Microlevel: predatory pricing approach	Less expansive approach in the US	More expansive approach in the EU
Microlevel: economics analysis per se in the enforcement of competition policy	Compliant with economic analysis	Largely disinterested in economic analysis
Microlevel: exploitative abuses	Disinterested overall in exorbitant or excessive prices	Interested in exorbitant or excessive prices

2.2 Macrocomparison

At the macrocomparative level, a more straightforward system of antitrust law in the USA is one what one generally observes, when comparing the American approach to the EU approach. The American approach centres itself around the original Sherman Antitrust Act 1890, as this has been amended by the Clayton Antitrust Act 1914. Further amendments to the Clayton Antitrust Act 1914 have been achieved by virtue of the Robinson-Patman Act 1936. Section 2 of the Sherman Act is enforceable by the Department of Justice and also by the Federal Trade Commission. Nonetheless, the majority of antitrust cases are legally actioned by private parties (Fox, 2014, p. 136). An interesting feature of the US Antitrust system is also the fact that whilst court-based as a whole, it is possible for litigation to occur both in the American courts and the Federal Trade Commission. The high degree of independence of the US antitrust authorities is something one would have to note here and it is the case that relevant agencies

very rarely attract any sort of interference from higher governmental authorities (Fox, 2014, p. 131). The US Supreme Court's decisions in the area must otherwise be respected and applied by both the courts and the Federal Trade Commission as a matter of course. Furthermore, the original social justice characteristic of fairness of American antitrust law towards the 'little guy' in the market seems to be largely irrelevant nowadays in the decisions of bodies within the US legal order, as the law would not, technically speaking, be concerned with questions of fairness or a level playing field (Fox, 2014, p. 131).

The formal predecessor of the EU, on the other hand, the European Community, had had to develop its own competition regulatory framework with the birth of the European Economic Community, as this came about through the Treaty of Rome 1957. However, from the legal historical point of view, the first common Western European competition rules would be found in the provisions of the Paris Treaty 1952, the Treaty Establishing the European Coal and Steel Community. The core of the EU competition law would, of course, be found in Articles 85 (81) and 86 (82) of the original Treaty of Rome 1957 (now Articles 101 and 102 TFEU). It would be important to note at this point the ambitious legal aim behind the Treaty of Rome, it being the creation of a new legal order in Europe in the face of international law. Amongst other things, one of the goals of the particular treaty was to bring down trade barriers in the limited geographical legal space of Western Europe (see 'Original Six' States of Belgium, France, Italy, Luxembourg, Netherlands and West Germany). Despite its limited territorial scope, the original Treaty of Rome and, by extension, old Articles 85 and 86 would create legal history: Europe, for the first time, would create an extensive set of common economic law rules, thereby abolishing the preferential treatment that national companies would enjoy at least up until the early 1950s. Europe was changing and a new supranational form of competition law was in its first steps. Unlike the US approach, the EU approach, as one would expect, is essentially civilian, and would be about the creation of a level playing field for European undertakings. Articles 101 and 102 TFEU are about abuse of dominance and anticompetitive practices. Implementation of relevant EU framework occurs under a system of Directives and Regulations, as this would be provided for in Article 103 TFEU. The respective responsibilities of the national competition authorities of the Member States and the Commission are found in Articles 104 and 105 TFEU respectively. Finally, under Article 106 TFEU, state-granted privileges to any public companies cannot be used to pre-empt an environment of free competition.

The overall ethos and certain of the legal standards of the compared antitrust approaches is what differentiates them. Overall, the EU approach tends to be legal-political in competition matters with a slightly higher degree of centralisation to its American counterpart, when the US approach tends to be largely decentralised

and one that would be more legal-economics based. For EU competition law it would seem that what matters the most is 'the process of competition, seeking to enable all market actors to compete on their merits', whilst for US antitrust law the emphasis would be on the 'costs of antitrust intervention' (Fox, 2014, p. 143). Also, EU competition law is not monothematic; as stated, it prioritises the process of competition; the idea of fairness is not a key theme [this being somewhat reminiscent of the US approach otherwise]; the approaches of the Commission and the Court of Justice of the EU are somewhat divergent; the Commissioner for Competition may set different goals depending on who is in this position; the school of ordoliberalism seems to be still the prevalent school of thought in Europe, whilst the rate of cases has slightly increased over the years (Stylianou & Iacovides, 2021, p. 5).

2.3 Microcomparison

Despite the largely common economics ideology that characterises the USA and the EU, one could clearly maintain that at the level of microcomparisons, the two antitrust systems have even more profound differences than at the level of macrocomparisons. Additionally, there have been certain calls in favour of US antitrust law emulating the competition law of the EU (Khan, 2016; Khan & Vaheesan, 2017). Such calls have been mostly met with scepticism in the US (Manne, 2018, pp. 2–3). By all means, what one would need to appreciate at the level of microcomparisons is that even small differences can have significant consequences (Manne, 2018, p. 2). The microcomparative headings that follow are offered on an indicative basis.

2.3.1 Doctrine

First and foremost, one notes at the microcomparative level differences in doctrinal matters between the antitrust and competition systems of the EU and the US. For instance, we are informed that in the USA the burden of proof on a *prima facie* anticompetitive agreement falls on the shoulders of the defendant, who would have to put forth an efficiency justification, the plaintiffs countering such a point by displaying anticompetitive impact under a rule of reason analysis (Abbott, 2005, p. 4). Of course, Article 101 TFEU would by and large correspond to section 1 of the Sherman Act in the USA. Nonetheless, whereas the European perception of the world in competition matters would put value to the benefit of the consumer, its greatest interest by virtue of Article 101 TFEU would lie in the parties' economic freedom, which, in turn, would place the emphasis of the European approach on block exemptions. Thus, European competition lawyers would traditionally be mainly interested with devising trade agreements that would fall within block exemptions, as opposed to them making competitive sense *per se* to participants (Abbott, 2005, p. 5). However, despite this, the European and

the American approach seem to have come somewhat closer with the changes that were brought about in European competition law in 2004.

2.3.2 Goals & Objectives

Additionally, the goals and objectives in the two systems are not always similar. The European Parliamentary Research Service has rightly concluded in 2014 that, whereas [most] of the goals of both the EU and US competition laws and policies are similar, their approaches differ (European Parliamentary Research Service, 2014, p. 1). It would seem that this has to do with the way these two legal orders have developed their competition and antitrust regulatory frameworks in the first place. Also, it goes without saying that the very constitutional orderings of the EU and the US are quite different. Thus, the US is a federation, whereas the EU is more of an association of otherwise sovereign States, which devolved certain of their constitutional powers to supranational EU bodies, in pursuit of common economic, social and political goals. Finally, the European approach, unlike the American approach, comes much closer to the school of ordoliberalism. Therefore, one notes here the partially different ideological upbringing of the two comparables as the third key reason for their divergences, especially when it comes to the practical enforcement of competition policy.

2.3.3 Precautionary Principle

There is also considerable divergence in the area of the precautionary principle. The situation in US antitrust law would be worthy of re-calibration, in that it has been repeatedly recognised by the US Supreme Court that the American courts face challenges as to recognising between pro-competitive and anticompetitive practices leading to 'false positives', whereas the presumption under EU competition law is that markets are unlikely to function well or self-correct, if left to their own devices (Manne, 2018, p. 3).

2.3.4 Interference of Political Authority in the EU and Absence Thereof in the US

Fundamentally, another difference one notes between the two comparables is that the US approach is a hybrid approach between law and economics, whereas the EU approach is more of a hybrid approach between law and politics. Of course, almost everything is political in the realm of law, unless it would have to be a technocratic exercise that one would prioritise in lawmaking and enforcement processes. A paradox in EU competition law, however, is the fact that, whilst the Commission stands for the clearest and most extensive manifestation of a technocratic body amongst EU institutions, it can act politically in competition law matters. Indeed, the head of the Directorate General for Competition in the Commission is a politician, whose competition policy approach may set a very different tone to the competition policy approach of his/her predecessor, even if

the competition authorities of the Member States themselves would tend to be perceived as highly technocratic (Coppola & Nazzini, 2019, p. 3). In this respect, the US approach can be described as wholly technocratic, whilst the EU approach as a midway approach between political and technocratic considerations.

2.3.5 Both Systems Allow for the Judicial Examination of Matters but their Procedures Differ

Whereas the US model clearly benefits from a greater continuous tradition of resolving competition matters through litigation, both the US and the EU model allow for the adjudication of matters in independent formal courts of justice (Coppola & Nazzini, p. 8). Naturally, relevant procedural rules would differ but that would be the case because of the traditionally different procedural rules one would observe between the US and the Member States of the EU. This divergence of procedural rules would tend to be systemic and historical rather than one which would have developed because of the way antitrust and competition laws in the US and the EU would have developed.

2.3.6 More Expansive Predatory Pricing Approach under EU Law

Also, under current EU law competition and practices, an undertaking would be *ab initio* presumed to have engaged in predatory practices, if it could be simply established that the undertaking has reduced a price below average variable cost, as was shown in the judgment of *AKZO Chemie BV v Commission of the European Communities.* US antitrust law is different in this respect, if not more complex, in that a finding of predatory pricing will be established on the basis that a plaintiff can prove that a company reduced its prices below their incremental costs and there was a probability that the company would recoup initial losses (Fox, 2019, p. 303) as in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*

2.3.7 Economics Analysis in the Enforcement of US Antitrust Law

The US approach in antitrust policy enforcement is one that has been at the centre of reform of policy in the United States. Here one notes the greater alignment of economic theory, empirical evidence and an error-cost analysis to antitrust policy enforcement (Easterbrook, 1984; Manne, 2018, pp. 41-42). Whereas one could argue that by and large EU competition law is compliant with such a school of economics as ordoliberalism, economic analysis *per se* would not necessarily characterise EU competition law enforcement the way such a type of analysis would characterise US antitrust law currently. One would be reminded in this respect of the fact that a person such as the Commissioner for Competition in the EU could actually change the direction of the EU approach in the area of enforcement to a significant extent, something that one does not observe in the US, especially considering that political interferences in the area of enforcement

would be a very rare phenomenon in the States. As has been rightly suggested, the US antitrust structure is 'shaped by the political process through the election of Congress and the President [but it] is nonetheless largely insulated from direct political concerns' (Manne, 2018, p. 44).

2.3.8 Exploitative Abuses Divergence

Another interesting point of divergence between our two comparables would be exploitative abuses. Here the point that has been made in the past is that US law, perhaps because of its greater degree of fidelity to economic liberalism, would be unconcerned with one might consider excessive or exorbitant prices, something that is not the case under EU competition law (Manne, 2018, pp. 54–55). The EU's approach on this might be clearly down to its general allegiance to the school of ordoliberalism, a somewhat more regulated school of economic liberalism than economic liberalism *per se*. In this respect, EU competition law would be deemed more consumer-friendly than US antitrust law would be considered.

3. Conclusion

It was the purpose of this paper to expose on an indicative basis certain similarities and differences between US and EU antitrust law. The legal orders, in which EU competition law and US antitrust law operate, are otherwise at the forefront of the globalisation phenomenon and would subscribe to economic liberalism, with or without digressions to ordoliberalism and economic neoliberalism. The differences between US antitrust law and EU competition law remain significant and this is something one would have to note when comparing these two different worlds, even after the 2004 reform of EU competition law, which harmonised somewhat more the two different schools of thought. Of course, there would be space for further convergence in the future but, equally, one would also have to note here the traditional scepticism of US circles towards the otherwise newer and somewhat less technocratic EU competition law model. After all, the US antitrust approach has served the American legal order well for more than a century. Would that be a reason sufficient enough in itself to keep the US antitrust approach, policy and law divergent from certain of the more advantageous aspects of EU competition law? Probably not. Equally, one could certainly argue that the political interference over competition law and policy in the EU could be the subject matter of competition law reform in Europe. However, one would also have to conclude with a finding which effectively recognises the full authority of legal orders to prescribe their antitrust and competition strategies as they see fit. The ideal of convergence between the US and the EU in the area of antitrust policies and law remains but, considering the

slightly different priorities of these two legal orders in the area, it remains to be seen how close these different realities will come in the future.

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BUSINESS MODELS, ECONOMIC SECTORS, AND THEIR COMPETITION LAW

Digital markets and sharing economy

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Abstract

The sharing economy relies on digital intermediary networks to enable the shared and frequently sequential use of goods and services. The entry of peer-to-peer (P2P) services into the market increases competition, which can lead to price reductions, better quality, and a larger selection of items. It's vital to prevent unequal regulation that distorts competition between current and new suppliers in terms of competition. The goal of this paper is to examine the competitive issues that arise in platform services, in particular in regard to private accommodation, and describe, if suitable, what regulation should address potential security concerns while also avoiding market distortions.

Keywords: competition, digital markets, intermediary platforms

JEL Classification: K21, K22, K210

1. Introduction

Competition policy continues to be focused on digital marketplaces (Funta, 2020b, pp. 1–7). In this article, we will extend our competition policy assessment of digital markets (Funta, 2019, pp. 173–183) by addressing difficulties connected to shared usage of economic products (sharing economy). At the heart of the sharing economy are digital intermediary platforms that permit the common, frequently sequential use of commodities or services. Increased competition in economic areas impacted by the entry of P2P (peer-to-peer) services can lead to price reductions, improved quality, and a broader range of possibilities. It is critical to avoid legislation that distorts competition between current and new suppliers. On the one hand, a proper framework for P2P service providers should be designed, taking the nature and scope of the activity into account. Traditional suppliers, on the other hand, should rethink their policies. The majority of the discussion is centered on intermediary services in the private lodging industry.

2. Problem Formulation and Methodology

The purpose of this essay is to discuss competition difficulties that develop in platform services. In order to understand the properties of this article, we use scientific knowledge methodologies. On the basis of this, as well as on the content and scope of the article, we will also focus on the use of the logic method. We presented several points of view on legal regulation and the interpretation of the concepts under consideration. Data was acquired from scientific journals through in-depth document analysis.

3. Sharing Economy

There is currently no agreed-upon definition of the sharing economy. In theory, sharing economy firms are those whose business model is based on the mediation of transitory usage rights for the sequential use of commodities or services. A digital intermediary platform that connects supply and demand for certain commodities or services is frequently maintained by businesses. Aside from that, a wide range of distinct types of sharing economy services can be distinguished. Sharing economy services can originally be classified based on the users engaged. P2P services allow organizations (B2B, business-to-business) or private individuals to share or use goods and services (C2C, consumer-to-consumer). Differences in sharing economy services can also be apparent in terms of the offer's remuneration and pricing structure. Depending on the business strategy, the items or services can be supplied for a fee or for free. Private individuals, for example, sell their rooms for a price on some platforms (such as Airbnb) and for free or a little allowance on others. Finally, there are also differences between sharing economy services with regard to the financing of the platform itself (Plavčan and Funta, 2020, pp. 156–167). The use of the platform can be charged or free for individual user groups, depending on the business model's inclination. In most cases, one or more user groups pay a commission per transaction or a monthly flat fee for the usage of the intermediary platform, with pricing based on the elasticity of the user groups' demand. If all user groups are free to use the platform, it is usually funded through advertising or donations. Business models based on the concept of "sharing", or the common use of goods and services are considered to have high market potential. According to a study conducted by Price Waterhouse Coopers, global earnings from sharing economy services in the categories of lodging, vehicle sharing, finance, music, and video streaming will increase from roughly 15 billion dollars in 2015 to around 335 billion dollars in 2025. (PwC, 2020).

3.1 Reasons for the emergence and growth of the sharing economy

Several factors have led to the growth of sharing economy services, which has been seen mostly in the United States but also elsewhere. The significance of

technological innovation in the realm of information technology cannot be overstated. The popularity of mobile internet and the development of smartphones have resulted in significant reductions in transaction costs, particularly for search and information. Transactions that would have failed in the past due to high transaction fees are now possible because to digital intermediation platforms. This specifically applies to private individual transactions. Furthermore, the widespread availability of mobile phones with GPS navigation enables many of today's sharing economy applications. Another important driver of the rise of sharing economy services is the need to alleviate trust concerns. In P2P markets, where individuals routinely rent out their personal goods, trust is extremely vital. Trust difficulties may arise due to a lack of knowledge about the proposed transaction's behaviour. Businesses use a range of techniques to overcome the market's anonymity and generate transparency since information problems and the consequent trust difficulties may impede meaningful transactions. (Glavanits, 2007, pp. 65–77). This is accomplished through the use of evaluation and reputation systems. Sharing economy enterprises were able to draw on years of expertise with rating systems from early Internet pioneers like eBay in this regard. These systems are continually developing and reacting to the particular demands of the services in order to prevent manipulation and boost the informational value of evaluations. Other trust-building strategies include integrating user accounts in some sharing economy services with social network profiles (Funta, 2020a, pp. 193–205) and user identification verification.

3.2 Efficiency gains through digital intermediary platforms

The digital mediation of products and services is central to the economic model of the sharing economy. Peer-to-peer service providers do not own the items in demand, nor do they provide the services in demand. Instead, they concentrate on a single component of the value chain: providing a digital intermediary platform for linking offers with demand, as well as any extra services. Digital communication via platforms can provide several efficiency gains (Schallbruch and Schweitzer and Wambach, 2019, pp. 33–38). Because this technology is inherently available to all market players, provided they are not prohibited from doing so by existing regulations, the following insights apply not only to the sharing economy or peer-to-peer services, but to digital platforms in general (Botta, 2021, pp. 500–512). To begin, as previously stated, digital platforms enable the accomplishment of efficiency improvements by cutting transaction costs. The direct and transparent link between individual users makes it much easier to select a transaction partner. As a result, the cost of looking for and acquiring information is reduced. Many platforms offer extra features to help with transaction processing, such as central pricing and direct payment processing through the platform. Furthermore, such platforms make more efficient use of scarce resources possible. Increases in

efficiency may arise, for example, from combining or utilising items for several purposes. Improved information availability also leads to increased efficiency. Operators can quickly collect and handle data thanks to the platform operation. For example, a platform could be utilized to better coordinate supply and demand. Knowledge gaps between user groups, for example, can be addressed via evaluation systems. If the rating system operates in both directions, poorly rated suppliers and customers or consumers, for example, may be prevented from utilizing the platform. This sanction mechanism reduces the incentives for misconduct for both user groups. From a competitive standpoint, it's worth noting that sharing economy services frequently compete with established businesses (Whish, and Bailey, 2012). This is especially true with peer-to-peer (P2P) networks, which enable private individuals to offer their goods or services on a low-cost basis. This form of commercial service offered by private individuals is novel in many places, and it may contradict with the existing legal structure, limiting the expansion of P2P enterprises. Asymmetrical regulation can exacerbate competition between established enterprises and the sharing economy or peer-to-peer services.

3.3 A need for regulation?

Many critics of sharing economy services argue that many of these services are not subject to or would not comply with the specific regulatory rules that apply to traditional providers in their respective industries, particularly those pertaining to consumer protection. Because of this feature, sharing platforms may charge less for their services, giving them an unfair competitive advantage (Karas and Králik, 2012). To minimize such competitive distortions between traditional and digital suppliers, it is often advocated that existing regulation be expanded to encompass sharing economy services. This criterion, however, ignores the fact that the introduction of new technology frequently reinforces the sense that established standards are no longer applicable. This is especially true for legislation aiming at removing potential information asymmetries, as the Internet in general, and digital switching platforms in particular, to reduce them. Due to external effects and knowledge asymmetries among users, the regulation of P2P services to avoid a market failure is called into question. The fact that P2P services may have a direct impact on non-users has external consequences.

Individuals that want to provide specific services on P2P networks may establish minimal standards in this regard. Aside from external factors, knowledge asymmetries may explain a market failure in P2P services that necessitates regulation. Aside from external externalities and knowledge asymmetry, long-term market participant regulation may be successful in ensuring that the legislative obtains offers that the market does not. Overall, regulation of P2P services may be appropriate due to knowledge asymmetry, external impacts, or other policy goals.

However, this does not imply that traditional providers and P2P service providers must follow the same set of standards in order to avoid market distortions (Jones and Sufrin and Dunne, 2019). The goal of regulation should not be to protect individuals against potentially more efficient competitors, but rather to correct market failure in each situation. Regulation may be less stringent than with traditional providers due to the use of new technology, particularly in the case of peer-to-peer services. It should also be ensured that the amount of control considered the supplier's specific scope. Unreasonable regulation should not be used to put excessive restrictions on intermittent P2P network activity. Finally, it's worth noting that many of the technologies employed by sharing economy firms can also be used by traditional providers. To minimize market distortions, these providers' regulatory framework should be assessed to see if it is still current, or if it needs to be adjusted or reduced. Regulations that are no longer essential or that have become obsolete due to new technology should be modified (Budzinski and Mendelsohn, 2021). Extending similar limits to include P2P services, on the other hand, is not recommended because it would reduce the efficiency gains noted above, placing consumers and businesses at a disadvantage.

3.4 Concentration tendencies and potential competition problems

From an economic point of view, P2P services are so-called two-sided or multi-sided platforms (Niels and Ralston. 2021). The platform service itself acts as an intermediary between the providers and buyers of certain products or services. There is a propensity for market concentration, as with other two-sided or multi-sided platforms. As a result, favourable indirect network effects between individual platform user groups are mostly responsible for fostering concentration. This indicates that a greater number of users on one platform, such as potential visitors, benefit from a greater number of users on the other, and vice versa. Indirect network effects and economies of scale favor increased market concentration. This does not, however, imply that the market must be monopolized. As there are additional variables that resist concentration, there must be comparable competitive issues. On the one hand, there are platform capacity and usage constraints, as well as differentiation choices, and on the other, there is so-called multihoming, which allows specific user groups to access several platform services at the same time. However, if a P2P service has a strong market position, it can, like other corporations, try to utilize its market power to stifle other platforms or drive them out of the market (Budzinski and Gaenssle and Stöhr, 2020, pp. 38–43). It's possible, for example, that a platform provider exploits exclusive agreements to prohibit its customers from using other platform services, preventing competing platforms from developing and perhaps driving them out of business. It's debatable if such exclusivity contracts can be enforced. Overall, a possible concentration tendency in peer-to-peer services should not be utilized to make broad conclusions about

competitive concerns. Instead, from an economic viewpoint, this concentration reflects an efficient market structure, which is essentially the result of the presence of favourable indirect network effects. Any misuse of a dominant market position in P2P services, on the other hand, is likely to be completely covered by current competition legislation (Miskolczi-Bodnár and Szuchy, 2017, pp. 85–109). It is debatable whether a new rule should be enacted. From the standpoint of competition policy, such a transfer of ratings from one platform service to another is essentially desirable, since it might lower possible switching costs and facilitate platform switching, particularly for providers of P2P services. However, it should be noted that, on the one hand, a transfer of the ratings received could be problematic from a data protection point of view if the users who submitted the rating have not given their consent for such a transfer (Wen and Feng. 2019, pp. 1336–1367; Karácsony, 2019, pp. 39–50.). In this case, the question of who owns the reviews emerges. Peer-to-peer service rating systems, on the other hand, may take a different approach. In this regard, it is vital to assess how similar specific P2P service ratings are, as well as whether a correct transfer across rating systems is possible.

4. Intermediary services for private accommodation

The sharing economy's intermediary platforms for private accommodation are a fascinating and hotly debated topic (Schor, 2020). Private individuals can use these platform services to quickly and easily market their own apartment or individual rooms to potential visitors via the Internet. This short-term rental can, in theory, be done for a price or for free. Platform providers frequently charge a fee for their intermediary services, which is paid by landlords, potential guests, or both categories of users. Some of them also provide supplementary services, such as payment processing. Private home short-term rentals have long been an important aspect of the hotel industry. This occupation has grown in popularity in recent years as a result of the ability to rent out rooms through digital intermediary platforms (Schweitzer and Welker, 2019, pp. 16–24). Although short-term private housing leasing is becoming more popular, it is not without controversy. While private landlords gain from this growth, the hotel industry complains about competitive distortions caused by inconsistency in legislation. From a competitive viewpoint, the more intense competition in the lodging sector is generally considered as advantageous. At the same time, it's vital to ensure that individual suppliers compete fairly and that market distortions are kept to a minimum (Klimek, 2013, pp. 105–121).

4.1 Differentiation between private and commercial offers

One crucial topic to consider when renting private housing through platforms is whether some or all of this activity should be classified as commercial, and if so, what limitations apply. When determining the corresponding rental offers,

a distinction between commercial and tax law must first be determined. If the rental includes more than just asset management, but also a business operation, commercial law will usually apply. If there is a lot of economic activity and profit-seeking, the rental is more likely to be a commercial enterprise. Because there is no clear distinction between commercial activity and pure asset management, each issue must be considered individually.

4.2 Reasons for regulating short term rentals

Many of the limits imposed on lodging establishments are based on the number of beds available rather than the presence of a commercial activity. As a result, only short-term private apartment or room leases are currently subject to statutory restrictions. Any additional regulation, such as broadening the requirements for big hotel providers to include small private providers, would only be justified from an economic standpoint if there was a systematic market failure (Funta, 2014, pp. 69–93). State control of lodging facilities may be advised due to information asymmetry and to protect consumers or accommodation guests. This is especially true when it comes to safety and hygiene, which are difficult for guests to assess. In order to maintain a fair level of safety and hygiene, housing facilities must often meet minimal criteria. From the standpoint of competition policy, it should be underlined that an appropriate regulatory framework should, in theory, take into consideration the particular security concerns associated with each economic activity's type and scope. A regulatory distinction between a major hotel facility and a (occasional) private overnight stay provider may be perfectly acceptable in this scenario. Smaller providers may have a financial advantage and, as a result, a competitive advantage due to less severe limitations, but this is not an excuse to apply the same safety rules. Rather, it is possible that this will create a market entry hurdle, reducing competition in the accommodation industry. At this moment, it is not possible to fully investigate whether current private accommodation safety laws are appropriate or should be strengthened. On the one hand, it is questionable that previously reasonable safety regulations for rented private housing have suddenly become insufficient, especially given that the flats in question may be suitable for long-term rental. On the other hand, it may be argued that more frequent short-term private accommodation rentals pose security risks, thus requiring stricter security measures. In this case, specific criteria for lodgings with a small number of beds that are less extensive than those for big lodging providers but higher than the level for private flats may be considered. Increased safety regulations, for example, could be linked to the number of nights rented each year or the frequency with which they are rented. When it comes to renting private housing, market failure is most typically caused by knowledge disparities and adverse externalities. There may be information gaps between landlords and potential visitors when it comes to safety and sanitation issues. Minimum government regulations may be required

to protect customers and ensure an appropriate level of safety and hygiene. Short-term leasing of private flats has a detrimental external influence on the local housing market, most notably a rising scarcity of living space and an increase in rental costs. Furthermore, an increase in the number of tourists in residential areas might have a negative impact on the quality of life in those areas, such as noise pollution or a scarcity of parking spaces (Ladychenko and Golovko, 2018, pp. 455-459). Permanent vacation rentals of private apartments must be distinguished from occasional vacation rentals of regularly occupied flats or rooms, such as when the regular occupants are away. No flats are taken from the property market in the latter situation since there is no permanent reallocation of ordinary apartments to permanent holiday accommodation. Various steps can finally counteract the possible negative consequences of growing short-term rental of residential dwellings. The landlord's straightforward application of house rules may be a less restrictive approach to likely noise pollution. This method is used by many private landlords and may be adequate for managing guest behavior. This is especially true for digital platform bookings, where an evaluation is undertaken following the overnight stay. These ratings enable landlords to target their guests on the one hand, while also creating incentives for visitors to act responsibly on the other, as they may be barred from returning to the platform if their rating profile is poor. If there is noise pollution, landlords may be notified under a current registration requirement for private landlords. If there are any further incidents, they may be barred from providing private lodgings. The surge in short-term rentals has resulted in a dearth of parking spots in residential neighborhoods, which might be solved by offering extra free parking spaces for residents as well as paid guest parking spaces. In both cases, putting annual restrictions on the number of overnight stays should help to mitigate the unfavorable external effects. Setting a limit may help ensure that no ordinary units are permanently removed from the market, while also allowing landlords to rent out their properties on occasion. A total prohibition on the occasional short-term leasing of private residences may be enforced only in extreme circumstances, such as due to building planning and building requirements.

5. A reason for regulation of intermediary services or no regulation due to concentration tendencies?

In addition to the above-mentioned reasons for regulating private accommodation providers, it must be assessed to what degree intermediary platform regulation is necessary. We argue that there is no longer a need for special regulation due to concentration tendencies and the competitive difficulties that come with them. However, one key question is whether intermediary platforms for private accommodation should be legally required to provide insurance for any harm caused as a result of its use in order to protect clients. Requiring platforms to

carry insurance may give a financial incentive for them to do more extensive security checks on their products. The fact that the costs of such an obligation could act as a market entry barrier for potential new intermediary services speaks against a required statutory insurance requirement for intermediary platforms from a competitive standpoint. This could increase already existing concentration tendencies due to the platforms' multi-sided nature (Šmejkal, 2016, pp. 105–114), making certain intermediary services' market positions more difficult to fight, and reducing competition among platform services as a whole. Finally, because of the potential for concentration or monopolistic tendencies, as well as the associated competition challenges, it is necessary to decide whether intermediary services for private housing should be regulated. Private lodging intermediary services are two-way platforms that connect landlords as private housing suppliers with guests as private lodging purchasers. Potential visitors benefit from increased landlord presence, while landlords benefit from increased potential guest presence. In the sphere of private accommodation intermediary services, this mechanism demonstrates a degree of market concentration. Despite this concentration trend (Šmejkal, 2020, pp. 448–461), there is no economic reason for special regulation of intermediate platforms for private accommodation. It is feasible that a platform will gain a dominant position and employ abusive tactics to force competitors out of the market in order to raise rates or fees for landlords and guests (Svoboda, 2011, pp. 238–267). Negotiating exclusivity agreements that would prevent landlords from using many platform services at the same time (multihoming) or setting competitive pricing would be possible. Such aggressive action, however, is already covered by the appropriate competition statute. In this regard, it's vital to realize that platform services frequently have minimal market entry barriers. Users, on the other hand, usually have low switching costs (Klemperer, 1995, pp. 515–539) because they are not in any way connected to a platform service, such as by paying expensive membership fees. However, it is debatable to what extent users' willingness to transfer is hampered by their inability to delete their own ratings or reputation.

6. Conclusion and recommendations

Because of digitization, there are now intermediary platforms where private persons can sell their accommodations for short-term rental for tourist purposes. Private lodging renting is not a new concept, but middleman businesses have boosted the supply of corresponding flats. The introduction of matching platform services into the market increases the competition for hotels and other accommodation facilities. Consumers gain from the new intermediary services by having access to a greater selection of products and maybe reduced prices, while private individuals who provide the services benefit from the possibility for higher revenue. The research focused on peer-to-peer (P2P) services, which allow private persons to sell products or

services economically. To avoid introducing unnecessary barriers to market entry, laws should consider the nature and scope of the activity (Stehlík and Hamuľák, 2013). Excessive regulation should be avoided to prevent disproportionately restricting service platforms that offer just occasional activities. Because of competition issues, there is currently no explicit requirement for regulation of sharing economy services. If a service gains a dominating market position, any misuse of that market position may be reported to the applicable competition legislation (Furman, 2019). There is no need for considerable regulatory action in the short-term leasing of private lodging via digital intermediary platforms from a competitive standpoint. To avoid market distortions, any legislative changes, such as those enacted in response to existing safety regulations, should be implemented independently of different sales channels and should not affect only private dwellings or vacation homes rented through internet platforms. To make the distinction between commercial and private offerings clearer, a *de minimis* level beyond which short-term private housing rentals are considered non-commercial might be created. It is not required to regulate the complete operation of the operator services. There is no specific statutory insurance need for intermediate services. Specific information requirements, such as current insurance coverage and safety practices, may be required, if necessary, to increase market openness and strengthen consumer positions.

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Game Over? Rethinking Sporting Autonomy and Legal Regulation at EU Level

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Abstract

The lack of comprehensive legal regulation of sport in the EU has never been more evident: The discussion on the football Super League not only (once again) calls into question the demarcation between legitimate supervision and anti-competitive behaviour of sport governing bodies, but above all raises fundamental questions of EU competition law. The proposed paper aims to assess whether the current legal framework and the patchwork of CJEU rulings are sufficient to regulate European sport and to curb the abusive sporting autonomy of governing bodies. Does sport really need a monopoly and/or a restriction of competition to exist and ensure its functioning? In particular, the level of justification under Articles 101 and 102 TFEU is examined in more detail. In light of the recent *ISU* decision, assigning a more assertive role to the EU and the application of competition law to sports issues is more topical than ever, and is gaining momentum as Europe's most popular sport is on the pitch.

Keywords: conflict of interest, EU competition law, justification, sporting rules, Super League

JEL Classification: K210

1. Introduction

From a competition law perspective, the regulation of sport poses a difficult dilemma. On the one hand, economic actors, such as athletes and clubs, are prevented by (excessive) regulation from enjoying unrestricted competition. On the other hand, without such regulation, sport would be deprived of its sporting and economic substance.

Until 2009, the European Union (EU) had no competence in the field of sport. Nevertheless, the Commission and the Court of Justice of the European Union (CJEU) have previously applied the rules on free movement and competition law to sport when an economic activity was at stake (e.g., C-36/74 *Walrave*; C-415/93

Bosman; C-519/04 P *Meca-Medina*; T-93/18 *ISU*). The Lisbon Treaty established in Article 165 a supporting EU competence for "developing the European dimension in sport" and for "the promotion of European sporting issues, while taking into account the specific nature of sport, its structures […] and its social and educational function". This provision preserves the autonomy of sport governing bodies as it does not foresee the possibility of harmonising legislation. However, the terms "fairness" and "openness" can be interpreted as a means of challenging the traditional sport rules and regulations and aligning them to EU law. Moreover, according to Article 3(3) of the Treaty on European Union (TEU) in conjunction with Article 26(2) of the Treaty on the Functioning of the European Union (TFEU), any national practice that hinders the development of the internal market falls within the scope of EU law. Consequently, in its *Meca-Medina* ruling, the European Court of Justice (CJEU) rejected an *a priori* exclusion of competition law for sport and clarified that Articles 101 and 102 TFEU are fully applicable to cases concerning the regulation or organisation of sport (C-519/04 P *Meca-Medina*, para. 27). Similarly, the Commission states in its White Paper on Sport that "sport is subject to the application of the *acquis communautaire*" and that "European policies in a number of areas already have a considerable and growing impact on sport" (Commission, 2007a, p. 2).

In April 2021, several European football clubs announced the creation of and their participation in a breakaway league, the Super League, which would be the first annual European competition outside the Union of European Football Associations (UEFA), the governing body of European football. Accordingly, these clubs would remain members of the national leagues but no longer participate in UEFA's Champions League. UEFA and the Fédération Internationale de Football Association (FIFA) have tried to prevent this on the basis of their statutes by initiating disciplinary proceedings and threatening sanctions against the clubs and their players, such as temporarily excluding the teams from European competitions and banning the players from representing their national teams (UEFA [online], 2021). The Commercial Court of Madrid has issued an injunction prohibiting UEFA and FIFA from taking punitive measures of any kind against the clubs or players involved. Although the discussion is off the table for the time being, it will not disappear as the Spanish Court has referred preliminary questions to the CJEU on the compatibility of those football regulations and the monopoly for the exploitation and organisation of international competitions with EU competition law (C-333/21 *European Superleague Company*, pending).

The *ISU* ruling delivered by the General Court (GC) in December 2020 concerned similar issues. In both cases, the question is whether the monopoly of a sport governing body, which has a supervisory and disciplinary function for all European competitions, and its decision not to authorise a competition, are

contrary to Articles 101 and 102 TFEU, or whether such a monopoly is necessary to ensure the proper functioning of sport. This paper seeks to clarify these issues and assess whether there is a need for further regulation at EU level.

2. Special Characteristics of Sport

It is undisputable that sport has certain characteristics that distinguish it from other industries. These characteristics include the need for and interdependence between competitors, the uncertainty of outcome, the educational, social and cultural function, and the monopolist pyramid structure. The distinctive feature of this governance structure is that, as a rule, a single governing body regulates a sport at European or international level (Weatherill, 2017, pp. 2 et seq.). Such pooled power is necessary as most sports are truly global, i.e., their rules of the game do not differ regardless of the country in which they are played in.

Probably the most unique aspect of sport is the need for competitors to bring value to it. Participants are not competitors in the usual sense, but cooperate and compete at the same time. Hence the need for an overarching structure for organising competitions, rules of the game and governance. In fact, each sport involves a complex system with horizontal relationships between competitors as well as vertical relationships between the governance and the individuals involved. Sports associations usually have practical monopolies in a given sport and are considered dominant. This results from the pyramid structure that makes clubs and athletes dependent on the activities and regulations of the association (see e.g., Budzinski and Szymanski, 2014).

Another peculiarity is the difficulty in drawing a line between economic and non-economic aims or purely sporting rules and all other rules. Sporting rules can pursue a variety of objectives, including the integrity of competition, the health of players and the competitive balance (Commission, 2007b, chapter 2.1.5). They can be divided into different categories of rules: rules of the game, rules governing the conduct and transfer of players, rules governing relationships with other actors (e.g. agents), rules governing the monetisation of value created (e.g. broadcasting rights) or rules governing income caps. Competition law tends to intervene in cases where it is not the classical rules of the game that are at stake, but everything else related to a particular sport. Especially rules regulating the behaviour of participants are increasingly scrutinised by authorities and courts (e.g., C-519/04 P *Meca-Medina* (anti-doping) or T-93/18 *ISU* (participation in rival competitions)). These peculiarities are also reflected in sport litigation. Litigation can take months, if not years, to be decided, while sport careers are usually very short. Thus, in practice, sport governing bodies are immune to litigation, as athletes usually choose to continue their careers rather than end them prematurely (Weatherill, 2017, p. 2).

For these reasons, some scholars and professionals argue that the *lex sportiva*, which encompasses the regulations and practices created and adopted by sport governing bodies, merits exception from EU law (the so-called sporting exception; Weatherill, 2017, p. 6). It should be noted, however, that Article 165 TFEU explicitly recognises and refers to the specificity of sport and its structure. It aims to protect the European model of sport and governance. Although its social, cultural and educational functions are recognised, sport generates large amounts of money (cf. Agafonova, 2019, p. 99), i.e., it is not that special that it would be incomparable with other industries. In the end, despite their interdependence, clubs and players remain competitors in terms of players, sponsors, or broadcasters. Therefore, the common argument that issues of a purely sporting nature (as initially differentiated from commercial activities in C-36/74 *Walrave*, paras. 4 and 8) should be excluded from the application of EU law has lost its relevance. Today, competition law is applied by the Member States and the EU institutions as soon as economic activities are involved. Nonetheless, both the Commission and the CJEU take into account the special characteristics in their decision-making through the so-called *Wouters* test. Stephen Weatherill, Emeritus Jacques Delors Professor of European Law at Oxford University, refers to the relationship of federations to EU law as "conditional autonomy", according to which sport governing bodies act in line with their *lex sportiva* on condition that they demonstrate why their actions and practices are necessary for the organisation and integrity of sport and thus in conformity with EU law (Weatherill, 2017, pp. 71 et seq.). What this means will be clarified in the following chapter.

3. Sport and EU Competition Law

It follows from the Court's ruling in *Meca-Medina* that EU competition law is fully applicable to cases concerning the organisation and regulation of sport (C-519/04 P *Meca-Medina*, para. 27; Van Rompuy, 2015, pp. 174 et seq.). Hence, the sporting exception was curtailed and ultimately dismissed by the CJEU and cannot be invoked to exclude the application of EU competition law, which inherently restrains the autonomy of sport governing bodies.

Article 101(1) TFEU prohibits agreements between undertakings and decisions by associations of undertakings, which have as their object or effect the restriction, distortion or prevention of competition, and which affect trade between Member States. According to Article 102 TFEU, the abuse of a dominant position by one or more undertakings which affects trade between Member States is incompatible. Moreover, the rules and decisions of sport governing bodies are often subject to challenge on free movement grounds (e.g., C-415/93 *Bosman* on transfer rules and the free movement of workers), although this is not the focus of this paper.

3.1 Existing CJEU Case Law and Commission Decisions

In the absence of EU competence, there is no truly European sports law. The current regulation of sport governing bodies and their rules is based on a patchwork of CJEU decisions. This paper focuses on the most important and ground-breaking decisions.

The *Walrave* ruling of 1974 is the first case of the CJEU to address the compatibility of sports practices with the demands of EU law. The Court held that EU law applies to sport insofar as it constitutes an economic activity (C-36/74 *Walrave*, para. 4). Consequently, issues of purely sporting interest are excluded from its scope. The assumption that sport and economic activity can be clearly separated was refuted in the following years. More than 20 years later, the Court was again confronted with a sports case in its *Bosman* judgment. In this case, it confined its analysis to free movement provisions. An important outcome of the case is that the Court excluded the absolute immunity of sports regulations from EU law and thus an unconditional autonomy of sport governing bodies (C-415/93 *Bosman*, paras. 76 and 127). Nevertheless, the Court accepted certain special characteristics of sport as legitimate and therefore as a justified restriction (C-415/93 *Bosman*, para. 106). The judgment in the *Deliège* case amounts in principle to the same conclusion (C-51/96 and C-191/97 *Deliège*, paras. 64 and 69). The cases after *Bosman* and *Deliège* concerned mainly the application of competition law to sport, rather than the free movement rules.

The CJEU's *Meca-Medina* ruling is the landmark case for the application of competition law to sports issues. Two swimmers were banned from competition for a period of two years after failing a doping test. The Court ruled that the sanctions imposed by the sport governing body for the violation of its anti-doping rules were *prima facie* contrary to competition law, in particular Article 101 TFEU, as they were capable of producing restrictive effects on competition, excluding the athletes from sporting events (C-519/04 P *Meca-Medina*, paras. 40 et seq.). However, as the sanctions were necessary for a healthy sport and healthy players, they were held to be reasonable and proportionate and thus justified (C-519/04 P *Meca-Medina*, para. 45 applying the *Wouters* test). The Court reiterated that the objectives of the rules must be assessed *in concreto* (C-519/04 P *Meca-Medina*, para. 42). Furthermore, the Court rejected once and for all the sporting exception (C-519/04 P *Meca-Medina*, para. 27). Article 102 TFEU only really came into play in the *MOTOE* judgment, where a sport governing body was alleged to have infringed Article 102 TFEU by organising and commercially exploiting motorcycling events and refusing to grant its consent to a competition organised by MOTOE. The Court found a dominant position on the market for the functionally complementary organisation of motorcycling events in connection with their economic exploitation in Greece and an abuse of that

position due to a conflict of interest. The governing body had a regulatory power which it could use to favour its own events and competitions and exclude those of its competitors (C-49/07 *MOTOE*, paras. 33 and 51; see also Opinion of AG Kokott in C-49/07 *MOTOE*, para. 98). In that regard, the Court held that

> [A] legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of [sport] events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles [102 and 106 TFEU]. Those articles preclude a national rule which confers on a legal person […] the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review (C-49/07 *MOTOE*, para. 53).

The latest decision of the CJEU dealing with the application of competition law to sport is the *International Skating Union (ISU)* case from December 2020. The GC upheld the Commission's decision on appeal concerning measures taken by the speed skating governing body (ISU) to protect its model against third-party organisers of competing events. The skaters wanting to take part in events not approved by ISU were banned from competitions organised by it. The Commission considered that ISU's powers went beyond what was necessary for the organisation of the sport and the preservation of its integrity (AT.40208 *International Skating Union's Eligibility Rules*, paras. 254–258; T-93/18 *ISU*, paras. 59 et seq. and 81 et seq.). It found a conflict of interest as ISU's regulatory function overlapped with its commercial interests, of which the latter prevailed (T-93/18 *ISU*, para. 75). This was held to be a restriction by object in breach of Article 101 TFEU (AT.40208 *International Skating Union's Eligibility Rules*, paras. 162-188; T-93/18 *ISU*, para. 123). Moreover, the sanctions envisaged by ISU were considered disproportionate in the absence of clear authorisation criteria (T-93/18 *ISU*, paras. 84 et seq.). The problem in *ISU* was not the gatekeeper role of the governing body, but the leveraging of its economic power to gain a commercial advantage (Weatherill [online], 2021). The GC ruling has been appealed and is still pending, as are the questions referred to the CJEU for a preliminary ruling on the Super League.

3.2 Pending Super League Proceedings

The similarities between the *ISU* case and the Super League as well as the possible disciplinary measures against participating members are obvious. Both situations involve a non-compete obligation imposed by the sport governing body responsible for the organisation of tournaments. In the regulation of football, UEFA and FIFA enjoy a monopoly on the organisation and authorisation of European and international competitions respectively. Their statutes prohibit

the organisation of competitions or leagues without their consent or approval (Articles 71 and 73 FIFA Statutes; Articles 49 and 51 UEFA Statutes).

The Super League would consist of fifteen permanent members and five additional teams that would have to qualify annually in their national leagues. Clubs would be bound by a spending cap, i.e., they would be allowed to spend a maximum of 55% of their revenues on sporting expenses and would invest more than ten billion euros in solidarity payments (European Super League Company [online], 2021). UEFA and FIFA openly opposed such a Super League and threatened to sanction the clubs by excluding them from all other competitions and the players by denying them representation of their national teams (UEFA [online], 2021). The football clubs involved allege abuse of a dominant position by UEFA and FIFA under Article 102 TFEU. Furthermore, the imposition of allegedly unjustified and disproportionate restrictions would violate Article 101 TFEU. The monopoly in the organisation and authorisation of competitions, the exclusivity in the management of resulting economic revenues and the announced sanctions would impede free competition in the market for sports competitions. Instead, UEFA is accused of furthering its own commercial interest in maintaining monopoly control over the Champions League by suppressing the emergence of a new form of competition (C-333/21 *European Superleague Company*, request for a preliminary ruling).

The alleged conflict of interest is comparable to that of ISU, because UEFA and FIFA also have a double function, namely a regulatory and a commercial one. On the one hand, they set rules, determine the match calendar and protect the welfare of players and fans. On the other hand, their regulatory choices have direct commercial consequences, such as the imposition of sanctions, in addition to generating income (Weatherill [online], 2021). The approval by the governing bodies is not subject to any limits or objective criteria to avoid discriminatory or anti-competitive effects. Rather, they have a wide margin of discretion. It is therefore necessary that the activities and rules by sport governing bodies do not go beyond what is necessary for the proper organisation of sport (Weatherill [online], 2021).

In the following chapters, indications of a possible methodology and outcome of the CJEU decision in the appeal procedure are given: First, the sport governing body must be classified as an undertaking or an association of undertakings. Next, the rule or decision in question must restrict competition (Article 101(1) TFEU) and/or abuse a dominant position (Article 102 TFEU). Moreover, trade between the Member States must be affected by its behaviour. This condition is easily fulfilled in the present case and does not require further examination, as the rules adopted by sport governing bodies apply across borders in more than one State and the competitions are held throughout the EU. Finally, it must be determined whether the rule or decision is justified and proportionate.

3.2.1 Undertaking v Association of Undertakings

Article 101 TFEU applies to undertakings and associations of undertakings, while Article 102 TFEU applies to undertakings. The question is whether sport regulatory bodies can be classified as either. An undertaking is defined as an entity engaged in an economic activity (C-41/90 *Höfner*, para. 21). An economic activity, in turn, can be defined as an activity consisting in offering goods or services (for remuneration) (C-35/96 *Commission v Italy*, para. 36, C-413/13 *FNV*, para. 27). Therefore, when sports associations engage in commercial activities, they are to be considered as undertakings. In the sports industry, commercial activities take place at various levels. Sport governing bodies are generally considered as undertakings as they have numerous sources of income (Commission, 2007b, chapter 3.2.). FIFA and UEFA, for example, perform economic functions that include the conclusion of advertising and broadcasting contracts or the commercial exploitation of sporting events (IV/33.384 and IV/33.378 *Distribution of package tours during the 1990 World Cup*, paras. 47–48; Commission, 2007b, chapter 2.1.3.). Moreover, the national associations under the umbrella of UEFA form an association of undertakings by virtue of their economic activity (similar to UEFA), which in turn are associations of undertakings uniting different clubs (see e.g., COMP/C.2-37.398 *Joint selling of the commercial rights of the UEFA Champions League*; Van Rompuy, 2021, p. 835). In *Piau*, the Commission confirmed that sports federations can be both undertakings and associations of undertakings (T-193/02 *Piau*, paras. 68–72). But do the regulatory functions of sport governing bodies constitute an economic activity at all? Even though the regulatory activity cannot be unequivocally regarded as an economic activity, it has previously been held that the concept of an undertaking does not presuppose a profit-making intention, but only potential competition with other products or services on the market (C-49/07 *MOTOE*, para. 28). Moreover, the cultural and social function of the activities is not sufficient to negate their economic character (see e.g., C-237/04 *Enirisorse*, para. 34). Therefore, the exclusion of regulatory functions from the scope of commercial activities and thus from competition law provisions cannot be supported.

Exceptions to the notion of undertaking, such as the delegation of public tasks or the performance of exclusively social tasks, are not further explored in this paper.

3.2.2 Restriction of Competition and Abuse of Dominance

A further condition of Article 101(1) TFEU is that a restriction must result from an agreement between undertakings or from a decision of an association of undertakings. The rules established by sport governing bodies can easily be considered as agreements or decisions by undertakings or associations of undertakings. In this sense, the decision of UEFA and FIFA to prohibit the

creation of the Super League, based on the exclusive power of authorisation, is both a decision of an association of undertakings and an agreement between the two.

The dual function of organising and authorising competitions naturally implies a conflict of interest. It enables the association to select or eliminate its competitors. In the *ISU* case, the GC emphasised that a restriction by object is present if all competition on the relevant market is eliminated and if the decision is sufficiently harmful to the functioning of competition (T-93/18 *ISU*, para. 82). Due to the lack of legitimate objectives and the severity of the penalties, the Court found such a restriction by object on the part of ISU (T-93/18 *ISU*, paras. 77 et seq.). In its statutes, UEFA merely refers to the FIFA Regulations Governing International Matches with regard to the approval requirements for new competitions (Article 49(3) UEFA Statutes). However, as each sport is different, the sanctions foreseen and the objectives pursued cannot be compared one-to-one. It cannot be assumed or inferred that the primary objective of UEFA was to restrict competition and hinder market access for new entrants, rather than to improve the sport. In any case, the protection of a commercial interest does not in itself amount to a restriction by object (in *ISU*, the Commission was wrong to imply this). However, there is no doubt that UEFA's decision has the effect of restricting competition, as competitors will not be able to enter the market and compete effectively if they have to seek authorisation from the only association active in the market. The issue is not so much the right of a sport governing body to decide which third-party events may take place, but rather that the conditions for authorisation must be based on objective, transparent and non-discriminatory criteria.

With regard to Article 102 TFEU, the question of the existence of a dominant position does not even arise, because it is clear that sport governing bodies have a monopoly position in the sport they regulate and organise, so too UEFA and FIFA with a market share of 100% (cf. T-83/91 *Tetra Pak*, para. 109). The Court has previously clarified that the organisation of competitions in a specific sport sector can be regarded as the relevant market (T-93/18 *ISU*, paras. 115-119). In the case of UEFA and FIFA, the relevant market is the organisation and regulation of football competitions in Europe and at international level. Therefore, only the question of abuse of this dominance is relevant. There is no doubt that UEFA and FIFA have sufficient economic power to prevent effective competition (see also C-457/10 P *AstraZeneca*, para. 175). Again, the fact that the only active market player decides whether and which competitors can enter the market and compete effectively or not makes it highly unlikely that it will ever allow competition that jeopardises its own leagues. Moreover, the authorisation mechanism is not subject to further review and is therefore exposed to arbitrary use. Hence, UEFA and FIFA can be considered to have abused their (collective) dominant position.

3.2.3 Justification and Proportionality

Restrictions of competition and abuse of dominance can still be justified in a next step. In this respect, the *Wouters* case set important standards. *Wouters* did not deal with a sports-related case, but with a Dutch ban on partnerships between lawyers and accountants and its compatibility with Article 101 TFEU. The Court found a restriction of competition, while emphasising the importance of the overall context in which a decision is taken, the objectives pursued and the analysis of whether such restrictive effects are proportionate and inherent in the pursuit of those objectives (C-309/99 *Wouters*, paras. 94–97). The Court concluded that the restrictive effects were proportionate in view of the special nature of the legal profession (C-309/99 *Wouters*, paras. 109–110). The *Wouters* test should not be regarded as a rule of reason analysis, since the balancing of anti- and pro-competitive effects is reserved for Article 101(3) TFEU. The test already applies under Article 101(1) TFEU. So far, it has only been applied to cases involving Article 101 and not Article 102 TFEU, but should be applied by analogy.

Applied to the sport sector, the practices and decisions of associations of undertakings fall outside the scope of competition law if they are inherent in and proportionate to the pursuit of a legitimate aim, such as the maintenance of a proper structure and organisation of sport (Weatherill, 2021, pp. 10 and 18–19). Thus, the *Wouters* test provides flexibility to take into account the special characteristics of sport and public interest considerations. In this context, the Commission has identified, *inter alia*, ensuring fair sporting competitions and the uncertainty of outcomes as legitimate objectives (Commission, 2007b, chapter 2.1.5.). The *Wouters* test was already applied in the *ENIC/UEFA* Commission decisions relating to the rule limiting investment to one club participating in UEFA competitions. ENIC, the investor in six different football clubs, considered that this rule distorted competition. The Commission rejected the complaint based on the *Wouters* test and the *Meca-Medina* case, concluding that the rule was indispensable, albeit restrictive (AT.37806 *ENIC/UEFA*, paras. 27 et seq.).

It is likely that the CJEU will refer to the *Wouters* test in its preliminary ruling on the Super League. The argument of the Super League founders is that only the strongest teams can compete, which guarantees high quality matches and great public attention. The danger of match fixing or manipulative betting is not greater. The rules of football are not changed and the physical integrity of the athletes is not endangered. Last but not least, financial solidarity is preserved through solidarity payments to the national associations (C-333/21 *European Superleague Company*, request for a preliminary ruling). In view of the high economic stakes and the exclusivity of members, UEFA can claim that it pursues legitimate interests and objectives which justify its decision. These include safeguarding the integrity of the sport, preserving the open nature of football

based on promotion and relegation, preventing player overload, protecting the pyramid governance structure, ensuring equal rules globally and redistributing income (Weatherill [online], 2021). By preventing the creation of a closed parallel tournament, weaker clubs will still have the opportunity to compete with the strongest. Moreover, the preservation of the pyramid structure is necessary to ensure the proper functioning of national competitions and avoid scheduling issues. Other arguments against the Super League include that the agreement to create a breakaway league can itself be considered an anti-competitive agreement and grounds for collective dominance, as it harms existing products, in this case leagues, and raises costs for broadcasters. In fact, such a league replaces rather than competes with existing competitions (e.g., Van der Burg, 2020, p. 11). Nevertheless, the system of prior authorisation as such is not subject to any further control, regulation, or time limit and cannot be considered proportionate. Additionally, less drastic measures than the decision to ban the Super League altogether could have been implemented, for example a positive decision subject to further requirements, including solidarity contributions by the organisers and the participating clubs to UEFA and the national leagues. It cannot be confirmed that competition would be completely eliminated, since there are still other competitions, such as the UEFA Europa League.

For a restrictive practice to be justified under Article 101(3) TFEU, the decision or agreement must lead to productive or dynamic efficiencies and allow consumers to participate in them, while being indispensable to the attainment of those improvements and not substantially eliminating competition (cf. Jaeger, 2020, p. 317). According to the Commission, "such a justification is likely to apply where a rule is not inherent in the organisation or proper conduct of sport so as to justify the application of *Wouters* but where the beneficial effects of a rule outweigh its restrictive effects" (Commission, 2007b, chapter 2.1.6.). Contrary to UEFA's arguments under the *Wouters* test, which are based on the preservation of the pyramid structure of governance, UEFA can justify its decision under Article 101(3) TFEU by arguing that it has a benefit for consumers and is therefore indispensable to provide all clubs with equal promotion opportunities and to preserve the excitement of competition. A closed league jeopardises the competitive balance between clubs and the enjoyment of fans, as it becomes impossible for non-participating clubs to compete with renegade clubs (see also Zglinski, 2021, pp. 5–6). However, as UEFA and FIFA have a monopoly on the organisation and authorisation of competitions with no guarantees for the remaining clubs, it will be difficult, if not impossible, for them to argue that competition is not substantially eliminated.

Consequently, when applying the *Wouters* test to the *Super League* case, UEFA and FIFA will be able to demonstrate that their decision to refuse the competition

is inherent in the pursuit of legitimate objectives. Nevertheless, the decision taken and the disciplinary measures announced could and should be found to be disproportionate. The analysis would then end here. However, if the *Wouters* test is not applied or not met, UEFA and FIFA would still have a chance for justification under Article 101(3) TFEU if they can plausibly demonstrate that consumers benefit from their decision and that competition is not substantially eliminated. Even in this case, UEFA and FIFA are unlikely to pass this test, leaving them no chance against Europe's top clubs and the EU's competition law rules.

4. Conclusion

The EU has been consistently resistant to grant sport an automatic exemption from the application of EU law, despite the claim of sport governing bodies of commercially significant sports that they deserve autonomy by advocating fair and tolerant play and lifestyles. This results not the least from the lack of EU competence in the field of sport. In the presence of economic effects, the *lex sportiva* is never completely exempt. Instead, EU law recognises and takes into account the special nature and characteristics of sport, so that certain measures taken by sport governing bodies with overall responsibility for a given sport are permissible to protect their legitimate interests, subject to proportionality. As a result, the compatibility of sporting practices with EU law provisions must be assessed on a case-by-case basis. The downside of such a methodology is, of course, legal uncertainty and unpredictability for the sports associations, clubs and players concerned.

The main problem is the leverage of regulatory power to achieve commercial advantage and the resulting imbalance of power between the different actors in a given sport. The dilution of these two functions, regulatory and commercial, creates a conflict of interest that is likely to be challenged even more frequently in court. As can be seen from the CJEU's case law on sport and the above analysis on the Super League, the chances of winning against sport governing bodies and their restrictive regulations are relatively high. In practice, however, athletes or clubs are unlikely to claim a breach of EU competition law, as they may fear retaliation, reputational damage, high litigation costs and an early end to their careers.

Sport is a very dynamic and fast-growing sector (Commission, 2007b, chapter 3). For this reason, and in combination with a lack of competence, further regulation at EU level would be redundant. It is not possible to foresee every type of possible sporting rule; such a list would never be exhaustive. Nevertheless, the EU, especially at the initiative of the Commission and with the support of the Courts, must take a more assertive role. More intervention leads to a greater threat to the sport governing bodies' autonomy and a greater ability to control the legitimacy and proportionality of the rules and sanctions adopted. This is all the more

important because the idea of a Super League and, more generally, of a breakaway league still exists. This is not least the case because three of the original twelve participating clubs have still not withdrawn from the idea of a new league. In light of the above considerations, Articles 101 and 102 TFEU, in conjunction with the *Wouters* test, provide flexibility to take into account the specificities of sport and its legitimate objectives on a case-by-case basis. The ever-growing case law of the CJEU would at least provide some guidance by helping to identify which types of rules are normally considered compatible or incompatible with the Treaty. Provided that EU law is respected in areas such as free movement, non-discrimination, and competition, the promotion of self-regulation and the recognition of sports associations' responsibility for governance would also be in the interest of sport governing bodies. This kind of EU regulation through the backdoor can be compared to the Commission's efforts to control illegal fiscal state aid. Although direct taxation falls under the competence of Member States, the Commission and the EU Courts assess national tax laws and measures under Article 107(1) TFEU, so that Member States cannot adopt laws that violate EU law (fundamental freedoms are equally applicable). In this respect, intervention in sport should not be regarded as a withdrawal of Member State competence, but rather as a means to achieve the goal of making European sport genuinely interesting and the outcomes difficult to predict, accompanied by a gradual erosion of the monopolist structure in professional sport, especially in football. Thus, make it a truly European way of sport.

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Telecommunications Infrastructure Sharing as an Opportunity for Effective Deployment of Very High Capacity Networks

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Abstract

The objective of promoting the widespread deployment and take-up of very high capacity networks is at the core of the EU's ambition towards a gigabit society. Infrastructure sharing can be instrumental for this deployment by reducing costs, and risk of deployment, reducing environmental impact and ensuring efficient use of spectrum and network assets. In the same time infrastructure sharing can reduce incentives to invest and ability to compete between providers of electronic communications networks and increase coordination between telecom market participants, which presents an obvious risk relating to tacit collusion as well as potential breaches of competition law.

The research goal of the paper is to determine whether the EU provides a coherent regulatory approach balancing the potential benefits and drawbacks of infrastructure sharing in the electronic communication sector and whether this approach ensures the development of very high-speed connectivity in the EU.

The subject of the analysis is the European Electronic Communications Code (EECC), which provides the obligations to share infrastructure (Article 61(3–4) of the EECC) and promote co-investments in very high capacity networks (Article 76 of the EECC).

Keywords: European Electronic Communications Code, infrastructure sharing, very high capacity networks

JEL Classification: K210, K230

1. Introduction

The technological development of electronic communications and deployment of very high capacity networks affect all sectors of the economy, changes everyday life, the working environment and communication modes. Autonomous cars, e-medicine, voice assistants (Alexa, Siri, Cortana), smart cities and the Internet of Things (IoT) are only some of the possible applications of the new telecommunications technologies. Moreover, the basis for prosperity in the EU is the development of strategic digital infrastructure and capabilities (artificial intelligence, high-performance computing systems and cyber-security) and improvement of the functioning of the state by the digitisation of contacts between administrations and citizens and by providing public e-services. The development of very high capacity networks is also a prerequisite for the introduction of Industry 4.0, which means organisation of production based on intelligent machines, storage systems and production facilities capable of exchanging information autonomously, triggering actions and controlling each other. These changes are crucial for maintaining and increasing Europe's global competitiveness. Therefore, the rapid and effective deployment of very high capacity networks remains one of the main building blocks (followed by effective use, skills, review of policies, security and privacy, strategic coordination) for a digital transformation supporting well-being in the EU. The growth in this area has been observed, but it is still a challenge for the sector specific regulation and call for rethinking of the existing approach to regulation in a digital ecosystem.

2. Problem Formulation and Methodology

Ensuring the very high capacity connectivity requires: the transition from copper to high speed broadband; technological improvements of different types of hybrid networks based on fibre and copper (FTTN / FTTC, TV/Hybrid cables, fibre-coaxial); introduction of the 5G technology; the convergence of fixed and mobile telephony. To allow these improvements to come into force introducing new technological solutions and large investments is required. The basic research question is whether the EU sector specific regulation relating to infrastructure sharing is suitable for investment challenges faced by the modern telecommunications?

The methodology will involve interpretation of the European legislation, using semantic and syntactic rules of legal and natural language, and rules of formal logic and legal inferences. The subject of the analysis is in particular the European Electronic Communications Code (EECC), which provides the obligations to share infrastructure (Article 61(3–4) of the EECC) and promote co-investments in very high capacity networks (Article 76 of the EECC). In this article, the term infrastructure sharing is used to designate sharing of either fixed or mobile network infrastructure.

3. Analysis and Problem Solving

3.1 Very high capacity networks as the priority of the European Union

EU strategic documents (European Commission 2010a, 2010b, 2015) show that the priority for the Union over the last ten years has been to create a smarter Europe by supporting digital social and economic transformation and making full use of information and communication technologies. According to the strategy prepared for the five years until 2025 entitled Shaping Europe's Digital Future (European Commission 2020a), the EU is to ensure: 1) development, deployment and uptake of technology that works for people; 2) development of a fair and competitive economy using digital technologies, products and services; 3) shaping of an open, democratic and sustainable society. The COVID-19 crisis has demonstrated the need to accelerate the digital transformation of the EU. As the Commission noted in its Communication Digital Compass 2030: the European Way for the Digital Decade (European Commission 2021), the COVID-19 pandemic 'has radically changed the role and perception of digitalisation in our societies and economies, and accelerated its pace. Digital technologies are now imperative for working, learning, entertaining, socialising, shopping and accessing everything from health services to culture'. The outbreak caused by the SARS-CoV-2 coronavirus has led EU Member States to take measures to limit face-to-face social contact. This has resulted in increased demand for internet access and increased web traffic. As the European Commission noted in its Recommendation for the deployment of 5G networks in the EU (European Commission 2020b), 'electronic communications networks, in particular very high capacity networks, have been playing a crucial role in the response to the crisis by enabling remote working and schooling, healthcare, and personal communication and entertainment'.

One of the elements within the 'communications' area, to which the Commission pays special attention, is mobile broadband access and the implementation of 5G networks in the European Union. 5G mobile networks will provide users of mobile devices with very high-speed connectivity. In 2016, the Commission adopted the Communication 5G for Europe: An Action Plan to ensure early deployment of 5G infrastructure across the EU. In this document, the European Commission emphasised that the rapid deployment of 5G networks would enable the Union to become a leader in the global telecommunications sector, strengthen Europe's global competitiveness and represent an opportunity for the rapid development of the EU economy and society. The aim of the plan was to launch 5G services in all EU member states by the end of 2020 at the latest. According to the most recent targets expressed in the Digital Compass, by 2030 all European households are to have access to a high-speed Gigabit network, and all populated areas are to be in range of 5G networks (European Commission

2021). In order to achieve these goals, in its recommendation of 18 September 2020 (European Commission 2020c) the European Commission required the Member States to develop a common set of tools primarily to: ensure timely and investment-friendly access to 5G radio spectrum; implement timely spectrum allocation procedures for pioneering 5G network bands; streamline the issuance of permits necessary for the construction of very high capacity networks; develop best practices for enabling operators to access technical infrastructure (including buildings and street infrastructure elements) controlled by public entities.

In the case of 5G networks, in order to meet the IMT-2020 requirements for gigabit data rates as well as low latency, 5G network transmitters must be fully supported by networks with very high capacity (BEREC 2020a), e.g. fibre. This applies both to macrocells (range of up to several km) in rural and suburban areas and for microcells (range of up to 2 km) in urban centres (Ministry of Digital Affairs 2018). For these upgrades to take effect, new technological solutions and large investments are required. According to ETNO (European Telecommunications Network Operators' Association 2021) estimates, the total investment required between 2020 and 2027 to unlock the full value of 5G is € 300 billion (i.e., estimated costs of € 150 billion to upgrade fixed infrastructure to gigabit speeds, and another € 150 billion to build the full infrastructure to enable 5G). These figures suggest that the deployment of 5G is a financial challenge for telecom operators due to the necessary investments in infrastructure – higher than for previous generations of mobile telephony. In this context, the sharing of infrastructure and spectrum between operators and the regulation of network access are key issues with an impact on the reduction of 5G deployment costs and creation of a legal environment that encourages investment. The main EU legal instrument governing these issues is the European Electronic Communications Code (EECC 2018). According to the Commission's Communication 5G for Europe: An Action Plan (2016), this piece of legislation is intended to support the deployment and uptake of 5G networks, particularly with regard to radio spectrum allocation, as well as to create investment incentives and favourable framework conditions.

3.2 The current EU model of regulation of the electronic communications sector and the deployment of very high capacity networks

One of the objectives of the EECC, in addition to those already mentioned in the regulatory framework of 2002 (Telecoms Package, 2002) – i.e., promoting competition, contributing to the development of the internal market, promoting the interests of the citizens of the Union – is the rollout of very high capacity networks to benefit end-users (Article 3(2)a of the EECC). According to Article 2(2) of the EECC the term 'very high capacity network' means either an electronic communications network which consists wholly of optical fibre

elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation.

The general political consensus in the EU on the benefits of an effective deployment of very high capacity networks in Europe and the introduction of an additional regulatory objective did not translate into changes in the legal model of telecommunications regulation. Functioning in the EU since 2002, this model was maintained in the EECC. It provides for *ex ante* sector-specific regulation, which is implemented in the Member States in a decentralised manner and applied by national regulatory authorities (NRAs). It is an asymmetric regulation, targeting only operators with significant market power (SMP). This model obliges SMP operators to make their network/infrastructure available to new entrants (alternative operators) under conditions controlled by regulators. This supports market competitiveness and maximises user benefits (in the short term), but may also make SMP operators and alternative operators less keen on investment and innovation, and negatively affect the development of infrastructure competition (in the long term). When analysing this regulatory dilemma, S. Piątek (2011, p. 135 and p. 136) points out that

> [T]he regulator's focus on making the incumbent operator's resources available to competitors and reducing the former's charges to the level of an efficient operator's costs supports market competitiveness and maximises user benefits, but may weaken the propensity for investment and innovation both on the part of this operator, as well as alternative ones using its resources under the conditions set by the regulator.

Over-regulation through the imposition of access obligations may therefore strongly discourage investment if new entrants gain access to the infrastructure without bearing the costs and associated economic risks (Walden 2018, p. 437; BEREC 2019). When imposing regulatory measures, the crux of the problem therefore remains striking a balance between the objectives of EU electronic communications law as listed in Article 1(2) of the EECC, i.e., between the deployment and take-up of very high capacity networks, sustainable competition, accessibility of networks and services and end-user benefits on the one hand and ensuring the provision throughout the Union of good quality, publicly available services on the other.

On the one hand, potential benefits of infrastructure sharing are: cost reduction, improved efficiency, enhanced consumer choice, public interest (e.g., environmental benefits). On the other hand, infrastructure sharing agreements may reduce infrastructure-based competition, and hence investment incentives, or facilitate collusion between co-investors (BEREC 2019, Bourreau, Hoernig, Maxwell 2020, p. 6; Brom 2020).

The new regulatory instruments introduced by the EECC to encourage operators to make infrastructure investments also appear to be insufficient, i.e.: 1) exemption from symmetric access obligations for the wholesale operator providing access to very high capacity networks (Article 61(3)(2) in conjunction with Article 80 of the EECC), 2) co-investment in new very high capacity networks exempting the SMP operator from regulatory obligations (Article 76 of the EECC).

Article 61(3) of the EECC introduces the possibility for NRAs to impose what can be called 'symmetric access obligations' on providers of electronic communications networks or owners of network elements. The term 'symmetric regulation' is used because it refers to obligations that can be imposed on all electronic communications operators – symmetrically, and not only on those with significant market power – asymmetrically. Symmetric access obligations may be imposed in relation to: 1) access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the national regulatory authority, where that point is located outside the building (Article 61(3), subparagraph 1, of the EECC); 2) access to elements beyond the first concentration or distribution point, to a point that it [the NRA] determines to be the closest to end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers (Article 61(3), subparagraph 2, of the EECC). Symmetric access obligations are imposed upon reasonable request where duplication of network elements would be economically inefficient or physically impracticable. Since obligations for access to higher network tiers (access to network elements beyond the first concentration or distribution point) are more burdensome for electronic communications network providers, the criteria for their imposition are stricter. They can only be applied by NRAs where other access obligations, including those imposed on operators with significant market power (SMP), do not sufficiently address high and persistent economic or physical barriers to infrastructure duplication underlying an existing or developing market situation limiting the benefits of competition for end-users. The EECC leaves very little discretion to the Member States in implementing the new regime for the imposition of symmetric access obligations. The consistent application of Article 61(3) of the EECC by NRAs is to be ensured by the BEREC Guidelines (2020b). They set out criteria for determining (a) the first point of concentration or distribution; (b) the point, beyond the first point of concentration or distribution, that is capable of serving a sufficient number of end-users to enable an efficient undertaking to overcome the significant barriers to duplication identified; (c) which ongoing networks can be considered new; (d) which projects can be considered small; and (e) which economic or physical barriers to duplication are high and persistent. This new system of *ex ante* symmetric access regulation shows that the EECC, through the BEREC Guidelines, is intended to ensure

full harmonisation, not only in the implementation of the EU framework, but also in its interpretation and application.

The objective of Article 61(3) of the EECC is to promote competition in the interests of end-users by enabling NRAs to provide access to non-replicable infrastructure. However, in order to encourage investment, in particular in ultra-high capacity networks, the EECC introduces regulatory exceptions for wholesale-only undertakings providing access to ultra-high capacity networks. In accordance with Article 80 of the EECC, these are undertakings that are not present in any retail market for electronic communications services. Article 80 of the EECC clarifies that wholesale-only undertakings must have the following characteristics:

> (a) all companies and business units within the undertaking, all companies that are controlled but not necessarily wholly owned by the same ultimate owner, and any shareholder capable of exercising control over the undertaking, only have activities, current and planned for the future, in wholesale markets for electronic communications services and therefore do not have activities in any retail market for electronic communications services provided to end-users in the Union; (b) the undertaking is not bound to deal with a single and separate undertaking operating downstream that is active in any retail market for electronic communications services provided to end-users, because of an exclusive agreement, or an agreement which de facto amounts to an exclusive agreement.

According to Article 61(3)(a) and (b) of the EECC, NRAs may not extend an obligation to provide access to network elements beyond the first point of concentration or distribution where they find that: the provider is a wholesale-only undertaking and provides a viable and similar alternative means of reaching end-users by providing access to a very high capacity network, to any undertaking, under fair, non-discriminatory and reasonable conditions. Nor is it possible for regulators to extend symmetric access obligations where imposing them would call into question the economic or financial viability of deploying a new network, in particular by smaller local projects. In addition, where a wholesale-only company is designated as having SMP, the NRA may not impose all regulatory obligations on that company, but only obligations of non-discrimination with regard to interconnection or access (Article 70 of the EECC), obligations for access to and use of specific network elements and associated facilities (Article 73 of the EECC), or obligations for fair and reasonable prices, if justified by market analysis.

Infrastructure investment is also to be promoted by the co-investment mechanism provided for in Article 76 of the EECC (European Parliament 2018). According to this article, undertakings that have been designated as having significant market power

> may offer commitments (..) to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment, for example by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.

Co-investment in infrastructure can take various forms (Bourreau, Hoernig, Maxwell 2020, p. 29), including offering co-ownership or long-term risk sharing through co-financing or purchase agreements leading to specific structural rights (Article 76(1) of the EECC). Recital 198 of the EECC clarifies that commercial access agreements which are limited to the leasing of capacity do not give rise to such rights and therefore cannot be considered as co-investment. The possibility of co-investment applies only to fibre and does not apply to other technologies (such as satellite). This constitutes a derogation from the principle of technological neutrality. In addition, the investment must be new and relate to the fibre to the premises (FTTP) or (in the case of mobile networks) to the base station. Other types of fibre investment, such as FTTC (fibre to the curb), are not eligible for the co-investment mechanism.

In accordance with Article 76(1) of the EECC, a co-investment offer must meet all of the following conditions: (a) it is open at any moment during the lifetime of the network to any provider of electronic communications networks or services; (b) it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active; (c) it is made public by the undertaking in a timely manner and at least six months before the start of the deployment of the new network (except for the wholesale operator); (d) access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets; (e) it complies at a minimum with the criteria set out in Annex IV and is made in good faith. According to Annex IV of the EECC, the co-investment offer: (1) shall be open to any undertaking over the lifetime of the network built under a co-investment offer

on a non-discriminatory basis; (2) shall be transparent; (3) shall include terms to potential co-investors which favour sustainable competition in the long term; (4) shall ensure a sustainable investment likely to meet future needs, by deploying new network elements that contribute significantly to the deployment of very high capacity networks.

The EECC co-investment provisions offer a (very complex) way of exempting new investment from the wholesale access provisions that would otherwise apply. They are designed to encourage additional investment in one particular technology (fibre) – and only if the new infrastructure is FTTP and not alternatives such as FTTC. Once all these conditions are met, the SMP operator will be able to refuse to provide the new infrastructure, or the services that can be provided on it, to competitors who are not co-investors. (BEREC 2012; Conradi 2018).

4. Conclusion

However, the solutions provided by the Code are not sufficient to ensure a high level of investment in building a secure and efficient digital infrastructure. According to the 5G Supply Market Trends report (Austrian Institute of Technology *et al*. 2021), although Europe is home to two of the three major telecom equipment providers and is the global leader in 5G trial investment (European Parliament 2019), European infrastructure investment lags behind other regions of the world, particularly the US, China and South Korea, and European companies and consumers are only just beginning to see the benefits of 5G.

Firstly, symmetric regulation, which could potentially affect all market participants if they own the infrastructure, is particularly questionable. Paradoxically, the lack of a requirement for a market analysis and the designation of an SMP company reduces the limits of regulatory interference, which can act strongly against infrastructure investment. The exception for wholesale-only operators is very narrow and only covers situations of extended access obligations to network elements beyond the first concentration or distribution point. Secondly, according to Article 76(1) of the EECC, the co-investment offer is open at any time during the lifetime of the network to any provider of electronic communications networks or services. This allows all co-investors to benefit from the first mover advantage over other companies. Thus, the EECC provisions on co-investment are in effect long-term commitments to grant access (Vogelsang 2019). This means that the regulatory measures adopted in the EECC do not provide an optimal regulatory environment for the technological development of the sector in the EU. One of the objectives of the EECC is the deployment and roll-out of ultra-high capacity networks (Article 1(1a) of the EECC). However, for this to be possible, a more deregulatory approach would be needed. Competition for sustainable infrastructure could be increased, in particular by deregulating two or three infrastructure providers of

equal size and a bolder policy of co-investment and network sharing with first mover incentives.

This means that the EU regulatory measures adopted in the electronic communications do not provide optimal regulatory environment for the technological development of this sector in the EU. It makes Europe lagging further and further behind USA and many countries in Asia. This is primarily due to US regulatory forbearance ensuring that barriers to investment in infrastructure are removed. The US essential facilities doctrine calls for obligatory wholesale access only if there is an infrastructure monopoly. While Federal Communications Commission (FCC) as the US sector-specific regulator already in 2003 used a high capacity connectivity goal to deregulate new fibre infrastructure. The duopoly competition, which would be treated as an oligopoly and subject to regulation by EU law, between the dominant cable companies and telephone incumbent was viewed as sufficient for abolishing regulation of fibre. In the mobile sector in the US, unbundling was first established in 1996 to open up markets to competition. Spectrum caps were originally viewed by the FCC as one means to ensure effective competition in early stages of mobile market development. Starting in 2003, the regulatory policy in the US changed to a market led approach, with lighter spectrum control (spectrum caps were replaced with a case-by-case review of spectrum aggregation), enabling a dynamic secondary market, and abandoning unbundling. The US favours commercial agreements (e.g., roaming, MVNO, spectrum), a technology agnostic approach to regulation (e.g., same treatment for cable than for traditional 'incumbents', technology neutral spectrum) and a more open approach to consolidation.

In South Korea the attention is increasingly focused on the need to use the 'negative regulation' that minimises regulations on new technologies and the 'regulatory sandbox' system that provides opportunities to invest for operators. A 'regulatory sandbox' is a system in which companies seeking innovation are exempt from or waived existing regulations for a certain period of time when they release products.

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Antitrust Treatment of Sharing Economy Actors Viewed through New Institutional Economics Lens. The Case of Uber.

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Abstract

The so-called 'Sharing Economy' brought about some new challenges to the application of competition/antitrust law to the entities participating in it. Uber and the so-called uberization of economy are mentioned as prime examples of the respective issues. Competition law struggled how to appropriately tackle some of the issues brought about by Uber's new 'business model'. In some jurisdictions Uber was challenged as a dominant company engaging in pricing abuses. In others its model was under scrutiny as a device coordinating price fixing among Uber drivers, i.e., as some sort of 'hub-and-spoke' collusive conspiracy. It has been also argued that rather than a horizontal collusion facilitating device, it could a prohibited vertical price fixing scheme (resale price maintenance) when Uber requires its drivers to follow fixed prices set by an Uber algorithm. In this connection, one of the key issues dealt with was the position of Uber drivers within the Uber eco-system. Are they employees of Uber even if not treated by Uber as such? In case they are employees forming dependent inherent parts of Uber economic unit, then they cannot be treated as independent economic units (undertakings) and, hence, the relations between Uber and its drivers would be outside the scrutiny of competition law. Competition law could look just at the effects caused by Uber's model outside the Uber eco-system. On the contrary, if they are not employees but independent contractors, what is their antitrust law treatment? Can they be considered genuine commercial agents forming just auxiliary organs of 'Uber body' in which case they would again largely fall out of competition law purview or are they truly independent undertakings engaged in horizontal collusion or (vertical) resale price maintenance? I will argue that the 'New Institutional Economics' (NIE) insights concerning various forms of

economic organization are helpful in finding the right antitrust treatment of the actors engaged in the 'Sharing Economy' such as Uber and its drivers. The current attempts addressing the above issues seem to be based on a simplified 'binary' view trying to classify Uber drivers either as employees or agents, i.e., dependent parts of Uber (outside of e.g., Article 101 TFEU purview) or as separate undertakings (in which case the model would be contrary to Article 101 TFEU). In NIE's terms, that can be considered as an attempt to view the Uber business model just either as the 'hierarchy' (based on traditional concepts of employment or agency) or as the 'market' modes of economic organization. But a more elaborate view seems to be more appropriate. One possibility would be to step out from the traditional concepts of employment/agency and consider the different technology-based modes of governance within the Uber eco-system as a 'hierarchy' without the need to classify Uber drivers as employees or agents. Another view would be to consider Uber business model (and other sharing economy actors' models) to be in between 'hierarchy' and 'market' modes of economic organization in the zone which is labelled as 'hybrids' or 'networks' and which necessitates a more refined antitrust treatment. Such a treatment should appropriately take into account specifics of the Uber business model, incl. its innovativeness, and would concentrate on the effects of Uber (and other sharing economy actors) practices through appropriate 'counterfactual analysis' focusing on what pros and cons it brought about from the consumer welfare perspective. Such analysis shall be appropriately deferential to the choice of 'business models' by private economy actors especially in innovative industries and should not second-guess their commercial choices unless they bring clear harms to consumer welfare.

Keywords: counterfactual analysis, networks, new institutional economics, sharing economy, Uber

JEL Classification: K210

1. Introduction

The so-called 'Sharing Economy' brought about some new challenges to the application of competition/antitrust law to the entities participating in it (e.g., King 2015, Dunne 2018, Bostoen, 2019 or Lougher, Kalmanowicz 2016). Uber and the so-called uberization of economy are often mentioned as prime examples of the respective issues. Competition law struggled how to appropriately tackle some of the issues brought about by Uber's new 'business model'. In some jurisdictions Uber was challenged as a dominant company engaging in pricing abuses (be it predatory pricing, price gouging or price discrimination) (Passaro 2018, Denis 2021 or OECD 2018, pp. 25–29). In others, its model was under scrutiny as a device coordinating price fixing among Uber drivers, i.e., as some

sort of 'hub-and-spoke' collusive conspiracy (*Meyer v. Kalanick*, 174 F. Supp. 3d 817, Decision of Competition Commission of India of 6 November 2018, Case No. 37 of 2018, In Re: *Samir Agrawal and ANI Technologies, Uber et al.*, or Kupčík 2016, Nowag. 2016, 2018, Bekisz 2021). It has been also argued that rather than a horizontal collusion facilitating device, it could be a prohibited vertical price fixing scheme (resale price maintenance) when Uber requires its drivers to follow fixed prices set by an Uber algorithm (Decision of Competition Commission of India of 6 November 2018, Case No. 37 of 2018, In Re: *Samir Agrawal and ANI Technologies, Uber et al.*, or Bekisz 2021).

In this connection, one of the key issues dealt with was the position of Uber drivers within the Uber eco-system. Are they employees of Uber even if not treated by Uber as such? In case they are employees forming dependent inherent parts of Uber economic unit, then they cannot be treated as independent economic units (undertakings) and, hence, the relations between Uber and its drivers would be outside the scrutiny of competition law. Competition law could just look at the effects caused by Uber's model outside the Uber eco-system. On the contrary, if they are not employees but independent contractors, what is their antitrust law treatment? Can they be considered genuine commercial agents forming just auxiliary organs of 'Uber body' in which case they would again largely fall out of competition law purview or are they truly independent undertakings engaged in horizontal collusion or (vertical) resale price maintenance (RPM)? From a different perspective, could Uber be viewed rather as an agent for its partner drivers intermediating the possibility to conclude transport contracts (rides) with riders? And what would that mean for the application of competition laws?

I will argue that the 'New Institutional Economics' (NIE) insights concerning various forms of economic organization, as developed primarily by Oliver E. Williamson and works stemming from that (Williamson 1975, 1985, 1996, 2000 and Ménard, Shirley 2008 or Brousseau, Glachant 2008a), are helpful in finding the right antitrust treatment of the actors engaged in the 'Sharing Economy' such as Uber and its drivers. The current attempts addressing the above issues seem to be based on a simplified 'binary' view trying to classify Uber drivers either as employees or agents, i.e., dependent parts of Uber, outside of e.g., Article 101 of the Treaty of Functioning of the European Union (TFEU) purview, or as separate undertakings, in which case the model would be likely contrary to Article 101 TFEU. In NIE's terms, that can be considered as an attempt to view the Uber business model either just as the 'hierarchy' (based on traditional concepts of employment or agency) or as the 'market' modes of economic organization. But a more elaborate view seems to be more appropriate. One possibility would be to step out from the traditional concepts of employment/agency and consider the different technology-based modes of governance within the Uber eco-system as a 'hierarchy' without the

need to classify Uber drivers as employees or agents. Another view would be to consider Uber business model (and other sharing economy actors' models) to be in between 'hierarchy' and 'market' modes of economic organization in the zone which is labelled as 'hybrids' or 'networks', or some development thereof, and which necessitates more refined antitrust treatment.

Such a treatment should appropriately take into account specifics of the Uber business model, incl. its innovativeness, and would concentrate on the effects of Uber (and other sharing economy actors) practices through appropriate 'counterfactual analysis' focusing on what pros and cons it brought about from the consumer welfare perspective. Such analysis shall be facts specific and appropriately deferential to the choice of 'business models' by private economy actors especially in innovative industries and should not second-guess their commercial choices unless they bring clear harms to consumer welfare.

The structure of this paper shall be as follows. At the outset, I will briefly explain what I consider the 'Sharing Economy' and point to various competition law issues that have been discussed in connection with the antitrust treatment of 'Sharing Economy' actors and their conduct. In this respect, I will concentrate on Uber as the prime example of the 'Sharing Economy'. Second, I will describe NIE's insights concerning firms and other modes of business governance with an emphasis on the role the so-called networks or hybrids among them and will also touch upon how those insights have been and could have been used in the application of competition law. Third, I will apply those insights onto Uber and the antitrust treatment of its business model and will show that it may be wrong to try to fit that business model just into the dichotomy of 'hierarchy' and 'market' modes of governance, esp. if that dichotomy would not reflect different technology-based modes of governance within the Sharing Economy, and that another approach, which is carefully aware of what is the appropriate 'unit of analysis' and which employs an appropriate 'counterfactual analysis', is to be the preferred one. Lastly, I will conclude.

2. Sharing Economy and Competition Law

2.1 General Overview

The phenomenon of the 'Sharing Economy' (sometimes called also "Collaborative economy") has been described in many papers both in academia (e.g., King 2015, p. 729, Dunne 2018, pp. 91-92, Anderson, Huffman 2017, pp. 864–873, Bostoen, 2019, pp. 1–4, or Lougher, Kalmanowicz 2016, pp. 88–91) and in documents issued by competition agencies such as Federal Trade Commission (FTC) (FTC 2016) or the European Commission (EC) (EC 2016a, 2016b). I take that most of the readers have a very good general grasp of what it is when we deal with the

'Sharing Economy' and, hence, no detailed definitions and/or descriptions are needed at this point. I, therefore, only summarize some principal points utilising the documents referred to above. The 'Sharing Economy' is often understood to be a term "used to cover a wide range of internet-based business models" whose "underlying feature … is a multisided platform that facilitates exchange" (King 2015, p. 729). EC (2016a), for instance, defines collaborative/sharing as:

> [B]usiness models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect – via an online platform v providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit. (EC 2016a, p. 3).

These on-line enabled platforms are two-sided or multisided businesses, well described e.g., in Evans, Schmalensee (2016) or Kindl *et al.* (2021), ch. VII, but in comparison to traditional two-sided businesses (such as, e.g., newspapers) with the advent of Internet and smartphones usage they "have been 'turbocharged', reaching new levels of scale and effectiveness" (Nowag 2018, p. 384). That was caused primarily due to network effects and changes to operating models enabled by innovative digital technologies (Iansanti, Lakhani 2020, ch. 2). However, the 'Sharing Economy' is just a sub-group of a larger term "platform economy" which encompasses, for instance, also "online marketplaces, app stores, price comparison websites, search engines, social networks" (Bostoen, 2019, p. 1), and the like.

The advent of 'Sharing Economy' also brought about a plethora of competition issues which have been discussed in academia from many angles (e.g., King 2015, Dunne 2018, Anderson, Huffman 2017, Lougher, Kalmanowicz 2016, Nowag 2018, Bostoen, 2019). Those issues include, *inter alia*, potential competition law risks associated with incumbent platforms abusing their positions to exclude rivals especially if they would not be allowing multi-homing (King 2015, pp. 730–732, Lougher, Kalmanowicz 2016, pp. 98–99), or with contracts that reference rivals (King 2015, pp. 732–734), risks of unilateral (both exclusionary and exploitative) as well as coordinated (both horizontal and vertical) anticompetitive conduct (Dunne 2018, pp. 92–103, Bostoen 2019).

2.2 The Case of Uber

Uber was discussed as a prime example of the 'Sharing Economy' actor and as the showcase eliciting the respective competition law issues. Uber's business model is well-known and has been described extensively (e.g., Nowag 2016, Anderson, Huffman 2017, pp. 875–878, Bekisz 2021, pp. 223–224, OECD 2018 or the Court of Justice's judgment and related opinion of AG Szpunar in the so-called *'Uber Spain'* case, C-434/15). The gist of the model (the core business) is that Uber connects drivers and riders (customers) via its Uber application which so allows to find a driver nearby the rider who is willing to transport the rider where needed for a price set by Uber's algorithm. In comparison with some other sharing economy companies (e.g., Airbnb), Uber sets quite detailed rules regarding qualifications of the drivers, their cars and quality of service and, in particular, sets the price (via algorithm) instead of the drivers themselves. The riders and drivers evaluate each other after the ride via a star evaluation system. Uber also arranges for some ancillary services (e.g., UberEats or UberHealth) via its platform (Iansanti, Lakhani 2020, pp. 146–151). There are other similar ride-sharing (or ride-sourcing) companies like Uber around the globe. The well-known examples include, e.g., Lyft in the US, Bolt (formerly Taxify) in Europe or DiDi Chuxing or Grab in Asia. The allegations regarding Uber's conduct in various jurisdictions related particularly to the fact that Uber sets the prices of rides via its algorithm.

There were especially three categories of potential anticompetitive conduct allegations discussed in this connection. Those are: (i) horizontal (hub-and-spoke) conspiracy allegation, (ii) vertical RPM allegation and (iii) various allegations of Uber's unilateral anticompetitive conduct allegations. I will deal with these briefly in turn. One can also point out that there may be other competition law issues associated with Uber (or ride-sharing) business in the 'merger assessment' area, incl. the increasing concentration caused by acquisitions or joint ventures among ride-sharing businesses, and issues relating to the horizontal shareholdings which occur as a result of those transactions (Bostoen 2019, pp. 19–24). Those issues are, however, out of scope of this paper.

2.2.1 Horizontal (Hub-and-Spoke) Conspiracy Allegation

It was argued that Uber and its drivers are separate undertakings for the purposes of EU competition rules and, hence, by setting a uniform price mechanism for all its drivers Uber, acting as a common agent for all the drivers, actually orchestrates a horizontal hub-and-spoke cartel among the drivers. This was the allegation that was dealt with and preliminarily sustained (in the decision rejecting the motion to dismiss) in the US *Meyer v. Kalanick* case (*Meyer v. Kalanick*, 174 F. Supp. 3d 817) and discussed in related US literature (Anderson, Huffman 2017). This was also the line of argument discussed within the framework of EU competition law

(esp. Nowag 2016, 2018, Kupčík 2016, Dunne 2018, pp. 98–103, Bekisz 2021, pp. 225–232, Bostoen 2019, pp. 9–17) or more generally (not in a jurisdiction specific way) (Ezrachi, Stucke 2016, pp. 50–55).

In the EU context, the leading question was whether drivers constitute parts of the single economic entity (a single undertaking) with Uber (either as employees or as agents) or not. In case they would be considered to form a single economic entity with Uber, then no cartel would be present as no conspiracy (an agreement within the meaning of Article 101(1) TFEU) can occur within the single undertaking (Bekisz 2021, pp. 227–229, Bostoen 2019, pp. 9–12). On the other hand, if they are separate independent contractors, a horizontal conspiracy could occur. The answers to this question were different (*cf.*, e.g., Nowag 2016, 2018, Kupčík 2016, Bekisz 2021, Dunne 2018, pp. 98–103, Bostoen 2019, pp. 9–17, Cifuentes 2016). All, however, dealt with the underlying dichotomy of (i) being a single undertaking and, hence, outside Article 101(1) TFEU or (ii) not being a single undertaking and, hence, likely being an Article 101(1) TFEU infringement subject to potential Article 101(3) TFEU assessment.

A more nuanced approach, however in the somewhat different US context, was proposed by Anderson, Huffman (2017) who advocated for a 'rule of reason' approach with the level of complexity being dependant on the assessment of the level coordination, on the one hand, and the level of risk sharing among the participants to the platform, on the other hand (Anderson, Huffman 2017, pp. 917–931). Similarly, complexities of the related assessment were also discussed in Ezrachi, Stucke (2016) where the authors rightly pointed to non-trivial policy choices and enforcement challenges associated with such an assessment (pp. 50–55).

The same allegation was also dealt with in front of the Competition Commission of India in the case of complaint of *Samir Agrawal* and was rejected in the following terms: "Such pricing does not appear to be similar to the 'hub and spoke' arrangement as understood in the traditional competition parlance. A hub and spoke arrangement generally require the spokes to use a third party platform (hub) for exchange of sensitive information, including information on prices which can facilitate price fixing. For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers. In the case of ride-sourcing and ride-sharing services, a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There does not appear to be any such agreement between drivers *inter-se* to delegate this pricing power to the platform/Cab Aggregators." (Decision

of Competition Commission of India of 6 November 2018, Case No. 37 of 2018, In Re: *Samir Agrawal and ANI Technologies, Uber et al.*, para. 15).

2.2.2 Vertical RPM Allegation

An alternative view regarding the competition law assessment of the Uber's pricing model was such that instead of being a horizontal conspiracy among the drives orchestrated by Uber, there is a series of vertical arrangements between Uber and its drivers whereby Uber fixes the prices for which drivers can offer their (transport) services. Accordingly, it was argued that such an arrangement could represent a vertical RPM restriction which is also treated as a 'by-object' restriction under the EU competition law, also subject to potential Article 101(3) TFEU assessment (Bekisz 2021, pp. 232-233, Dunne 2018, p. 103, Nowag 2018, pp. 394–398, Bostoen 2019, pp. 14). This view also depends on the assessment of the position of drivers within the Uber ecosystem as, similarly as in the context of horizontal conspiracy allegation, there cannot be a vertical agreement within the boundaries of a single economic entity. Accordingly, should drivers be considered employees of Uber or its (genuine) agents, there would be no RPM. The views on whether Uber drivers are Uber's employees widely differ and there are also diverging court opinions on that (Bekisz 2021, pp. 227–228, Nowag 2018, pp. 388–391, Tomassetti 2016). Concerning drivers being treated as agents of Uber (the principal), the prevailing opinion seem to be that the strict requirements following from EU Court of Justice (CJEU)'s case-law are not met (Bekisz 2021, pp. 228–229, Bostoen 2019, pp. 11–12). From a different perspective, it was also discussed whether Uber should not be treated as an agent for the drivers, views on that also differ (*cf.* Bekisz 2021, p. 229 and Akman 2019). Such a position of Uber would exclude finding of a vertical agreement between Uber and the drivers but would not insulate Uber from the allegation of a hub-and-spoke conspiracy (Nowag 2018, pp. 397–401).

It has been also discussed in this connection that one can hardly have *resale* price maintenance when there is no resale as Uber does not sell goods/services to drivers that would then be resold by them ((Nowag 2018, pp. 395-396, Anderson, Huffman 2017, pp. 902–904) but "merely provides a matching service that helps drivers and riders find one another" (Anderson, Huffman 2017, p. 904). In other words, Uber either sets the price for the service provided for by the drivers themselves and collects fees for intermediation (if drivers were considered to be the service providers and Uber only the matchmaker) or Uber sets the price of its own transport service (if Uber were considered to be a transport service provider itself as it seems to be suggested, e.g., in the CJEU's judgement in *Uber Spain* case, C-434/15). In neither of these situations, there is any resale and, hence, no RPM. It was, on the other hand, mentioned in this connection, with the

reference to CJEU's judgment in *Binon* case (243/83, para. 44), that case-law on RPM is indifferent towards the position of the parties to the vertical price fixing agreement and, hence, that RPM (Article 101(1) TFEU by-object infringement) can occur without the resale, strictly speaking (Bekisz 2021, p. 232, Dunne 2018, p. 103). A reliance on *Binon* case in this respect, however, seems to be overstretched as that case actually involved a classic supplier-distributor/reseller relationship.

The same allegation was also dealt with in front of the Competition Commission of India in the case of complaint of *Samir Agrawal* and was rejected as untenable for the lack of resale and for the lack of fixing 'floor prices' via Uber's algorithm (Decision of Competition Commission of India of 6 November 2018, Case No. 37 of 2018, In Re: *Samir Agrawal and ANI Technologies, Uber et al*., para. 17).

2.2.3 Uber's Unilateral Anticompetitive Conduct Allegations

Other allegations of potential anticompetitive conduct rest on the assumption that Uber is acting unilaterally when setting the prices and could represent a competition law problem only if Uber was found to having been dominant or was attempting to monopolize the market. Allegations could relate to exclusionary abuses, esp. predatory pricing, to price discrimination or to excessive pricing, esp. in connection with Uber's surge pricing mechanism (OECD 2018, pp. 25–29, Passaro 2018, Denis 2021, Bostoen 2019, pp. 17-19).

3. New Institutional Economics Insights

3.1 General Overview

New Institutional Economics "is not an integrated theory based on a set of common hypotheses, but, rather, a combination of bricks coming from different traditions" (Brousseau, Glachant 2008b, p. xxxix). And, yet, there are some unifying themes, including that NIE focuses largely on analysis of mechanisms of governance and coordination in various social arrangements, including in the business area (Williamson 2000). As of its beginnings set famously by Ronald H. Coase in his 1937 Article on "The Nature of the Firm" (Coase 1988), it dealt with analysing 'make-or-buy' decisions (Gonzáles-Díaz, Vázquez 2008) and defining 'firm's boundaries' and assessing why actors on the market choose to prefer to vertically integrate rather than to negotiate a market exchange on the spot market. There are now multiple books containing various strands of NIE and its insights on those various aspects of the so analysed institutions (for a general overview, see, e.g., Ménard, Shirley 2008 or Brousseau, Glachant 2008a).

Concerning (industrial) organization structures, NIE came from a fundamental distinction between 'hierarchies', on the one side, and 'markets' on the other (Williamson 1975, 1996). These two modes of governance, however, are not

binary but lie on the continuum whose ends (poles) they occupy and in between them there are various 'hybrid' governance forms which do not fit neatly either under the 'hierarchy' (vertical integration) or (spot) markets (Williamson 1996, p. 119, Lianos 2007, p. 652, Ménard 2008, pp. 294–302, Thompson 2003, ch 5, Kindl *et al.* 2021, p. 285, Ménard 2021). Franchising was, e.g., first mentioned as an example of 'hybrid' mode "located between market and hierarchy with respect to incentives, adaptability, and bureaucratic costs" (Williamson 1996, p. 107) and it was argued that NIE's insights can explain some differences in treatment of various vertical arrangements such as commercial agency, franchising, or selective distribution systems (Lianos 2007, pp. 652–672, Kindl *et al*. 2021, pp. 285–286).

When one assesses how those hybrid governance mechanisms work, one needs to take well into account that they carry out transactions neither just through a price mechanism (as the market would do) nor through directions (as it occurs in the hierarchy setting). It has been said that "[b]ecause they cannot or can only weakly rely on prices or on hierarchy to discipline partners, hybrids depend on specific mechanisms of governance for their survival" (Ménard 2008, p. 297). In other words, it is something in between which takes various forms. Even vocabulary is not uniform. They have been described as follows: "Hybrids, clusters, networks, symbiotic arrangements, and chain systems are used quite indifferently. The forms encapsulated by these fluctuating terms seem also heterogeneous. They include subcontracting, networks, alliances, franchising, collective trademarks, partnership, and even forms of cooperative. However, they are connected by the underlying idea that they participate to the same "family" of agreements among autonomous entities doing business together, mutually adjusting with little help from the price system, and sharing or exchanging technologies, capital, products, and services without a unified ownership." (Ménard 2008, p. 295).

3.2 NIE and Sharing Economy

It is well recognized that the 'Sharing Economy' brough about new, innovative, or simply different ways of managing some tasks that have been previously organized differently. For instance, by established (traditional) players (through traditional cab drivers or taxi dispatching services if we would take ride-sharing as an example, or through hotels and B&Bs if we would venture into Airbnb zone) or not at all (e.g., some drivers who are ready to ride-share from time to time would never think of working as a taxi driver even part-time). Hence, one could wonder where would those new 'modes of governance' or new ways of transactions handling fit from the NIE's perspective. When we compare the definition of the Sharing (or Collaborative) Economy as provided for, e.g., in EC (2016a) with the explanation of what 'hybrids' can encompass (Ménard 2008, p. 295), it follows that they would fit in there quite neatly.

There have been attempts to view the Sharing Economy (as well as two-sided markets more generally) through NIE's lens (e.g., Acquier 2018, Reimers, Guo, Li 2019, Tomassetti 2016, Davies, Sinha 2021).

It has been, for instance, argued that in order to properly capture two-sided markets Williamson's original trichotomy of hierarchies-hybrids-markets needs to be extended as they represent functional alternatives to those 'traditional' modes of governance (Reimers, Guo, Li 2019). In this regard, the authors come up with a classification of two-sided markets as instances of generic forms of governance structures and they distinguish between (i) *online trading platforms*, which are "the online version of traditional private exchanges" (Reimers, Guo, Li 2019, p. 11), (ii) *online service delivery platforms* which "combine managerial transactions and rationing similar to Williamson's hierarchy" (ibid, p. 12), and (iii) *supply chain management platforms* (ibid, pp. 12–13). Uber was so considered to be the online service delivery platform and it was argued vis-à-vis it that:

> In contrast to hierarchically organized firms, rationing and managerial transactions are made with regard to platform members, not employees. For example, Uber uses algorithms to decide which vehicle is being sent to which client, based on various factors such as current location of vehicles, traffic situation, and caller preferences. That means that Uber uses managerial transactions to combine resources, in this case drivers, vehicles, and clients, to create a useful service, similar to production planning and control processes. In addition, Uber prescribes requirements for drivers, cars, and clients, and also sets prices, thus apportioning benefits and burdens among its members, i.e., it also conducts rationing transactions. (ibid., p. 12).

Hence, the authors view "online service delivery platforms such as Uber as institutional alternatives to hierarchical governance" and also point out that such a treatment is corroborated by courts when they reclassify Uber partner drivers as employees even though there are obvious differences between the platform members and employees (ibid.).

Another author summarizes that: "Peer-to-peer digital platforms constitute new organizational archetype in the landscape of organizations. For productive activities, there "market-organizations" differ radically from the managerial firm that has prevailed since the second industrial revolution, and which was the cornerstone of the existing regulatory framework of business. … From an organizational point of view, the rise of platforms marks the rebirth of the putting-out system, where digital tools are used as controlling devices. In this neo putting-out system, work is controlled though algorithms rather than managerial hierarchy, and power relationships are based on market power instead of hierarchical power. In this new economy, work situations are very diverse in terms of worker autonomy and economic dependence." (Acquier 2018, p. 25).

Given that, the author argues, the established concepts need to be rethought and updated (ibid.). Also, the author points to the traditional dichotomy of “organization as an entity” and “organizing as a process” which becomes blurred when peer-to-peer digital platforms come to play (ibid., pp. 25–26).

4. Antitrust Treatment of Sharing Economy Actors Through NIE Lens

As it was described above, the attempts to assess Uber’s business model or rather its operating model (for a distinction between business and operating models, see Iansiti, Lakhani 2020, pp. 27–32) from the competition law perspective were based on trying to fit Uber (and actors within its platform) into established categories, esp. into the contours of the ‘single economic unit’ doctrine. Hence, it was e.g., argued that from the antitrust perspective it would be better for Uber if its partner drivers were treated as employees rather than contractors (Nowag 2015). The related antitrust treatment seemed to have been premised on the so set dichotomy of Uber drivers being employees (or potentially genuine agents) in which case the price setting by Uber would be outside of competition law’s purview or they were not so classified in which case the respective arrangements between Uber and its drivers would be contrary to antitrust law either as a hub-and-spoke cartel or vertical price fixing (RPM). The single economic doctrine corresponds to the hierarchical mode of governance as discussed in NIE (Lianos 2007, pp. 655–658). But the fact that Uber’s operating model cannot always fit under the previously established categories, including e.g., the categories of labour law relationships or commercial agency arrangements, does not mean that its arrangements with the partner drivers shall be automatically treated as those being on the opposite pole of the ‘hierarchy-market’ spectrum, i.e. as a collusive agreement organized by Uber.

The above discussion of NIE’s insights was meant to show that the attempts to fit Uber’s business/operating model just into the dichotomy of ‘hierarchy’ and ‘market’ modes of governance may not be appropriate. Another approach, which uses those insights, should be preferred. That approach follows from the previous arguments that NIE can significantly contribute to better understanding of various antitrust law concepts. For example, Lianos (2007) applied that to various vertical arrangements but also concluded that:

> [T]he new-institutional economics approach should not be limited to “vertical restraints,” but may also extend to the assessment by competition law of the restrictive effect of clauses included in horizontal cooperation agreements that are not by their nature anticompetitive and that require the setting of hybrid forms of cooperation, such as alliances or joint ventures. (Lianos 2007, p. 672).

Similarly, such an approach should be extended to the assessment of arrangements within the Sharing Economy, including the case of Uber. How would such an approach look like? In my view, such an approach should be carefully aware of what is the appropriate 'unit of analysis', in the sense of an entity to which the assessment would relate and should employ an appropriate 'counterfactual analysis' to assess effects of the respective arrangements when needed (Kindl, Dufková 2021).

Business and operating models of Sharing Economy platforms differ. They also differ from other platforms in the so-called multisided platform economy. These differences need to be properly taken into account as they may impact on the relevant antitrust law treatment (Caffarra 2019, Jacobides, Lianos 2021, Schrepel 2021a). If we take the case of Uber, there need not be the only way to put the arrangements between the drivers and Uber outside of competition law's reach by classifying Uber drivers as its employees (or potentially agents), one can look at Uber's business and operating models, including the related governance systems and transactions that take place within its eco-system, and could find out that those arrangements truly lead to a functional institutional alternative to the hierarchical governance (Reimers, Guo, Li 2019) which should be treated similarly from the regulatory (antitrust) perspective even when drivers would otherwise be considered 'independent contractors'. Such assessment should be jurisdiction specific as there can be appreciable differences based on different institutional settings in the affected jurisdictions (Davies, Sinha 2021).

If Uber (or similarly functioning other applications, e.g., called online service delivery platforms; Reimers, Guo, Li 2019) is treated in that way, one could extend the scope of application of the 'single economic entity' doctrine beyond the boundaries of the 'firm' in the traditional sense and concentrate on the 'Uber eco-system' as such as the relevant 'unit of analysis' (being an entity to which the antitrust assessment would relate to; not necessarily the unit of analysis in the organizational sense; *cf.* Williamson 1996, p. 249). Accordingly, the effects of the Uber pricing mechanisms would be assessed from the 'external' point of view, i.e., from the perspective of what are its effects to other market participants outside Uber eco-system. That could lead to assessing whether the resulting prices are or are not predatory or excessive or discriminatory etc. and how they impact on other market players. But one would not condemn such a mechanism as a (hub-and-spoke) cartel or RPM as the related arrangements between Uber and its drivers occur inside the eco-system. The need to step out of the traditional theory of firm in the antitrust context need not apply just to Sharing Economy. It has been, e.g., also argued that such a theory is not 'fit for purpose' in respect of blockchain where one would need to apply antitrust to a differently defined 'unit of analysis' / entity (Schrepel 2021b, esp. chs 6 and 7, and his theory of granularity). Here, the idea is similar.

However, even if the Uber eco-system (or other Sharing Economy platforms) would not be treated as an institutional alternative to 'hierarchic governance', it should still not be considered to belong to the 'market' pole of the respective organizational forms continuum. As explained above, the differences in its business and operating models fit it neatly into the zone of hybrid forms of governance on the 'market-hybrid-hierarchy' continuum. Accordingly, even in such a scenario, the peculiarities of that model shall be taken into account. Similarly as, for instance, restraints in franchising (esp. the ones that are necessary to secure common identity and reputation of the franchising chain) are treated more leniently than in most of other vertical arrangements (Lianos 2007, pp. 658–664, Kindl *et al.* 2021, pp. 299–302), it could be well argued that some restraints within the Uber eco-system (such as uniform pricing via the Uber algorithm) would be treated as not anticompetitive if they would be reasonably necessary to bring about the benefits associated with Uber's coming on the market and disrupting traditional taxi business to the benefit of consumers. Accordingly, those arrangements should be assessed in the 'by effects' analysis and shall not be treated as 'by object' restrictions even though they relate to pricing. Such a treatment would not be uncommon in the EU context, if one look, e.g., at *Groupement des cartes bancaires* (C-67/13 P) or *Budapest Bank* (C-228/18) cases decided by CJEU where seemingly 'by object' restrictions were held to need 'by effects' analysis. That could also be similar to the 'rule of reason' analysis indicated by Anderson, Huffman (2017) in the US context.

The foregoing approach would require an appropriate counterfactual analysis to be made (Kindl, Dufková 2021) in which the competition authority shall be appropriately deferential to business choices of the respective actors and shall not 'second-guess' their business models without sufficiently compelling reasons based on cogent evidence. In respect of Uber, competition authorities would, for instance, need to well distinguish between various kinds of drivers and take into account that the Uber app allows for multi-homing by drivers. *Uber Spain* judgment and the related opinion of Advocate General pointed out that Uber allowed drivers to 'offer their services' who would never do so otherwise. In such a case, the counterfactual analysis would lead to an outcome that Uber actually brought new competition where it was none before. Hence, the fact that such a competition might be limited by the contours of the Uber's pricing mechanism shall not be considered anticompetitive. To the extent one would concentrate on 'professional drivers' (e.g., professional cab drivers who also drive as 'traditional taxis') using Uber app, one would need to ask (and model counterfactuals) whether they are genuinely limited in their price competition to the detriment of consumer welfare when they can choose various ways of how to offer their transport services to customers (be it via Uber, via Lyft or other applications, via traditional taxi dispatching services or through taxi stands and the like all in

parallel and with different pricing choices). In other words, Uber could be viewed as another distribution/pricing option served to those drivers on top of the other ones they have. The assessment of effects of Uber business/operating model shall be, hence, facts specific and well nuanced and should take into account, *inter alia*, what market power Uber has and what other choices are there both for drivers and riders (Ezrachi, Stucke 2016, p. 55).

5. Conclusion

It has been well put that:

> [P]latforms are set in a much blurrier landscape [than managerial firms], where workers act as independent contractors, with unclear boundaries between market and hierarchy, between the professional and domestic spheres, where work situations vary greatly in terms of autonomy or economic dependency, and where behavior is controlled and governed by algorithms rather than formal rules, authority, or hierarchy. In such a context, determining what/who is inside or outside the organization is difficult, as is deciding where platforms' responsibilities start and end in relation to those individuals using them. (Acquirer 2018, p. 22; fn omitted).

When competition law faces such 'much blurrier landscape' it should not try to solve the issues by trying to put a square peg (Sharing Economy actors) into a round hole of traditional competition law concepts without properly taking into account the differences in modes of governance and related pros and cons the respective Sharing Economy platform (such as Uber) brings from the perspective of consumer welfare.

NIE's insights concerning various forms of economic organization are helpful in finding the right antitrust treatment as shown above. Uber's business model (and other sharing economy actors' models) lies most likely in between 'hierarchy' and 'market' modes of economic organization in the zone which is labelled as 'hybrids' or 'networks', or their proper assessment necessitates some extension even of current NIE's concepts. The antitrust treatment needs to be more refined even though that could present new challenges to competition policies (Ménard 2021, p. 13). That treatment should appropriately take into account specifics of the Uber business model, incl. its innovativeness, and should concentrate on the effects of Uber (and other sharing economy actors) practices through appropriate 'counterfactual analysis' focusing on what pros and cons it brought about from the consumer welfare perspective. Such analysis should properly take into account different characteristics of participants in the Sharing Economy (e.g., different types of Uber drivers). Such analysis shall also be appropriately deferential to the choice of 'business models' by private economy actors especially

in innovative industries and should not second-guess their commercial choices unless they bring clear harms to consumer welfare.

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Operation of air transport as a service of general economic interest in the context of COVID-19 pandemic

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Abstract

This paper deals with operation of air transport as a SGEI in the EU and with individual conditions under which such operation of air transport can be realized, mainly in the context of COVID-19 pandemic. These conditions, which are laid down in Regulation (EC) No 1008/2008, are very strict, which makes it difficult for Member States to entrust air carriers with performance of SGEIs in case of extraordinary circumstances, in particular those long-lasting. Thus, the paper proposes changes to the current legislation, such as extension of the emergency procedure or broadening the scope of emergency measures, which would make it easier for the Member States to immediately react to such unexpected situations even in the future.

Keywords: Air transport; competition law; COVID-19; SGEI; state aid

JEL Classification: K210

1. Introduction

The spread of SARS-CoV-2 causing COVID-19 at the turn of 2019/2020 across the world caused not only shock and concerns about the health of the population of individual countries, but in connection with the strict anti-pandemic measures significantly restricting movement of people also a strong hit to the world economy. And even to the air transport sector, which is in today's globalized world highly dependent on passenger transport and was one of the most affected sectors of the world economy. As for illustration, the total number of passengers travelling by air in the European Union (EU) in 2020 decreased by 73.3 % compared with 2019 (Eurostat [online], 2021). Hence, in a short time, the thoughts of increasing liberalization of air transport switched to the opposite direction – towards the need to support air carriers which got into severe economic or even existential problems.

Given the financial demands of air transport operation, some air carriers were unable to cope with the sudden and very significant loss of revenue, for which they were not and could not be prepared in practice. Thus, individual countries have faced and, in many cases, continue to face the unpleasant situation of whether to support these air carriers, or to leave them at the mercy of market mechanisms, even if that would mean their entering into insolvency and possibly bankruptcy. In this context, it is possible to mention the recent recapitalisation aid granted to the German airline Lufthansa (European Commission [online], 2020) or the Czech airlines České aerolinie who got into insolvency because of the COVID-19 pandemic after not obtaining any state guarantees or other state benefits and is currently undergoing reorganisation (ČTK [online], 2021). While it can be expected that the current COVID-19 crisis may have a negative impact on the financial side of air carriers in the future, where in some cases it may lead to a reduction in the offer of transport connections or, in extreme cases, their extinction. This may apply mainly to those routes which are economically unattractive and the operation of which makes no sense from the point of view of a regular investor.

However, as individual countries are generally obliged to provide a certain level of connectivity and serviceability and some routes cannot be operated efficiently by modes of transport other than air transport, operation of such economically unattractive air routes may be considered necessary for the Member State and its population just to ensure a certain level of transport connectivity and serviceability. In such a case, it may be necessary for the Member State concerned to intervene in the market and to entrust an air carrier to operate the route as a service of general economic interest (SGEI), under the so-called "public service obligation" (PSO), eventually even in connection with provision of financial compensation.

Therefore, this paper deals with the operation of air transport as a SGEI (i.e., under PSO) and with individual conditions under which such operation of air transport can be realized, in particular in the context of the current COVID-19 pandemic. In this regard, this paper also tries to reveal the shortcomings of the current legal regulation in connection with the COVID-19 pandemic and to propose changes thereto. In connection therewith, mainly general theoretical methods are used, such as analysis and synthesis, deduction and induction, and comparison with legal regulation in rail transport.

2. Main characteristics of SGEIs

The free movement of goods, persons, services, and capital is ensured within the EU internal market under Article 26(2) of the Treaty on Functioning of the EU (TFEU). For the purposes of their enforcement and to avoid restriction of business conduct (Tomášek, 2013), EU law ensures free competition prohibiting any state intervention in the market, including granting of state aid under Article 107(1)

TFEU. However, EU law also provides for exceptions where interventions in the market may be considered permissible under certain circumstances. One of these exceptions concerns, in accordance with Article 106(2) TFEU (resp. in conjunction with Article 14 TFEU and Protocol No 26 to the TFEU), provision of SGEIs.

SGEIs can be broadly defined as services of an economic nature that are so crucial to the daily lives of EU citizens that it is essential for a Member State to be involved, directly or indirectly, in their provision in the event of a market failure (Communication from the Commission, 2007, Article 2). Otherwise, these services would not be provided either at all or would be provided under less favourable conditions (e.g., to a limited extent or quality). It follows that these SGEIs, which usually include social services, postal services, or services in energy supply, telecommunications or public transport (Communication from the Commission, 2011), can be characterized by four main defining features: (i) their object is an economic activity; (ii) they are performed in the public interest; (iii) they represent a service to citizens; (iv) they may only be provided in the event of a market failure. This definition of SGEIs is probably the most frequently used and is also used by the Czech Office for the Protection of Competition (ÚOHS [online], 2013), although it is certainly not all-encompassing and flawless.

Unfortunately, SGEIs – often referred to and interchanged as a synonym, in particular in the area of transport, with PSOs (see C-480/06; Wehlander C., 2016, pp. 8) – are not uniformly defined in the EU law. Hence, it is not easy to clearly define these services and to draw a precise boundary when a service becomes a SGEI, and thus, when we can consider whether provision of such service is able to "trigger" an exception to the general competition rules. This is not only due to the fact that the EU institutions (notably the Commission) have hitherto used and defined the term of SGEIs in different ways, but also to the fact that under EU law Member States have a very wide margin of discretion when defining the SGEIs (Commission Staff Working Document, 2013). And even delimitation of SGEIs differs greatly across Member States (Commission Staff Working Paper, 2011). All the more so that the SGEIs are an appropriate tool to pursue a policy objective (especially at regional level) in an otherwise liberalized EU market, since they may - as one of the few services provided within the EU internal market - benefit from exemptions from strict EU competition rules. However, for the purposes of this paper, it is sufficient to mention that even transport services, including air services, may be deemed SGEIs and as such may, under certain circumstances, be exempted from application of EU competition rules.

3. The legal regulation of the provision of SGEIs in air transport

The legal regulation of SGEIs is contained in particular in Article 106(2) TFEU, according to which "undertakings entrusted with the operation of services

of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them." Pursuant to this provision, operation of SGEIs is subject to the same competition rules as other commercial services, unless that would prevent their providers from carrying out the tasks assigned to them. However, this exception, like any other exception to the general rule, must be interpreted restrictively according to the settled case law of the Court of Justice of the EU (CJEU) (see C-159/94), so that the provision of SGEIs will in principle be subject to all competition rules, including the prohibition of granting state aid under Article 107 TFEU. This also applies to the field of air transport, as air transport is (unlike, for example, rail transport) expressly excluded from the legal regulation of the common transport policy by virtue of Article 100(1) TFEU and, in accordance with the settled CJEU case law (in particular, C-209/84 to C-213/84, para 41), is subject to all the general competition rules contained in Article 101 *et seq*. TFEU, including the aforementioned Article 106(2) TFEU.

More detailed regulation of operation of air services is contained in Regulation (EC) No 1008/2008 (Air Services Regulation), which, as a key aviation legislation, regulates besides licensing of Community air carriers also operation of intra-EU air services, pricing of intra-EU air services and operation of air services as SGEIs (i.e., under PSO). The operation of air services as a SGEI within the EU, including the entrustment of the air operator, is therefore only possible based on the Air Services Regulation. While only in specific cases, it may be excluded due to its character from application of general competition rules based on the "subsidiary" provision of Article 106(2) TFEU (Schmauch, 2012, pp. 109).

3.1 Operation of air transport under PSO

The operation of air services under PSO constitutes an exception to the liberalized area of EU air transport, in which Community air carriers have the right to operate intra-EU air services in principle without restriction (Article 15(1) of the Air Services Regulation). The operation of air services under PSO, including the entrustment of the air carrier with PSO, which is a key prerequisite therefor, is thus only possible under the Air Services Regulation and subject to the strict substantive and procedural conditions set out in Article 16 *et seq*. of this regulation.

3.1.1 Open and restricted PSOs

The Air Services Regulation is based on the principle that any air carrier which expresses an interest in operating a route at its own risk and which fulfils the

conditions of PSO applicable to that route must be granted access to that route (Article 16(8) of the Air Services Regulation). This is the so-called "open PSO". Thus, the legislation does not, in principle, allow to reserve an air route for a single (exclusive) air carrier, even if air services under PSO should be provided. The reason is to avoid, to the maximum extent possible, any unnecessary and unproportionate restrictions of competition, and exclusive authorization of any entrepreneur may certainly have severe impacts on the competition.

Hence, exclusive entrustment of an air carrier ("restricted PSO") can only be realized by a Member State under very strictly defined conditions, although in reality the number of restricted PSOs is paradoxically much higher than the number of open PSOs, representing around 80% of all public air transport obligations in the EU (Costa, 2021).

3.1.2 Permissible types of routes

First of all, it should be noted that the Air Services Regulation allows Member States to entrust air carriers with PSO only to scheduled air services. The imposition of PSO on non-scheduled air services (charter flights) is therefore completely ruled out. In addition, the Member States' possibility to impose the PSO for a scheduled air service is further limited to only two types of routes, namely (i) on routes to airports serving a peripheral or development region in the Member State's territory, or (ii) on thin routes to any airport on its territory.

While *a peripheral region* is typically a remote region or a region accessible with difficulty from the capital and other main cities in the Member State, *a development region* is a region which is lagging behind economically, as measured for example by GDP per capita or by unemployment rate (Interpretative Guidelines, para 20). The so-called *thin routes* are usually routes with a traffic volume of up to 100,000 passengers per year (*ibidem*).

The PSOs on these routes do not have to be imposed within one Member State only but can be also imposed on any route within the EU. This is evidenced by the relatively recent cases of imposing a PSO on the route from Brno (Czech Republic) to Munich (Germany) or from Ostrava (Czech Republic) to Munich (Germany) and Vienna (Austria) or planned imposition of PSO on the route from Strasbourg (France) to Madrid (Spain) (European Commission [online], 2021b). Such PSOs cannot be, however, imposed on routes to third countries due to the fact that the scope of the Air Services Regulation is limited to intra-EU air services, as follows from its Article 1(1) as well as from the CJEU case law (C-563/17, para 51).

Nevertheless, both in case of routes to an airport serving a peripheral or development region and thin routes, the route on which the PSO is to be imposed must be considered vital for the economic and social development of the region served by the airport and be defined from one airport to another, not

with reference to more (e.g. neighbouring) cities or regions (Article 16(1) of the Air Services Regulation; Interpretative Guidelines, para 22). This should prevent Member States from imposing the PSOs to support the development of the air carrier or airport in the region, although the Member State's thoughts will often head in this direction.

Such *vital character* of the route will most certainly have a route to a small island or a remote region (but not every such route, as emphasized by the CJEU; C-205/99, para 29), and under certain circumstances also route linking small and medium-sized cities to important economic or administrative centres (Interpretative Guidelines, paras 25–26). Recently, for example, PSOs have been imposed on routes from Sicilian city of Comiso (Italy) to the Italian capital Rome-Fiumicino and "the fashion capital" Milan-Malpensa, and from Thessaloniki (Greece) to the Greek island of Samos (European Commission [online], 2021b).

And what is important to note is that the above conditions may be complied with even by a route connecting a Member State's capital with a city in which the EU bodies and other institutions are seated (Interpretative Guidelines, para 26), and eventually with a city where also other international organisations are based (e.g., Brussels, Strasbourg, Luxembourg, Frankfurt, Geneve). Hence, such PSOs may be imposed even on a route linking major EU cities, as in case of PSO imposed on route from Strasbourg (France) to Prague (Czech Republic) or Munich (Germany) (European Commission [online], 2021b).

It follows that although the Air Services Regulation stipulates only certain routes on which it is possible to impose the PSOs, the definition of these routes is rather vague and broadly interpreted even by the Commission. This enables the Member States to impose the PSO not only to routes which may be described as indispensable from the connectivity perspective, but which may be vital even from a wider (e.g., regional socio-political) perspective.

3.1.3 Proportionality and necessity of PSO

The key preconditions which need to be assessed before imposing PSO on any route is whether such imposition would be proportionate and could not be achieved by other, less intrusive measures. Compliance with these principles of proportionality and necessity (subsidiarity) must be assessed on the basis of the criteria laid down in the Air Services Regulation and has to follow at least implicit definition of the relevant market in question (Kociubiński, 2013, pp. 92) which is generally defined in the air transport sector as individual O&Ds (*point-of-origin/point-of-destination*) (T-162/10, paras 138–139).

It follows from these criteria that the PSO should be proportionate to the economic development needs of the region and imposed only if the transport needs of the region cannot be met by existing rail links or other modes of transport. These

conditions will be met in particular by routes to islands for which there is insufficient year-round tourism demand from commercial air carriers, or routes between very remote regions in sparsely populated Member States, if other modes of transport cannot provide relevant transport services (Interpretative Guidelines, para 36). This can be illustrated by a recent Finnish case, where PSOs were imposed on several routes from Helsinki (e.g., Helsinki–Joensuu) due to the interruption of commercial air traffic on these routes as a result of measures related to the COVID-19 pandemic (Traficom [online], 2020), or in the UK where PSOs were imposed on routes between the Shetland Islands and the Out Skerries (Commission [online], 2021b).

If the imposition of the PSO is not necessary or would not be proportionate, the Member State would not be entitled to impose the PSO on such route. Otherwise, it would be in breach of the EU law which could also lead to granting unlawful state aid to the air carrier.

3.1.4 Content of PSO

PSO may only be imposed on the basis of an entrustment act, the form of which may vary (e.g., a legislative or regulatory instrument or contract), as follows from various EU legal regulations as well as soft law (see Communication from the Commission, 2012, para 44).

Generally, the entrustment act shall specify at least the content and duration of the PSO; the air carrier and the O&D; the nature of any exclusive or special rights assigned to the air carrier; the parameters for calculating, controlling and reviewing the compensation (if any); and arrangements for avoiding and recovering any overcompensation (*ibidem*, para 52).

In accordance with the Air Services Regulation, which contains a more specific regulation on the content of the entrustment act, the entrustment act should also include the setting of requirements regarding continuity and regularity of connections, prices, or minimum capacity (Article 16(1) of the Air Services Regulation). The entrustment act may thus include the requirement of a minimum number of seats offered or a minimum number of connections in a certain period (e.g., summer or winter season, or throughout the year), setting maximum prices or tariff structure for services offered, including discounts for residents or students, eventually also requirements regarding the aircraft used or the language skills of its crew, while taking into account the principle of non-discrimination (Interpretative Guidelines, paras 45–49). It is also possible to include in the entrustment act the continuity obligation (*ibidem*) meaning that the air carrier will be obliged to operate the route for a specified period of time which should be considered in particular in case of open PSOs, as granting of exclusive right in case of restricted PSOs is already usually conditional on compliance with this continuity obligation.

As mentioned above, air carriers are usually (mainly in case of restricted PSOs) granted also compensation for discharging the PSO. Thus, provided that the air carrier should be granted such compensation, the entrustment act should also contain provisions on how such compensation should be calculated and mechanisms for controlling and reviewing payment of such compensation, as well as for avoiding and recovering eventual overcompensation. Regardless of the above, such compensation may not also exceed the amount required to cover the net costs incurred in discharging each PSO, taking account of revenue relating thereto kept by the air carrier and a reasonable profit (Article 17(8) of the Air Services Regulation), and shall be set *ex ante* in order to exclude any *ex-post* coverage of the air carrier's losses.

It follows from the above that the content of the PSO imposed may highly differ, not only based on whether the air carrier is entrusted to operate the route on an exclusive basis or not, but also with respect to other conditions which may relate to the route in question and which should be thoroughly considered and reflected by the Member State in the entrustment act. And these conditions may also reflect provisions which may be more than useful in cases of extraordinary events, such as the current COVID-19 pandemic (e.g., force majeure clauses).

3.1.5 Procedure for imposing PSO

The imposition of PSOs in air transport is based, in particular, on the principles of openness, publicity, non-discrimination, and transparency (Interpretative Guidelines, paras 7, 18).

Therefore, if a Member State decides to impose a PSO on a route, it must first fulfil an extensive information obligation towards other entities. The Member State must first consult other Member States of its intention to impose a PSO and inform the Commission, the airports concerned, and the air carriers providing the air services on the route in question and provide them with sufficient time for comments (Article 16(1) of the Air Services Regulation).

As soon as the Member State approves the final version of a planned measure by which it intends to impose the PSO (e.g., concludes a public contract), the Member State must re-notify it to the abovementioned subjects and the Commission, which will then publish a notice in the Official Journal of the EU, unless publication in the national official journal is sufficient (Article 16(4) and (5) of the Air Services Regulation). This notice is necessary not only to ensure the transparency and publicity of the imposition of PSO, but also because the publication of the notice in the Official Journal of the EU (or national office journal) is a key condition for its entry into force and at the earliest from that date, the PSO may apply to all Community air carriers operating on the route. Thus, after successful imposition of the PSO, all Community air carriers may at any time start operating

scheduled air services on this route under the conditions laid down in such PSO (Article 16(8) of the Air Services Regulation), even on the basis of code-share agreements (Interpretative Guidelines, para 59), as the PSO is not linked only to the entrusted air carrier but to the route as such (Zajac, 2015, pp. 6).

3.1.6 Exclusive PSO and public tender procedure

It follows from the above that a route may in some cases be operated partly on a commercial basis and partly based on PSO. However, in exceptional cases, the Member State still has the possibility to "reserve" a route exclusively for the needs of a single air carrier and grant it the exclusive right to operate air services on that route. Such a restricted PSO may be imposed on a route only if no Community air carrier has commenced or intends to commence scheduled air services on that route in accordance with the PSO applicable to the route, if any (Article 16(9) of the Air Services Regulation). However, such exclusive right may be granted for an individual route or for a group of routes for a maximum period of four years (resp. five years, if the PSO applies to a route to an airport serving one of the outermost regions, such as the Canary Islands, Madeira, the Azores, Réunion, Martinique and others; see Articles 349 and 355(1) TFEU) and must be offered in a public tender in accordance with the Air Services Regulation and after publication in the Official Journal of the EU, even if the exclusive right is to be granted without any compensation which illustrates the uniqueness of the procedure. The Member State must subsequently also inform the Commission of the outcome of the public tender. This public tender procedure regulated in Article 17 of the Air Services Regulation thus represents a *lex specialis* to the public procurement rules.

3.1.7 Imposition of PSO in extraordinary circumstances

It should be noted that the procedures for imposition of PSOs as described above apply to any circumstances regardless of their nature. And as such, these procedures are quite strict, administratively complicated and time-consuming and do not provide the Member States with sufficient flexibility in entrusting an air carrier in unexpected circumstances when it is required to act swiftly, such as in case of the recent COVID-19 pandemic. Thus, we should also ask whether the Air Services Regulation enables the Member States to entrust the air carrier even in extraordinary circumstances, since the EU bodies have repeatedly identified the COVID-19 pandemic as an exceptional circumstance (see European Commission [online], 2021a). In this regard, the Air Services Regulation regulates two types of measures which may be applied in these circumstances: (i) emergency procedure and (ii) imposition of emergency measures.

The emergency procedure under Article 16(12) of the Air Services Regulation is applicable to situations when the exclusive air carrier suddenly interrupts the provision of air services (e.g., due to insolvency of the air carrier caused by, *inter alia*, anti-pandemic measures) and there is insufficient time to launch a new public tender. In such a case, the Member State is entitled to entrust another Community air carrier to operate on this route for a period of maximum seven months in line with the existing PSO. However, such a temporary entrustment, the purpose of which is to ensure the uninterrupted operation of air services on a given route, can only be carried out "in case of emergency" and subject to strict conditions, including compliance with the principles of transparency and non-discrimination and obligation to launch a new tender without undue delay (Article 16(12) of the Air Services Regulation).

Hence, the Member States should be generally authorized to use this emergency procedure in exceptional situations, such as the current COVID-19 pandemic, to entrust the air carrier with PSO, provided that all its conditions are duly met. Nevertheless, the use of this emergency procedure is quite limited for several reasons. Such PSO may only be imposed for a period not exceeding seven months and may not be prolonged, which makes it impossible to be used for the entire duration of the COVID-19 pandemic. Furthermore, it is not allowed to use the emergency procedure for an open PSO and neither in cases when the interruption of the provision of the air services could have been expected (e.g., when the interruption of operation of air services is resulting from foreseeable termination of the contract or notification of interruption of operation of air services on that route was made at least six months in advance) or occurred due to delays in national procurement procedure (Interpretative Guidelines, para 107). It follows that the use of the emergency procedure is very limited in, particularly long-lasting, extraordinary circumstances, such as the currently ongoing COVID-19 pandemic.

Furthermore, in Article 21, the Air Services Regulation enables the Member States to deal with sudden problems of short duration resulting from unforeseeable and unavoidable circumstances by adopting emergency measures consisting in the refusal, limitation or imposition of conditions on the exercise of traffic rights. And since the Air Services Regulation does not impose any further conditions related to adoption of such emergency measures, except for their very short duration (14 days, subsequent prolongation only with the Commission's consent) and the requirement to respect the principles of proportionality, transparency, objectivity and non-discrimination, the Member States could make use of this provision in order to regulate the operation of air services in extraordinary circumstances, including COVID-19 pandemic. A similar provision is also contained in Article 21a of the Air Services Regulation according to which the Member States may refuse, limit, or impose conditions on the exercise of traffic rights if this action is necessary in

order to address the COVID-19 pandemic which was, however, only applicable until the end of year 2020 and has not been extended so far.

However, as clearly follows from the above, the Members States may refuse, limit, or impose conditions on the exercise of traffic rights (e.g., by "reserving" a route to a single air carrier), but unfortunately may not impose a new PSO on a route which may be, however, required in these extraordinary circumstances as well. Thus, the entitlement to adopt the emergency measures under Article 21 (resp. Article 21a) of the Air Services Regulation is limited to its scope and does not enable the Member States to impose a new PSO in cases where a route which is vital for the relevant Member State would suddenly become unoperated.

3.1.8 Evaluation of current legislation and considerations de lege ferenda

It follows from the above analysis that in case of extraordinary circumstances such as the COVID-19 pandemic, the Member States may only impose a new PSO either via the general procedure, which is administratively complicated and time-consuming, or using the emergency procedure under 16(12) of the Air Services Regulation which is only applicable to situations when the exclusive air carrier suddenly interrupts the provision of air services and there is insufficient time to launch a new public tender and such entrustment of the air carrier may not last longer than seven months. So the possibilities of the Member States to impose a new PSO in these extraordinary circumstances are very limited and lack almost any flexibility, compared to imposition of PSO in extraordinary circumstances in rail transport where the legal regulation is much more flexible and the rail operator may be entrusted with PSO almost immediately (e.g., the Member State may, in the event of a disruption of services or the immediate risk of such a situation, entrust the rail operator directly, without any public tender, and even for a period of up to two years; Article 5(5) of Regulation (EC) No 1370/2007).

It would therefore be worth considering including in the Air Services Regulation a new provision which would set a broader entitlement for the Member States to act swiftly and impose the PSO in case of extraordinary circumstances such as the current COVID-19 pandemic (e.g. by extending the emergency procedure to open PSOs or by broadening the scope of emergency measures under Article 21 of the Air Services Regulation so that they would include the possibility of imposing a new PSO). Because the current general legal regulation on entrustment of air carriers is very rigid, inflexible and time-consuming from administrative point of view and is not suitable for unexcepted situations in which immediate imposition of PSO may be required. And because the specific legal regulation of entrustment of air carriers contains several loopholes (e.g., the limitation of emergency entrustment to seven months, the impossibility to use emergency entrustment in cases where the route was not operated exclusively, the impossibility to impose

a new PSO as emergency measure) which do not enable the Member States to entrust the air carrier in the event of long-lasting extraordinary circumstances, such as the COVID-19 pandemic. Such new entitlement would be useful not only in case of the current COVID-19 pandemic, but also in cases of other, similar long-lasting extraordinary circumstances which may severally affect operation of air services in the EU.

3.2 Requirement of assessment of PSO under state aid rules

Finally, it should be borne in mind that although the above-mentioned regulation of SGEI constitutes a special regulation for the entrustment of service operators and related tendering in the field of air transport, compensation is usually provided to the entrusted air carrier in connection with discharging the PSO. Since such compensation will come from the Member State, resp. its resources, the entrusting body will need to assess, regardless of the above, if such compensation does not constitute an unlawful state aid under Article 107(1) TFEU. And if so, whether the state aid may not be exempted from the ban on granting state aid either based on specific exemptions related to performance of SGEIs (in particular, Article 106(2) TFEU, conditions set out in the so-called "Altmark package"), or general exemptions related to any state aid (in particular block exemptions or exemptions contained in Article 107(2) and (3) TFEU). If the compensation constituted state aid and there would be no ground for its exemption, the Member State could not provide the air carrier with the respective compensation and any compensation paid to the air carrier in breach thereof would have to be recovered by the Member State.

4. Conclusion

COVID-19 pandemic has clearly had and will continue to have a huge impact on air transport, resulting in the fact that many air carriers will either disappear or will not be able or willing to provide air services on some air routes, in particular those without economic potential. Thus, the operation of such economically unattractive routes which are important for the population and Member State's ensuring of a certain level of connectivity and serviceability may be required more than before.

In this case of market failure, a Member State may entrust an air carrier with operation of air services as a SGEI (under PSO). However, since the entrustment leads to restriction of competition on the market, it may be only realized in accordance with strict conditions laid down in Air Services Regulation. These conditions apply to any imposition of PSOs, regardless of whether the air carrier is entrusted with the PSO under normal or extraordinary circumstances. Thereby, making it difficult for Member States to impose PSOs in case of unexpected events which may require prompt action. And although the Air

Services Regulation explicitly entitles the Member States to regulate operation of services also in case of extraordinary circumstances by way of imposing a PSO using the emergency procedure or by applying emergency measures, their scope is very limited and in case of long-lasting extraordinary circumstances such as the current COVID-19 pandemic, almost inapplicable.

Thus, it should be considered granting to the Member States a broader entitlement to entrust air carriers with PSO in case of extraordinary circumstances such as the current COVID-19 pandemic. Such new entitlement could be applied in cases of long-lasting extraordinary circumstances which could severally affect operation of air services in the EU. Whether such approach, which may be deemed a "step-back" from the perspective of a liberalized market, would be acceptable is a though question that should be duly evaluated and discussed elsewhere.

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The EU Policy Reform on Distribution Law: The European Commission Trying to Catch up with Market Developments

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Abstract

On 9 July 2021, following a thorough evaluation and consultation process, the European Commission presented its long-awaited drafts of the revised Vertical Block Exemption Regulation (the VBER) and accompanying Guidelines on Vertical Restraints to replace the current regime, which expires on 31 May 2022. This paper analyses the most important amendments to the current EU distribution law framework. Whereas the most significant shortcomings of the current regime were identified in relation to the e-commerce sector and online platforms, this paper focuses particularly on these issues. An important element of liberalisation in the proposed regime is allowing dual pricing and minimum advertising price (MAP) policies to benefit from the safe harbour under certain conditions. In many aspects, the proposed framework reflects the previous case-law, e.g., in the field of price parity clauses, bans on the use of price comparison websites, or marketplace bans.

Keywords: block exemption regulation, distribution, EU law, reform, vertical restraints

JEL Classification: K210

1. Introduction

The Vertical Block Exemption Regulation (European Commission, 2010a; the "VBER") lays down, together with its accompanying Guidelines on Vertical Restraints (European Commission, 2010b; the "Vertical Guidelines"), the EU competition policy framework for vertical agreements, i.e., agreements between undertakings operating at different levels of the production or distribution chain. As the VBER expires on 31 May 2022, the European Commission undertook a thorough evaluation process to decide on whether to let the VBER lapse and withdraw the Vertical Guidelines, or renew or revise both.

The evaluation confirmed that the VBER and the Vertical Guidelines are effective tools for undertakings to facilitate the self-assessment of vertical agreements and generally meet the objective of avoiding both false positives and false negatives. However, the evaluation identified several shortcomings (European Commission, 2020).

As the VBER entered into force on 1 June 2010, more than 10 years have passed since the last EU distribution law reform. Since then, the market has changed significantly, particularly because of the growing importance of e-commerce and associated online marketplaces, search engines, and price comparison tools. The European Commission found that "*today's customer journey is a fluid omni-channel process*" (European Commission, 2020, p. 36), whereby customers switch easily within the online channel, between online and brick-and-mortar distributors, within the brick-and-mortar channel, and between mono-brand and multi-brand retailers. Businesses are responding in different ways. They are looking for solutions to limit the free-riding problem, they are increasingly using selective distribution systems – whereas the use of exclusive distribution is rather on the decline today –, and within these they are trying to set appropriate criteria for the online channel, and/or they are trying to create a coherent omni-channel environment for their customers (European Commission, 2020, p. 30 *et seq.*).

In this context, the evaluation process has shown that some provisions of the VBER and the Vertical Guidelines – especially in relation to the online environment – lack clarity, are difficult to apply and no longer reflect current market developments. Some new types of vertical restraints – such as retail price parity clauses, restrictions on sales through online marketplaces, or online advertising – are often not addressed, or are addressed only partially in the current VBER and/or Vertical Guidelines. This not only makes self-assessment of vertical restraints by businesses more difficult, but also creates room for divergent application of EU distribution law by national competition authorities and national courts (European Commission, 2020, p. 51 *et seq.*). For that matter, the situation of divergent application of competition rules in relation to vertical restraints has already arisen in the past, most visibly in the context of the assessment of the narrow retail parity clauses (European Commission, 2020, p. 184; Krumlová, D., 2019, p. 65 *et seq.*). Thus, the evaluation revealed that there is a continued need for the VBER and the Vertical Guidelines. However, the gaps need to be filled and more clarity needs to be brought to the EU distribution law (European Commission, 2020).

On 9 July 2021, following a detailed impact assessment process (European Commission [online], 2022a), the European Commission presented its long-awaited drafts of the revised VBER (European Commission, 2021a; the "Draft VBER") and the Vertical Guidelines (European Commission, 2021b; the "Draft Vertical Guidelines") to replace the current regime.

A public consultation on the published documents was underway until 17 September 2021 (European Commission [online], 2022b). The individual contributions as well as their summary have been published (European Commission [online], 2022a). Based on the evidence gathered during the impact assessment phase, including stakeholder comments on the Draft VBER and the Draft Vertical Guidelines, the European Commission will finalise the documents so that they can enter into force on 1 June 2022 (European Commission [online], 2021b).

2. Problem Formulation and Methodology

In this paper, the author describes, and analyses selected amendments to the current regime concerning vertical agreements as proposed in the Draft VBER and the Draft Vertical Guidelines. The aim is to highlight the most significant differences from the current regime and to identify potential shortcomings.

Since the author's PhD research focuses on vertical restraints in the e-commerce sector, this paper will focus particularly on key amendments of the current EU distribution law related to the online economy. Indeed, unless there is a significant change in the European Commission's approach following the carried-out consultation process, the most essential amendments of the regime will be made in this area. This is where the European Commission is trying to catch up the most with market developments.

3. Analysis of the Most Significant Amendments

3.1 Resale Price Maintenance ("RPM") Still a Hardcore Restriction

Under Article 4(a) of the Draft VBER, RPM remains a hardcore restriction. However, compared to the current Vertical Guidelines, the European Commission puts more emphasis on the fact that although RPM is a type of agreement which usually has the object of restricting competition under settled case-law, it is not *per se* prohibited. Indeed, even typical by object agreements such as RPM may benefit from the exemption under Article 101(3) of the Treaty on the Functioning of the European Union (European Union, 2012; the "TFEU"), if it has positive effects in a specific case. This may be particularly relevant in situations where – in the absence of a less restrictive means – RPM can be an effective tool (i) to incentivise distributors to promote a new product at launch (for a limited period), (ii) to organize a coordinated short-term low-price campaign (of 2 to 6 weeks in most cases), particularly, but not exclusively, in a franchise system, or (iii) to prevent free-riding at the distribution level (the Draft Vertical Guidelines, para. 180 *et seq.*).

In contrast to the current Vertical Guidelines, the Draft Vertical Guidelines also deal with socalled fulfilment contracts. These are contracts where the supplier

and the end user agree on certain commercial conditions, but where ultimately the contract is executed by an intermediary (this may concern, e.g., logistics). In a situation in which the intermediary is not acting as an agent (the Draft Vertical Guidelines, paras 40–43), the fixing of the resale price in an agreement between the supplier and the buyer as an intermediary that executes a prior agreement between the supplier and a particular end user, does not constitute RPM, provided that the end user has waived its right to choose the undertaking (the intermediary) that should execute the agreement (the Draft Vertical Guidelines, para. 178). Setting clear rules on the issue of fulfilment contracts is clearly welcome. However, the author considers them probably set too strictly. The fact that the end user must waive its right to choose the undertaking to execute the contract may not be of such importance. The price has already been agreed in the contract between the supplier and the end user and is therefore no longer a competition parameter. In such a situation, the end user should have the possibility to choose among the undertakings which execute the contract, taking into account other factors such as the quality of service.

3.1.1 Price Monitoring

Although price monitoring increases price transparency in the market and makes RPM strategies more efficient, it does not constitute RPM as such. Thus, the Draft Vertical Guidelines allow manufacturers to effectively monitor resale prices in their distribution networks and to intervene quickly in case the price falls. Similarly, retailers can monitor the prices of their competitors and notify price falls to the manufacturer, together with a request for action against those price falls (the Draft Vertical Guidelines, para. 176).

The Draft Vertical Guidelines explicitly confirm that although price monitoring may give rise to suspicions of competition law infringements – particularly the one using special software – in itself it is fully compliant with competition law.

3.1.2 Minimum Advertised Prices ("MAPs")

Pursuant to para. 174 of the Draft Vertical Guidelines, obligations of the retailers to adhere to the MAPs are considered hardcore restrictions if the supplier enforces them by sanctions to retailers ultimately selling below the respective MAPs, requiring them not to offer discounts or preventing them from communicating that the final prices could differ from the relevant MAPs. Thus, it seems that if a retailer is ultimately free to sell at prices below MAPs, it is not a hardcore restriction and therefore can benefit from the block exemption in the Draft VBER. This is an interesting shift from the recent case-law – mainly the one of the British Competition Authority prior to Brexit – which considered MAPs to be a form of RPM (Krumlová, D., 2019, p. 37 *et seq.*).

However, the author of this paper considers the above interpretation of MAPs as potentially problematic particularly for retail chains for which, in principle, the advertised price (e.g., in leaflets) is the same as the price at which the goods are eventually sold to customers in stores. A situation in which the advertised and actual prices differed would be unacceptable, particularly with regard to consumer protection rules. Thus, if suppliers could legally impose MAP policy on retail chains, retail chains would be forced by factual circumstances (not by the supplier) to sell at prices corresponding to MAPs. At the same time, retail chains could not afford to refuse to comply with MAP policies imposed by many large suppliers with significant market power.

Therefore, the author of this paper is convinced that the wording of para. 174 of the Draft Vertical Guidelines should be amended in order (i) to clarify that MAPs are usually considered a form of RPM even without the supplier additionally influencing the price-setting, or preferably (ii) to take into account the situation in which the retailer has no choice but to resell at the advertised price in view of the factual circumstances (in particular consumer protection).

3.2 Safe Harbour for Dual Pricing under Certain Conditions

Dual pricing is a practice where the supplier sets a higher wholesale price for a product intended to be resold by a distributor online than for the same product intended to be resold by the same (hybrid) distributor via a brick-and-mortar (offline) channel (Vertical Guidelines, para. 52(d); European Commission, 2017, paras 596–597).

Under the current regime, dual pricing is considered a hardcore restriction of passive selling (Vertical Guidelines, para. 52(d)), i.e., a restriction on the distributor's ability to respond to unsolicited demand from individual customers (Vertical Guidelines, para. 51). However, according to para. 64 of the Vertical Guidelines, dual pricing may, in exceptional circumstances, fulfil the conditions of Article 101(3) of the TFEU. Such circumstances may arise if a manufacturer agrees on dual pricing with its distributors, as sales to be made online lead to substantially higher costs *for the manufacturer* than sales in the offline channel, e.g., where online sales do not include home installations by the distributor (as opposed to offline sales) and therefore may lead to more customer complaints and warranty claims for the manufacturer. *Distributors'* costs associated with online vs. offline sales are not considered.

The European Commission is now proposing to relax the current strict rules and allow agreements containing dual pricing to benefit from the safe harbour in the Draft VBER (not only the possibility of the exemption under Article 101(3) of the TFEU) under certain conditions (beyond compliance with the rules on market share thresholds in Article 3 of the Draft VBER). The Draft Vertical

Guidelines refer to a block exception for situations where the purpose of requiring differential pricing is to incentivise or reward an appropriate level of investment in the online and offline channel. The different price should be related to the differences in investments and costs incurred in each channel *by the distributors* at the retail level. The wholesale price difference, however, must not be driven by an object to prevent the effective use of the internet for the purpose of selling online – otherwise, it is a hardcore restriction. This concerns particularly situations in which the price difference would make "the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable" (the Draft Vertical Guidelines, para. 195).

In general, the author welcomes this proposal. In practice, to motivate offline distributors to promote the manufacturer's brand when the manufacturer cannot reward the distributors for their efforts and investment with a lower wholesale price is a tough nut to crack for the manufacturer. Under current regime, it can only provide them with a fixed fee to support offline sales, but this may not vary depending on the turnover realised (Vertical Guidelines, para. 52(d)). Therefore, offline and hybrid distributors often become less competitive compared to the pure online players who can afford to sell at low retail prices given their minimal sales costs. The current possibility of applying Article 101(3) of the TFEU, explicitly mentioned only in the case of higher costs for the manufacturer and not for distributors, does not make sense in the context of business reality (Vogel, L., p. 277). A practical approach taking into account the distributors' costs is therefore more reasonable.

However, the interpretation of the second part of para. 195 of the Draft Vertical Guidelines concerning the prohibition of dual pricing in situations where its object is to prevent the effective use of the internet for online sales could raise interpretative problems. In practice, there may be a thin line between conduct that benefits from the safe harbour (rewarding an appropriate level of investment) and conduct that is a hardcore restriction (preventing the effective use of the internet for the purpose of selling online). Thus, the assessment of whether the conditions for applying the block exemption will be met is likely to require objective justification based on the costs that the distributor incurs in selling via each distribution channel. The prices charged to both channels should be more or less equivalent, taking into account the costs incurred by each channel. This may not only be quite problematic from a practical point of view, but may also carry a risk, e.g., in the case of a dual distribution system in the context of the exchange of potentially competitively sensitive information (see the new rules under Article 2(5) of the VBER).

Therefore, unless an element of clarity is introduced into this provision, the self-assessment of this kind of vertical restraint under the new regime may not

provide businesses with a sufficient legal certainty. The assessment will require the assistance of lawyers, which can be particularly challenging for SMEs. Otherwise, it will lead to significant competition law risks. Furthermore, there is also a risk of diverging interpretations of this issue by national competition authorities and/or national courts.

3.3 Online Sales Restrictions

Having in mind the recent EU and national case-law, in particular, Coty Germany, ASICS, and Valve (European Commission [online], 2021a), the Draft VBER and the Draft Vertical Guidelines clarify a number of restrictions related to online sales.

The Draft VBER more precisely defines active and passive sales in the context of online selling. Under Article 1(1)(n) of the Draft VBER, a restriction that has as its object to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels is a 'restriction of active or passive sales' which has as its object to restrict (i) the territory into which or (ii) the customer group to whom the buyers may sell the contract goods or services, or (iii) active or passive sales to end users by members of the selective distribution system operating at the retail level of trade.

Thus, certain restrictions of selling or advertising online benefit from the safe harbour in the VBER if they do not prevent the distributor from effectively using the internet for the purposes of selling. The European Commission is therefore taking a relatively flexible approach whereby whether a particular restriction on online sales is block exempted or considered a hardcore restriction will depend on a somewhat subjective assessment of the restriction in question (its nature and intensity) and of its effects. The border between what complies and what infringes competition law can thus potentially be narrow. On the other hand, this logic allows the European Commission to block exempt some of the restrictions that have so far been treated as hardcore.

In the past, some national competition authorities, e.g., the German Competition Authority (see, e.g., German Competition Authority (Bundeskartellamt), 2018, p. 3), have expressed the view that the evaluation of the (non)existence of a hardcore restriction should also take into account the specificities of a particular (national) market. Presumably, in response to these statements, the Commission now clarifies that the assessment of whether a restriction is hardcore cannot depend on the individual circumstances of the market or of one or specific customers (the Draft Vertical Guidelines, para. 188).

3.3.1 Hardcore Restrictions on Online Sales

Among the hardcore restrictions related to online sales, para. 192 of the Draft Vertical Guidelines explicitly mentions (i) a direct restriction on the use of the internet as a sales channel, as well as the indirect measures such as a requirement for a distributor (ii) to only sell in a physical space or in the physical presence of specialised personnel, (iii) to seek the supplier's prior authorisation for selling online, or (iv) not to use the supplier's trademarks or brand names on its website.

Geo-blocking restrictions, i.e., requirements for a distributor (i) to prevent customers located in another territory from viewing its website or to automatically re-route its customers to the manufacturer's or other distributors' websites, or (ii) to terminate consumers' online transactions once their credit card data reveal an address that is not within the distributor's territory, are also regarded as hardcore (the Draft Vertical Guidelines, para. 192).

The Draft Vertical Guidelines also consider a direct or indirect prohibition on the use of a specific channel for online advertising – such as total ban on the use of price comparison tools or advertising on search engines, or other measures indirectly prohibiting the use of a specific online advertising channel – as a hardcore restriction. On the other hand, the European Commission believes that restriction on the use of one specific price comparison tool or search engine would typically not prevent retailers from selling online effectively. A retailer can still use other tools to increase customer awareness of its online sales activities (the Draft Vertical Guidelines, para. 192). However, the assessment of situations that do not fall under either of the 'extremes' addressed by the European Commission – i.e., a situation where the use of only certain advertising services (but not "*all most widely used*" ones – see the Draft Vertical Guidelines, para. 192) in the relevant online advertising channel is restricted – can be tough, as the test of effective use of the internet for online sales purposes must be carried out.

3.3.2 Safe Harbour for Online Marketplace Bans and Online Sales Quality Standards

Pursuant to para. 194 of the Draft Vertical Guidelines, restrictions on the use of specific online sales channels, such as online marketplaces, or setting quality standards for online sales, are block exempted provided that they are not intended to prevent buyers or their customers from effectively using the internet for online sales or from effectively using one or more online advertising channels. Following the Coty judgment, which applies generally and not just to luxury goods (*Coty Germany*, para. 68; Wijckmans, F., 2018, p. 375; Botteman, Y. and Barrio, D., 2019, p. 527), this is a universal rule, without reference to a specific type of distribution system.

3.3.3 No Need for Equivalence between Online and Offline Sales Criteria

In the context of a selective distribution system, currently, the Vertical Guidelines prohibit a supplier from imposing any obligations on its authorised distributors to discourage them from using the internet by imposing criteria for online sales which are not overall equivalent to the criteria imposed for offline sales. Otherwise, it is a hardcore restriction (the Vertical Guidelines, para. 56).

The Draft Vertical Guidelines depart from this strict approach. Under para. 221 of the Draft Vertical Guidelines, the criteria imposed by a supplier on its authorised distributors for online and offline sales do not need to be identical. The premise is that the criteria imposed for online sales do not have as their object to prevent buyers or their customers from effectively using the internet for online sales. The Draft Vertical Guidelines in this context, unlike the Vertical Guidelines, no longer even mention the need for an equivalence test. Conversely, para. 221 of the Draft Vertical Guidelines explicitly confirms that the supplier may set specific requirements to ensure certain service quality standards for the online channel, e.g., the set-up and operation of an online after-sales help desk, covering the costs of customers returning the goods or the use of secure payment systems. The change of the European Commission's approach is based on the different characteristics of the online and offline channel (the Draft Vertical Guidelines, para. 221).

The author of this paper is aware from her own experience that businesses have found the equivalence test very difficult to deal with and have sometimes set "artificial" criteria that they did not really need, just with the aim of meeting the equivalence test. Therefore, the author welcomes the proposed amendment. However, more specific guidance on the edge beyond which the European Commission will consider that a difference in criteria has the effect of hindering the effective use of the internet for online sales could be useful to facilitate businesses self-assessment of the criteria.

3.4 Safe Harbour for Parity Obligations, Except the Wide Ones

Parity obligations, also known as Most Favoured Nation clauses (MFNs) or Across Platform Parity Agreements (APPAs) include a commitment of the supplier (in recent case-law usually a hotel) to offer the services or goods to the other party (so far usually an online travel agency) on conditions no less favourable than those offered by the supplier to certain other parties or on certain other channels (the Draft Vertical Guidelines, para. 333).

According to Article 5(1)(d) of the Draft VBER, the block exemption does not apply to a wide retail parity obligation, i.e., to "any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services." Under para. 238 of the Draft Vertical Guidelines, the obligation may be expressed or applied by other direct or indirect measures and may

relate to conditions concerning prices, inventory, availability or any other terms or conditions of offer or sale. This is a restriction that is "grey-listed". While it does not enjoy the benefits of a block exemption, it is not automatically prohibited. If the parties wish to agree on such a clause, they will have to self-assess its compliance with Article 101 of the TFEU, in accordance with the detailed guidance provided for this purpose in section 8.2.5 of the Draft Vertical Guidelines.

Para. 239 of the Draft Vertical Guidelines expressly confirms that all other types of parity obligations benefit from the safe harbour in the Draft VBER (provided that the rules on market share thresholds in Article 3 of the Draft VBER are met). This applies to (i) wholesale parity obligations, which relates to the conditions under which goods or services are offered to undertakings that are not end users, (ii) parity obligations relating to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs, and particularly (iii) narrow retail parity obligations, which apply to the conditions relating to the supplier's own sales or marketing channels (the Draft Vertical Guidelines, para. 239).

For the sake of completeness, price parity obligations must not lead to RPM. This could be the case when a supplier agrees to price parity and sets a minimum resale price to a competing retailer in order to fulfil it. This would be considered a hardcore restriction and, thus, the safe harbour in the Draft VBER would not apply (the Draft Vertical Guidelines, para. 345). It should be underlined that this prohibition also applies in relation to online platforms. The European Commission considers online platforms (providers of online intermediation services) as 'suppliers' within the meaning of the Draft VBER (the Draft VBER, Article 1(d)), not as agents for the purposes of Article 101(1) of the TFEU (the Draft Vertical Guidelines, para. 44). Thus, the seller of goods to be sold on the platform is also considered the buyer of the online intermediary services provided by the platform. The online platform should therefore avoid imposing a fixed or minimum sales price (RPM) for the transaction that it facilitates.

The European Commission's approach to parity obligations is not surprising. It is based particularly on the previous case-law of national competition authorities and national courts concerning mostly parity clauses in the agreements between hotels and online travel agencies such as Booking.com, Expedia or HRS-Hotel Reservation Service. Subject to the divergent case-law of the German Competition Authority and the national courts according to which even narrow parity clauses restrict competition (for the last decision of the Booking.com saga, see the German Federal Supreme Court, 2021), there is a consensus between the national competition authorities that narrow retail parity clauses usually have a low or no negative impact on competition, whereas wide parity obligations may raise competition concerns (European Commission, 2020, p. 184; Bostoen, F., 2017, p. 224 *et seq.*; Krumlová, D., 2019, p. 65 *et seq.*).

4. Conclusion

The proposed rules on vertical agreements are a step in the right direction, i.e., towards greater consideration of the economic efficiencies associated with certain types of vertical restraints. The new rules give businesses greater room for considerations of the specific needs of each sales channel – e.g., in terms of the level of investment and brand protection – and better organize their distribution networks.

Nevertheless, the author of this paper identified several uncertainties or gaps that would need to be filled for the new EU distribution law regime to meet the objectives pursued, in particular, to be an effective tool for businesses themselves to assess the compliance of their conduct with competition law, preferably without huge costs and/or enforcement risks. Greater clarity of the rules would – in view of current risks of divergent approaches by national competition authorities and/or national courts – help to achieve the goal of harmonizing competition law rules across the EU.

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Constitutional dimension of the competition law of the EU in sports

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Abstract

The debate on the potential of the competition law of the EU to pursue non-economic objectives is currently vividly discussed in the doctrine. Most frequently it is conducted on the example of the digital gatekeepers, environmental protection, or public health objectives. However, one of the fields, in which the social impact of the antitrust law is the most visible is quite surprisingly sports. The most recent examples of the application of the provisions of the competition law of the EU to sports show that it has great potential in strengthening the level of protection for the rights of individuals, hence it gains constitutional dimension. Its objective in application to sports is more socio-oriented than economically – it can become a useful legal tool for increasing the level of protection of fundamental rights to the fair trial of the athletes, maintain openness, accessibility, and significance of sports in the society and help implement accountability and proportionality in the governance of sport disciplines across the EU.

Keywords: Article 165 TFEU, constitutional dimension, European Super League, International Skating Union, limiting transnational power

JEL Classification: K210, L440

1. Introduction

The competition law of the European Union (EU), enshrined in Articles 101-108 of the Treaty on the functioning of the European Union (TFEU) is one of the cornerstones of the Internal Market of the EU. These provisions are traditionally perceived to constitute the legal basis for actions aimed at fulfilment of the objectives of the EU defined in Article 3(3) of the Treaty on the European Union (TEU), as has been also interpreted by the Court of Justice of the European Union (CJEU). Hence the competition law of the EU should foremost support the sustainable development of Europe, balanced economic growth and price stability, highly competitive social market economy (Craig, DeBurca, 2020, pp. 1034–1035).

Such a strong focus on economically oriented objectives led to the establishment of the doctrine (Zimmer, 2012; Lianos, 2013) on primary goals of the competition law of the EU being oriented around the effective allocation of resources on the markets, fair pricing, and consumer welfare, sometimes dubbed as the "orthodoxy" of the EU competition law (Weatherill, 2014a, p. 203, Weatherill, 2014b, p. 283).

However, the question of whether the focus of the competition law of the EU should still be limited mainly to the economic objectives is looming over the European scholars due to the numerous challenges faced by European societies in the 21st century – climate change, the rise of digital markets and social media, global pandemics, and – *last but not least* – transnational power of private bodies. Against this background, this paper seeks fitting responses in the relatively overlooked field of the European economy and of the application of the provisions of the competition law of the EU – sports. Secondly, the paper aims to use the example of the application of the provisions of the competition law of the EU to sports to support the thesis that the non-economic objectives may enrich the competition law of the EU with the constitutional dimension defined as counterbalancing the transnational normative power of the monopolistically positioned sports governing bodies (SGBs) and increase the level of protection of fundamental rights of individuals.

2. Problem Formulation and Methodology

Therefore, the problem faced by attempting to formulate an answer to the question on non-economic objectives of the competition law of the EU is mostly related to the existence of a sound legal basis for such an argument. Scholars seeking for other-than-economic aims of public policy that should be pursued through the application of the provisions of the competition law of the EU may struggle to indicate the articles of the TFEU or TEU or relevant case law of the CJEU to identify these aims. Therefore, the method adopted by the author of this paper is based on the traditional legal research – literature review, analysis of the case law of the CJEU, and the interpretation of the provisions of the TFEU and TEU.

3. Analysis and Problem Solution

3.1 Non-economic objectives of application of the EU competition law provisions in the field of sports

In literature, it is increasingly often observed that the competition law of the EU may play a significant role in the fulfilment of socio-cultural objectives (Claassen, Gerbrandy, 2016, pp. 1–15; Van Rompuy, 2012). The challenges named in the introduction – climate change, the threat of social media for democracy, consequences of the Covid-19 pandemic – are among the most frequently analysed fields in this respect (Cseres, 2019, pp. 1–8; Kozak, 2021, pp. 118–129). Sports is

the field in which some of the similar observations have been present (Weatherill, 2014c, pp. 302–308; Van Rompuy, 2015 pp. 206–208; Duval, Van Rompuy, 2016, pp. 256–257; Pijetlovic, 2016, pp. 127–128; Szyszczak 2018, p. 281; Duval 2020, p. 33) – mainly due to the existing case law of the CJEU and the decision practice of the European Commission.

3.1.1 Including the legitimate non-economic objectives in the Wouters test

These observations are mostly founded on the premise of the "specificity of sport" in the application of provisions of the competition law of the EU to the actions of SGBs – especially to the activities related to their self-regulatory autonomy. The overall principles of such a sport-specific approach were laid by the CJEU in its *Meca-Medina and Majcen* ruling in 2006. According to para. 42 of this judgment

> for the purposes of application of [art. 101 TFEU] to a particular [sport-related] case, account must first of all be taken of the overall context in which the decision of the [SGB] was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.

This reference to the so-called "regulatory ancillarity" (Pijetlovic, 2016, pp. 131–132; Pijetlovic, 2018, pp. 335) and the conditions of the *Wouters* test is commonly interpreted as the method to include reasons of non-economic nature as well as mainstreaming public policy objectives (especially other policies determined in the TFEU and TEU) within the framework of competition law of the EU (Vermeersch, 2007, p. 253; Parrish, 2012, p. 725; Weatherill, 2014d, pp. 412–422; Van Rompuy, 2015, p. 196; Pijetlovic, 2016, pp. 132–133; Pijetlovic, 2017, p. 100). In the field of sports, it translates into the possibility to include reasons related to the socio-cultural dimension of sports in Europe as the potential *Wouters*-consistent legitimate objectives that could justify some of the restrictions of the competition on the internal market resulting from the provisions of the statutes and regulations adopted by the SGBs (provided that they remain inherent and proportionate).

What is worth stressing – in accordance with the pluralist theories of the EU legal order – the legitimacy of objectives is determined by the own assessment of pursued objectives by the SGBs and merely acknowledged by the competition law of the EU (Szyszczak, 2007, p. 105; Avbelj, 2018, pp. 126–129). The existing case law of the CJEU and the European Commission's decision record provide the catalogue of such potential sport-related legitimate objectives. Following the most recent examples of the Commission's decision and subsequent ruling of the General Court in the case of the eligibility rules of the *International Skating Union (ISU),* such legitimate objectives should not be solely (nor overwhelmingly) related to the economic interests of the SGBs (European

Commission, 2017, para. 220; General Court, 2020, para. 109). Hence, they are non-economic almost *per definitione* and *par excellence* (Cattaneo, 2021, p. 320; Kolasiński, 2019a, p. 61). Nevertheless, more specific legitimate sports-related objectives that have been acknowledged by the CJEU cover combating doping, protecting the integrity, objectivity, as well as clean and ethical contests, securing the health of athletes, ensuring uncertainty and comparability of results, and equal chances of participants (Court of Justice, 2005, para. 43; Van Rompuy, 2015, p. 197; Pijetlovic, 2016, p. 144). Furthermore, the General Court added to the list the (vertical) solidarity among grassroots and professional sport, unity of sport disciplines, and protection of competitions against manipulations (General Court, 2020, paras. 101–102). The Advocates General recommended in their opinions to consider the perspective of viewers, the interdependence of the competitors, and the access to sports competitions (Advocate General Kokkott, 2008; Van Rompuy, 2015, p. 200; Pijetlovic, 2018, p. 336). The Commission strongly emphasised the necessity to maintain uniform and consistent interpretation and application of the sporting rules within the disciplines, which can justify the monopolistic regulatory position of SGBs (European Commission, 2011, p. 12; Pijetlovic, 2018, p. 335). This catalogue is thus inclusive, broad, and relates to the specificity and social significance of SGBs in governing sport disciplines and protecting legitimate objectives of importance for the European societies (Avbelj, 2018, pp. 126–127). Therefore, the application of competition law in the field of sports provides an example of pursuing non-economic objectives by these provisions.

3.1.2 The role of Article 165 TFEU

As argued above, the conditions of the *Wouters* test allow for the mainstreaming of other EU public policy objectives within the framework of the competition law of the EU. Since 2009, the sports policy of the EU has been legally determined in Article 165 TFEU. The EU should "contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function" and its actions shall be aimed at "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen". Hence, this provision should play the role of a compass for the EU institutions while taking action in the field of sport – also through other instruments provided by the Treaty. It is sometimes observed that Article 165 TFEU does not have horizontal character (contrary to the environmental or consumers protection), however, it has legal relevance and binding force equal to all other provisions of the TFEU (Parrish, 2012, pp. 727-728; Weatherill, 2014e, p. 533; Pijetlovic, 2016, p. 133). Thus, it should constitute a legally significant element of interpretation of

the objectives of the application of the provisions of the competition law in the field of sport. The responsibility for its "operationalisation" rests foremost on the Commission as the "Guardian of the Treaties" (Szyszczak, 2018, p. 191).

A crucial role in this context once again plays the *Wouters* test – Article 165 TFEU should constitute the background against which the legitimacy of objectives strived by the SGBs could be examined (Van Rompuy, 2015, p. 207; Pijetlovic, 2016, p. 133). Particular attention should be paid to the specific nature of sport and its social function – jointly these features are deemed to constitute the main characteristics of the widely supported European Model of Sports (European Parliament, 2021; the Council of the European Union, 2021). Hence, Article 165 TFEU provides a sound legal basis for pursuing the non-economic objectives by application of the competition law provisions in the field of sport. It is worth presenting two examples from the most recent case law of the General Court and the Commission decision practice as the case study for this argument – the case of *ISU* and the case of the *European Super League.*

3.1.3 Case study – International Skating Union and European Super League

In its judgment issued in 2019, the General Court fulfilled the obligation to follow non-economic objectives of competition law in the field of sport enshrined in Article 165 TFEU by acknowledging that the integrity of sport may constitute a legitimate objective in the *Wouters* test. The importance of solidarity between grassroots and professional sports and the safety of participants is also stressed (the General Court, 2020, paras. 78 & 101–102). Furthermore, the non-economic context was looming over the judgment also in the part related to the eligibility rules and authorisation procedure provided by the statutes adopted by the ISU. The General Court found the ambiguous and arbitrary loyalty clauses to breach Article 101 TFEU not only by the virtue of constituting an unfair economic advantage, but also because of the conflict of interest between commercial and regulatory roles of the ISU. It also referred to the social significance of sport and its specificity to highlight the special responsibility resting on the SGB (ISU) towards its competitors and athletes to govern the discipline (speed skating) by the good governance principles, such as accountability, predictability, and transparency (General Court, 2020, paras. 84–95). Therefore, the result of the application of the competition law in the field of speed skating and determining violation of competition law by the ISU has led primarily to the amendment of the unproportionate sanctions (lifetime ban) and untransparent authorisation procedure (including conditions to be met for granting authorisation to third party organisers of speed skating events). Increased economic efficiency of the market for speed skating events (bigger choice of events available for athletes

and viewers) has been rather a by-product of the positive changes in the internal governance mechanism of the ISU.

A similar duality of non-economic objectives can be observed in the case of the *European Super League*, currently under consideration as the case number C-333/21 as a result of the preliminary question to the CJEU dated May 2021. On the one hand, the competition law may be used as a "sword" by complainants – the poor and non-transparent governance of European football by UEFA represented by its arbitrary authorisation procedure may be attacked for its lack of conformity with good governance principles and thus contrary to non-economic objectives of the competition law of the EU. On the other hand, the competition law may be used as a "shield" by the defendant – the non-economic legitimate objectives, such as the need to maintain openness, unity, and integrity of European club football competitions, may constitute justification grounds under the *Wouters* test (Bozza, Marasà, 2021). Hence, even though the background to the dispute is purely economical (control over the stream of revenues from the sales of commercial rights to the football competition), it may be finally resolved by balancing the non-economic objectives of the competition law. Whatever direction the final ruling of the CJEU will follow, it should be expected that the outcome will be based upon Article 165 TFEU and the fundaments of the European sport policy enshrined therein (Parrish, 2018; Weatherill, 2014f; Weatherill, 2018). Among others, the most relevant ones seem to be the promotion of fairness and openness in sporting competitions and cooperation between bodies responsible for sports, the social function of sport (especially football), and its specific nature.

3.2 Constitutional dimension of the competition law of the EU

Good governance of the SGBs as one of the non-economic objectives of the competition law of the EU is strongly related to the constitutional dimension discussed in the literature. In the most overall context, the competition law of the EU is described as a part of its "economic constitution" (Drexl, 2006, pp. 633–674; Gerbrandy, 2019a, pp. 127–142). The constitutional dimension of the competition law of the EU is also described in the context of the objectives of the public policy as presented above (Monti, 2002, pp. 1057–1099; Gerbrandy 2019b, pp. 33–50). In the context of sport, it is most relevantly considered twofold: firstly as the legal tool in the EU legal toolbox to counterbalance the transnational normative power of SGBs of private and non-democratic origin, and secondly, as the tool to increase the protection of the fundamental rights of individuals, in particular, the right to a fair trial of athletes (Szyszczak 2019, pp. 188–191; Duval, 2020, p. 33; Duval, 2017, pp. 18–22; Weatherill, 2014d, pp. 420–421; Motyka-Mojkowski, Kleiner, 2017, pp. 460–461; Kornbeck, 2020,

p. 224; Kornbeck, 2019, pp. 76–77; Van Rompuy, 2015, p. 207; Duval, Van Rompuy, 2016, pp. 245-278; Pijetlovic, 2014, pp. 161–162 & 185).

3.2.1 Counterbalancing transnational normative power of the SGBs

The structure of organisation within the European model of sport is traditionally formed in the shape of a pyramid. One federation at the international level supervises activities of continental confederations which in turn are above the national associations (one per each discipline) with the International Olympic Committee (IOC) and national Olympic committees acting as umbrella organisations. This simplistic scheme translates into a very characteristic feature of the whole model – monopolistic position of the SGBs on respective markets for regulation, organisation, and commercialisation of sports competitions in each discipline (with some minor exemptions like boxing). The omnipresence of this structure led to the formulation of remarks (Kolasiński, 2019b, pp. 600–601) that this situation is a perfect example for a natural monopoly (sometimes validated by the state legislation – *vide* Article 13 of the Polish legal act on sport dated 25 June 2010). Simultaneously, the activity of the SGBs at the international and continental level is transnational and cross-border *per definitione,* as they have to enable uniform application and interpretation of sporting rules regardless of national borders. Hence, the SGBs are natural allies of globalisation – their global outreach guarantees them *de facto* immunity from national legal orders (Meier, Garcia, 2015, pp. 890–906) and functioning in the grey zone in-between the public international law and self-created autonomous regulatory regime (Hock, Gomtsian, 2018, pp. 186–204). Behemoth-size of international bodies like FIFA or IOC, their *ultra*-strong monopolistic market position, and exclusive self-regulatory competencies combined give the SGBs often the position of the parallel Leviathan – with private, non-democratic, yet regulatory and transnational power deprived of the strings attached to the social control (Duval, 2020, p. 33).

In this context, the competition law of the EU may play a counter-balancing and democratising, thus constitutional, role thanks to its three features. Firstly, it is applied by an impartial, supranational, and independent authority – the European Commission – of the supranational organisation – the EU – which is democratically legitimated and subdued to the form of social control (even if vague) (Van Rompuy, 2015, pp. 206–207). Secondly, thanks to the so-called "Brussels effect" (Bradford, 2020), the normative power of the EU is spreading beyond its borders and its actions may have global influence, which is very relevant for dealing with actions of transnational entities (Garcia, Meier, 2016, pp. 850–870; Geeraert, Drieskens, 2017, pp. 79–94; Menon, Weatherill, 2008, pp. 397–416). Thirdly, the extraterritoriality of the competition law of the EU itself makes it a very useful legal framework to address the actions of legal entities

based abroad, which in the context of the SGBs is combined with the fact that the majority of them are registered in Switzerland (Szyszczak, 2018, p. 264).

Thus, the application of the provisions of the competition law of the EU may have a positive effect on increasing the social accountability of the actions of the SGBs. Such an effect would amount to the increased legitimacy of the SGBs in adopting their own "societal constitutions" such as the Olympic Charter and statutes (Duval, 2018, pp. 245–269; Bützler, Schöddert, 2020, pp. 40–54) and attach much-needed strings on often wilful actions of sport-Leviathans. Similarities to the approach and reasoning behind such an effect and the most prominent proposal of the Commission related to the competition law, i.e., Digital Market Act regulation (limiting market and social power of digital gatekeepers) are self-evident in this respect.

3.2.2 Strengthening the fundamental rights of the athletes

Such strings are much-needed foremost due to the effect that the actions of the SGBs may have on the individuals. Especially in the most vulnerable sphere of their fundamental rights. Without any form of societal control, the SGBs would be almost immune in affecting the fundamental rights of the athletes – due to the private nature of the SGBs invoking fundamental rights enshrined in the Charter of fundamental rights of the EU (CFREU) or the European Convention on Human Rights (ECHR) in horizontal disputes may be very obstructed (Lewandowski, 2020, pp. 55–66; Shinohara, 2021; Haas, Hessert, 2021, pp. 287–307). Additionally, the combined size, market power, self-regulatory competencies, and transnational activities grant the SGBs a very strong position *vis-à-vis* athletes in economic and legal terms – this disproportion translates into *de facto* semi-verticality of their relation (in comparison to the formally horizontal relation of two equal, private entities) (Kolasiński, 2020, pp. 4–8; Becker, 2007, pp. 1017–1018). The affected fundamental rights can be of various character (freedom to choose the occupation, right to privacy, right to healthy working conditions, the prohibition of discrimination in the workplace), but arguably the most severe violations may concern the right to a fair trial due to the widely used non-voluntary arbitration clauses within, conferring almost exclusive right to appeal from the decisions of the SGBs on the Court of Arbitration for Sports (CAS).

The topic of compatibility of sports arbitration system with the requirements of impartiality and independence and the standards of Article 47 of the CFREU and Article 6 of the ECHR is widely discussed in the literature (Łukomski, 2013; Duval, 2017; Duval, 2020; Duval, Van Rompuy, 2016; Kolasiński 2018; Pijetlovic, 2014; Motyka-Mojkowski, Kleiner, 2017; Cattaneo, 2021), therefore it is worth to highlight the contribution that can be made in this respect by the competition law of the EU. This contribution is twofold – on the one hand, the European Commission in its *ISU* decision determined that the arbitration

clauses included in the statute of the SGB may reinforce the anticompetitive effect of other provisions contrary to Article 101 TFEU, on the other hand, the *Oberlandesgericht* (OLG) in Munich found the arbitration award of the CAS in the *Pechstein* case as contrary to the competition law, and thus to an *ordre public,* and therefore invalid under the conditions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, neither of the approaches have been confirmed in the appeal (for various reasons), yet they offer interesting examples of the use of the provisions of the competition law beyond its economic context and as a straightforward tool to increase the level of protection of the rights of individuals. This possibility has also been stressed by the General Court in its *ISU* judgment, where it referred to the possibility of lodging a complaint by individuals with a national competition authority or the Commission and seeking compensation for damages before national courts (the General Court, 2020, paras. 157–160). Thus Article 101 TFEU (as well as Article 102) may be used as a legal weapon by individuals to increase their level of protection against harmful actions of the collective entities, such as SGBs – this also amounts to the constitutional dimension of the competition law of the EU.

4. Conclusion

As it was presented above, the competition law of the EU may be interpreted far beyond its traditional ordoliberal context of dealing with economic objectives, such as the effective allocation of the resources on the market, protection of the structure of the market, or the consumer welfare. Sports present an interesting field of application of its provisions because of its specificity that translates into the potential exemption of various sport rules from the scope of application of Article 101 or Article 102 of TFEU if the conditions of the *Wouters* test are met. Non-economic objectives of competition law may be pursued by acknowledging them as legitimate objectives under the conditions of the *Wouters* test, but also by strengthening good governance principles within the operations of the SGBs. The effects of implementing good governance principles, such as accountability, unarbitrary criteria, or transparency, amount to the constitutional dimension of the competition law of the EU. This dimension is the most clearly visible in the counterbalancing effect for the transnational regulatory and economic power resulting from the monopolistic position of the SGBs on the relevant markets for respective disciplines and in the strengthening of the fundamental rights of individuals against abuses from the SGBs, in particular in increasing the level of protection of their right to a fair trial. These conclusions may be transposed to other fields covered by the EU policies in which a similar setup favourable for abuses – the strong market position of collective private actors and disproportions in the formally horizontal relations – exist.

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Nord Stream 2 – Antitrust Law and Energy Security

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Abstract

The author of this article focuses on decarbonisation in the energy sector as an element of critical infrastructure. In the first part of the paper, he highlights the negative impacts of the energy crisis, including price increases. He goes on to discuss the energy mix adjustment, legal regulations in the energy sector and the context of decarbonisation, and the permit-granting process within Nord Stream 2. The approval process is compared to that of wind power plants, where regulation is adjusted between decarbonisation requirements and environmental protection. The second part discusses energy security and its importance for consumers and others, with a view to ensuring future prosperity and environmental sustainability. The author concludes that the change in the social paradigm in the environmental field will also affect regulations.

Keywords: decarbonisation, energy security, Nord Stream 2

JEL Classification: K210

1. Introduction

The transformation of the energy sector in the EU means a transformation of the law based on political decisions and international efforts. These are based on international agreements on climate protection, conventions related to the protection of biodiversity or the legal protection of the atmosphere or water. The EU's energy transition can therefore be subordinated as a component of an international (legal) approach to environmental protection that will enable and ensure its functioning across society around the world.

In 2022, we will mark the 50th anniversary of the United Nations Environment Programme from the United Nations Conference on the Human Environment, which was held in Stockholm from 5 to 16 June 1972. This involves a gradual change of perspective in the face of increasing negative impacts and pollution (Buttler, 1987, pp. 541–542).

The energy sector forms part of the critical infrastructure that is essential for security of the state and its defence. Although proper functioning of the energy

sector could be taken for granted, long-term grid blackouts (i.e., even a few days) and inability to use stable energy sources can lead to significant social damage and harm to the population. One example of this could be seen in the power crisis in the US state of Texas in February 2021. This showed how severe the consequences of a lack of sufficient energy (and its high pricing) could be for households, communities and/or businesses.

This is notwithstanding the impact on price stability, where energy prices – as part of the consumer basket – contribute to overall inflation (European Commission, 2021a) and the prosperity of those who are vulnerable to energy poverty.

2. Problem Formulation and Methodology

The methodological basis of the study are the legal methods of the scientific knowledge.

As the main method of this article, I first chose the analytical method, which will be partially supplemented by the descriptive method.

Furthermore, I will also examine energy security and its legal foundations, partly from the perspective of social systems theory (law as a social phenomenon), as stated by Josef Požár – a) dynamism (changing of the law, including the soft law, over time) and b) complexity (legal and factual consequences of different information, including information asymmetry). (Požár, 2003, p. 27)

The purpose of regulation is to ensure, through a change of law, that the behaviour of those being regulated (persons, entities) changes in the future. In other words, as Hans Kelsen states:

> A legislator enacts norms only because he believes that these norms, as motives in the mind of man, are capable of inducing the latter to the behavior desired by the legislator. (Kelsen, 1943, p. 391)

The main question is how the law regarding the proposed and current decarbonisation legislation will transform, especially regarding decarbonisation in the energy sector.

The thesis of this paper is that decarbonisation policy will have an impact on current and future energy projects, including the regulation of legal aspects.

3. Analysis and Problem Solution

The so-called "energy mix", which, in compliance with Article 194(2) of the Treaty on the Functioning of the European Union, refers to the "Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply" (Treaty on the Functioning of the European Union, 2012) is, in my opinion, it is similar to the term "diversification", which is usually used in the financial

sector. In both cases, it is essential to secure the desired and desirable objective via various sources. This could be done with the help of various financial assets or energy resources, while the objective could be, among other things, stability, security and/or environmental sustainability. In the positive definition, it is about ensuring the profit and functionality of the system with respect to the stated objectives (such as the welfare of society or environmental protection). Negatively, it is about preventing the loss of one's own financial resources (or in the energy sector, avoiding a blackout and related social impacts).

In the case of energy, it is therefore about ensuring a stable, secure, and long-term supply. Furthermore, – using the analogy of the hypothetical supply of water to a person in the desert – the basic supply must be regular (at a specified time and space) and secure (of a specified quality and quantity).

In addition to the above, the role of energy system regulation is to ensure that consumers are protected. This is because of their possible exposure to energy poverty. There is an inverse relationship here: the lower a household's income is, the higher share its energy costs may be because of its financial vulnerability of not being able to secure enough savings from which it would benefit in the long term (such as house insulation or less energy-intensive appliances).

Furthermore, it is important to establish regulations that respect the Member States' choice of their own energy sources, keeping in mind the environmental aspect. The similar approach is that to comply with legal environmental obligations, the Member States should maintain mutual solidarity and motivate private actors to contribute to the stability of the energy sector, ensure a long-term, stable supply and, last but not least, avoid the negative environmental externalities.

One concrete case in this respect might be wind farms (regardless of whether off-shore or on-shore), whose generated energy essentially has three possible uses (1. directly into the grid, 2. storage in batteries, and 3. conversion – e.g., power-to-gas or power-to-hydrogen). These are one example for progressively ensuring decarbonisation throughout society, including in the energy sector. The basic approach in energy transformation is based on the fact that achieving decarbonisation targets is not a matter of "here and now", but is rather based on long-term planning, including an interim period for e.g., natural gas.

Article 16 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources currently regulates the organisation and duration of the permit-granting process, which must not exceed a period of two years for power plants, including all relevant procedures of competent authorities and under extraordinary circumstances, must not exceed a period of three years. However, as stipulated by Article 16(7) of the afore-mentioned directive:

> The deadlines established in this Article [16] shall apply without prejudice to obligations under applicable Union environmental law, to judicial appeals, remedies and other proceedings before a court or tribunal, and to alternative dispute resolution mechanisms, including complaints procedures, non-judicial appeals, and remedies, and may be extended for the duration of such procedures. (Renewable Energy Directive, 2018).

The purpose of this legal research is to provide the decarbonisation context in the case of Nord Stream 2 – as a contributor within a specific period to the change and security of the EU's future energy supply. The delays created by legal instruments contrary to the law can also be observed in this project. Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission in the context of the United States sanctions against (also) Nord Stream 2 stated clearly and openly:

> As a matter of principle, the European Union opposes the use of sanctions by third countries on European companies carrying out legitimate business. Moreover, it considers the extraterritorial application of sanctions to be contrary to international law. (Borell, 2020)

Nord Stream 2 AG (the Company), as aptly summarised by the General Court of the European Union, "is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company Gazprom. It is responsible for the planning, construction, and operation of the Nord Stream 2 pipeline, 50% of whose funding, which amounts to € 9.5 billion, is provided by the companies ENGIE SA (France), OMV AG (Austria), Royal Dutch Shell plc (Netherlands and United Kingdom), Uniper SE (Germany) and Wintershall Dea GmbH (Germany). Like the Nord Stream (now commonly known as Nord Stream 1) pipeline, which consists of a system of two lines, construction of which was completed in 2012 and which was to be operated for a period of 50 years, the Nord Stream 2 pipeline, also consisting of two gas transmission lines, will ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany) near Greifswald (Germany), bringing the overall transport capacity of the Nord Stream 1 and Nord Stream 2 pipelines to 55 billion cubic metres per year." (*Nord Stream 2 v Parliament and Council*, 2020) The Company appealed against the decision of the General Court and currently, only the Opinion of Advocate General Michal Bobek delivered on 6 October 2021 is available – according to which the legal position of the Company will inevitably change because of unbundling, which will have an impact on the Company. (Opinion of Advocate General Michal Bobek, 2021)

Nevertheless, autonomous interpretation by the Court of Justice of the European Union (CJEU) should also represent a legal guarantee for the successful functioning of the European law in the future – with the exclusive jurisdiction

of the Member States' courts. The CJEU cannot deny justice to the parties in cases within its jurisdiction and it must also consider the principles and concepts common to the laws of the Member States. These include the values on which the EU is based, and which are attractive to foreign investors. Violations of these values, such as rule of law, including obvious formal errors (error of law), can affect the legal position of companies and should be, if not rightfully prevented, then protected. Therefore, additionally:

> The European Court of Justice, for example, not only places little emphasis on grammatical interpretation and much emphasis on teleological interpretation, but is also very aware of the institutional, political, and economic environment in which it judges. Those who rely solely on the wording of a norm in Luxembourg are less likely to be successful. (Haltern, 2017, p. 35)

4. Legal Dynamic

It can be considered a notoriety that social changes have their overlap in law. A recent example is the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU: Joint European Action for more affordable, secure, and sustainable energy (hereinafter referred also as "the Communication"). The Communication is a preparatory stage for further legal measures that may be taken to the detriment of the Russian Federation – in the case of gas supplies. The European Commission here draws attention to potential distortions of competition – referring to Gazprom. (European Commission, 2022, Article 1.2) In my opinion, the use of the word "potential" by the European Commission is merely a reflection of the right to a fair trial and the presumption of innocence.

As the – potentially – breach of competition is indirectly linked to the now openly and publicly communicated opinion of the European Commission on Russia's military aggression in Ukraine and on ensuring energy security, including through gas storage – as part of critical infrastructure – given the current geopolitical situation, progressive shift towards renewable energy and energy efficiency. (ibid, Article 1.1)

For the above reasons, it can be – as an intermediate result – concluded that the future of European energy policy will be focused mainly on decarbonisation in the long term and that energy security will be tenaciously strengthened in the short term.

In the case of building energy infrastructure (electrical grid, pipelines), it is about setting up a long-term functional system. However, competition law also considers construction of a pipeline (regardless of whether gas or hydrogen

one) as a long-term investment project that involves risk assessment – including "prospects which could reasonably be envisaged" (*E.ON Ruhrgas AG and E.ON AG v Commission judgement*, 2012, para 147).

Therefore – given the current state of scientific knowledge – in the medium-term perspective blending of hydrogen into the natural gas could stop. As opportunities will open up (with regard to the legal regulation of permitting processes – in the field of renewable energy sources – e.g., on-shore and off-shore wind) and subsequent power utilisation – through power-to-gas/hydrogen based technologies and hydrogen pipelines. The forthcoming legislation includes inter alia Proposal for a Regulation of the European Parliament and of the Council on the internal markets for renewable and natural gases and for hydrogen (European Commission, 2021b) and Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen. (European Commission, 2021c)

5. Conclusion

Social paradigm shifts in the environmental or (geo)political field have historically been reflected in regulations and in my view, this will continue to be the case in the future – including with regards to the legal interpretation by the courts. Given the significant society-wide impact of the energy sector on people's lives and nature, a deepening and broadening of regulation can be assumed – including the acceleration of approval processes, while maintaining safety and environmental impact assessments. In the case of major projects such as Nord Stream 2, it is also essential that strategic planning covers the monitoring of trends in society, local communities, and critical infrastructure protection along with new developments in environmental research. After all, they may be directly or indirectly affected by the project and its positive or negative impacts may form the basis for future legislation or legal interpretation.

To conclude, climate change forms the setting for a planet-wide solution based on science and policy adaptation. Regarding the climate risks, climate protection will further gain an essential role in strategic decision-making of international organizations, states, and companies. As the English saying goes: "When the going gets tough, the tough get going."

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