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Editorial Office

Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
e-mail: cars@wz.uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

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ELIPSA Publishing House
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Editorial foreword

It is my great pleasure to present to you the newest issue of Yearbook of Antitrust and Regulatory Studies. We are proud that the YARS continues to attract original contributions discussing the developments in Central Europe and beyond. This is our eighteenth issue since the establishment of YARS in 2008 and the second one in 2018.

The issue covers diverse topics of direct relevance for competition law, competition economics and sector-specific regulation. However, the fact needs to be noted that 2018 has brought, or is about to bring significant changes into the broader legal framework affecting the functioning of legal areas that are of interest to YARS. Most notably, in Poland the judiciary was affected by far reaching reforms, undermining its independence, what led to the opening of infringement proceedings against Poland by the European Commission. It came without much notice that the changes affected directly the judicial review of decisions of the Polish competition authority and its sector-specific regulators.[1] Most notably, the new law on the Supreme Court moved appeal cases to a new chamber of the Supreme Court, a Chamber staffed with newly appointed judges. The recognition the Supreme Court enjoyed, as well as its expertise in the area of antitrust and sector-specific regulation, is likely to be lost. In a similar vein, at the end of 2018, the Hungarian Parliament passed a law establishing a new administrative court system in Hungary, which will be empowered to hear competition law cases. Again, there is a risk that the expertise of some of the judges of Kuria (Hungarian Supreme Court) will no longer be used.[2]

The issue opens with the obituary of Professor Irena Wiszniewska-Białecka, former judge of the General Court and the Polish Supreme Administrative Court, a leading Polish expert in competition and IP law. The obituary is co-authored by her colleagues from Polish academia and the judiciary.

The first article by Andrzej Nałęcz discusses how to empower consumers, the end-users of internet access services. The author reviews behavioural law and economics literature, and applies the resulting insights to interpret Article 4(1) of Regulation 2015/2120. Most interestingly, he proposes how to label internet access services so as to provide consumers with meaningful and understandable information. The issue continues with insightful analysis of the application of fundamental right standards in Hungarian competition law. Tihamer Toth's original and well-balanced observations benefit from

[1] See Bernatt, M. (2019). Illiberal Populism: Competition Law at Risk? Working Paper, available at http://ssrn.com/author=1183912.

[2] Ibidem.

his practical experience in both the competition agency and private practice. The author underlines that the case-law clearly shows that the traditional administrative law enforcement regime is in conformity with fundamental rights requirements. What is crucial is for judicial checks to not be limited to narrowly construed legal issues. Still, there is place for improvement as to some specific procedural issues including, among others, the effectiveness of judicial review over inspections conducted by the competition authority and the immediate enforceability of administrative fines. Next, Paulina Korycińska-Rządca examines the Polish leniency model. She considers whether the leniency model was subject to spontaneous, legislative or judicial harmonization with EU law. According to the author, the lack of legislative harmonization leads to a situation where differences between national leniency programmes and the programme applied by the European Commission continue to exist. However, existing differences do not fully explain the lack of popularity of leniency in Poland. Maria Elisabete Ramos analyses opt-out collective redress scheme in the light of Portuguese experience. She discusses the advantages and the disadvantages of opt-out system and assesses the factors which can trigger abusive litigation. She considers what safeguards should be put in place to preserve positive characteristics of opt-out system. Dominik Wolski presents in his article the results of comparative research on judicial models, adopted in several European and non-European countries, in order to deal with private enforcement of competition law. The author concludes that it is difficult to find a clear link between the type of court – whether specialised or not – and the development of private enforcement in a particular State. Nevertheless, he argues that expert knowledge of judges can have positive effects when adjudicating private antitrust cases. Therefore, he is not against a judicial model where the same courts review the decisions of the competition authority and decide private antitrust damages cases; he favours the specialised judicial model. Zbigniew Jurczyk provides an overview of several economic theories relevant in the case of vertical restraints. By doing so, he analyses the economisation of competition law and the shift towards effect-based approach in the area of vertical restraints. By presenting different economic schools, he shows which of them affected and continues to affect the axiology of competition policy, as well as which of them offers specific evaluation criteria for vertical restraints. Kamil Dobosz addresses the incoherencies in the field of competition law and argues for greater unity both at EU and national level. A major role in this respect should be played by the CJEU. Another option is further-reaching legislative harmonization. Lastly, pro-EU interpretation of national competition law is necessary. In his article dedicated to state aid law, Marek Rzotkiewicz discusses whether the European Commission abuses its powers when it chooses Article 108(2) TFEU instead

of Article 258 TFEU as a basis of its infringement proceedings. The author does not reach a clear conclusion in this respect, but he cautions against such risk given the benefits the Commission gains when opening proceedings under Article 108(2) TFEU.

In addition to articles, the issue also contains an essay. Oles Andriychuk makes a case against hard-law based Net Neutrality rules. He argues that soft Net Neutrality rules are capable of meeting all positive objectives of regulation, without causing problems generated by hard Net Neutrality rules, such as those currently in place in the EU.

The next part of the issue is dedicated to legislation and case-law analysis; it opens with the study by Patrycja Szot and Ana Amza on the selective distribution agreements within EU competition law following the Coty Germany judgement. The authors provide a broad reading of the judgement and argue that Coty Germany effectively removed the limitation of sales via online platforms from the 'by object box', irrespective of the nature of the goods concerned. Moreover, in respect of luxury goods, such ban should be considered not to infringe competition law at all. Dragan Gajin describes the developments in the field of competition law in Western Balkans (Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia). The author shows that these countries differ from each other. In particular, the enforcement priorities are set differently. In addition, the peculiarities of each of the system are discussed. They include the existence of a notification system with respect to individual exemptions of restrictive agreements in three out of the four analysed jurisdictions. In addition, the issue contains case-comments to two important recent judgements. Marta Michałek-Gervais discusses the limitations imposed on electronic searches conducted by the Polish competition authority by means of a decision of the Polish competition court. Alexandr Svetlicinii analyses a judgement of the Croatian Constitutional Court which imposes additional burdens on the competition authority in terms of showing anti-competitive effects of price-fixing agreements.

The issue concludes with three conference reports and a book review.

I would like to thank all who contributed to this issue of YARS. My special gratitude goes to all peer-reviewers.

Enjoy reading!

Munich, 15 December 2018

Maciej Bernatt
University of Warsaw
YARS Volume editor

In Memoriam of Professor Irena Wiszniewska-Białecka

Professor Irena Wiszniewska-Białecka died on 23 May 2018 at the age of 71. She was a lawyer, an outstanding academic, long term judge of both Polish and European Union courts, a member of our circle, a fair and wise person, a close friend to many of us.

We would like to start these Memories of Professor Irena Wiszniewska-Białecka by focusing on her exceptional carrier. It started in 1969 – immediately after graduating from the Faculty of Law and Administration of the University of Warsaw – when she joined the Institute of Legal Science of the Polish Academy of Science as an academic. It is there that she gained her Doctorate in 1976 on the basis of a thesis entitled *Legal instruments of the implementation of inventive projects*. From the outset, she placed herself under an intensive continued education and research programme. In 1976, she took part in the Columbia Summer Program in American Law at the University of Leyden. During the winter term of 1980–1981, she completed a 6 monthly research internship at the Max Planck Institute of Foreign and International Patent, Copyright and Competition Law in Munich. She returned to this Institute in the academic year of 1985–1986 for a yearly research stay as a holder of the Alexander von Humboldt Foundation Scholarship. As a result of her research project, she wrote a book entitle *Cartel law borders of the legality of patent licences*. On the basis of this work, she has gained the academic grade of doktor habilitowany (habilitated doctor). She accumulated much professional recognition at home and abroad for both of her monographs, and over 50 articles in collective publications as well as Polish and foreign periodicals concerning industrial intellectual property rights and competition law. Professor Irena Wiszniewska-Białecka was without a doubt among the most important experts on public and private competition law and industrial property law in Poland. Among the highlights of her carrier was receiving from the Polish President the title of a professor of legal science in 2001 and full professor in 2010.

We will remember Professor Irena Wiszniewska-Białecka not just for her outstanding academic work, including several ground-breaking publications, but also as an accomplished practicing lawyer. While actively engaging in

academic work, she started her practical endeavours with a yearly internship in the legal practice of Professor Alois Roller in Lucerne. Between 1992–2000, she worked of counsel for the law firm Wardyński and Partners. She used her knowledge to support public authorities also. Between 1981–1984, she was a member of the Economic Reform Commission concerning the self-government of public enterprises and antimonopoly regulation; in this capacity, she was among the co-authors of the basic assumptions and the draft of the first Polish Antimonopoly Act (of 1987); she also partook in the works on the overall reform of the Polish economy between 1988–1993. In 1991–1992, she acted as a legal advisor to the President of the Polish Antimonopoly Office, as well as a part of the commission preparing the draft of the new Polish Competition Act (of 1993). She was a member of the Polish Group AIPPI (Association for the Protection of the Industrial Property), Head of the Polish branch of the International League of Competition Law, and the President of the Polish Association of Competition Law (1995–1998).

It is not surprising therefore that her accumulated academic achievements combined with extensive practical experience have given fruit when in the year 2000, the Polish President appointed Professor Irena Wiszniewska-Białecka as a judge of the Supreme Administrative Court, a position which she held from 22 February 2001 until 30 April 2004. This was followed by the decision of the Polish and European authorities to appoint Professor Irena Wiszniewska-Białecka as a judge of the Court of First Instance (currently the General Court) of the EU, a decision which was welcomed and fully supported by both academic circles and legal practitioners. Her tenure in that role, held between 2004–2016, was outstanding and constituted the culmination of her carrier. The Polish President appointed her once again on 12 January 2017 as judge of the Supreme Administrative Court (Economic Chamber); she retired on the 7 July 2017.

We would like to draw attention to the fact that Professor Irena Wiszniewska-Białecka was honoured with the Cavalier's Cross (2003) and Officer's Cross (2011) of the Polish Order of Polonia Restituta for her outstanding academic achievements as well as for her contribution to the creation of a democratic Polish state and civil society.

Many more than those who signed these Memories know that Professor Irena Wiszniewska-Białecka has always set her path towards, and managed to achieve, ambitious goals both in the academic and legal practitioners' realms. Ultimately, the results of her research work as well as the experiences she gathered as a barrister and legal advisor have opened before her the judiciary path also, a role she excelled at.

It is also necessary to point out her character traits which have defined her professional life as well. She was an ambitious person who was also very hard

working – possibly too much so. She expected the most of herself, but she also had high expectations for her co-workers, doctorial students and authors of works she reviewed. She was stern but fair. Especially during the first period of the III. Republic of Poland (the 1990ties), she was eager to share her knowledge with the Polish Antimonopoly Office and the Antimonopoly Court; she took part in the preparation of publications on the harmonisation of Polish competition law with that of the EU. We are left with the memories of heated discussion, often in the early hours, often on the phone. In recent years, we greatly appreciated her work on the Scientific Council of the Yearbook of Antitrust and Regulatory Studies (YARS®).

Socialising with Irena was also a pleasure – she was always courteous, tactful and elegant.

Losing Professor Irena Wiszniewska-Białecka was more than just losing an outstanding lawyer and co-operator, we also lost a friend.

Anna Fornalczyk
Stanisław Gronowski
Tadeusz Skoczny
Stanisław Sołtysiński

A R T I C L E S

Empowering the 'Unempowerable'. Behavioural Insights into Informing Consumers about Internet Access Services in the European Union under Regulation 2015/2120

by

Andrzej Nałęcz*

CONTENTS

Abstract

The European consumer policy relies on the ideal of consumer empowerment, which involves providing all consumers with detailed information on the goods on offer. This policy also applies to the electronic communications sector, and

* Dr Andrzej Nałęcz, Assistant Professor, Faculty of Management, University of Warsaw; e-mail: ANalecz@wz.uw.edu.pl. Article received: 30 May 2018; accepted: 2 November 2018.

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empowering consumers who are the end-users of internet access services. The author reviews behavioural law and economics literature that pertains to consumer empowerment and applies the resulting insights to interpret Article 4 (1) of Regulation 2015/2120 laying down measures concerning open internet access in a way that would truly empower the sophisticated consumers. The author also proposes advising or obliging the providers of internet access services to label those services to provide even the unsophisticated consumers with meaningful and understandable information.

Resumé

La politique européenne des consommateurs repose sur l'idéal de l'autonomisation des consommateurs (*consumer empowerment*), qui consiste à fournir à tous les consommateurs des informations détaillées sur les produits proposés. Cette politique s'applique également au secteur des communications électroniques et habilite les consommateurs qui sont les utilisateurs finaux des services d'accès à Internet. L'auteur passe en revue la littérature sur les analyses économiques du droit relative à l'autonomisation des consommateurs et applique les idées qui en résultent pour interpréter l'article 4, paragraphe 1, du règlement 2015/2120 établissant des mesures relatives à l'accès ouvert à l'internet pour le bénéfice des consommateurs sophistiqués. L'auteur propose également de conseiller ou d'obliger les fournisseurs de services d'accès Internet à étiqueter ces services afin de fournir aux consommateurs moins sophistiqués des informations utiles et compréhensibles.

Key words: consumer empowerment; sophisticated consumers; unsophisticated consumers; internet access services; labelling contracts; open internet.

JEL: K23

I. Introduction

The main overall objective of the EU Consumer Policy Strategy is to empower consumers, specifically through choice, information and awareness of consumer rights and means of redress. The EU also aims to integrate consumer interests into key sectoral policies. In the article I focus on the issue of providing all consumers in the EU – both the sophisticated and the unsophisticated ones – with relevant and meaningful information pertaining to internet access services. Using insights from behavioural law and economics literature I analyse the concept of consumer empowerment and apply the resulting conclusions to, firstly, interpret Article 4 (1) of EU Regulation

2015/2120[1], and secondly, to formulate policy proposals. I specify in detail the obligations of internet access providers under Article 4 (1) of Regulation 2015/2120, serving to truly empower the sophisticated consumers. I also propose the issuing by national regulatory authorities of guidelines advising internet access providers to use a universal labelling system to empower also the unsophisticated consumers, by providing them with basic, understandable information on the real-world functionality of internet access services. In order to update the ideal of consumer empowerment, by dividing consumers into sophisticated and unsophisticated ones, I intentionally depart from the concept of the average consumer as formulated in the judgments of the Court of Justice of the European Union.

While the article relies to some extent on data from the Polish internet access market, the conclusions will be applicable in any EU Member State enforcing Regulation 2015/2120.

II. Behavioural insights into the ideal of consumer empowerment

The extent to which European consumer law relies on the ideal of consumer empowerment is deeply rooted in information economics, which concentrates on reducing the information asymmetry between sellers and buyers (Lissowska 2010, 59–60). While the concept of the average consumer, formulated by the Court of Justice in C–210/96 *Gut Springenheide*, does not lie at the core of European consumer law as such, it seems to unduly influence the legislation pertaining to consumer empowerment and its application. In *Gut Springenheide*, the Court described an average consumer as one who is 'reasonably well-informed and reasonably observant and circumspect'.[2] While the Court recently showed some signs of 'pushing forward interpretations rendered in prior case law' (Schebesta and Purnhagen 2016), specifically in C–195/14 *Teekanne*,[3] the concept of the 'reasonably well-informed' consumer still influences consumer policy. However, in reality consumers are not

[1] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union. ELI: http://data.europa.eu/eli/reg/2015/2120/oj.

[2] CJ judgment of 16.07.1998, case C-210/96 *Gut Springenheide and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt*, ECLI:EU:C:1998:369.

[3] CJ judgment of 04.06.2015, case C-195/14 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG*, ECLI:EU:C:2015:361.

a uniform group. Already in the 1970s, Geistfeld, Sproles and Badenhop observed that consumers may be divided into two groups – the unsophisticated and the sophisticated. An unsophisticated consumer is one who uses only easily accessible and superficial measures to determine the extent to which a product possess high level characteristics (that is, the most abstract and general characteristics of a product). Such consumers are not interested in the lower level product characteristics. A sophisticated consumer is one who looks at more objective information to estimate high level product characteristics, which includes acquiring information on and analyzing its more detailed and measurable lower level characteristics (Geistfeld, Sproles and Badenhop 1977). Consequently, the practical viability of the policy of uniformly empowering all consumers by providing detailed information on goods through disclosure obligations, specifically in form contracts, is presently questioned by many scholars, especially those in the field of behavioural law and economics. They generally observe that 'Providing information to consumers without paying attention to the format, quantity, and effectiveness of the disclosure can be inefficient or have adverse effects' (Faure and Luth 2011, 346) and that 'The ideal of the consumer prudently deciding on the basis of complete information comes with costs that are prohibitively high' (Engel and Stark 2015, 108). The behavioural positions are reviewed below.

It is unrealistic to expect all consumers to read the entire contract with all its terms (Ayres and Schwartz 2014, 552). The common assumption that consumers do not read standard form contracts is often based on anecdotal evidence (Hillman and Rachlinski 2002, 436; Ben-Shahar 2009, 2; Bar-Gill and Ben-Shahar 2012, 117). However, this view is also strongly supported by concrete studies conducted in the last ten years, which show that, firstly, many consumers do not even attempt to read a standard form contract, and, secondly, almost all of those who read it, do so perfunctorily, spending only a token amount of time on the activity (Stark and Choplin 2009, 677–688;[4] Eigen 2012;[5] Bakos, Marotta-Wurgler and Trossen 2013;[6] Obar and Oeldorf-

[4] Of the 91 undergraduate students who participated in the study, 95.6% signed a consent form they were presented with, styled after a form contract, even though it contained extremely disadvantageous, fraudulent terms. Only four participants read enough of the consent form to spot its fraudulent content and refused to sign it. Of the 87 participants who signed the form, 86.2% did not even look at it and 10.3% looked so briefly that they could not have read it – their average reading time was 2 seconds (Stark and Choplin 2009, 681).

[5] Of the 1 003 subjects who had the opportunity to read the contract supplied in the study, 28.9% did not read it at all. The mean time spent reading by the remaining participants, excluding three outliers, was just 54.1 seconds (Eigen 2012).

[6] Based on their study, the authors estimate the fraction of retail software shoppers who access End User Licence Agreements at between 0.05% and 0.22% (Bakos, Marotta-Wurgler and Trossen 2013, 35).

Hirsch 2016).[7] On the other hand, some scholars claim their surveys show that in fact more people read contracts than is usually assumed – if not at the time of contracting, then at least after the fact (Becher and Unger-Aviram 2010). However, these surveys come with many limitations,[8] as respectively does a survey carried out for the European Commission in 2010, which also indicated a higher percentage of consumers reading contracts than real-world studies show (EC 2011).[9] There appears to be a notable difference between results gained from surveys, like those of the EC, and Becher and Unger-Aviram, and from an analysis of people's actual behaviour, like that of Stark and Choplin, Eigen, Bakos, Marotta-Wurgler and Trossen or Obar and Oeldorf-Hirsch. One is led to speculate that while consumers realise they should read standard form contracts, and therefore tend to claim that they do it when queried about a hypothetical situation, they usually act differently in the real world, when faced with the practical transaction costs and discomfort related to actually reading contracts. This apparent paradox has been noted in the literature – people may not be willing to labour to acquire information even when they know they need it (Ben-Shahar and Schneider 2011, 710). As Korobkin put it, 'The problem that buyers face of choosing among product alternatives (…) can be reframed as a problem of balancing the desire to make accurate choices with the mutually exclusive desire to minimize effort' (Korobkin 2003, 1222).

The idea to provide the consumer with important information in the contract is not invalid in itself. The problem is the amount of information provided, and the way it is presented. Stark and Choplin very appropriately describe it as user-unfriendly (Stark and Choplin 2009, 655–656). Subjecting the consumer to more information than she can process leads to an information overload (Lissowska 2010, 61). This overload is caused by an overabundance of both the contract terms themselves and of the characteristics of the product on offer. Firstly, for a person without technical and legal expertise, 'distinguishing between relevant

[7] 74% of the participants of the authors' study skipped reading the provided Privacy Policy altogether. Those participants who did read the policy, which measured 7 977 words, on average spent only 73 seconds doing so, while it is estimated an average person can read 250–280 words per minute (Obar and Oeldorf-Hirsch 2016, 2, 11, 15).

[8] The authors themselves realise the limitations of their research – they carried out a study among university students, including law school students, pursuing bachelor's and master's degrees. The authors admit that such a sample population is not representative of the general population. Specifically, the students' responses were probably shaped by their skills, education and the perceived expectations of their professors conducting the study (Becher and Unger-Aviram 2010, *supra* notes 62-63, at 225–226).

[9] According to the survey, 31% of consumers carefully and completely read their most recent service contract (e.g. electricity, bank, telephone), and 42% of Internet shoppers did so (EC 2011, 10).

and irrelevant contract terms is a very demanding task' (Becher 2007, 174). Consumers 'do not even know what information they should be looking for or whether they need to be looking for information in the first place' (Stark and Choplin 2009, 659–660), and 'Even when buyers do notice a specific contract term, they will not necessarily be able to evaluate its salience' (Korobkin 2003, 1234). Secondly, the number of product attributes buyers are likely to consider when making decisions is perhaps as low as five (Korobkin 2003, 1227). The more information consumers are presented with, the simpler their choice strategies become, resulting in sub-optimal decisions (Korobkin 2003, 1226–1227;[10] Armstrong 2008, 131). Some consumers may even resolve a complicated choice situation by making a random move (Engel and Stark 2015, 113).[11] Somewhat paradoxically then, providing the consumer – especially the unsophisticated one – with an exhaustive contract and a comprehensive list of product attributes may lead to adverse effects for consumer empowerment. Offering too much information may be dysfunctional in that it makes the purchase decision more difficult and time-consuming to reach. It may even induce the consumer to either completely disregard the information given (leading to a random choice) or to consider it only selectively, with no guarantee that the objectively critical product attributes will be included in the consumer's subjective selection (Jacoby 1984, 435; Grundmann 2002, 286). This selectiveness of consumer attention has important policy implications. Policymakers should concentrate not on how much information is provided but on which information is accessed in practice (Jacoby 1984, 435).

The selectiveness and limits of consumer attention can be exploited by sellers (Jacoby 1984, 435; Korobkin 2003, 1233; Persson 2018, 102). Firms can use advertising to manipulate the attention of prospective buyers, making them pay attention to product attributes which they otherwise would not consider salient (Korobkin 2003, 1241). Advertising, also disguised as advice offered to the buyer by an agent of the seller at the point of sale (Engel and Stark 2015, 115–116; Stark and Choplin 2009, 662–666), might have the effect of distorting the consumer's perception of what the truly important attributes are. Consumer preferences may thus be adversely influenced, leading to an inefficient purchase decision (Ben-Shahar 2009, 16; Lissowska 2010, 60).[12]

[10] See also the decision theory literature referenced in Korobkin 2003, *supra* notes 76–77 and 81–82, at 1226–1227.

[11] See also the studies referenced in Engel and Stark 2015, *supra* note 27 at 113.

[12] An example of such manipulation is the use of maximum speed values as the basis of the advertised download speed of the internet access services (for examples of advertised speed definitions on the Polish market see Nałęcz 2017); in practice, information about the normally available and minimum speeds is more important in making an informed decision on which internet access service to buy. Such information, however, is not exposed in advertisements.

In any case, advertisers can only be trusted to point out the good aspects of a product (Armstrong 2008, 103). Thus, consumer policy should aim to 'provide product information which it is not in the industry's interest to provide itself' (Armstrong 2008, 142–143).

Behavioural law and economics literature provides valid arguments against the assumption that every consumer's attention can be focused on all the contract terms and on all the attributes of a product. The goal of consumer policy should be to provide the sophisticated consumer with all the information she requires to make an informed decision,[13] while at the same time to draw the attention of the unsophisticated consumer to the very few, most important product attributes, presented in a truly and universally understandable manner, allowing the consumer to understand her future user experience. Bar-Gill and Ben-Shahar make a valid point when they observe that 'disclosure mandates (…) misconstrue people's objectives, thinking of consumers as guzzlers of technical information, not as users of products. They tell people stuff about matters that most people have no experience with, which require a theoretical framework to analyse' (Bar-Gill and Ben-Shahar 2013, 118).[14] It is unrealistic to expect consumers to educate themselves about this framework before making a purchase decision, as they have neither the time nor the resources to do so. Ben-Shahar also points out that even a relatively simple contract is too complicated for a consumer, given existing levels of literacy (Ben-Shahar 2009, 13).[15] Literacy levels are not the only argument against assuming all consumers benefit from being provided with detailed information. The EU survey of 2010 revealed very low arithmetic skills among European consumers

[13] The traditional, neoclassical view is that market forces in competitive markets discipline sellers into providing efficient contract terms for all buyers (since the sophisticated consumers allegedly perform contract term control to the benefit of all consumers, including the unsophisticated ones), thus making unnecessary any regulatory tools that seek to inform unsophisticated consumers. This view is questioned in the literature. 'Businesses can afford to lose the small cadre of readers and dictate onerous terms to the nonreaders. Further, in more competitive climates, businesses may be able to identify readers and offer them more favorable terms' (Hillman 2006, 843). 'Exploiting the ignorance of the vast majority of consumers might be more lucrative for some businesses than competing for the smart consumers' (Hillman and Rachlinski 2002, 443).

[14] For a similar argument see Stark and Choplin 2009, 661.

[15] It is beyond the scope of this paper to present a complete overview of the literature on literacy levels. However, recent studies in various EU Member States show that cognitive ability and literacy levels are lower than previously assumed. The results of a survey presented in 2011 in Germany show that 14.5% of those aged 18 to 64 are functionally illiterate (that is, they can write or read and understand at most a single sentence). A 2011 survey in France identified 11% of the adult population as functionally illiterate. According to a British 2002/2003 survey, 16% of English people aged between 16 and 65 have low reading and writing skills (Grotlueschen, Riekmann and Buddeberg 2014, 56–60).

– only 45% of respondents answered correctly to all three simple questions, requiring very basic arithmetic skills (EC 2011, section 14).[16]

It is not likely that all consumers can be empowered to the extent that they know and understand all their rights, all the obligations of sellers and all the attributes of the products on offer. Such empowerment only applies to the very few sophisticated consumers. The law and consumer policy should also cater to the much more numerous, unsophisticated buyers, for whom the costs of deciding based on complete information are simply too high (Engel and Stark 2015, 108). They would benefit from 'rules that reduce complex information to information which is simple enough to be processed by [them]' (Grundmann 2002, 287). The information should be broken down into easy, modular pieces, 'perhaps to the point of using symbols instead of sentences' (Ben-Shahar and Schneider 2011, 729, 743).

III. Empowering sophisticated consumers through the law – disclosure obligations under Article 4 (1) of Regulation 2015/2120

1. Introduction to disclosure obligations under Article 4 (1)

Regulation 2015/2120 seeks to empower end-users through effective provisions enabling them to make informed choices about internet access services.[17] Foremost among those provisions is Article 4 (1) of Regulation 2015/2120, under which providers of internet access services shall ensure that the contract specifies at least the characteristics of the service listed in points (a) through (e). This information must also be published.

The scope of the information is considerable. Under Article 4 (1) (a), the contract must provide information on how traffic management measures applied by the provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data. Under Article 4 (1) (b), the contract must clearly and comprehensibly explain how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services. Under Article 4 (1) (c), the

[16] The questions were: 1) The same flat-screen TV is on sale in both shop A and B. Which one is cheaper? 2) Thinking now about savings or deposit accounts, which of the following would be the best interest rate? 1%, 2%, 3%, 4%; 3) A family is charged interest at 6% per year on a 50000 euro home loan. How much is the interest for the first year? € 300, € 3000, € 5000, € 6000 (EC 2011, *supra* note 12 at 7).

[17] Regulation 2015/2120, recital 19.

contract must clearly and comprehensibly explain how any services referred to in Article 3 (5)[18] to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user. Under Article 4 (1) (d), the contract must clearly and comprehensibly explain the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3 (1). Finally, under Article 4 (1) (e), the contract must clearly and comprehensibly explain the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d). All the above information is included in the already long and complicated contract on the end-user's electronic communications service.[19]

From the point of view of the sophisticated consumer, contractually providing meaningful, realistic and accurate information on the internet access service allows it to be qualified as a search good – one the qualities of which may be assessed at the moment of sale – rather than an experience good, the qualities of which may only be assessed after purchase.[20] The information will play this important role only if it is presented in a comprehensible form. Below in part III I propose an interpretation of Article 4 (1) that seeks to achieve this comprehensibility for the benefit of the sophisticated consumers.

2. Information on the impact of traffic management measures

Unlike the following points (b) through (e) of Article 4 (1), point (a) does not require the relevant information to be provided in a clear and comprehensible manner. One is tempted to speculate that even the European

[18] These are the so-called 'specialized services', allowing optimised access to specific content, applications or services.

[19] For example, the standard form contract of the Polish electronic communications provider Netia SA contains almost 9300 words, which translates into an 18 page single spaced document when formatted in a 12pt Times New Roman font (https://www.netia.pl/files/pomoc/dokumenty_2017/regulamin_swiadczenia_uslug_przez_spolki_grupy_netia_druk_1711.pdf).

[20] On the role of providing meaningful information in transforming experience goods into search goods see Grundmann 2002, 285.

lawmaker did not believe it possible to explain an issue as complicated as traffic management in a way that would be both relatively detailed and easy to understand. Studies show that people without computer science or related backgrounds have only a very basic idea of how the internet works, treating it as a 'magic black box' handling the exchange of information (Kang et al. 2015). Trying to explain in the contract even the basic technical aspects of traffic management to an otherwise sophisticated consumer without computer science education would be an exercise in futility. Such attempts are bound to create confusion rather than empowerment. For example, in order to explain how traffic management measures could impact the quality of internet access services, consumers would have to be informed if the provider distinguishes between various categories of traffic, and if so – what these categories are, how traffic is assigned to a specific category and how each category is treated under various circumstances. This information should be accompanied by an explanation of how traffic on the internet works, including, but not limited to, packet data transmission, queueing in routers, and congestion. Such information would go into technical detail beyond the grasp of anybody without a computer science education. It would also require the provider to amend the contract each time it introduced new traffic management measures, which would be extremely inefficient. Therefore, the information provided to end-users, and especially to consumers, must necessarily be less detailed, to the point of losing any objective salience. An overview of contracts used by Polish internet access service providers shows that usually they simply quote Article 3 (3) and (4) verbatim. Such a solution seems better than the extremely technical alternative.

It would be best if Regulation 2015/2120 did not require internet access service providers to provide end-users with information on traffic management. After all, under Article 3 (3) and (4), traffic management has been rather strictly regulated and it is up to the regulators to ensure that internet access service providers do not use measures contrary to the principles and rules set out in the provisions mentioned. As it is, consumers are only very broadly – and meaninglessly – informed about the issue. However, as has been indicated above, there is no better alternative.

3. Information on the influence of volume limitations and quality of service parameters

The contract should provide information allowing the end-user to understand the implications of the internet access service's parameters to the usage of internet services and applications (BEREC 2016, section 137). Objectively

estimated download and upload speed, and delay requirements of various popular internet services and applications should be presented. The regulator may indicate these speed and delay values to be replicated by internet access service providers in the information presented to consumers. It is currently estimated by EU regulators that: ultra-high definition video requires an actual download speed[21] of 25 Mb/s; high definition video – 6 Mb/s; standard definition video 2 Mb/s; real-time on-line games – 2 Mb/s; non-real-time on-line games – 1 Mb/s; website browsing – 1 Mb/s; music streaming – 0,5Mb/s; voice-over-Internet-Protocol (VoIP) conversations – 64 Kb/s. Most applications and services require a delay no higher than 150–200 ms, while real-time on-line games require a delay no higher than 30 ms.[22] The explanation should be simple enough for a consumer with reasonable arithmetic skills to calculate what content she and the other members of her household would be able to use at the same time. Given the popularity of the strictly digital distribution of media such as games (Lee, Holmes and Lobe 2016), the contract should also allow the end-user to estimate how long it would take to download the files related to such media, e.g. in sizes of 5, 10, 25, 50 and 100 GB. The end-user should be instructed to make the relevant calculations based on the normally available speed of the internet access service, rather than the maximum speed.[23]

If the internet access service comes with volume limitations, the contract should allow the end-user to easily calculate for how long various services and applications could be used before the volume limitation is reached. This may be achieved by explaining how many minutes of watching video (ultra-high definition, high definition, and standard definition), streaming music or playing real-time on-line games may be enjoyed under various volume limitations, e.g. 100 MB, 1 GB etc.

4. Information on the impact of specialised services

The end-user should be informed if and how the activation of specialised services affects her own internet access service (BEREC 2016, section 122). For example, it should be explained that using a specialised service will reduce the maximum and normally available speeds of the internet access service, or that delay will be increased. This information must be included only in contracts which actually include both internet access and specialised services (Piątek 2017, 285).

[21] Rather than a maximum speed.

[22] Data based on: Ofcom 2016, 1; UKE 2014, 36–37.

[23] For an explanation of internet access speeds, see III.5 below.

5. Information on download and upload speeds

The minimum speed is the lowest speed that the provider undertakes to deliver to the end-user (BEREC 2016, section 143; Piątek 2017, 289–290). That initial sentence notwithstanding, BEREC indicates that non-conformity of performance regarding the agreed minimum speed occurs when the actual speed is significantly, and continuously or regularly, lower than the minimum speed (BEREC 2016, section 143). Such an interpretation of the provision of Article 4 (1) (d) is unacceptable. There can be no doubt that an end-user who read the contract would understand the term 'minimum speed' in accordance with its natural, linguistic meaning. 'Minimum' means the least quantity assignable, admissible or possible.[24] Allowing for the actual speed to be lower than the value described as the minimum removes all meaning from that description. One is tempted to speculate that such convoluted interpretations of otherwise clear and understandable terms are one of the forces acting against consumers reading contracts in the first place. Why read when even the simplest terms are not what they appear? Therefore, I propose a strict, linguistic interpretation of the term 'minimum speed', with only one caveat regarding the provider's liability – the provider should not be liable for delivering an actual speed lower than the minimum for reasons outside its control, for instance in cases of *force majeure*.

The normally available speed is the speed that an end-user could expect to receive most of the time when accessing the service (BEREC 2016, section 147; Piątek 2017, 291). This is by far the most important speed parameter from the point of view of a consumer, since it determines the ability of the internet access service to handle traffic generated by the end-user's internet services and applications in standard, everyday situations. This speed should be explained, firstly, by a numerical value, and secondly, by an indication of the time of day when it is available. Sociological literature confirms anecdotal assumptions and indicates that traffic generated by private use of the internet increases after the end of working hours in the late afternoon, peaks in the evening and decreases at night (Vilhelmson, Thulin and Elldér 2017). Thus, in consumer contracts, the normally available speed should be required to be available for most of the duration of the afternoon and of the evening, when most consumers use the internet. Any other interpretation of the provision of Article 4 (1) (d) would be contrary to the naming of the speed as 'normally available' and it would go against the purpose of Article 4, which is to provide end-users, including consumers, with meaningful information. It is certainly

[24] Definition from the Merriam-Webster on-line dictionary of English, https://www.merriam-webster.com/dictionary/minimum.

not enough to specify that this speed is available more than 12 hours per day (or more than 50% of the day), since that does not indicate what speed is at the disposal of the end-user during peak hours. Even more unacceptable would be defining this speed as available during most of the billing cycle, since that would allow for lower speeds for days or even weeks at a time, which would be utterly unreconcilable with the idea of a 'normally available' speed – 'transparency amounts to more than mere calculus. It must be *meaningful* transparency' (van Boom, 2011, 373).

The maximum speed is the one that an end-user could expect to receive at least some of the time, for example at least once a day (BEREC 2016, section 145). The moment when this speed becomes available may occur during the hours of reduced traffic, specifically at night. Thus, the maximum speed is in practice the least important from the point of view of the end-user, since its availability typically will not coincide with her internet activity. However, this speed should indeed be realistically achievable in the service purchased by the end-user in whose contract the numerical value of the speed was specified (Piątek 2017, 290). That means that it may not be assigned a numerical value equal to the theoretical maximum speed achievable by a given network technology (for example fibreoptic cable) only under artificial testing conditions, for example exclusively in laboratory testing. Informing an end-user, especially a consumer, of such a value would be misleading rather than meaningful.

The advertised speed is the one the provider uses in its commercial communications, including advertising and marketing (BEREC 2016, section 150; Piątek 2017, 293). For the information on the advertised speed to be meaningful rather than misleading, several conditions must be met. Firstly, the advertised speed should be rooted in reality. It may not be assigned an abstract numerical value. In no case should it be higher than the maximum speed actually available to at least some of the end-users in the provider's real-world network – most of all it should not be specified as equal to the theoretical maximum speed of a given network technology. Secondly, different numerical values might have to be used in direct marketing and in other forms of marketing. Direct marketing involves targeting a specific individual in order to influence her purchase decision by satisfying her individual preferences (Lipowski 2016, 103–104). Such a person should be informed of an advertised speed that is no higher than the maximum speed she would be able to utilise after signing the contract, for instance at the end-point at her disposal in the case of internet access at a fixed location. In other forms of marketing, the advertised speed should be based on the maximum speed achievable in the area where the service is offered (which might be of a national scale).

The estimated maximum speed (in a mobile network) is the speed that should realistically be available to the end-user in the service she purchased, in various locations and under real circumstances (BEREC 2016, section 153; Piątek 2017, 294). Just like the maximum speed in a fixed network, it may not be specified as equal to the theoretical maximum speed of a given network technology. Different realistically estimated maximum speed values should be presented for the different technologies used in the provider's network (for example GPRS, EDGE, HSPA+, LTE).

It is unfortunate that Regulation 2015/2120 does not expressly require providers to inform end-users that one of the main differences between internet access in a fixed network and in a mobile network is the fact of the lack of a relatively predictable, normally available download and upload speed in the latter. For consumers to make truly informed decisions on which service to choose in a competitive market, they would have to understand this. Provider's disclosure mandates to that effect could and should be legislated by the individual Member States.

6. Information on the remedies available to consumers

Information on the remedies available to consumers under national law in the event of a discrepancy between the actual performance of the internet access service and its performance indicated in the contract should provide the consumer with practical, useable knowledge on what to do when her service acts up. A simple enumeration of the remedies, devoid of an explanation of how to use them, would not be sufficient, since Article 4 (1) (e) specifically calls for an explanation of the remedies. Therefore, the contract should specify whom and how to contact (for example the provider, a court, the regulator), what claims to submit (for example claims for: a price reduction, early termination of the contract, damages, a rectification of the non-conformity of performance – or any other claims enforceable under national law; BEREC 2016, section 158) and how to submit them (for example in writing or using an on-line form), how long it will take to settle the case, and whether any additional costs will be incurred by the consumer (for example the costs of proceedings). All this information should be provided in a way understandable to a person without an education in law, since the lack of understanding of the law is one of the reasons consumers often forgo the use of legal remedies (Pietraszewski 2010, 41).

7. Publishing information specified in Article 4 (1)

Article 4 (1) second subparagraph requires providers of internet access services to publish all the information referred to in the first subparagraph and elaborated upon above. This obligation is an important element of consumer empowerment, since it is meant to grant consumers access to all the information necessary to make an informed decision on the purchase and use of internet access services. The information should be disclosed to the public in a way that makes all of it readily available, specifically on the provider's website and at all its points of sale. Publishing will be meaningful only when the information is properly organised and presented. An analysis of the practices of Polish providers of internet access services shows that in many cases they publish documents on unsorted lists encompassing all the standard form contracts, promotional terms and conditions, and tariffs in use by the given provider. Thus, the consumer is presented with a list of dozens of documents with no clear indication which of them relate to the service she would like to purchase. In isolated cases, the names of services used by the provider in commercial communications, such as advertising, do not match the names under which those services are described in the published information, which is bound to sow confusion among consumers (Nałęcz 2017, 32–33).

The obligation specified in the second subparagraph of Article 4 (1) of Regulation 2015/2012 will serve the empowerment of sophisticated consumers only if the manner in which the relevant information is presented is taken into consideration. All the information on every distinct variant of a service offered by a provider should be clearly gathered in the same place, be it on a website or at a physical location.

IV. Empowering unsophisticated consumers through the insights of behavioural economics – labelling internet access services

What interests the end-user in practice is what the internet access service is really good for. Will it or will it not be good enough to serve the needs of the household? How the answer to that question translates into the technical characteristics of the service (including the numerical values of the download and upload speeds or packet delay) is not meaningful to the unsophisticated, marginal end-user – especially one who is a consumer. This assumption is

supported by data from the Polish internet access service market. A survey conducted in 2017 showed that 72,3% of the representative sample population of Polish consumers did not know the maximum speed of their internet access service at a fixed location.[25] Apparently, an overwhelming majority of Polish consumers are ignorant of the numerical values of internet access speeds. However, at the same time, they are aware of what their internet access service is good for in practice (UKE 2017, 22–24).

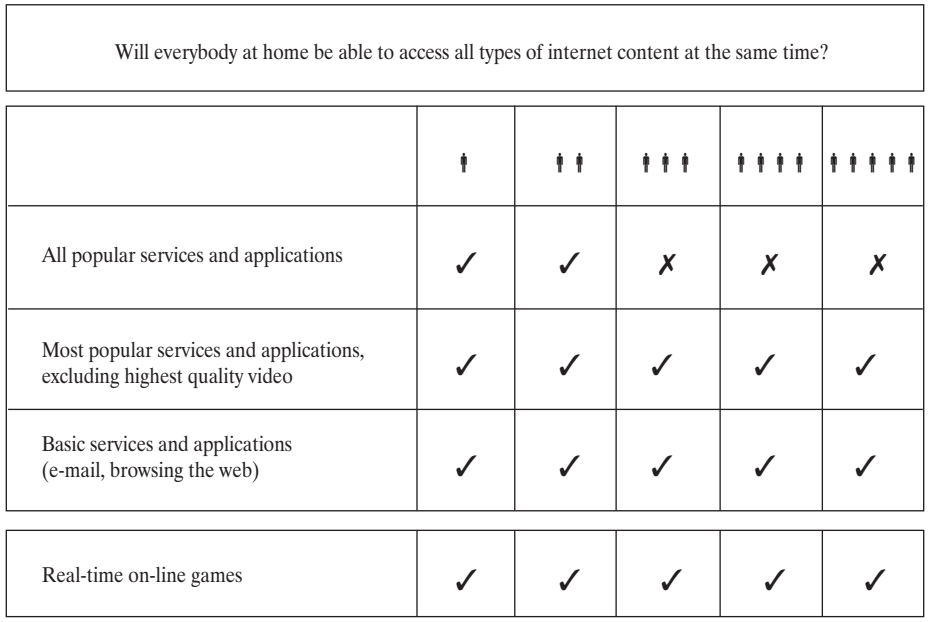
I propose introducing a system of clearly and prominently labelling internet access services with simple descriptions and symbols, indicating the real-world usefulness of a particular variant of the service for households with different numbers of members. By looking at the label, the consumer would be able to assess at a glance whether a given service would satisfy the needs of her household, without having to read the overcomplicated contract and educate herself on the theoretical framework needed to understand it (neither of which the consumer would most likely do at all) or having to rely on the one-sided information provided through the seller's advertising and by its salespeople (which might lead to an inefficient purchase decision, resulting from the overexposure of the practically meaningless maximum speed or estimated maximum speed of the service).

The label should be designed as a very simple and visually appealing table, using natural language and instinctively understandable symbols. Its columns would represent households with different numbers of members, with icons in the column headers showing the given number of people in a household. The table's rows would represent the ability to use internet services and applications with various requirements as to the quality of service parameters. For the sake of simplicity, there should be as few rows as possible, one indicating the ability to use only the most basic of internet content, such as sending and receiving e-mail and browsing websites, and another indicating the ability to access all content, including highest quality video. The introduction of an intermediate row would also be advisable, encompassing all internet content except for the most bandwidth intensive, highest quality video. Since real-time on-line games rely on low packet delay to a much greater extent than other internet content does[26], they would require a separate row in the table. Unambiguous, commonly recognised symbols at the intersections of the columns and rows – such as green ticks and red crosses – would indicate if a given set of services and applications would realistically be available to all the members of the household, all of them accessing the internet at the same time.

[25] The survey did not enquire after speeds other than the maximum.

[26] See section III.3 above.

Figure 1. An example of what a label proposed in the article might look like in the case of an internet access service in a fixed network with a normally available speed of 60 Mb/s and a delay of 30 ms



The functionality of the service visualised on the label should be based on all the relevant quality of service parameters realistically, reliably and predictably available in the provider's network. For the purpose of accessing internet content other than real-time on-line games, foremost among the relevant parameters is the normally available download and upload speed. Basing the information on the label on the maximum speed value – which, as was mentioned above, is also usually presented in the provider's marketing as the advertised speed – would defeat the whole purpose of meaningfully empowering unsophisticated consumers in making decisions on choosing their internet access services. A quality of service parameter that is met possibly as infrequently as once daily – which may be true of the maximum speed – is no proper basis for describing the utility of an internet access service to a consumer seeking to satisfy the real-world needs of herself and her household. Normally available packet delay should also be taken into account.

In the case of internet access services in mobile networks, the service's technical characteristics determine that a normally available speed may not be specified. This should be reflected in the label of such services – the label should indicate that it may not be determined whether the internet access service will

be able to reliably serve the needs of all the members of the household.[27] This could be done by using a question mark symbol in the table instead of a tick or cross symbol. Such a solution would benefit especially a consumer who is considering a choice between two internet access services – one provided in a fixed network, and the other in a mobile network. By comparing the labels of the two services, the consumer would instantly perceive the difference between their reliable, real-world ability to allow access to internet content. This would be possible even for a consumer without the theoretical framework needed to read and understand a standard form contract involving internet access services.

The label should be prominently displayed in any contract that includes an internet access service, and in all the documents published under the second subparagraph of Article 4 (1) of Regulation 2015/2120. The design and layout of the label should be uniform for all internet access services offered by all providers, in order to facilitate the comparison of various services by consumers.

The use of the labels proposed above may be recommended to the providers of internet access services by the soft law of national regulatory authorities. An obligation to label internet access services would have to be legislated either at the EU level, as an amendment to Article 4 of Regulation 2015/2120, or at the level of the individual Member States.

V. Conclusions

European policy seeks to empower consumers through choice, information and awareness of consumer rights and means of redress. The EU also integrates consumer interests into key sectorial policies, including the electronic communications policy. Regulation 2015/2120 aims to empower end-users, including consumers, through provisions enabling them to make informed choices about internet access services. Consequently, Article 4 (1) of Regulation 2015/2120 requires the providers of those services to disclose relevant information to end-users in the contract. A review of the behavioural law and economics literature provides arguments against blind faith in such

[27] Traffic in mobile networks may be unpredictable. Traffic hotspots occur when a cell in a mobile network experiences significant traffic, impacting the quality of service. Hotspots occur randomly across the network. A recent study showed that download hotspots offer average download speeds ranging between 0,9 Mb/s and 19,1 Mb/s (Nika et al. 2016). While many applications and services would be useable at the high end of the range, few would be at the low end.

disclosure mandates. Behavioural economics research supports the division of consumers into an unsophisticated majority and a sophisticated minority. Unsophisticated consumers rely on superficial information, such as that gleaned from advertising, when determining the high-level characteristics of the goods on offer and making purchase decisions, which often turn out to be inefficient. They lack the theoretical framework to read and understand contracts. Sophisticated consumers rely on detailed information, including data disclosed in the contract – however only if it is properly presented.

In the case of internet access services, consumer policy should seek to transform them from experience goods into search goods. This goal will be achieved only if certain conditions are met. In the article I proposed a comprehensive interpretation of Article 4 (1) of Regulation 2015/2120 that takes into account the need to describe the internet access service as an actual product, used in the real world by real people. Such an approach should encourage the sophisticated consumers to read contracts, leading to their true empowerment. I also proposed the labelling of internet access services for the benefit of the unsophisticated consumers, who are 'unempowerable' when the means of empowerment are traditional disclosure mandates, based on providing the consumer with more information than she can process, crammed into a contract so long and complex no average person can be realistically expected to read it, let alone understand all of it. The labels would serve to provide the unsophisticated consumers with information necessary to make a reasonably informed decision when choosing an internet access service, instead of having to rely on the cherry-picked characteristics of the service stressed in advertising. The use of the labels may be either recommended by the soft law of national regulatory authorities or made obligatory under new legislation.

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Life after *Menarini*: The Conformity of the Hungarian Competition Law Enforcement System with Human Rights Principles

by

Tihamér Tóth*

CONTENTS

Abstract

The corporate human rights development was fueled by the increasing amount of fines imposed on both European and national level. For many years, the jurisprudence of the ECtHR has classified administrative, including competition law enforcement as a quasi-criminal process during which human rights shall be respected to a certain extent. This paper strives to explain the evolution of competition law enforcement in Hungary, with procedural safeguards protecting undertakings having come close to the level of protection provided under criminal law. Of the numerous human rights relevant in competition law enforcement the

* Professor at Pázmány Péter Catholic University, Faculty of Law and of counsel at Dentons Réczicza Europe LLP; the author benefited from its experience as a former chairman of the Competition Council of the GVH, the Hungarian competition authority; e-mail: Tihamer.Toth@dentons.com. The author would like to thank Petra Láncos, András Kovács, Pál Szilágyi and Wouter Wils for their valuable comments. Article received: 22 August 2018; accepted 30 September 2018.

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paper will focus on institutional check-and-balances, and the appropriate level of judicial review. The thoroughness of the judicial review of administrative decisions resulting in fines is critical to the analysis of whether the traditional continental European structure of administrative law enforcement is in conformity with the principles of the ECHR. The narrow interpretation of the prohibition of judicial re-evaluation and judicial deference to competition authorities exhibiting significant expert knowledge is of central importance in this debate.

Résumé

Le développement des droits de l'homme liés aux entreprises a été alimenté par le nombre croissant d'amendes imposées aux niveaux européen et national. Pendant de nombreuses années, la jurisprudence de la Cour européenne des droits de l'homme a classé le processus administratif, y compris l'application du droit de la concurrence, parmi les procédures quasi pénales au cours desquelles les droits de l'homme doivent être respectés dans une certaine mesure. Cet article vise à expliquer l'évolution de l'application des lois de la concurrence en Hongrie, considérant que les garanties procédurales protégeant les entreprises se rapprochent du niveau de protection prévu par le droit pénal. Parmi les nombreux droits de l'homme pertinents dans le domaine de l'application du droit de la concurrence, le document se concentrera sur les aspects institutionnels et sur le niveau approprié de contrôle juridictionnel. La minutie du contrôle juridictionnel des décisions administratives entraînant des amendes est essentielle pour analyser la conformité de la structure traditionnelle de l'application de la loi administrative de l'Europe continentale aux principes de la Cour européenne des droits de l'homme. L'interprétation restrictive de l'interdiction de la réévaluation judiciaire et de la retenue judiciaire à l'égard des autorités de la concurrence faisant preuve de connaissances approfondies revêt une grande importance dans ce débat.

Key words: human rights; competition law enforcement at national level; the Hungarian Competition Authority; judicial deference; administrative judicial review; fines.

JEL: K23

I. Introduction

European and national antitrust rules are enforced in various procedural settings. Competitors or buyers may sue cartel members or a dominant undertaking for damages before civil courts. In these cases civil procedural rules apply, plaintiffs often benefit from special provisions promoting private

actions, i.e. rules on the presumption of damages.[1] Yet, the dominant form of enforcement in Europe is public interest driven. The process is managed by expert competition authorities integrated into public administration and enjoying various degrees of independence from the government. The third, *ultima ratio* option is provided by criminal law. In Hungary, just like in many European countries, public prosecutors may charge directors or other persons involved in a public procurement cartel. The sentence can be imprisonment up to five years. When criminal authorities go after an individual manager or employee, criminal procedural rules with numerous and well established safeguards will apply, including the right to remain silent. General legal principles, now enshrined in constitutions, international treaties, and the EU Charter of Fundamental Rights[2] protect presumably innocent persons against the potential intrusion of the State. Ever increasing antitrust fines imposed by competition authorities and accompanying 'public blame' campaigns have brought traditional administrative law enforcement closer to criminal procedures. The European Convention of Human Rights (hereinafter: ECHR) and the European Court of Justice (hereinafter: ECJ) have implanted more and more criminal law principles into administrative law. Nowadays, in many cases, authorities and attorneys spend more time on procedural issues, analyzing and developing human rights based arguments than substantial questions about the existence of a cartel.

In Hungary, ever since 1991 competition rules have been enforced by the Hungarian Competition Authority (officially: Gazdasági Versenyhivatal, hereinafter: GVH). The usual sanction is fines imposed on corporations. The procedural framework is an administrative one, the rights and obligations of the GVH and the undertakings are set out in general in the law on administrative procedures and specifically in the competition act (Act on the prohibition of unfair market practices and competition restriction, hereinafter: Tpvt.). Although the GVH investigates the actions of undertakings instead of natural persons, and sanctions may not include the restriction of personal

[1] Article 17 (2) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1 05.12.2014.

[2] The Lisbon Treaty, which entered into force on 1 December 2009, created in Article 6(2) TEU the legal basis for the EU to accede to the ECHR. According to Article 6(1) TEU, the Charter of Fundamental Rights of the EU shall have the same legal value as the Treaties. Moreover, its provisions shall be interpreted so as to guarantee at least the same level of fundamental rights protection as the ECHR. This implies that EU Courts shall take into account the case law of the Strasbourg court. This was an important development since the ECJ was reluctant to acknowledge the criminal nature of the EU Commission's antitrust procedures.

liberty, over the years, principles rooted in criminal law have found their way into administrative procedures.

This paper strives to contribute towards explaining this evolution, focusing on institutional check-and-balances and the appropriate level of judicial review. The 'criminalization of administrative procedures' may be gleaned from the detailed procedural provisions of the Tpvt. (i.e. rules on attorney-client privilege were codified for the first time in the Tpvt., just like provisions on dawn raids and the handling of electronic evidence), but more importantly, also from the changing attitude of law enforcement and judges reviewing the GVH's decisions. Fifteen years ago, arguments based on the ECHR and the case-law of the European Court of Human Rights (hereinafter: ECtHR) were summarily dismissed. By now, the procedural safeguards protecting undertakings have come close to the level of protection provided under criminal law. Furthermore, ECHR based arguments asserted by lawyers representing alleged cartel members have become more elaborate, as did the reasoning of administrative and judicial decisions. This earlier ignorance of Strasbourg case law in antitrust proceedings was also due to the lack of understanding of the ECHR by lawyers practicing competition law, both in the authority and attorneys.

The corporate human rights development was fueled by the increasing amount of fines imposed on both European and national level, the judgments of the ECtHR classifying administrative competition law enforcement as a quasi-criminal process, and the wealth of scholarly literature, often generated by practicing attorneys drawing their experience from representing alleged cartel members before and against competition agencies.[3] There is a changing public perception surrounding the stigma of being involved in a cartel emerging as a further factor contributing towards the criminalization of competition law. Although a 2006 amendment of the Criminal Code deemed public procurement cartels to be an offense in Hungary, thorough empirical research should be carried out to ascertain to what extent society considers restrictions on competition, especially cartels and abuses of a dominant position, to be a harmful act bearing a criminal, or quasi-criminal stigma.[4] It is

[3] The phenomenon of soft criminalization of administrative law enforcement is not peculiar to competition law. Indeed, seminal cases decided by the European Court of Human Rights involved tax law related sanctions. Many other legal fields, including administrative rules protecting the environment, could be natural candidates for human rights defenses. Actually, the largest ever fine imposed on a single undertaking in Hungary related to an environmental law infringement, also followed by criminal convictions (HUF 135 billion [EUR 421 million] was imposed on Magyar Aluminium in 2011).

[4] A research conducted in November 2011 by the Competition Law Research Center of the Pázmány Péter Catholic University showed that the most deterrent sanction is, first, the potential of a jail sentence for bid rigging cartels, the second would be individual administrative

difficult to recall stories about companies being boycotted by their customers or that directors or CEOs were dismissed because of their wrongdoings. Antitrust infringements simply do not carry the same stigma as robbery, or even a theft. The devil in cartels may seem obvious only to competition law experts. The price premium consumers pay while being unaware of the cartel, or the misery of potential consumers who cannot buy the overpriced product, look more like theoretical arguments than obvious facts. It does not help either that competition authorities do not prove the upward price effect during their investigations and decisions published do not identify the harm caused. Published calculations about the theft-like price effects of cartels are prepared ex-post based on general information; they serve mainly policy purposes of competition authorities, to make sure that their existence is not questioned by populist politicians.

In this paper I will structure my thoughts as follows. First, the legal provisions on the architecture of the GVH and the role of review courts will be presented. After that, I will summarize those provisions of the ECHR which are relevant for antitrust procedures. The special focus of this paper will be on the right to an independent and fair trial, including both the administrative side of the status of the GVH and its decision making body, the Competition Council, including the depth of review carried out by administrative courts. Third, I will recall the first GVH cases at the beginning of the new millennium that dealt with human rights issues. After 2000, following an amendment of the GVH, the establishment of a new cartel department, the hiring of case handlers with investigation experience, and a more aggressive fining policy[5] pursued by the Competition Council of the GVH, the stakes of antitrust procedures became much higher. As a result, the first references to the ECHR appeared in the arguments of the undertakings involved in cartel investigations. The next section of the paper focuses on the depth of judicial review, with special regard to the review of discretionary decisions. The thoroughness of the judicial review of administrative decisions resulting in fines is critical to the analysis of whether the traditional continental European structure of administrative law enforcement is in conformity with the principles of the ECHR. Finally, I will summarize why the present system of law enforcement is in line with the

penalties (which do not exist in Hungary), third comes corporate fines of up to 10% of the turnover and director disqualification (which does not exist either). 71% of the companies being fined reported that they put more emphasis on compliance (52 persons, mainly corporate lawyers and attorneys responded to the fairly long questionnaire).

[5] This is not to claim that high fines were unknown before. There were some cases in the '90s when the Competition Council imposed high fines. Yet, these were isolated decisions, overall, the level of fines was far from having a genuine deterrent effect.

requirements of the ECHR as well a further legal instruments with similar requirements, including the Fundamental Law (the constitution) of Hungary.

II. Competition law enforcement and judicial review in Hungary

The GVH conducts various procedures, some of which may result in infringement decisions with fines of up to 10% of the undertaking's turnover. About one third of all decisions handed down each year concern mergers and acquisitions. These procedures, based upon notifications submitted by undertakings, are quite different from antitrust cases. Procedural guarantees do not have an important role to play here; rather, companies seek an approval from the competition authority as soon as possible. It is also unlikely that an antitrust investigation terminated after accepting commitments proposed by companies should give rise to human rights concerns.[6] Finally, just like the Polish, the Dutch or the Italian competition watchdogs, the GVH also deals with unfair commercial practices that potentially affect competition.[7] Interestingly, even though the same provisions regarding fines apply here, and there are cases indeed where fines amount to tens if not hundreds of millions of HUF, or are set at the maximum level allowed by law, human rights concerns rarely if ever have arisen in misleading advertising procedures.

The GVH was established in 1990 as an independent institution reporting to the Parliament. Antitrust investigations into cartels and abuses of a dominant position start with an order issued by a case handler who is supervised by one of the vice-presidents of the GVH, nevertheless she or he enjoys much freedom in conducting the investigation phase of the procedure.[8] After several months (in a worst case scenario, after one or two years), case handlers conclude their investigation producing a report which they hand over, together with all the files of the case, to the Competition Council. The chairman of the Council appoints then a panel of three or five members of the Council. Members of the Competition Council are high level civil servants enjoying judge like independence when it comes to decision making. The proceeding competition council drafts a preliminary position, just like the EU Commission's statement of objections, to give parties the chance to defend their cases both in writing and orally. Parties have a couple of weeks

[6] In theory, they may or should, since commitments are born in infringement procedures, and although they are officially voluntary, undertakings are forced to act this way to avoid the bad publicity of an infringement decision as well as follow-up damage actions.

[7] Actually, these procedures account for about half of the decisions each year.

[8] The Legal Service department of the GVH.

to prepare their submission and to ask for a hearing. This hearing is conducted by the chair of the proceeding council. I should mention that in the early years of competition law enforcement these hearing were just like trials in courts, the council acting like a panel of judges, the case handlers like prosecutors and the companies like defendants. Due to efficiency reasons, this system changed. Nowadays hearings are not controversial in nature, according to our experience they do not provide much added value to the written submissions, the council members rarely take an active role in bombarding the companies with questions and comments. Nowadays, the decision is adopted after the hearing and delivered to the parties.[9]

Parties have 30 days to file their claims before the first instance review court. Judges reviewing administrative decisions, including those of the GVH, form a special division within the given court dealing with administrative law cases.[10] The judgment of the first instance court could be appealed before the Municipal Court of Law. Both courts reviewed the facts and legal questions of the cases. The first instance court routinely heard the same witnesses as the GVH. Finally, if there was a genuine legal issue disputed by the parties, they can submit an extraordinary appeal to the Curia, the highest judicial authority, where judges specialized in administrative cases hear competition law cases.[11] The court system responsible for reviewing administrative decisions is in a process of transformation right now. New procedural laws will enter into force in January 2019,[12] and there are plans to establish a new supreme court dedicated to administrative law, which would take over the existing duties of the Curia. Competition decisions will be reviewed by the Municipal Court of Law, which was previously the second instance court. With two, instead of the previous three court levels, final review is expected to take less time than previously.

For the sake of completeness, the role of the Constitutional Court should also be mentioned. The Constitutional Court is not part of the judicial system. Among others, it may review judgments if the constitutional rights of the parties are claimed to have been infringed. It will be shown that the

[9] Previously, the operative part of a final decision was adopted and read to the participants of the hearing with a short explanation at the end of the hearing, often recorded by the media, just like in court houses. The written version of the decision was delivered some weeks later.

[10] They also hear labor law cases.

[11] A report about administrative justice in Hungary, written by Péter Darák, the president of the Curia, can be found at http://www.aca-europe.eu/en/eurtour/i/countries/hungary/hungary_en.pdf. See also András Kovács and Márton Varjú: Hungary: the Europeanization of judicial review, http://real.mtak.hu/19916/1/theeuropeanizationofjudicialreviewhungaryepl.pdf.

[12] The new Administrative Court Procedural Act was adopted by the Parliament in February 2017. The new act, together with the new Administrative Procedural Act applicable from 1 January 2018, re-regulates judicial control of administrative procedures.

Constitutional Court had the opportunity to rule on various human rights issues where it followed the Strasbourg jurisprudence. Relevant provisions of the Fundamental Law include Article XXIV paragraph 1 of the Chapter on 'Freedom and responsibility' providing that every person has the right to have his or her case decided by administrative authorities in a reasonable time in an impartial and fair procedure.[13] The right to a fair judicial process is enshrined in Article XXVIII paragraph 1 of the Fundamental Law as the right to have criminal charges against a person or civil rights and obligations determined within a reasonable period of time in a fair and open trial by an independent and impartial court established by law. Paragraphs (2) and (4) incorporate the principles of *nullum crimen sine lege* and *nulla poena sine lege*. The similarity of these provisions entails that when the Constitutional Court interprets these provisions of the Fundamental Law, it will take into account the relevant jurisprudence of the ECtHR.[14]

III. Human rights invoked by undertakings in administrative proceedings

Originally, first generation human rights intended to protect the individual against the power of the State. These rights were gradually extended to cover less hard core aspects of human dignity, involving for example social rights. Corporations appeared on this stage in two ways. First, there is a tendency of assigning large, mainly multinational corporations the same obligations as States have to bear.[15] Second, corporations also appeared as right holders.[16] By now, most, if not all human rights have been acknowledged by the ECtHR to be applicable to companies as well. It is beyond doubt that despite the obvious difference between a natural and a fictional legal person, most due process related rights should be respected by public authorities when they proceed in a criminal or quasi-criminal manner against corporations. What is not entirely

[13] This principle of fair administration is also incorporated into the provisions of Act 2004: CXL on Administrative Procedures.

[14] See, 30/2014. (IX. 30.) AB of September 23, 2014, § 25.

[15] See the UN Guiding Principles on Business and Human Rights issued in 2011, available at: https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

[16] For a critical review of this extension of the personal scope of human rights, see: Sanchez-Graells, Albert and Marcos, Francisco, 'Human Rights' Protection for Corporate Antitrust Defendants: Are We Not Going Overboard? (February 2, 2014). University of Leicester School of Law Research Paper No. 14-04. Available at SSRN: https://ssrn.com/abstract=2389715 (noting that this trend is questioned only by a few scholars. Referring to U.S. case law on the religious freedom of corporations, they recall that this extension occurred uncritically, giving way to rather unimaginable arguments and situations).

clear is to what extent these originally human rights should be applied in quasi-criminal procedures, involving public antitrust enforcement.[17] The most recent EU legislative document, the ECN+ proposal also emphasizes the importance of human rights, and among them the right to a judicial review.[18] This proposal includes provisions on procedural safeguards and the calculation of fines, yet it does not intend to harmonize the way in which judicial review of administrative decisions is organized in EU Member States.

Article 6(1) ECHR provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.' Antitrust proceedings involving the imposition of a fine, concern 'criminal charges' within the wider, autonomous concept of Article 6 ECHR, even if such proceedings are not classified as criminal under domestic laws. Article 47 of the Charter implemented the protection afforded by Article 6(1) ECHR in EU law.[19]

[17] Take, for example, the right against self-incrimination. This is a well-established principle of criminal law, but there is no global consensus as to what extent it should apply to legal entities, especially in an antitrust framework. In the U.S., this right is not acknowledged for corporations, not even in a criminal context. Also in Germany, the Bundesverfassungsgericht refused to accept this right for companies (BVerG. 26 February 1997, 1 BvR 2172/96). See in more detail, Wouter Wils: Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis, (2003) 26 World Competition 567. Another example can be the protection of home under Article 8 ECHR. It is extended to cover business premises too, but public authorities may interfere with this right more broadly than for private homes of natural persons (opinion of AG Geelhoed in case C-301/04 P Commission v SGL Carbon, paragraphs 62–67).

[18] Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22.03.2017 COM(2017) 142 final. On page 13, it provides that 'The proposal ensures the protection of the fundamental rights of companies which are subject to competition proceedings, namely (but not exclusively), the right to conduct a business, the right to property, good administration and the right to an effective remedy before a tribunal (Articles 16, 17, 41 and 47 of the Charter of Fundamental Rights of the European Union). …. It will oblige Member States to provide for appropriate safeguards for the exercise of these powers which at least meet the standards of the Charter of Fundamental Rights of the European Union and are in accordance with general principles of EU law, including due respect of the data protection rights of natural persons. In particular, these safeguards should respect the rights of defence of companies subject to proceedings for the enforcement of Articles 101 and 102 TFEU, an essential component of which is the right to be heard. This includes the right to formal notification of the NCA's objections under EU competition law and effective right of access to the file so that companies can prepare their defence. Moreover the addresses of final decisions of NCAs applying Articles 101 and 102 TFEU should have the right to an effective remedy before a tribunal to challenge these decisions.' Available at: http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf

[19] There are other ECHR provisions that may be relevant in the course of an administrative competition supervision procedure.

Article 6(1) ECHR sets out three institutional and procedural requirements to ensure due process. First, parties should have a right to a fair and public hearing where they can explain their case. Second, all this should be arranged within a reasonable time. These two procedural requirements have not posed real issues in Hungary. Companies do have the right to argue their case orally before the decision of the Competition Council is handed down. Some antitrust investigations might take two-three years, but none of these have ever made a judge quash a 'late-comer' decision. The third requirement is that the hearing should be conducted and the decision should be delivered by an independent and impartial tribunal. This paper focuses on this third criterion.

The most important cases where the ECtHR interpreted Article 6(1) ECHR are the *Engel*,[20] *Jussila*[21], *Bendonoun*[22], and the *Menarini* cases.[23] In *Engel*, the ECtHR established three criteria for evaluating the meaning of a criminal charge. These criteria, or more precisely, features of a criminal charge, are not cumulative and do not have the same weight either. First, it is relevant whether domestic law treats the contested penalties as forming a part of criminal law. If so, it is most likely that it falls under Article 6(1) ECHR. If not, the administrative or other charge can nevertheless be characterized as criminal for the purposes of the ECHR. Second, the nature of the offence should be of general concern and application. Third, the nature of the severity of the potential penalty is also important. These rather general and vague conditions were extended in *Bendonoun*, where the ECtHR emphasized also the importance of whether the sanction operates as punishment and/or a deterrent or much rather as a pecuniary compensation for the damage caused.

In *Jussila*, involving oral hearing related issues of a Finish tax administrative fine, the ECtHR, tempering the effect of its wide interpretation of the criminal charge, introduced the notions of hard core and non-hard core criminal spheres. Unfortunately, the Court neither explained how exactly the dividing line should be drawn, nor made the effects of this distinction specific. The Court noted that the criminal-head guarantees, laid down in Article 6 ECHR, do not necessarily apply with their full stringency to cases falling outside the hard core of criminal law. The court emphasized in *Jussila* that there are

[20] *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 34–35, §§ 82–83.

[21] Judgment of 23 November 2006 in *Jussila v Finland* (Application no. 73053/01).

[22] *Bendonoun v France*, judgment of 24 February 1994 ECtHR (A284).

[23] Judgment of 27 September 2011 in *Menarini Diagnostics v Italy* (Application no. 43509/08). For a critical review of the *Menarini* judgment, see Pál Szilágyi: Fundamental rights protection and competition law in the European Union: an effects based protection and a need for reform? Published by CreatSpace, First edition (29 June 2014).

criminal cases which do not carry any significant degree of stigma: there are clearly 'criminal charges' of differing weight and, consequently, the criminal-head guarantees did not necessarily apply with their full stringency.[24]

As far as the organization of the enforcement system is concerned, the ECtHR did not use Article 6 to torpedo the traditional continental administrative model which combines investigation with decision making, and often leads to the imposition of serious sanctions. However, if the sanction is imposed by a non-judicial authority, the appeal court should exercise 'full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision.'[25] In *Jussila*, the ECtHR expressly mentioned competition law declaring that severe sanctions may bring it within the 'criminal charge' box under Article 6(1) ECHR.

This reference to competition law in *Jussila* had been preceded by *Societe Stenuit*[26], where the Strasbourg judges acknowledged for the first time that the procedure of the French competition authority was criminal in nature.[27] Before *Menarini*, one could have argued in light of the exceptionally severe fines imposed, as well as the constant effort of competition authorities to present cartel members as evil, that competition law could even become part of hard core criminal charges, requiring a complete reform of the traditional European enforcement systems.[28] However, the case of *Kammerer*,[29] decided in 2010, suggested that fines imposed by authorities do not carry any significant degree of stigma. By contrast, prison sentences do stigmatize and so any attempt by the administration to impose prison sentences would still fall foul of the fair trial requirement of Article 6(1) ECHR. Since companies cannot be sent to prison, administrative fines imposed on them, short of the stigma effect, would not be considered a hard core criminal sanction.

The first case where the ECtHR dealt with the substance of the architecture of traditional European competition law enforcement was *Menarini*. In this case, concerning an Italian cartel on the market of diagnostic tests for diabetes,

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[24] *Jussila*, para 43.

[25] *Jussila*, para 43.

[26] *Societe Stenuit v. France*, Judgment of 27 February 1992 ECtHR Series A No.232-A.

[27] In another case, involving Russian competition law, the Court denied the applicability of Article 6(1) ECHR, given the limited scope of the act and the lack of severe sanctions. *Neste v Russia*, Judgment of 3 June 2004 (admissibility decision in re applications no 69042/01 et al).

[28] Marco Bronckers and Anne Vallery: Fair and Effective Competition Policy in the EU, August 2012 European Competition Journal. Also the EFTA Court noted in April 2012 in the *Posten Norge* case that the fine of some €12m imposed by the EFTA Surveillance Authority in an abuse of dominance case carried significant stigma with it.

[29] *Kammerer v. Austria*, Judgment of 10 May 2010, No., 32435/06. The case involved a €72 fine order under the Motor Vehicles Act for non-compliance with the obligations of registered owners to have their cars duly inspected.

it was confirmed that the imposition of criminal penalties, as interpreted under the ECHR, by an administrative body is acceptable as long as this decision is subject to full review by an independent court. The ECtHR in *Menarini* specified that this judicial body must have the power to annul in all respects, on questions of fact and law, the decision of the competition authority. What the ECtHR checks is whether the reviewing court in fact exercised this full jurisdiction. This was crucial in the *Menarini* case, since Italian review courts at that time did not have such a wide jurisdiction.[30]

Other relevant human rights provisions of the ECHR include Article 6(2)[31], the presumption of innocence is often referred to by undertakings when it comes to uncertainties of proving a cartel. Article 8 protecting private life and home can be invoked to challenge dawn raids conducted by competition authorities.[32] The principles of *nullum crimen sine lege* and *nulla poena sine lege* of Article 7 have not yet been applied in a cartel case by the ECtHR, but the Court of Justice of the European Union has already acknowledged the applicability of these principles in cartel cases.[33]

IV. Competition law cases involving human rights issues

The first case I can recall where the relevance of human rights was considered by the Competition Council was the seminal motorway construction cartel.[34] I had the privilege to chair the five member council in this public procurement case imposing record breaking fines in July 2004.[35]

However, this was not the first case where the Competition Council made reference to the jurisprudence of the ECHR. Two years earlier, in 2002, the proceeding panel of the council led by the then chairman of the Council, Barna

[30] This issue was highlighted by the Hungarian judge, András Sajó, in his concurring opinion.

[31] Article 48 (1) of the Charter.

[32] Article 7 of the Charter. See, among others, DEBÚT Zrt. and Others v. Hungary, application no. 24851/10, decision of 20 November 2012 (refusing the complaint, emphasizing that business premises require a lower level of protection than private homes).

[33] As noted by the Constitutional Court, ibid, 97., referring to C-3/06. P *Groupe Danone* v. *Commission*, ECR 2007., I-1331., 87–88.

[34] VJ-27/2003 *Motorway construction cartel*. It was especially the lawyer of the Hungarian subsidiary of the French Colas group who built his defense on procedural flaws recalling the jurisprudence of the ECHR.

[35] In those days, this was the first time that a public authority would impose fines of the magnitude of billions of HUF. The case also enjoyed wide media coverage. Planning the publicity of the decision took almost as much time as deliberating on the merits of the case. The Competition Council usually hears cases in three-member panels. The chairman of the Competition Council may assign five members to important cases.

Berke, had claimed that the Council duly respects the procedural guarantees stemming from Article 6 ECHR in the course of its infringement procedures.[36] This decision acknowledged that competition supervision procedures may come under the criminal heading of Article 6 ECHR.[37] The reasoning noted that the protection of human rights may also benefit corporations.[38]

Coming back to the motorway construction cartel case, the reasoning of this decision devoted a separate chapter to human right issues.[39] It was argued that Article 6 ECHR is infringed if the authority conducting the investigation and imposing the fine is not independent. The Competition Council invoked the *Albert and Le Compte,* and the *Van Leuven and De Meyere* cases[40], where the ECHR made it clear that it is sufficient if the guarantees of Article 6 are respected during the court review process of an administrative decision. The Competition Council explained that the Hungarian civil procedure code complies with these requirements. Judicial review is independent, non-biased, fair and public. Furthermore, the courts exercise full jurisdiction since they can not only annul the decisions of the GVH, but they can also amend them. Administrative courts, acting within the confines of the plaintiff's request for review, check not only the facts, but also the considerations and the discretionary powers exercised by the GVH.[41]

The Council was convinced that Hungarian procedural rules meet the test set out by several judgments of the European Court of Human Rights,

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[36] Vj-190/2001 *Diákhitel Központ* (Center for Student Loans), p. 10. Interestingly, the decision terminated the procedure, so the reference to human rights was not really necessary.

[37] In the reasoning of the decision, no explicit reference was made to relevant cases of the European Court of Human Rights.

[38] The application of the ECHR to corporations is far from evident. Furthermore, the level of protection granted to corporations may differ from those applicable to natural persons. For instance, the European Court of Human Rights held that the protection of the home provided for under Article 8 ECHR may also cover business premises, it has noted that public authorities' interference with this right might be more far-reaching where professional or business activities or premises were involved. By now, it is beyond doubt that corporations not only enjoy certain 'human' rights, but in turn, must also respect those rights.

[39] I can recall that this was the first time that the GVH commissioned a report by a scholar of international law, Prof. László Blutman (University of Szeged) to better understand the case-law of the European Court of Human Rights. The reasoning of the GVH decision expressly refers to the paper of Wouter P.J. Wils.: The Combination of the Investigative and Prosecutorial Function and Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis (World Competition 2004 27(2), page 209) to explain that not only the Hungarian, but also the European enforcement system is in line with the ECHR.

[40] *Van Leuven and De Meyere v Belgium*, decision of 23.06.1981, point 51. *Albert and Le Compte v Belgium*, decision of 10.02.1983, point 29.

[41] The decision refers to the following judgments: Fővárosi Bíróság 2.K. 35.262/2000/8., Legfelsőbb Bíróság Kf. IV. 27.929/1998/4., Fővárosi Bíróság 2. K. 31586/1993/6.

including the *Kingsley* case.[42] Alternatively, it also explained that the arguments of the parties are unfounded under the ECHR anyway. The fact that the Competition Council adopting the final decision on behalf of the GVH also issues a preliminary position which summarizes the facts and the legal issues, inviting parties to explain their positions, is not contrary to the requirement of independence. Rather, it allows undertakings to exercise their rights of defense effectively. The subsequent court judgment confirmed the GVH decision.[43]

The Curia summarized its opinion on human rights issues in the *Railways construction* cartel case.[44] The GVH imposed fines totaling more than HUF 7 billion in June 2010.[45] Although the first instance court refused to accept the arguments of the parties based on the ECHR, it annulled the decision, arguing that the cartel was insufficiently substantiated, since all the evidence was provided by a single undertaking. The second instance court quashed that judgment, upholding the GVH decision. The Curia basically agreed with the findings of the second instance court. This case also shows that judges conduct a thorough review of cartel decisions, often arriving at different conclusions themselves.

The Curia recalled that if the *Engel* criteria are fulfilled, the procedure must be regarded as criminal for the purposes of the ECHR.[46] Although the ECHR jurisprudence acknowledges the existence of the margin of appreciation of administrative authorities, this cannot be an explanation for a lax judicial review of antitrust fines. The takeaway form *Menarini* for the Curia was that a court should have the authority to review both questions of fact and law, be able to modify the decision, and be prepared to consider the principle of proportionality. The requirement of full review may even lead to the non-application of Section 339/B of the Code of Civil Procedure, that is often interpreted as precluding judicial reconsideration of discretionary administrative decisions.[47] Importantly, the Charter's identical provisions form part of EU law, thus the supremacy of EU law requires national judges to put aside national laws, such as the provision of the Code of Civil Procedure that would hinder the application of EU law.[48] The five-member judicial panel led by Judge Kovács found, in line with *Menarini*, that even if the courts referred to Section 339/B, in effect they exercised a full review of the factual and legal issues. These statements were limited only to those procedures where

[42] *Kingsley v United Kingdom*, decision of 07.11.2000., point 58.
[43] Judgments 2. K.33024/2004/46, 2.Kf. 27.360/2006/29.
[44] Kfv.III.37.690/2013/29., Judgment of 20 May 2014.
[45] The GVH's procedure was started in November 2007 (Vj-174/2007).
[46] *Ibid*, on page 25.
[47] Ibid, 26.
[48] Ibid, 29.

the competition authority and the review courts apply EU law, including the Charter.

Furthermore, the Curia drew the important conclusion that, in effect, decisions of the GVH should be considered as an indictment issued by a public prosecutor in a criminal law procedure.[49]

To me, this seminal statement means that the judges should always maintain a suspicious attitude towards the findings of the GVH and apply the *in dubio pro reo* principle in full.

Finally, the Curia explained that the fine, the maximum amount of which was calculated based on the turnover of the group of companies, but was addressed only to one corporation of that group – did not infringe the principle of proportionality.[50] Interestingly, the Supreme Court did this *ex officio*, even without an express claim by the parties, to show that it does take full review seriously.[51]

Most recent Curia judgments represent a step backwards from this brave, human rights based full review approach manifested in the *Railways construction* cartel. The *Early repayment home loan cartel* case[52] involved an information sharing agreement among almost all financial institutions in Hungary involved in providing home loans. Although the infringement period was not long, the case resulted in a record fine, HUF 9.5 billion [EUR 29,6 million], of which OTP Bank had to pay 4 billion [EUR 12 million] as it was the major player on this market. On appeal, both the first and the second instance courts agreed with the Competition Council's assessment. Although the Curia also found the existence of the cartel established, it still annulled the fines and obliged the GVH to recalculate them in a new procedure. Writing for the Curia, Judge Kovács reconsidered some of his earlier statements in the *Railways construction cartel* case, giving an interpretation which no longer makes a distinction between whether the procedure is based on national or EU competition rules.

The Curia explained that 339/B § of the Civil Procedural Code prohibits judicial reconsideration only for issues of law. Review courts should always be able to collect evidence and re-evaluate existing evidence provided in the GVH decision.[53] As to the conformity of the GVH procedure with Article 6 ECHR, the Curia stressed that the administrative procedure and the follow-up

[49] Ibid, 30.

[50] According to the Curia, this principle can be derived from Articles 6 and 13 ECHR and Article 47 of the Charter.

[51] Nevertheless, the Curia's jurisdiction is limited by law in so far as it can review only questions of law and not those of the facts.

[52] Vj-74/2011 decision of the GVH, Kfv.III.37.582/2016/16. judgment of the Curia.

[53] Curia judgment, point 108.

judicial procedure have to meet those requirements. The more fair and judicial the administrative procedure is, the less complete the court review procedure could be as far as procedural safeguards are concerned. The Curia examined the structure of the GVH and the conduct of the competition supervision procedure in light of the independent court or tribunal-related ECHR jurisprudence. It acknowledged that both the competition authority and the decision making members of the Competition Council act independently and that the requirement of impartiality is also met. However, the GVH procedure is not contradictory and the principle of equality of arms is not ensured. The Competition Council does not act like a judicial forum, listening to the arguments of both parties and then deciding their legal dispute based upon the facts and legal arguments presented. The Council is part of the GVH, and is involved to some extent in the case handlers' investigation, as far as it can give advice about the directions of the investigation. Moreover, it is not the report of the case handlers which is shared with the parties as a Statement of Objections, but the preliminary ruling of the proceeding competition council. Since the GVH procedure does not meet all the requirements of Article 6 ECHR, the Curia explained that the judicial review process should ensure that the legal protection envisaged under the ECHR exists. Consequently, administrative courts must be able to consider the full range of relevant facts and legal issues and shall review the decision of the GVH in a sufficiently rigorous manner considering the legality and reasonability of the decision as well as whether procedural rules were respected.[54]

The Curia had no doubts that the principle of full judicial review is ensured in Hungary. This does not mean, however, that judicial reconsideration should be limitless. The review court should no put itself into the place of the public authority, adopting a fresh decision. Courts are required to exercise review over an existing decision. The prohibition of reconsidering the facts of the case requires judges not to disregard the reasoning of the decision and establishing de facts of the case de novo, based upon reasons independent form the authority's views.[55] The prohibition of reconsideration of facts applies thus only to the procedure conducted by the Curia, which exercises an extraordinary legal review. The Curia will quash the review court's decision only if it is obviously unreasonable, suffers from logical flaws or is not sufficiently reasoned.[56]

In 2014, also the Constitutional Court took a position in the debate on the application of human rights in procedures conducted by the GVH. In a judgment upholding the Curia judgment concerning the *Heves county*

[54] 126–128. points of the judgment.
[55] Point 142. of the judgment.
[56] Point 145. of the judgment.

road construction cartel case[57], the Constitutional Court summarized the jurisprudence of the ECHR recalling *Jussila*, *Janosevic*[58], *Menarini* and *DEBÚT*[59]. The Court's opinion, drafted by Judge Dienes-Oehm, concluded that although competition supervision procedures are criminal in nature, yet they do not belong to the hard core of criminal law, therefore, principles applicable in criminal law do not apply to their full extent. The Constitutional Court took into account that competition supervision procedures generally target companies and not individuals, and the fines imposed do not have as much of a stigma effect as typical criminal prosecutions.[60] Despite this cautious statement, the Constitutional Court confirmed that the principle of *in dubio pro reo* is applicable also in a procedure conducted by the GVH, not only in the judicial review process.[61] This means that the standard of proof should effectively be the same as under criminal law. As to the main topic of this paper, the nature of the enforcement system and the judicial review, the Constitutional Court confirmed that administrative judges can take and review evidence themselves.[62] Unfortunately, the Constitutional Court did not elaborate on the required depth of the review conducted by the administrative court.[63]

V. The quest for finding the meaning of full judicial review: administrative discretion, deference and the prohibition of judicial reconsideration

The key point of defending the traditional European administrative enforcement of cartel rules is access to independent judicial review, following the decision of the competition authority. The European Court of Human

[57] Decision of the Constitutional Court No. 30/2014 (IX. 30.). The Constitutional Court acted upon the complaint of an undertaking who challenged the Curia's final judgment (Kfv. II.37.076/2012/28.) based on constitutional law grounds. About a Hungarian summary of the case see: László Bak: Alkotmányos versenyjog – a versenyfelügyeleti eljárás az Alkotmánybíróság fókuszában, Versenytükör 2014/2., 52. o.. This cartel case is also a good example to show how different courts might come to different conclusions: the first instance review courts quashed the GVH decision imposing 2,9 billion HUF (about 10 million €) fines, the appeal court agreed with this, however, the Curia annulled the judgment siding with the competition authority.

[58] *Janosevic v Sweden*, No. 34619/97, Judgment of 21 May 2003.

[59] *DEBÚT v Hungary*, No. 24851/10., Judgment of 20 November 2012.

[60] Ibid, 61–62.

[61] Ibid, at 71.

[62] Ibid, at 71., referring to § 339/A and 339/B. of the Code of Civil Procedures.

[63] For a critical summary about the Constitutional Court's jurisprudence see: Pál Szilágyi: Fundamental Rights in Competition Proceedings before the Constitutional Court—Still Unresolved Issues, in: Global Competition Litigation Review 9 (2), 62.

Rights uses the term '*full jurisdiction*'. The exact meaning of this requirement, and whether it must be exercised in the case at hand *de facto*, or whether its existence *de jure* is sufficient, may be up for discussion. The natural limitations of administrative judicial review compared to the civil or criminal paths, where the original decision is also made by a judge, and also the related Hungarian concept of the prohibition of reconsideration by the judge[64], allowing a margin of appreciation for the authorities, should be discussed here. Given the constraints of the scope of this paper, I will focus on Hungarian jurisprudence.[65]

When we discuss the meaning of full review, we should bear in mind that the ECtHR itself is aware that administrative review judgments cannot be the same as a *de novo* judgment adopted in a civil or criminal procedure. The ECtHR explained that review courts 'do not review the merits of the decision but confine themselves to ensuring, in brief, that the authority did not act illegally, unreasonably or unfairly.'[66]

Not surprisingly, judge Pinto de Albuquerque, dissenting in *Menarini*, warned that the principle of discretionary power of the administration, as applicable in most European jurisdictions, cannot be in line with the concept of full jurisdiction. Indeed, the notions of discretionary power, legal review, and judicial deference are at the heart of the issue whether the system of traditional administrative law enforcement coupled with administrative court review is in line with Article 6 ECHR.

There are many areas where administrative agencies take decisions involving the exercise of administrative discretion, or where their findings are the result of thorough consideration of facts requiring special technical knowledge or the weighing of competing public interests. The traditional role of administrative judges does not include second guessing policy issues. What they exercise is essentially a legal review.

It should be noted at the outset that in Hungary, unlike in EU competition law[67], no distinction is made between the review of the substance of the operative part of GVH decisions, that is, the existence of a cartel or a dominant position, and the review of the fines. Hungarian courts have the power to quash or amend every part of an infringement decision.

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[64] In Hungarian:'a bírói felülmérlegelés tilalma'.

[65] As to the case of EU courts, I find the paper by Wouter WILS particularly useful: EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights, World Competition, Vol. 34, No. 2, June 2011.

[66] *Weeks v. UK* Series A no 114 (1987); 10 EHRR 293.

[67] According to Regulation 1/2003/EC EU, courts can amend only the fines imposed by the EU Commission, but not the operative part of the decision.

The role of Hungarian administrative courts was expressly stipulated in Section 339/B of the Act on Civil Procedure: a discretionary decision should be considered lawful if the facts of the case are well established, procedural rules were observed, the factors taken into account by the authority can be identified, and the reasoning of the decision shows that the authority reasonably considered each piece of evidence.[68] The new law on administrative court proceedings adopted a new text, it is not known yet how judicial practice will evolve in the future. According to 85. § (5), in the case of legal review of discretionary decisions the court should *also* check whether the authority remained within the boundaries of its discretionary powers and whether the reasoning of how it arrived at its decision is clear and reasonable.

The former statutory provision resulted in a rather passive judicial activity, where some judges were reluctant to reconsider the fines unless the GVH made a legal error on the substance of the case.[69] A recent report of the Curia's working group analyzing the jurisprudence of the courts on administrative fines noted that even though Hungarian courts have full jurisdiction, they exercised their full review powers as regards fines only when the authority erred in the substance of the case as well. The report also called for the Curia to bring more clarity to the issues of judicial review of discretionary decisions in the future.[70]

The prohibition of judicial reconsideration of discretionary decisions is a well-established doctrine in Hungarian administrative law. Its essence is that whenever an administrative authority enjoys a room of appreciation provided by law, and it adopts a well-reasoned decision staying within this boundary, courts should withstand from judicial activism substituting their assessment for that of the authority. The rationale of this restriction can be traced back, among others, to more practical considerations such as traditional division of powers. The judicature should not take over the role of policy-making and administering regulations (A. Kovacs and M. Varju, 2014).[71] Another way to describe this concept is to discuss *judicial deference* (Bernatt, 2014).[72]

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[68] The European Court of Justice proceeds along the same principles: 'the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on the stating of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.' EU courts exercise a legality review under Article 263 TFEU.

[69] Curia judgment of Legf. Bír. Kfv.IV.37.499/2009/10.

[70] November 10, 2014 (published on March 23, 2015), page 20. http://www.lb.hu/sites/default/files/joggyak/a_kozigazgatasi_birsagok_vizsgalati_targykorben_joggyakorlat-elemzo_csoport_osszefoglalo_velemenye.pdf (last accessed on June 20, 2015). The Curia is entrusted with the task of monitoring the practice of lower courts to maintain the uniformity of judicial practice.

[71] The authors discuss the legal foundations of administrative judicial review in Hungary.

[72] Available at SSRN: https://ssrn.com/abstract=2447884 or http://dx.doi.org/10.2139/ssrn.2447884 (concluding that the way in which the EU Courts review EU Commission

However, unlike the prohibition of judicial reconsideration, this is not a legal principle, but more like a matter of fact.

However, when the exercise of discretionary powers could result in a tremendous amount of fines, the need for thorough judicial review arises. The traditional concept restricting reconsideration of the facts is simply not apt to antitrust investigations and other quasi criminal procedures.

In my view, this rule restricting judicial review should not be interpreted widely, implying that judges could not act effectively when plaintiffs ask them to reassess facts and law that require some economic knowledge or the consideration of forensic evidence. Truly, judges are not superheroes, but they do have access to experts and should possess the wisdom to decide on the concurring arguments of the parties. This prohibition of 'second guessing' does not render the review of the substance of cartel or abuse of dominance cases a mere formality. From time to time, there may be difficult cartel cases where the evidence is not entirely clear regarding the existence of a secret agreement, or there might be some doubt about the effects of an exclusionary behavior by a dominant undertaking.

Beyond legal concepts as well as institutional and procedural rules, a de facto crucial issue is to what extent are administrative judges overburdened. As a rule, there are no competition law specialized review courts in Europe. Administrative judges in Hungary have to proceed in various cases involving taxation, migration, environmental law, etc. Of these, competition law files occupy the most space and energy. It is not easy to exercise genuine full review under such pressure and with such a diverse focus on various legal issues related to administrative law.[73]

It is important that complex competition law issues (like proving a cartel based on circumstantial evidence, analyzing competition effects or making the distinction between fierce and abusive competition), and the often difficult choice among conflicting pieces of evidence, however difficult they may be to decide, do not involve the exercise of discretionary power subject to inherently limited judicial review. There is just one single correct answer to the question whether there was a cartel or not, or whether a company is dominant or not.[74] Discretionary decisions should mean something else.

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decisions is not very likely to be found in violation of Article 6 of the ECHR, however, further improvements of fairness of the administrative process should be considered).

[73] As for EU courts reviewing EU Commission decisions, one author argued for an increase of the number of judges to ensure full review in practice; Igor Nikolic: Full judicial review of antitrust cases after KME: a new formula of review? (2012) 33 ECLR, issue 12, p. 583.

[74] I should admit that cases involving the consideration of facts related to future market conditions, especially in merger and acquisition procedures, may involve some administrative discretion. However, in cases like this fines are not imposed, so human rigths issues, especially those related to Article 6 ECHR are irrelevant.

Where the GVH exercises genuine administrative discretion is only in its decisions regarding the amount of the fines.[75] Acting within the boundaries of its legal mandate given by the legislature, the Competition Council can choose whatever amount it sees fit for the infringement. Moreover, the Council is not obliged to impose fines automatically – it may even decide to establish an infringement of competition rules without fining the companies. As long as the amount of the fine does not exceed the statutory ceiling, and all relevant factors are considered sufficiently and fairly, parties will have a hard time in court persuading the judge to annul or reduce the fine. This is because if the existence of a cartel is proven, the competition authority could take an unlimited number of decisions on the appropriate level of the fines, provided that it gives sufficient reasons. The same cartel participation can be fined HUF 7,9 billion, HUF 4,3 billion, HUF 989,567 million, etc. as long as it does not cross the legal maximum and the rather vaguely formulated requirement of proportionality, provided the gravity and duration of the infringement were considered by the decision maker.

From this perspective, the significance of adopting non-binding guidelines on the method of calculating fines can be appreciated. Fining guidelines enhance legal certainty, predictability, and thus contribute to the goal of deterrence. Hungarian courts did struggle with GVH guidelines, there were cases where they simply disregarded them arguing that non-binding guidelines are not sources of law, so they fall beyond the scope of their legality review. Subsequent judgments delivered by the Constitutional Court and the Supreme Court followed a path more in line with EU courts, explaining that the principle of legal certainty requires review courts to check whether the GVH complied with its own guidelines, or whether the decision sufficiently explained why it deviated from the fining guidelines (T. Tóth, 2010).

At first sight, there seems to be a contradiction here. On the one hand, I argue that the GVH enjoys wide discretion when it decides on fines. This discretion is somewhat limited by its own fining guidelines. It should follow that administrative judges should exercise some self-restraint in this respect, not putting themselves into the shoes of the competition authority by re-evaluating what fines could best serve the goals of competition law enforcement. Yet, the ECtHR requires full jurisdiction review when it comes to the imposition of significant sanctions aimed at punishing or deterring unlawful behavior. Judges

[75] Administrative authorities enjoy discretionary powers only where expressly provided by statutes. For example, if the competition act reads that the GVH may impose fines of up to 10% of the undertaking's (or the group of undertakings) annual turnover, it provides discretion for the authority at three stages: (*i*) is there a need to impose fines at all, (*ii*) if so, what should be the exact amount of the fine within the 10% range, and (*iii*) should the ceiling be set based on the turnover of the given corporation or the group of undertakings.

are not expected to invent new ways of calculating fines 'from scratch', but should thoroughly check whether the GVH took into account all the relevant factors and afforded them the correct weight. For this purpose, as the Curia noted, the principle of proportionality should be of special importance.

This does not mean, however, that this inherently limited judicial review would not meet the full jurisdiction test of the ECtHR. Even the ECtHR takes into account when assessing the adequacy of judicial review, whether the decision subject to review involves the exercise of administrative discretion.[76]

The prohibition of reconsideration should not prevent a judge from carefully reviewing all claims of the parties, involving arguments on the facts of the case and the interpretation of the law, including the amount of the fines. For example, if the GVH failed to correctly establish the length of the infringement, or the role played by a cartel member, this factual error may easily lead to a recalculation and reduction of the fine. More importantly, even if the court agrees with the GVH on the facts of the case, not challenging the existence of a cartel, it should nevertheless feel competent to modify the level of the fines, namely, by invoking the general principle of proportionality. In a similar vein, a judge may consider that a repeated infringement should not lead to the automatic doubling of the fine, but should entail an increase of 50% instead, regardless of what is stipulated by the authority's fining guidelines. The prohibition of judicial reconsideration should not imply that courts can change the fines only if they also discern a factual error committed by the GVH.

Under this realistic approach towards the interpretation of full review, it would be unreasonable to expect a judge to exercise its review powers to re-calculate the fine by assigning somewhat different points to the factors taken into account by the Competition Council of the GVH.[77] For example, where the GVH applied a 25 point score to describe the seriousness of the infringement, judges would not give 23 or 24 points instead.[78] Such amendment of the GVH decision would hardly be justified even under the principle of proportionality.

Put it differently, the concept of full review is still about the required depth of a just review process. A review is always linked to a previous decision. It makes thus sense to consider the administrative and judicial stage in one. It is rational to argue that the thoroughness of judicial review is related to the structure and procedural guarantees of the administrative decision making process. Organizing two complete and fair hearings, both by the competition

[76] *Sigma Radio Television Ltd. v Cyprus (Application no, 32181/05)*.

[77] The Competition Council calculates the amount of the fine based on a 100 points scoreboard which can be fine-tuned according to criteria like recidivism and leniency application.

[78] As a matter of fact, not even plaintiffs themselves come forward with such claims.

authority and later by the court would make procedures inefficient and unreasonably lengthy. I share the views of Graells and Macros, reminding us, just as the Curia did in the *early repayment home loan* case, that even the jurisprudence of the ECtHR supports such 'lighter' judicial review.[79] The ECtHR found that where the administrative body followed a procedure which sufficiently complies with due process guarantees, and the decision involves a 'classic exercise of administrative discretion', or where the decision requires 'a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims', then a mere review of legality complies with the ECHR, provided that the judge can quash the first instance decision. A lighter review could be accepted thus involving issues like exemption from competition rules requiring complex market knowledge, or fines reflecting a certain policy of the competition authority. Such a quasi-full review can be in line with quasi-criminal cases. No deference should, however, be exercised about cartel related issues and checking whether fines comply with fundamental legal principles.

VI. Conclusion: the conformity of the Hungarian competition law enforcement mechanism with human rights requirements

Following the *Menarini* judgment, it is now beyond reasonable doubt that the traditional administrative competition law enforcement system meets the requirements of Article 6(1) ECHR. According to the ECtHR, public enforcement of competition rules against companies fits well into the quasi-criminal basket of cases. Even if fines can be exceptionally high, neither the subjects of competition law sanctions (typically legal persons instead of human beings), nor the seriousness of their wrongdoing (restricting free competition that may result in higher prices, lower output), nor the nature of the sanctions (pecuniary instead of limiting human freedoms) warrant a hard-core criminal approach. Put it differently, unlike individuals, companies would rarely, if ever, be stigmatized by high fines imposed on them. No one would expect customers to turn away from companies such as Google, Mercedes, LG, or Philips just because they were hit by huge fines. Ensuring the respect of procedural guarantees and due process is important so that the authority adopts good decisions. Pushing the corporate human rights argument to its extreme does not add too much to this debate.

[79] Ibid, at page 12.

Consequently, an agency model that combines investigative and decision-making powers, including the imposition of substantial fines, does not infringe human rights of corporations, as long as these decisions are subject to review by an independent judge exercising full jurisdiction. The ECtHR does not seem to give much weight to what extent the authority is independent and acts along the lines of due process requirements, or how many levels the court review process includes. Considering cases from a practical point of view, the ECtHR looks at what review courts actually did, instead of how the national procedural provisions could be understood literally.

Given the identical structure of competition law enforcement in Italy and Hungary, and the practice of Hungarian administrative judges to go into the details of each GVH decision, including the facts, the legal interpretation and the amount of the fines imposed, parties challenging the legality of the Hungarian system of competition law enforcement before the ECtHR would not be likely to succeed, just as they failed to persuade the Hungarian Constitutional Court.

My experience talking with administrative law judges confirmed that they regard the Competition Council of the GVH as a quasi-judicial body, well-staffed to decide complex economic and legal issues. Judges are aware that members of the Competition Council are independent, almost like judges. They cannot get orders from the government, not even from the president of the GVH or the chairman of the Council.[80] Naturally, judges were more prone to adopt a less activist attitude, in cases where some doubt may have arisen, erring on the side of the competition agency. All this is now confirmed by the Curia's reasoning in the *early repayment home loan cartel* case. This does not mean, however, that review courts, including the Curia, would not exercise their full jurisdiction when it was necessary to do so. The existence of a natural judicial deference to a competent and well skilled authority does not run counter to the requirement of full review in quasi-criminal administrative procedures.

I find it interesting that the ECtHR did not elaborate in *Menarini* on the status of the competition authority, and the level of the protection of procedural rights in the administrative procedure; instead, the focus of its reasoning related to the level of judicial review. Contrary to this, the Hungarian Curia emphasized in the *early repayment home loan cartel* case that there is a link between the status and governance of the competition authority and meeting the requirements of Article 6 ECHR. In borderline cases such as the Italian *Menarini* case, it may be important to bear in mind to what extent the authority itself could be considered as acting independently of governmental policy. The more the administrative procedure resembles a judicial process,

[80] I should add that about half of the members of the first Competition Council were former civil law judges.

the less relevant the inquiry into the sufficiency of judicial review seems to be. I would not go so far as to argue that it would be redundant, since sanctioning decisions adopted by an authority that started the procedure itself will always suffer from some level of deficit. The prosecutorial bias can be minimized with internal checks and balances, but cannot be eliminated (W. Wils, 2006).[81]

In sum, the judgments of the ECtHR, the Hungarian Curia and the Constitutional Court made it clear that the traditional administrative law enforcement regime is in conformity with human rights requirement. In order to ensure procedural fairness, great emphasis was put on how administrative judicial review is regulated, and more importantly, how it is exercised in real cases. It seems that even if courts do not conduct a green field litigation, in the sense that they have to rule on the legality of an administrative decision adopted following a long and thorough competition supervision procedure, Article 6 of the ECHR is not infringed as long as judges review questions of facts and law and have the power to change the fines imposed by the authority.

This is not to say that human rights related arguments in competition proceedings were and will be completely unfounded. There are some procedural issues which may cause concerns and so they should be scrutinized under the jurisprudence of the ECtHR. They include: the process of recording covert witness statements without providing an opportunity for the parties to ask questions directly, the lack of effective court review of on the spot searches[82], the immediate enforceability of administrative fines[83], or denying the privilege against self-incrimination[84]. As to Article 6(1) ECHR, the length of the procedures, including the administrative and the first instance court review phase, may become an issue were the GVH does not respect procedural deadlines.[85] Yet, the system as such can work efficiently, while at

[81] Discussing various potential bias during competition law procedures.

[82] See the Vinci cases decided by the ECtHR criticizing the French regulation of dawn raids: *Vinci Construction et GTM Génie Civil et Services c. France* (63629/10). Later, in its decision of 21 March 2017, No. 33931/12 *Janssen Cilag S.A.S v France*, the court found the modified French regulation to be in compliance with the requirements of the ECHR.

[83] It is true that parties who cannot pay the fine can submit a request for suspension to the first instance court, but the court is usually reluctant to do so and cannot carry out an in-depth review anyway. So, in the vast majority of the cases, the fines should be paid. The European Court of Human Rights ruled in *Janosevic* that the immediate enforcement of the payment of fines may infringe the principle of the presumption of innocence.

[84] The European Court of Human Rights has not addressed this issue with respect to companies yet. In the U.S., companies do not enjoy this privilege. The German Bundesverfassungsgericht also held that this privilege does not extend to legal persons, because it is grounded in the protection of individual human dignity (BVerG, 26 February 1997, 1 BvR 2172/96).

[85] According to Section 63. Tpvt., cartel and abuse of dominance procedures, including two potential extensions, should not last more than one and a half years. There can be two problems

the same time respecting the rights of corporations as required by the ECtHR jurisprudence.

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here. First, there are lots of procedural actions that are not counted into this 18 months period (in practice, only case handlers can know how much of the time has been absorbed). Second, there is no clear legal consequence of infringing the statutory deadlines. The temptation is thus strong to conduct a thorough investigation disregarding the time limits. The total length of the procedure, including the first judgment is never shorter than 2-3 years. Even if this might not infringe human rights, an effective sanction policy would require a decision much closer in time to the unlawful action.

Europeanisation of the Polish Leniency Programme

by

Paulina Korycińska-Rządca*

CONTENTS

Abstract

Leniency programmes in competition law make it possible to grant immunity from fines, or a reduction of any fine that would otherwise have been imposed on an undertaking who was a party to an unlawful agreement restricting competition. This immunity or fine reduction is granted as a reward for the cooperation with the competition authority and the provision of evidence of an unlawful agreement restricting competition. Legal rules regarding the application of leniency programmes have been introduced at the EU level as well as in the national legislations of numerous countries, including Polish law. The author makes an attempt to establish the degree to which the Polish leniency programme is an effect of the impact of EU law or the application of law within the EU (for instance, by its institutions). The analysis has been made on three levels. Examined first was the degree to which the Polish leniency programme is a result of spontaneous harmonisation. Second,

* Assistant at the Department of Public Economic Law at the Faculty of Law at the University of Białystok, Poland; attorney-at-law in Kancelaria Radców Prawnych Bieluk i Partnerzy; ORCID identifier 0000-0002-6177-7409; e-mail: p.korycinska@gmail.com. Article received: 30 May 2018; accepted: 30 September 2018.

the impact of legislative harmonisation in the area of leniency programmes was taken into consideration. Finally, it was verified whether those Polish authorities that apply Polish competition law are inspired by judgements issued by EU courts in cases regarding leniency programmes.

Résumé

Les programmes de clémence prévus par le droit de la concurrence permettent d'accorder une immunité d'amende ou une réduction de toute amende qui aurait autrement été infligée à une entreprise partie à un accord illégal restreignant la concurrence. Cette immunité ou réduction d'amende est accordée à titre de récompense pour la coopération avec l'autorité de la concurrence et la fourniture de la preuve d'un accord illégal restreignant la concurrence. Les règles juridiques relatives à l'application des programmes de clémence ont été mis en place au niveau de l'UE, ainsi que dans les législations nationales de nombreux pays, y compris le droit polonais. L'auteur tente de déterminer dans quelle mesure le programme de clémence polonais est un effet de l'impact du droit de l'UE ou de l'application du droit au sein de l'UE (par exemple, par ses institutions). L'analyse a été faite à trois niveaux. Tout d'abord l'auteur examine dans quelle mesure le programme de clémence polonais résultait d'une harmonisation spontanée. Après, l'impact de l'harmonisation des législations dans le domaine des programmes de clémence a été prise en considération. Enfin, il a été vérifié si les autorités polonaises qui appliquent le droit de la concurrence polonais s'inspirent des décisions rendues par les tribunaux de l'Union européenne dans des affaires concernant des programmes de clémence.

Key words: leniency programme; harmonisation; spontaneous harmonisation; legislative harmonisation; judicial harmonisation; competition law.

JEL: K21

I. Introduction

Agreements restricting competition, especially those which are concluded between entities operating at the same level of trade, usually have a negative impact on competition on the relevant market (see *inter alia*: Banasiński and Piontek, 2009, p. 180; Frenz, 2016, p. 551; Stawicki, 2016, p. 211). Therefore, counteracting and combating them is particularly important for ensuring the proper functioning of the economy. It was indicated in a document entitled 'Competition and consumer protection policies' issued in 2015, that one of the principles of the Polish national competition authority, namely the President

of the Office for the Competition and Consumer Protection (hereinafter; UOKiK President), is to increase the effectiveness of combating agreements restricting competition, in particular cartels.[1] Due to the fact that agreements restricting competition most often are concluded and kept secret by their parties, detection and combating these violations by competition authorities is difficult.

Undoubtedly there are difficulties in disclosing agreements restricting competition. Due to that fact, leniency programmes are being implemented all over the world in order to induce entities that violated the prohibition of competition-restricting agreements to cooperate with competition authorities in exchange for more lenient treatment, in the form of immunity from fines or a reduction of any fine which would otherwise have been imposed on a participant in an agreement restricting competition.

The first country that has decided to introduce such regulations into its antitrust law was the United States of America.[2] The American solution, however, concerned only the mitigation of criminal sanctions provided for violations of antitrust law. Similar regulations to those introduced into American antitrust law have also been adopted within the European Union (hereinafter; EU). It is worth noting that contrary to the solution adopted in American law, where the cartel prohibition is enforced not only with fines on companies but also with imprisonment of individuals, the European Commission and the competition authorities of most EU Member States can currently only impose fines on undertakings (see: Wils, 2007, p. 238–241). Therefore, the leniency programmes adopted within the EU include the mitigation of sanctions that are not of a criminal law nature (Article 23 paragraph 5 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[3]).[4]

In September 2006, the European Competition Network (hereinafter; ECN), comprised of the European Commission and the national competition

[1] See: Competition and consumer protection policies, Warsaw 2015, p. 30 *et seq*. Polish version available at: https://www.uokik.gov.pl/download.php?plik=16694 (16.05.2018). Not available in English.

[2] It is considered that the contemporary practice of leniency in antitrust enforcement started in 1978 by the adoption by the US Department of Justice of its first Corporate Leniency Policy (see: Wils, 2007, p. 213–214).

[3] OJ L 1, 4.1.2003, p. 1–25 as amended (hereinafter; Regulation No 1/2003).

[4] Despite the fact that Article 23 (5) of Regulation No 1/2003 expressly indicates such classification of those sanctions, there have been voices questioning this character indicating *inter alia* that the fines reach an amount that is rather indicative of criminal law (see more: Franz, 2016, p. 979). In Polish literature, see amongst others: Król-Bogomilska, 2013, p. 466; Piszcz, 2013, p. 29; Martyniszyn and Bernatt, 2015, p. 9; Bernatt and Turno, 2015, p. 88).

authorities of all EU Member States, endorsed its Model Leniency Programme.[5] The model was subsequently amended in November 2012.[6] This document is of a soft law nature, which means that it is not compulsory to implement the rules set out in it into national legal orders. Nevertheless, the ECN Model Leniency Programme contains a commitment of entities creating the ECN to use their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Leniency Programme.[7] In fact leniency programmes exist in all EU Member States, with the exception of Malta, which has started working on the introduction of such a solution but has not implemented it yet.[8] A leniency programme exists also in proceedings before the European Commission, where it is governed by the Commission Notice on immunity from fines and reduction of fines in cartel cases.[9]

It is believed that leniency programmes are the most effective tool to combat agreements restricting competition, especially cartels, that is, agreements concluded between entities operating at the same level of trade (competitors) (Hammond, 2004, p. 2; see also: Jurkowska-Gomułka, 2015, p. 69), by significantly increasing the chances of competition authorities to obtain evidence necessary to reveal and prove the infringement (Turno, 2013, p. 23–45 and p. 291–304).

Actions which infringe the prohibition of competition-restricting agreements often have effects on the territory of more than one EU Member State. Therefore, any differences between the leniency programmes applicable in different EU Member States may weaken the applicants' incentives to apply for leniency. The necessity to harmonize national leniency programmes due to that factor was indicated in the proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, which was presented on 22 March 2017.[10] In motive 10 of the proposal of this directive, it was clearly expressed that 'Companies will only come clean about secret cartels in which they have participated if they have sufficient legal certainty about whether they will benefit from immunity from fines'. In other words, leniency programmes may

[5] ECN Model Leniency Programme. English version available at: http://ec.europa.eu/competition/ecn/model_leniency_en.pdf (16.05.2018).

[6] ECN Model Leniency Programme (As revised in November 2012). English version available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (16.05.2018). Hereinafter referred as the 'ECN Model Leniency Programme'.

[7] ECN Model Leniency Programme, p. 1.

[8] See: https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/malta (16.05.2018).

[9] 2006/C 298/11.

[10] COM(2017) 142 final.

become an effective weapon against cartels with an international element only if the national leniency programmes are convergent. Only then, the entity submitting a leniency application will have certainty of the rules in force in different legal orders, including a guarantee that the conditions and rules for applying for leniency are analogous. Any differences in leniency programmes may negatively affect the interest of the potential applicant (the applicant who is not sure whether it can avoid penalty in all countries may not be willing to disclose the infringement and apply for leniency).

The first legal rules governing the leniency programme were introduced into Polish competition law by the Act of 16 April 2004 amending the Act on competition and consumer protection and certain other acts,[11] which amended the Act of 15 December 2000 on competition protection and consumers[12] (hereinafter; ACCP 2000) as of 1 May 2004. The rules governing the leniency programme in this act were modelled on solutions provided for in the Commission notice on immunity from fines and reduction of fines in cartel cases of 13 February 2002.[13] This realisation was explicitly stated in the explanatory notes attached to the draft Act amending the Act on competition and consumer protection and amending some other acts.[14] The solutions introduced by the above legal act were transferred into the Act of 16 February 2007 on competition and consumer protection[15] (hereinafter; ACCP). At that time, the general principles of the leniency programme were adopted in ACCP; detailed procedural solutions were set out in the regulation of the Council of Ministers of 26 January 2009 on the procedure for undertaking to apply to the President of the Office for Competition and Consumer Protection for immunity from fine or the reduction of fine.[16] However, the sources of the Polish legislator's inspiration in creating the legal framework of this legal institution were not indicated in the explanatory notes to the draft of the ACCP. Only a brief reference was made to the previously binding ACCP 2000.[17] The Polish leniency programme was substantially amended by the Act of 10 June 2014 amending the Act on Competition and Consumer Protection

[11] Journal of Laws 2004, no. 93, item 891.

[12] Consolidated text: Journal of Laws 2005, no. 244, item 2080.

[13] Official Journal C 045, 19.02.2002, p. 0003-0005.

[14] Explanatory notes to the draft Act amending the Act on competition and consumer protection and amending some other acts (*Sejm* paper no. 2561), p. 4. Polish version available at: http://orka.sejm.gov.pl/proc4.nsf/opisy/2561.htm (16.05.2018). Not available in English.

[15] Consolidated text: Journal of Laws 2018, item 798 as amended.

[16] Journal of Laws 2009, no. 20, item 109.

[17] Explanatory notes to the draft Act on competition and consumer protection together with draft executive acts (*Sejm* paper no. 1110), p. 26. Polish version available at: http://orka.sejm.gov.pl/proc5.nsf/opisy/1110.htm (16.05.2018). Not available in English.

and the Civil Procedure Code[18] (hereinafter; Amendment Act of 2014), which entered into force on 18 January 2015. The explanatory notes of the draft amendment act indicates that at least some of the solutions proposed by the authors of the draft act were inspired by, or at least referred to, the ECN Model Leniency Programme.[19]

In Poland, the leniency programme has not achieved the expected success (see *inter alia*: Turno in: Stawicki and Stawicki, p. 1482). The number of leniency applications is relatively low. In the years 2004–2016, only 64 applications were submitted under this programme (one of them under the leniency plus programme[20]).[21] The greatest number of 16 applications was received by the UOKiK President in 2012. In 2015 there were only two such submissions. Therefore, the question arises about what determines the small interest of undertakings in this legal institution. Can the lack of harmonisation of Polish national rules with analogous programmes in force in other EU Member States be the reason for that?

The subject of the analysis in this article is the Polish leniency programme. The considerations contained in this paper are aimed at verifying the following research thesis: despite the fact that EU legislature has not used legislative harmonisation for leniency programmes yet, the Polish leniency programme is largely inspired by the Model Leniency Programme endorsed within the ECN. It can, therefore, be said that the shape of the rules governing the Polish leniency programme is a manifestation of the Europeanisation of competition law made through spontaneous harmonisation. The Model Leniency Programme, adopted under the cooperation of competition authorities associated in the ECN, became a strong inspiration for national legislators, including the Polish one. However, the method of minimum harmonisation[22] proposed by the ECN has resulted in a situation where the Polish leniency programme goes beyond the model solution. Due to the application of this kind of approximation of laws, differences between the various systems could

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[18] Journal of Laws 2014, item 945.

[19] See: explanatory notes to the draft Act amending the Act on competition and consumer protection and the Code of Civil Procedure (*Sejm* paper no. 1703), p. 30. Polish version available at: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1703 (16.05.2018). Not available in English.

[20] Regarding the rules governing the leniency plus programme see remarks in part II of this article.

[21] *Sprawozdanie z działalności UOKiK 2016* (Report on the operations of UOKiK 2016), Warsaw 2017, p. 36. Polish version available at: https://www.uokik.gov.pl/sprawozdania_z_dzialalnosci_urzedu.php (16.05.2018). Not available in English.

[22] In section 3 of the ECN Model Leniency Programme, it was directly indicated that 'The ECN Model Programme does not prevent a CA [Competition Authority] from adopting a more favourable approach towards applicants within its programme'. See: ECN Model Leniency Programme, section 3, p. 1.

not be avoided. As a consequence, potential applicants cannot be sure that the rationale for this kind of programmes and procedures in different EU Member States is the same.

The purpose of this article is to find an answer to the question whether, and if so by which mechanisms the Polish leniency programme is subjected to the process of Europeanisation. However, answering this question would not be possible without establishing:

1) Whether, and if so, to what extent is the Polish leniency programme harmonised with the ECN Model Leniency Programme?
2) Whether, and if so, to what extent has EU legislature undertaken activities aimed at harmonising national leniency programmes by means of legislative harmonisation?
3) Whether, and if so, to what extent the Polish competition authority and courts, while applying the rules governing the Polish leniency programme, follow the jurisprudence of EU courts regarding leniency programmes and refer to these judgements in their decisions?

The answers to the above questions should make it possible to verify whether the shape of the Polish leniency programme is a result of spontaneous, legislative or jurisprudential harmonisation,[23] and if so, to what extent each of these methods of harmonisation has influenced the national legal framework.

In this research, the author mainly used the dogmatic method of analyzing the provisions contained in legal acts regulating the Polish leniency programme and the content of soft law documents related to the development of the ECN Model Leniency Programme. References were also made to views expressed in legal literature. In this paper, the comparative method was also used in order to identify the extent to which Polish regulation of the leniency programme is Europeanised. It was also important to analyze the application practice of rules governing the leniency programme by the UOKiK President and Polish courts.

II. Polish leniency programme and the ECN Model Leniency Programme (spontaneous harmonisation)

The analysis of the legal regulations concerning the Polish leniency programme leads to the conclusion that the national legislator decided to transfer, to a significant degree, the solutions proposed in the ECN Model

[23] In this article, the author has followed the methods of spontaneous, legislative and judicial harmonisation of competition law which have been distinguished by K. Kowalik-Bańczyk. See: Kowalik-Bańczyk, 2014, p. 141–159.

Leniency Programme into the Polish legal order. However, some differences can be seen between the Polish and the model solution.

The basic difference between the rules governing the Polish leniency programme and the ECN Model Leniency Programme is already visible at the stage of comparing the scope *ratione personae* of these programmes. The Polish regulations encompass any undertaking[24] who has infringed the prohibition of competition-restricting agreements specified in Article 6 paragraph 1 of the ACCP or Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter; TFEU). In other words, it is irrelevant whether the prohibited agreement was concluded between entities operating at the same trading level (horizontal agreement) or between entities operating at different trading levels (Rumak and Sitarek, 2009, p. 102–103). By contrast, in accordance with the assumptions of the ECN Model Leniency Programme, such programmes shall be limited only to secret cartels, that is, the agreements concluded between undertakings operating at the same trading level (competitors).[25] The only exception from this rule is the possibility to include also cartels with vertical elements, that is, hub and spoke agreements (for example: an agreement concluded between a producer and several distributors). It was explained in the Explanatory Notes to the ECN Model Leniency Programme that 'Other types of restriction such as vertical agreements and horizontal restrictions other than cartels are normally less difficult to detect and/or investigate and therefore do not justify being dealt with under a leniency programme'.[26] It is also worth noting that in most EU Member States leniency programmes are applicable only to horizontal agreements,[27] including additionally hub and spoke agreements.

This means that the scope of the Polish leniency programme is wider than the scope of most European leniency programs (see: Rumak and Sitarek, 2009, p. 102–103),[28] including the ECN Model Leniency Programme and the

[24] The beneficiary of the leniency programme in Poland may also be a managing person within the meaning of Article 4 subparagraph 3a of the ACCP, who in connection with performing his function at the time of the ascertained infringement of the prohibitions concerned – intentionally allowed, through action or omission, infringement by the undertaking of prohibitions referred to in Article 6 paragraph 1 subparagraphs 1-6 of the ACCP or in Article 101 paragraph 1 subparagraphs a-e of the Treaty on the Functioning of the European Union.

[25] ECN Model Leniency Programme, section 4, p. 2.

[26] ECN Model Leniency Programme Explanatory Notes, section 14, p. 11.

[27] Similarly as it is in the case of the leniency programme applied by the European Commission. See section 8 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases.

[28] See: ECN Model Programme: Report on Assessment of the State of Convergence, issued by ECN on 13 October 2013, where there was indicated that only Polish, Swedish, Romanian and Finnish leniency programmes among the ECN members had a wide scope of application.

leniency programme applied by the European Commission.[29] The inclusion of all agreements restricting competition in the Polish leniency programme, regardless of their nature, has been criticized by some of the commentators (see: Turno, 2013, p. 460–465 and the literature indicated therein; also see: Molski, 2009, p. 71; Molski in: Skoczny, 2014, p. 1407; differently: Sołtysiński in: Banasiński, 2004, p. 41). Some of authors have also found that this approach is incompatible with the principles of necessity and of the effective application of Article 101 TFEU (Sitarek, 2014, p. 210). At the same time, however, it is indicated that the inclusion of hub and spoke agreements into the Polish leniency programme should be assessed positively (Turno, 2013, p. 461; Molski in: Skoczny, 2014, p. 1408).

Both the Polish leniency programme and the ECN Model Leniency Programme provide for two forms of alleviating responsibility for the beneficiaries of the programme: immunity from fines and the reduction of fines,[30] but the rules for obtaining them are not identical.

In the case of immunity from fines, the differences between the Polish leniency programme and the ECN Model Leniency Programme are already visible at the stage of determining the requirements for obtaining this form of a mitigation of responsibility. In the Polish leniency programme, full immunity from fine is granted to an undertaking which has entered into an agreement referred to in Article 6 paragraph 1 of the ACCP or in Article 101 TFEU and fulfilled all of the following requirements:

1) it was the first of the participants of the agreement to submit an application meeting the requirements specified in Article 113a paragraph 2 of the ACCP and also not to disclose the intention to submit an application; cooperated fully with the UOKiK President from the time of submitting the application[31]; and ceased to participate in the agreement before submitting the application or immediately after submitting the application;
2) it has submitted evidence sufficient to institute antimonopoly proceedings[32], or information enabling the UOKiK President to

Available at: http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf (16.05.2018). On the changes in the legal orders of those countries in this regard see: Sitarek, 2014, p. 209.

[29] Due to this discrepancy, it is emphasized that the Polish leniency programme is significantly different from the EU programme (Piszcz, 2015, p. 93).

[30] Article 113a paragraph 1 of the ACCP and sections 5, 7 and 9 of the ECN Model Leniency Programme.

[31] It is emphasized that the applicant should perform an active role and provide information and evidence to the UOKiK President without waiting for calls from the authority (Banasiński and Piontek, 2009, p. 1005; Molski in: Skoczny, 2014, p. 1412).

[32] Under Polish law, the name 'antimonopoly proceedings' refers to full competition law proceedings.

obtain such evidence, or if the application was submitted following the institution of antimonopoly proceedings – evidence that will significantly contribute to the issuance of the decision declaring a practice as restricting competition, or – upon the request of the UOKiK President – information making it possible to obtain such evidence, provided that the UOKiK President was not in possession of such information or evidence at that time;

3) it has not encouraged other undertakings to participate in the agreement.[33]

Comparing these requirements with the requirements established in the ECN Model Leniency Programme, the two areas in which discrepancies appear should be pointed out.

First of all, the Polish leniency programme makes it possible to obtain immunity from fine not only if the applicant provides the UOKiK President with evidence sufficient to initiate antimonopoly proceedings or significantly contributes to the decision declaring a practice as restricting competition, but also when the applicant provides only information enabling the UOKiK President to obtain such evidence (Article 113b subparagraph 1 of the ACCP) (see: Molski in: Skoczny 2014, p. 1416). By contrast, the ECN Model Leniency Programme – similarly to the leniency programme applied by the European Commission[34] – establishes the requirement to provide the competition authority with evidence.[35] Thus, according to the ECN Model Leniency Programme, only providing information on the evidence would not be sufficient to obtain immunity from fines. Within this requirement, the Polish leniency programme establishes more stringent requirements in this respect than the ECN Model Leniency Programme.

Secondly, the ECN Model Leniency Programme – similarly to the leniency programme applied by the European Commission[36] – excludes from the subjective scope of this programme undertakings who coerced other entrepreneurs to participate in the cartel.[37] By contrast, the Polish

[33] Article 113b of the ACCP.

[34] Section 11 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases.

[35] ECN Model Leniency Programme, sections 5 and 7, p. 2–3.

[36] Section 13 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases. It is also worth pointing out that in the Polish language version of this notice the term 'coerce' has been erroneously translated as 'encourage', and therefore the requirement in the Polish leniency programme to not encourage other entrepreneurs to participate in the agreement is in line with the Polish language version of the notice.

[37] In accordance with section 8 of the ECN Model Leniency Programme: 'An undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme', ECN Model Leniency Programme, section 8, p. 3.

leniency programme excludes from immunity from fines any undertaking who encouraged (in Polish: *nakłaniać*) other undertakings to participate in the agreement. The use of the term 'not encouraged other undertaking'[38] by the Polish legislator resulted in the exclusion from immunity from fines of a wider range of undertakings, as 'encouraging' is a much lighter form than 'coercing' (Piszcz, 2015b, p. 50). It is also rightly pointed out that meeting this requirement may be extremely difficult, because sometimes even a passive role of the undertaking, limited to the sole participation in the agreement, may be sufficient to encourage other undertaking (see: Turno in: Stawicki and Stawicki, 2016, p. 1519). As a result, the Polish leniency programme puts the applicant in a more difficult situation. This may be the reason why the Polish leniency programme is not widely applied (see also: Turno, 2013, p. 512–215; Molski in: Skoczny, 2014, p. 1418–1419).

Within the remaining scope, the requirements for immunity from fines set out in the rules governing the Polish leniency programme are similar to those set out in the ECN Model Leniency Programme.

Regarding the second form of mitigating liability, namely reduction of fines, the Polish leniency programme and the ECN Model Leniency Programme determine convergent grounds, requiring the applicant: to submit a request to reduce the fine; not to disclose the intention to submit a leniency application; to cooperate genuinely, fully and on a continuous basis from the time of its application with the competition authority until the conclusion of the case, including not destroying, falsifying or concealing relevant information or evidence related to the matter; to end its involvement in the alleged agreement (as a rule immediately following the application); and to submit evidence relevant to the case which was not in the possession of the competition authority.[39]

There are, however, significant differences relating to the principles of fine reductions. In this regard the ECN Model Leniency Programme is limited only to indicating that the determination of the level of reduction of the fine should be made taking into account the time at which the evidence was submitted and the competition authority's assessment of the overall value added to its case by that evidence. The only restriction on the fine reduction is the stipulation that the fine imposed on the undertaking who submitted the application under the leniency programme after the competition authority initiated the proceedings shall not exceed 50% of the fine which would otherwise have been imposed.[40]

[38] Regarding the interpretation problems of this concept, see: Molski in: Skoczny, 2014, p. 1417–1418; Turno in: Stawicki and Stawicki, 2016, p. 1519.

[39] Article 113c paragraph 1 of the ACCP and sections 10 and 13 ECN Model Leniency Programme.

[40] ECN Model Leniency Programme, section 11, p. 4.

As it is explained in the Explanatory Notes to the ECN Model Leniency Programme, this limitation is aimed at ensuring that there is a significant difference between immunity from fines and reductions of fines. In that case, the application for immunity becomes significantly more attractive.[41] The ECN Model Leniency Programme does not introduce any other rules that should be followed by the competition authority while determining the specific level of fine reductions.

The legal regulations regarding the Polish leniency programme contain more detailed rules for the reduction of fines. In accordance with Article 113c paragraph 2 of the ACCP, the level of the fine reduction depends on the order in which the undertaking meets the conditions for a reduction of the fine: (1) in the case of the first undertaking to fulfil the conditions, the UOKiK President shall impose a fine reduced of 30%–50% compared to the fine that would have been imposed upon the undertaking had the undertaking not submitted the leniency application; (2) in the case of an undertaking who is the second to fulfil the conditions – reduction of 20%–30% compared to the fine that would have been imposed upon the undertaking had the undertaking not submitted the leniency application; and (3) in the case of other undertakings which have fulfilled the conditions – a maximum of a 20% fine reduction. The levels of fine reductions adopted by the Polish legislator are analogous to those applied by the European Commission.[42] Thus, the Polish leniency programme, on the one hand, gives less of a margin of discretion to the UOKiK President when determining the level of a fine reduction than the ECN Model Leniency Programme but, on the other, it is more transparent for the undertaking applying for leniency (Molski in: Skoczny, 2014, p. 1423).

As regards the procedure for leniency, the Polish leniency programme and the ECN Model Leniency Programme provide for similar solutions. In this respect, particular attention should be paid to three areas.

The first concerns the rules related to the confirmation by the competition authority of the moment of filing a leniency application. In accordance with the rules governing the Polish leniency programme, the UOKiK President shall confirm the date and time of filing of the application.[43] The ECN Model Leniency Programme states that the provision of date and time is made upon

[41] ECN Model Leniency Programme Explanatory Notes, section 24, p. 13.

[42] Section 26 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases.

[43] Article 113a paragraph 4 of the ACCP. It is assumed that confirmation of the date and time of submitting the application in the case of oral submissions should be made in the minutes of entering an oral application, applications submitted in writing should take place on the copy of the application intended for the competition authority and on the applicant's copy, and in the case of applications submitted in the form of a paper sent by post or electronic mail, confirmation of the date and time of submitting the application should be made in the first

request.[44] Considering that in both programmes the competition authority is obliged to immediately inform the applicant that the conditions for immunity from fines or the reduction of the amount of the fines have been met, the lack of the obligation to confirm the date and time of filing the application *ex officio* in the ECN Model Leniency Programme is of secondary importance from the applicant's point of view. That is so especially because in the case of such a request, the ECN Model Leniency Programme obliges the competition authority to confirm this information.

The second noteworthy procedural issue is applying for a 'marker'. The ECN Model Leniency Programme provides for the possibility of applying for a marker in order to protect a given applicant's place in the queue for a set period of time, which allows that applicant to gather necessary information and evidence in order to meet the relevant evidential threshold for immunity.[45] The Polish equivalent of the application for a marker is a leniency application in a shortened form. The ECN Model Leniency Programme indicates that the application for a marker – similarly to the regular application – may concern only cartels or hub and spoke agreements; in the Polish leniency programme such limitation does not exist.[46] The rules contained in the ECN Model Leniency Programme state that if the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted. Simultaneously, however, the model programme makes a reservation that the competition authority has discretion as to whether to grant a marker.[47] As a result, the applicant who decides to apply for a marker cannot be sure that its place in the queue will indeed be protected, even if the application for a marker meets all the requirements established in the ECN Model Leniency Programme. By so doing, the model leniency programme encourages applicants to file complete, regular leniency applications, because the later protect the given place of the undertaking in the queue. Giving a competition authority the power to decide freely about granting a marker should convince the applicant to apply for a marker only as a last resort.

A slightly different solution in this respect has been implemented by the Polish legislator. In Article 113e paragraph 2 of the ACCP, it is stated that the UOKiK President shall promptly, once an undertaking has submitted a leniency application, specify the scope of the information or evidence

letter of the UOKiK President (see: Turno, 2013, p. 600; Turno in: Stawicki and Stawicki, 2016, p. 1500; Molski in: Skoczny, 2014, p. 1411).

[44] ECN Model Leniency Programme, section 15, p. 5.

[45] ECN Model Leniency Programme, section 16, p. 5.

[46] Article 113e paragraph 1 of the ACCP.

[47] ECN Model Leniency Programme, section 17, p. 5.

that must be submitted and time limit for its submission. Thus, the UOKiK President has not been equipped with the competence to refuse to protect a place in the queue for an undertaking submitting a leniency application in a shortened form (Turno in: Stawicki and Stawicki, 2016, p. 1534).[48] Only if the undertaking fails to submit the additional information and evidence within the specified time limit would its application not being reviewed (Article 113e paragraph 4 of the ACCP).[49] This basically means that the Polish solution regarding the possibility of submitting the leniency application in a shortened form is more favourable for the applicant than the one provided for in the ECN Model Leniency Programme.

The Polish legal framework not only provides for the possibility of submitting a leniency application in a shortened form with respect to a wider scope of competition-restricting agreements, but it also does not equip the UOKiK President with the discretion to refuse to grant a place in the queue. Especially the latter difference may result in a decision to apply for leniency in a shortened form as the preparation of the shortened application requires less work and time. Additionally, if the applicant manages to perfect the application within the specified time limit, the shortened application will have the same effect as submitting a regular leniency application straight away. It is also worth noting that the assumptions of the leniency application in a shortened form provided for in the ECN Model Leniency Programme reveal that the main purpose of this application is to grant undertakings immunity from fines. Only when the competition authority informs the undertaking that applied for a marker that their application for immunity is rejected, may the undertaking consider submitting an application for a reduction of the fine.[50] The Polish legal framework does not provide for such a solution, which means that the undertaking, by submitting the leniency application in a shortened form may immediately apply for immunity from fines or for a fine reduction. Then, if the conditions for immunity from fines are not met, the date of submitting the leniency application in a shortened form and perfected within the time set by the UOKiK President will determine the place in the queue of that undertaking when deciding on the level of the fine reduction.

[48] Similar view has been expressed by E. Modzelewska-Wąchal who indicated that the UOKiK President after the receipt of a summary leniency application is obliged to inform the undertaking of the information and evidence that the applicant should present and to determine the deadline for their delivery (Modzelewska-Wąchal, in: Skoczny, 2014, p. 1432).

[49] As it was rightly emphasized by E. Modzelewska-Wąchal, a failure to take into account a summary application does not deprive the undertaking of the possibility of submitting another summary application, whereby the date and time of submitting the application will be determined by the moment of submitting the last application (Modzelewska-Wąchal, in: Skoczny, 2014, p. 1433).

[50] ECN Model Leniency Programme, section 21, p. 6.

The third procedural aspect emerging from the comparison of the Polish leniency programme with the model one concerns summary applications. Such applications should be supplemented upon the request of a competition authority, only if the authority has decided to initiate antimonopoly proceedings regarding a given agreement. The possibility to file a summary application is provided for in both programmes and is aimed at eliminating negative consequences of the general rule, according to which the submission of a leniency application to one competition authority does not have any effect on other bodies.[51] The Model Leniency Programme states that the applicant that has or is in the process of filing a leniency application, either for immunity or for a fine reduction, with the European Commission may file summary applications with any national competition authorities which the applicant considers might be 'well placed' to act under the Network Notice.[52] By contrast, the rules governing the Polish leniency programme limit the possibility of filing a summary application only to cases when an undertaking submits to the European Commission an application for the immunity from fines.[53]

The scope of the situations when an undertaking is entitled to file a summary application within the Polish leniency programme is, therefore, far more limited than in the model as it cannot be used when applying to the European Commission for a fine reduction (see also: Modzelewska-Wąchal in: Skoczny, 2015, p. 1435). Incidentally, it is worth noting that part of the provision of Article 113f paragraph 1 of the ACCP (where it requires that a leniency application is submitted to the European Commission first before submitting a summary application to the UOKiK President) is to a certain extent contradictory to Article 113f paragraph 3 of the ACCP. The latter states that a summary application shall also contain information about applications submitted or to be submitted by the undertaking in other EU Member States or with the European Commission. Taking into consideration this discrepancy and the solution provided for in the ECN Model Leniency Programme, it should be deemed that a summary application may be filed with the UOKiK President also in the case when the applicant is in the process of filing a leniency application with the European Commission (see also: Turno in: Stawicki and Stawicki, 2016, p. 1539).

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[51] Due to the fact that a leniency application filed in one member state does not have an effect in another member states, it is assumed that filing leniency applications in all member states where the effects of the competition restricting agreement took place increases the chances of the undertaking to benefit from the leniency programme regardless of the competition authority that will examine the case (Modzelewska-Wąchal, in: Skoczny, 2014, p. 1434).

[52] ECN Model Leniency Programme, section 24, p. 6.

[53] Article 113f paragraph 1 of the ACCP.

The solution adopted by the Polish legislator provides for the possibility of filing a leniency application not only by the undertaking being a party to the agreement restricting competition but also by a managing person who is liable under Article 6a of the ACCP for allowing the undertaking to infringe the prohibitions referred to in Article 6 paragraph 1 subparagraphs 1–6 of the ACCP or in Article 101 paragraph 1 subparagraphs a-e TFUE.[54] The provisions on leniency for managing persons raise a few doubts. For instance, the law does not expressly clarify if there is only one common 'immunity queue' for both undertakings and managers (on this doubts see more: Piszcz, 2015b, p. 50–51; Piszcz, 2016, p. 215–216). The ECN Model Leniency Programme concerns only immunity from fines and the reduction of fines imposed onto undertakings.[55] Simultaneously, however, in the Explanatory Notes, it is indicated that it may also be appropriate to offer protection from individual sanctions to employees and directors of applicants for a reduction of any fine, especially in cases where the law provides the possibility to impose sanctions also on such persons.[56]

Incidentally, it is worth adding that there is also an additional option in Poland – not provided for in the ECN Model Leniency Programme or in the leniency programme used by the European Commission. This option is called the 'leniency plus programme'. It has been introduced to the ACCP by the Amendment Act of 2014, which entered into force on 18 January 2015. The leniency plus programme assumes the possibility of obtaining an additional reduction of the fine imposed on an undertaking which filed an application for immunity from or reduction of fines pursuant to Article 113c paragraph 1 of the ACCP but failed to meet the conditions for immunity. In order to benefit from this programme, the undertaking shall, prior to the issuance of the decision in the case with respect to which it has submitted an application, be the first of the participants in another agreement (with respect to which no antimonopoly proceedings or preliminary proceedings have been instituted yet) to submit an application regarding that other agreement and to submit to the UOKiK President evidence or information referred to in Article 113b paragraph 2 paragraph (a) of the ACCP. Then the UOKiK President:

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[54] In accordance with the Article 6a of the ACCP, where an undertaking is found to be in breach of the prohibitions referred to in Article 6 paragraph 1 subparagraphs 1–6 of the Act or in Article 101 paragraph 1 subparagraphs a-e of the TFEU, a managing person, who – in connection with performing his function at the time of the ascertained infringement of the prohibitions concerned – intentionally allowed, through action or omission, infringement of such prohibitions by the undertaking, shall also be subject to liability.

[55] ECN Model Leniency Programme Explanatory Notes, section 15, p. 11.

[56] ECN Model Leniency Programme Explanatory Notes, section 15, p. 11–12.

1) in a case with respect to which the following has been submitted the first application – shall reduce the amount of the fine imposed upon that undertaking by 30% and
2) with respect to an application regarding another agreement – shall grant the undertaking full immunity against fines provided that the undertaking has fulfilled all of the conditions specified in Article 113b of the ACCP (Article 113d paragraph 1 of the ACCP).

The rules governing the leniency plus programme have been the subject of critical commentary (see: Martyniszyn and Bernatt, 2015, p. 11; Semeniuk and Syp, 2013, p. 33–41; Skoczny, 2015, p. 172). Amongst others, it has been emphasized that there is a problem of what the notion 'other agreement' means. It is not clear whether this notion refers to an agreement regarding another market, other parties, another period of time, or not. Moreover, one may find it hard to explain how to calculate the fine in case the applicant discloses two or more 'other agreements' (Piszcz, 2015b, p. 52; Piszcz, 2016, p. 216).

III. Polish leniency programme and EU legal acts (legislative harmonisation)

In accordance with Article 3 paragraph 1 subparagraph b of the TFEU, the Union shall have exclusive competence in establishing the competition rules necessary for the functioning of the internal market. However, the application of competition law in the EU by the national competition authorities of its Member States is decentralized. First of all, it is due to the parallel application of EU competition law and national legislation. The second reason for that is Article 3 paragraph 1 of Regulation No 1/2003 which obliges national competition authorities to apply also Article 101 and 102 TFEU in cases when the national competition authority comes to the conclusion that the competition restricting practise or an abuse of a dominant position subject to their antitrust proceedings infringes not only national rules but also rules regarding, respectively, Article 101 or Article 102 TFEU. While applying EU competition law, a national competition authority, in the absence of EU procedural rules, applies national procedural rules in accordance with the notion of national procedural autonomy[57], and imposes sanctions on the basis of national law.

[57] On the procedural autonomy of the Member States see more: Kowalik-Bańczyk, 2012, p. 530–546.

Looking for the basis for legislative harmonisation of national leniency programmes, it should be noted that under the current legal status, the essential competence rule authorizing the EU legislator to take action in the area of competition law is the provision of Article 103 paragraph 1 TFEU (Kowalik-Bańczyk, 2012, p. 550). It authorizes the Council, on a proposal from the Commission and after consulting the European Parliament, to lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. On the basis of this legal provision, it should be stated that legislative harmonisation of national leniency programmes, by adopting EU regulations or directives, would require stating that such step is necessary to give effect to the principles set out in Articles 101 and 102 TFEU.

So far, the EU legislator has decided to engage in legislative harmonisation regarding leniency programmes only in one single legal act, namely Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[58] (hereinafter; Damages Directive). The Damages Directive sets out rules coordinating the enforcement of competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.[59] In motive 26 of the preamble of the Damages Directive, it is indicated that leniency programmes are important tools for the public enforcement of EU competition law, as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Due to the fact that damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases.

The Damages Directive itself does not concern directly the rules for leniency programmes, and it is limited in this regard only to issues connected to the disclosure of leniency statements included in the file of a competition authority[60] as well as to ensure that the civil liability of an immunity recipient is limited.[61] As a consequence, the scope of legislative harmonisation required by the EU legislator in the area of leniency is limited only to follow on issues,

[58] OJ L 349, 5.12.2014, p. 1–19.

[59] Article 1 paragraph 2 of the Damages Directive.

[60] Article 6 paragraph 6 subparagraph a of the Damages Directive obliges Member States to ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose leniency statements.

[61] Article 11 paragraph 4 of the Damages Directive obliges Member States to ensure that an immunity recipient is jointly and severally liable to its direct or indirect purchasers or providers and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. In the scope of evaluation of the legal regulation included in the Damages Directive in the part relating to

not connected strictly to the rules or procedure of using leniency programmes by national competition authorities. In Poland, the Damages Directive is implemented by the Act of 21 April 2017 on claims for damages caused by the infringements of competition law.[62] This statute – similarly to the Damages Directive – does not concern any rules regarding the leniency programme itself or the procedure of applying this programme (it is limited only to the issues required by the Damages Directive).

In the remaining scope, the Polish leniency programme has not been legislatively harmonised.[63] Nevertheless, this situation may change in the near future because legislative harmonisation of national leniency programmes is one of the aims of the proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, which was presented on 22 March 2017. Due to the fact that the legislative procedure regarding the proposal of this directive has not been completed yet, which means that the final version of this act is not yet known, in this article the issues arising from this proposal were intentionally omitted because, in the author's opinion, an analysis of the draft act would not be useful for the research covered by this paper.

IV. Impact of EU jurisprudence on the application of the legal provisions on the Polish leniency programme by the national authorities (judicial harmonisation)

The analysis of the decisions issued by the UOKiK President in the years 2004–2017 in cases where leniency applications were filed lead to the conclusion that the Polish competition authority, in issues regarding the interpretation or application of provisions of law governing the leniency programme, very rarely refers directly to the judgements of EU courts.

The UOKiK President, while interpreting national rules, referred to EU jurisprudence in a case regarding a competition restricting practice, in the form of determining retail resale prices of paints and varnishes produced by *Tikkurila Polska S.A.*, applied by *Castorama Polska sp. z o.o.* and *Praktiker Polska*

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the leniency programmes see e.g.: Jurkowska-Gomułka, 2015, p. 68–69; Piszcz, 2015, p. 92–94; Bultorac Malnar, 2015, p. 142–149; Gulińska, 2015, p. 168–174.

[62] Journal of Law 2017, item 1132.

[63] Incidentally, it should be explained that the assessment of the grounds of further legislative harmonisation of national leniency programmes would exceed the scope of this article. Due to this fact, this issue will not be subject to any deeper analysis in this paper.

sp. z o.o. In the reasons for this decision, the Polish competition authority, when examining whether a leniency applicant met conditions for the immunity from fines, referred in general to European jurisprudence concerning the interpretation of the term 'initiator of the agreement'. However, while doing so, the authority did not refer to any particular judgement in which this term was interpreted.[64] An analogous situation can be observed in the reasons for the decision issued in the case of an agreement restricting competition on the market of taxi transport in *Grudziądz* (city in Poland), in the form of establishing directly or indirectly uniform prices of taxi transport services.[65] Taking into consideration the fact that references to specifically indicated EU judgements are made relatively often in the reasoning of decisions issued by the UOKiK President in cases regarding competition restricting practices, such a laconic reference in the abovementioned cases to unspecified case-law cannot be considered a sufficient sign of the Polish competition authority actually following EU judgements with respect to issues connected to the interpretation and application of the rules governing the Polish leniency programme.

On the other hand, as regards the case-law of Polish courts examining appeals against the decisions of the UOKiK President, it should be stressed that issues related to the interpretation and application of the provisions of the leniency programme are not often the subject of jurisprudential considerations.[66] This is mainly due to two factors. Firstly, as it was indicated above, in Poland there are not many cases where leniency applications are being filed. Secondly, the issues related to the interpretation and the application of the rules governing the Polish leniency programme may be, in practice, subject to judicial examination only when the UOKiK President in his decision refuses to grant immunity from fines or when the authority reduces the fine imposed on a leniency applicant but the scope of this reduction is challenged by the leniency applicant. If the UOKiK President grants immunity from fines, the benefiting leniency applicant is usually not interested in appealing against such decision. Moreover, other parties to the antimonopoly proceeding, fined by the UOKiK President for the participation in the same agreement

[64] See: the decision of the UOKiK President on 24 May 2010, no. DOK-4/2010, p 141.

[65] See: the decision of the UOKiK President on 26 November 2012, no. RBG-410-02/12/PD, p. 39.

[66] The issues related to the interpretation and application of the provisions of the leniency programme have been the subject of judicial deliberations, in particular in the cases regarding the following UOKiK President's decisions: the decision of the UOKiK President on 8 December 2009, no. DOK-7/09, the decision of the UOKiK President on 24 May 2010, no. DOK – 4/2010, the decision of the UOKiK President on 27 December 2012, no. DOK -8/2012, the decision of the UOKiK President on 4 December 2012, no. RBG-30/2012.

restricting competition, cannot appeal the decision with respect to the part where immunity from fines was granted to another leniency applicant.[67]

V. Conclusions

The analysis made in this article leads to the conclusion that the shape of the Polish leniency programme is undoubtedly a result of the Europeanisation process of national competition law.

The comparison of the rules in the ACCP governing the leniency programme with the solutions proposed in the ECN Model Leniency Programme indicated that the Polish legal solution is, in this regard, a result of spontaneous harmonisation. The minimum harmonisation method chosen by the authors of the ECN Model Leniency Programme resulted in significant discrepancies between the Polish system and the model programme regarding, in particular, the scope *ratione personae* of both solutions. In effect, the Polish leniency programme may encompass entities who infringed the prohibition of agreements restricting competition regardless of the nature of such practice. By contrast, in the ECN Model Leniency Programme, an undertaking may benefit from this programme only if it was part of a cartel. It basically means that the Polish leniency programme includes a broader scope of agreements. There are also discrepancies between both solutions with respect to rules governing immunity from fines and reductions of fines as well as with respect to rules on the application for a marker or making a summary application.

The rules governing the Polish leniency programme have not been directly subject to legislative harmonisation. There are also insufficient grounds for the conclusions that jurisprudential harmonisation took place in the interpretation and application of the provisions of the Polish leniency programme.

In conclusion, it should be emphasized that despite the fact that the EU legislator did not decide to use the mechanism of legislative harmonisation, the shape of the Polish leniency programme is undoubtedly an effect of the process of Europeanisation. The method of harmonisation which was applied resulted in a situation where discrepancies between the national leniency programmes and the programme applied by the European Commission exist. Due to the fact that the effects of one agreement restricting competition may appear on the territory of more than one EU Member State, each discrepancy between their respective leniency programmes may affect the interests of an undertaking in applying for leniency. Nevertheless, discrepancies between the

[67] See: the judgement of *Sąd Ochrony Konkurencji i Konsumentów* on 28 November 2014, no. XVII AmA 160/11.

programmes cannot be the only factor explaining the low level of interest in leniency in Poland. While searching for the explanation of the unpopularity of the Polish leniency programme, one more factor should also be taken into consideration and that is the generally low detectability of infringements by the UOKiK President.

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Private Enforcement and Opt-out System
Risks, Rewards and Legal Safeguards

by

Maria Elisabete Ramos*

CONTENTS

* Assistant Professor, Faculty of Economics of Coimbra. CeBER and Faculty of Economics, University of Coimbra; e-mail: mgramos@fe.uc.pt. Postal address: Faculdade de Economia da Universidade de Coimbra, Av. da Dias da Silva, 165, 3004-512 Coimbra. Article received: 11 October 2019; accepted: 11 Novemeber 2018.

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Abstract

The EU Antitrust Damages Actions Directive does not include provisions for collective redress. Each EU member state is free to provide national regulation on this matter. The Portuguese legal system provided regulation on *actio popularis* since 1995. The 'rational apathy' of individual consumers may lead to non-reparation of damage and be of significant benefit for the company that is in breach of the law. The opt-out models solve the crucial economic problem caused by a large number of consumers or clients who have suffered a small loss because of competition law infringements. Under those circumstances, it is rational to be apathetic, because it can be foreseen that the cost of filing for compensatory damages will exceed the recovery obtained from the defendant. Such rational apathy of the parties injured by competition law infringements favours the wrongfully acting companies by not extracting their illegal gains from them. By not requiring the active consent of each of the claimants, the opt-out model is able to override rational apathy of consumers.

Résumé

La Directive 2014/104/UE du Parlement Européen et du Conseil du 26 Novembre 2014 relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne n'offre pas des normes sur l'action collective. Chaque État-membre est libre d'adopter ses normes sur ce sujet. L'ordre juridique portugais prévoit des normes sur *l'actio popularis*, depuis 1995. L'apathie rationnelle de chaque consommateur peut déclencher la non réparation des dommages causés par l'infraction des normes de concurrence. Cet effet signifie un bénéfice pour les entreprises qui violent le droit de la concurrence.
Le system opt-out donne la solution pour le problème causé pour des nombreux consommateurs qui souffrent des modestes dommages causés par des violations du droit de la concurrence. En ces situations, il est rationnel ne pas réagir, parce que les couts sont supérieurs aux bénéfices. Cette apathie rationnelle favorise les entreprises qui violent le droit de la concurrence. Le system opt-out est capable de surmonter les effets de l'apathie rationnel.

Key words: competition law; private enforcement; collective redress; opt-out system.

JEL: K15, K21, L49

I. Introduction

Competition law deals with consumer welfare. European Union competition regulations aim to promote efficiency and consumer welfare, which is universally referred to as a leading benchmark, the protection of market structure and economic freedom, and market integration (Buxbaum, 2005, p. 475).

Notwithstanding the 'increasing "economisation" of antitrust enforcement' (Ezrachi, 2017, p. 49–75) of competition law, many differences remain across EU countries. Competition law is not an island in a given legal system; it is shaped by legal tradition, the judiciary, and social and political inputs. Many factors, including historical ones, influence the competition law system. Additionally, competition law 'in action' (Pound, 1910, p. 12) depends on the activity of many players, like enterprises, regulators, the judiciary, economic and legal experts, lawyers.

We must be aware of the role played by the judiciary. In fact, the capacity of the judiciary to properly assess and digest complex and evolving theories when considering antitrust cases is disputed (Posner, 2001, p. 925). 'While some jurisdictions benefit from experienced and dedicated competition courts, others may not' (Ezrachi, 2017, p. 63). The disparity between the court's capacity and economic complexity increases the likelihood for mistakes and error costs' (Baye & Wright, 2011, p. 1).

Given that economic grounds, political, social and historical factors shape competition law, this article addresses the collective redress opt-out system, which is an important legal mechanism to grant compensation to consumers harmed by competition law infringement. This paper discusses the opt-out model's risks and advantages, assessing the factors which can trigger litigation abuse, and the safeguards which may mitigate such an undesirable outcome. In fact, some risks and rewards connected to the opt-out model are driven by specific social and cultural factors.

The opt-out model has become part of the European legal experience since some EU Member States adopted it. However, each of these Member States shapes its own regulations on the opt-out model differently, regardless of the European Commission Recommendation on the opt-in model.[1]

[1] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

The Directive on private enforcement[2] does not require Member States to introduce class actions or other types of collective redress. Nonetheless, the national Directive's transposition processes have deepened the debate on the types of collective redress and on the pros and cons of each model (opt-in and opt-out).

The main questions discussed in this article are: *a*) In the context of private competition law enforcement, what is the role of collective redress? *b*) Which factors, including financial incentives, are grounds for the Recommendation's hostility towards the opt-out model? *c*) Does the European experience follow the European Commission or challenges the European Commission Recommendation? *d*) Which are the rewards and safeguards adopted by the Portuguese opt-out collective redress action?

The Portuguese legal system adopts an opt-out collective redress model, which can be filed by consumers who seek to be compensated for loss or damage caused by competition law infringements. So, the Portuguese legal experience is relevant to the consumer compensation topic, given it does not follow the European Commission Recommendation on the opt-in model. It is important to understand whether the Portuguese collective redress system incorporates an accurate balance between rewards and safeguards, or whether it can lead to litigation abuse.

II. The private enforcement of competition law and the critical role of collective redress

A. Public enforcement and the suboptimal level of fines

Competition has some special features. In fact, competition resembles a public commodity in that it has benefits for everybody because it brings lower prices, a wider choice, greater efficiency, and more products and services that meet consumers' needs. Rivalry among enterprises leads to the elimination of less efficient firms and businesses. This is the expected outcome of the competitive market (Ramos, 2016, 28).

However, there is a *market failure* that must be addressed by regulation – namely when market forces themselves cannot ensure compliance with competition rules. In the European Union, public enforcement by public

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200720.aspx. The Court of Appeal (Lisbon) slightly reduced the fines.

authorities ensures respect for competition law, but the authorities do not have the competences to seek full compensation for consumers affected by competition infringements.

It is disputed whether the fine level is optimal or suboptimal for cartel deterrence in the European Market. According to Smuda, 'median overcharge rates are found to be 20.70 percent and 18.37 percent of the selling price and the average cartel duration is 8.35 years' (Smuda, 2014, p. 63). Smuda concludes that 'empirical evidence reveals that from an ex-post perspective the currently existing fine level of the EU Guidelines is insufficient for optimal cartel deterrence' Smuda, 2014, p. 63). Notaro suggests that in the case of the pasta cartel in Italy, the 'fines levied by the AGCM [The Italian Authority for Competition Law] in this particular case were below "optimal" levels' (Notaro, 2014, p. 87).

In the so-called 'salt cartel', the Autoridade da Concorrência estimated that, between 1998 and 2004, this cartel negatively impacted consumers, industry and competitors in the amount of 5.6 million euros.[3] In this case, the Autoridade da Concorrência fined the cartelists in the amount of 910 728 euros.

One may wonder whether a breach of the law (including competition law) is acceptable when such infringement is efficient for the wrongdoer. Some literature suggests the admissibility of an efficient breach of the law. Bainbridge wonders: 'Individuals routinely make cost-benefit-analysis before deciding to comply with some *malum prohibitum* law, such as when deciding to violate the speed limit. Is it self-evident that directors of a corporation should be barred from engaging in similar cost-benefit analysis?' (Bainbridge, 2002, p. 272–273). According to Pepper, 'The *malum in se*/*malum prohibitum* distinction appears, in older garb, to formulate the difference between law as a true prohibition (that is, the identification of conduct not to be tolerated) and law as cost (that is, the identification of conduct not to be penalized in some fashion, but which the citizen is still free to choose to do' (Pepper, 1995, p. 1577).

The 'law as a cost' perspective is generally rejected in the civil law legal systems (Fleischer, 2005, p. 147), yet, a corporation's directors strive for the best performance, the most efficient decision, in a strategic approach. Companies and enterprises take decisions on a cost-benefit basis. If, in the case of a competition law infringement, the cost of the fine is lower than the cartel's profits, there is an economic incentive to be a cartelist. This undesirable effect (at the end of the day, the cartelists benefit from being in the cartel) may occur if competition law enforcement is unable to extract the illegal benefits arising from the cartel.

[3] http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200720.aspx. The Court of Appeal (Lisbon) slightly reduced the fines.

There is a *gap* between the cartel's negative impact and the effectiveness of the fines (Loureiro, 2017). In fact, economics literature suggests that the fines levied by the national authorities do not reach the 'optimal levels'. These conclusions may imply that the public enforcement of competition law, although necessary, is not enough to confer market efficiency. In fact, the fine is unable to extract all the illegal advantages arising from the cartel.

Compensating the consumers affected by the competition infringements is beyond the scope of public enforcement. There is a *legal specialization*, meaning that national authorities enforce competition law by imposing fines; meanwhile consumers and competitors seek compensation for the damage caused by competition law infringements[4]. Such specialization gives an opportunity for the complementary role of private enforcement.

The 10% legal ceiling does not apply to private compensation of damages. Consequently, private enforcement by seeking full compensation for loss may contribute, albeit complementarily, to the efficiency of the market and the efficient allocation of resources. Private enforcers are driven by the rewards they can get from the wrongdoers. The effectiveness of private enforcement depends on suitable rewards (especially financial rewards) given to private enforcers.

B. Rational apathy and the under-enforcement of the consumer right to seek compensation for competition law infringements

The ECJ's *Crehan* and *Manfredi* rulings asserted the right of each consumer to seek *full compensation* for the loss caused by a competition infringement.[5] Despite legal and judicial recognition, the right to full compensation for loss caused by competition infringements faces an economic obstacle. The ordinary consumer who suffers damage when a cartel pushes up the price of the bread by 1 EURO has no economic incentive to bring the cartelists [before the courts or] to justice. Even though the claimant will be successful, legal costs are higher

[4] According Rajabiun, 2012, p. 187, 'Long-term data on case filings, administrative resources, and judicial outcomes from the United States reveal that mixed regimes allow for the specialization of tasks between public and private enforcers: competition authorities focus on the regulation of dominance, while private litigants tend to identify collusion in contractual relations'.

[5] Kirst & Van den Bergh, 2016, p. 1, identify the conflict 'between optimal leniency incentives and compensation for all victims". To solve this conflict, the authors suggest that "cooperating undertakings that have received immunity or reduction from fines would be granted the same protection against damages liability. Following this alternative solution, the non-cooperating members of the cartel would then have to compensate the victims for the harm caused by the cartel.'

than any restitution they might receive from the cartelists. If the damage is relatively small from the economic point of view, the injured consumer tends to be apathetic and absorbs the damage – this is rational behaviour, in other words, this is the rational choice from an economic point of view. 'Consumers with dispersed interests and low individual stakes need special protection in market transactions, in political process and in adjudication' (Maciejewski, 2015, p. 7).

However, consumer apathy is not a desirable outcome from the macroeconomic perspective.[6] This apathy benefits the cartelists, because they keep the illegal economic rewards accruing from the cartel and the injured consumer gets no remedy.[7] The loss of 1 EURO per item means millions of euros if it is multiplied by millions of injured consumers (Mateus, 2006, p. 1079). If we consider the loss suffered by society as a whole, we realize how important it is to create legal mechanisms that can override the consumer's rational apathy. In fact, consumer apathy precludes the complete recovery of damages, jeopardizes the deterrent effect and does not promote market efficiency. 'Ideally, for consumers and for businesses, when a consumer suffers damage the redress should be available fully and timely and at minimal costs. This allows restoring the efficient allocation of resources and achieving other social goals such as justice and equal treatment and levelling the playing field between the defaulting enterprise and its competitors' (Maciejewski, 2015, p. 7).

Collective redress by allowing the aggregation of several individual claims in a single action solves the economic problem faced by consumers whose

[6] In fact, Laitenberger & Smuda, 2015, p. 955, estimate the damage suffered by German consumers due to a detergent cartel active between 2002 and 2005 in eight European countries. Applying before-and-after and difference-in-differences estimations they found 'average overcharges between 6.7 percent and 6.9 percent and an overall consumer damage of about 13.2 million euros over the period from July 2004 until March 2005. Under the assumption that the cartel-induced share on turnover is representative for the entire cartel period and for all affected markets, the overall consumer damage would even sum up to about 315 million euros'. These authors add that the 'results further suggest that the retailers reacted to the price increases of the cartel firms via price increases for their own detergent products, resulting in significant umbrella effects'. They 'quantify the damage due to this umbrella pricing to a total of about 7.34 million euros'. These data may be an important tool for consumer associations to use 'in order to claim damages before national courts and thereby actively fulfil their mandate of consumer protection'.

[7] Cartels are not only detrimental for consumers; they can also have an adverse impact on growth. Petit & Kemp & J van Sinderen, 2015, p. 501, use cartel and industry data on productivity growth to estimate the impact of cartel formation, cartel presence, and cartel termination on the total productivity growth in the Netherlands between 1982 and 1998. They conclude that their 'research results suggest that cartel presence, indicated by registration status in the cartel register, indeed curbs productivity growth'.

loss is too small to motivate them to litigate (Guiné, 2014, p. 225). Popular action (*actio popularis*) *efficiently* solves another problem, which concerns the standing to sue, 'when the interests harmed by the anticompetitive practises are not related to a specific case.' The problem is solved by 'freeing the private individuals from the need to demonstrate infringement of an individual right' (Correia, 2010).

III. Factors which ground the recommendation's hostility to the opt-out models

A. The White Paper's suggestion on the opt-in model

The Directive on private enforcement does not require Member States to introduce class actions or any other type of collective redress.[8] The European Commission addressed the collective redress topic through a *soft law* instrument.

In April 2008, the European Commission launched a White Paper for public consultation on damages actions for breach of EU antitrust rules.[9] It proposed that EU legislation should implement an 'opt-in' collective action.[10]

'The opt-out model has been the subject of considerable attention during the public consultation held by the Commission on the topic of a coherent approach to collective redress. As explained by Judge Jones in his contribution to the public hearing on collective redress held by the Commission on 5 April 2011, the opt-out system presents undeniable advantages and must be examined, not from the perspective of American class action litigation, but from the perspective of European experience, with a view to devising a European mechanism for collective redress that will ensure access to justice and compensation, but which will present acceptable safeguards to prevent the excesses that have repeatedly been attributed to the US model' (Delatre, 2011, p. 29).

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[8] Piszcz, 2017, addresses the different legal solutions adopted by Central and Eastern Countries on compensatory collective redress.

[9] White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN (accessed November 2017).

[10] The White Paper, p. 4, proposes 'opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action'.

The White Paper does not give reasons for preferring the opt-in model. However, the Staff Working Paper[11] briefly addresses the issue, weighing the pros and cons of the opt-in versus opt-out solution. It explains that: 'An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim's harm. However, the analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. There is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interest in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation and would therefore be more easily implemented at national level.'

The objective set out in the White Paper was to ensure that 'all victims of infringements of EU competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered.' However, a question arises: given that objective, is the opt-in group action the best way to achieve it? Some authors argue that 'the compensation of all victims of EU competition law infringement is impossible. The concern is therefore to ensure that as many victims as possible will be compensated for the harm they suffered. In this context, the choice of which type of procedure should be developed – opt-in or opt-out – is fundamental' (Delatre, 2011, p. 36).

B. The Recommendation on Collective Redress and the rejection of the opt-out model

In 2013, the Commission adopted the Recommendation on Collective Redress[12], its principles are intended to apply to claims regarding rights granted

[11] Commission, 'Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules' COM (2008) (Staff Working Paper) 165 final.

[12] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

under EU law in a variety of areas, including competition law.[13] Some previous initiatives (including some surveys) developed by the European Commission had shown the variety of national legal solutions for collective redress. In possession of this information, the European Commission chose to tackle the collective redress issues by enacting a soft law instrument.[14]

It is not the purpose of the Recommendations to harmonise national legal regimes.[15] This means that national legal variations on collective redress experiences will remain, in spite of the common principles for injunctive and compensatory collective redress mechanisms set out in the Recommendation.

The European Commission thus identified the main principles to be adopted by the national laws of each Member State, but tolerates the current range of national legal solutions. In fact, the Recommendation is not, by nature, a mandatory instrument, and, consequently, it has the advantage of showing the path to be followed without imposing immediate national legal reforms. By doing so, the European Commission rejects the 'one size fits all' approach.

Collective redress instruments are an important tool to encourage and enhance private enforcement of competition law in Europe (Peyer, 2012, p. 351). The Recommendation finds that competition is an area 'where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value'.[16]

The aim of the Recommendation 'is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that

[13] In April 2008, the European Commission published for public consultation a White Paper on damages actions for breach of EU anti-trust rules. All the Commission initiatives on collective redress can be found at http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm. On 22 May 2017, the Commission launched the public consultation 'Call for evidence on the operation of collective redress arrangements in the Member States of the European Union'. 'The European Commission is assessing how the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law is being implemented in practice.' The consultation took place between 22 May 2017 to 15 August 2017 (12 weeks).

[14] According to Article 288 of the Treaty on Functioning of the European Union, the 'Recommendations and opinions shall have no binding force'.

[15] Hodges & Voet, 2017, find that 'There is no coherence in national class action laws, none of which correspond to the European Commission's 2013 blueprint'. Buccirossi & Carpagnan, 2013, p. 3, suggest that 'a legislative intervention on collective redress in antitrust at EU level may be needed to improve the effectiveness of the private enforcement of EU competition law. This intervention could have article 103 TFEU as legal basis and the most effective legislative act would be a regulation.'

[16] Recital 7 of the Recommendation.

follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse'.[17]

According to the European Commission Recommendation, the principal aim and purpose of this soft law act is to 'stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation'.[18] However, it is a controversial issue among authors whether or not the current US class action legal regime incorporates the right procedural safeguards to ensure that only reasonable, well-grounded actions are allowed to proceed. Furthermore, it is important to consider whether the peculiarities of national traditions in Europe, the 'path dependence', contribute to the same kind of abuses that are allegedly practised by the US legal industry.

The European Commission consistently puts forward a number of 'principles common to injunctive and compensatory collective redress' that are designed to be followed by national legal regimes on collective redress. These principles cover a wide range of legal aspects: *a*) standing to bring a representative action; *b*) admissibility; *c*) information on a collective redress action; *d*) reimbursement of legal costs of the winning party; *e*) funding; *f*) cross-border cases. Then the European Commission identifies 'specific principles relating to injunctive collective redress'.

For the purposes of this paper, it is relevant to consider the 'specific principles relating to compensatory collective redress',[19] in particular the recommendation concerning the 'constitution of the claimant party by the 'opt-in' principle'.[20] The Recommendation suggests that the 'claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice'.[21] This option is contrary to Rule 23 of the US Federal Rules of Civil Procedure, which adopts the opt-out model.

The Recommendation looked at the US class action regime and experiences and, as result, very clearly one of the Recommendation's main purposes is to avoid certain alleged abuses, especially those consistent with unmeritorious litigation. 'There is a widely held belief among corporate and government stakeholders that the US class actions regime is not the right fit for Europe'. (Geradin, 2015, p. 9).

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[17] Recital 10 of the Recommendation.
[18] Recommendation, Recital 1.
[19] Recommendation, nº. 19–20.
[20] Recommendation, nº. 21.
[21] Recommendation nº. 21.

Whether the US class action regime favours 'strike suits' or not is beyond the scope of this paper. In fact, this class action regime is controversial both within and outside the United States. It has several advantages and, at the same time, is open to several criticisms. The advantages of class actions (including competition class actions) are: *a*) they overcome the economic barrier faced by individual claimants whose claim is too small to fund the litigation against the defendant; *b*) they aggregate a large number of individual claims, which concentrates the litigation and therefore saves time, energy and resources of the defendant; *c)* they induce a deterrent effect through the award of treble damages.

However, the risks of class actions are well known. Critics point out that the legal industry has developed practices to secure a settlement regardless of the merit of the claim. In fact, some risk-averse defendants (who want to avoid reputational damage) prefer to pay a settlement instead of going to trial and succeeding. Another critic points out that a sole claimant receives minimal compensation. In short, according to this critic, class actions generate benefits and profits for the lawyers, rather than for the injured consumers.

The Recommendation is very cautious, even conservative, with respect to the US experiences with class actions. In keeping with this approach, the Recommendation states that 'elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule'.[22]Some authors detect a 'clear hostility towards the US class actions regime, which is perceived as a source of excessive litigation and unmeritorious claims' (Geradin, 2015, p. 13).

The Recommendation acknowledges that collective redress mechanisms are crucial to achieving an effective *private enforcement of competition law* and perhaps the European regulator recognizes that the US class action regime promotes such effectiveness. Understandably, it is neither possible nor desirable to advocate a complete and blind 'legal transplant' (Watson, 1993) of the US class action system to the European legal regime. Nor should it be forgotten that a number of factors have contributed to the current US class action legal regime (economic, social, legal environmental, litigation culture). It is to be expected that such an attempt at a 'legal transplant' would not succeed. The European Commission is aware of the problems caused by the legal transplant or 'legal borrowing' (Fleischer, 2005). Of course, tolerating class action abuses would be neither desirable nor help to cultivate efficiency. There is no doubt that the misuse of class action lawsuits must not be tolerated under European regulations.

[22] Recital 15 of the Recommendation.

The Recommendation rejects the contingency fee arrangement for paying the lawyer and other economic incentives which can lead to excesses and abuses, such as punitive damages.

Delatre points out that 'That opt-out mechanisms, by themselves, engender litigation excesses is usually considered a given, and rarely grounded by empirical evidence, other than a vague reference to the US class action' (Delatre, 2011, p. 20–21). This Author, analysing the European Commission's hostility towards the opt-out model, points out that 'The only document which considers the opt-in/opt-out debate is the impact study. It covers the topic in three pages of what can arguably be regarded as a shopping list of issues and concerns, shows a complete lack of empirical data and provides no analysis of any kind' (Gaudet, 2008, p. 107–108).

This lack of empirical data grounding the opt-out model could weaken the statements of the European Commission rejecting the opt-out model. In fact, it is crucial to be aware of the opt-out risks and simultaneously assess whether or not the European legal regimes favour such risks. It is important to understand why risks arise, the economically, socially and culturally driven forces which lead to the alleged litigation abuse culture in the US. Does the European legal and cultural environment trigger the same risks, incorporate the necessary safeguards? These are relevant issues to be addressed.

C. Assessing the Recommendation on Collective Redress proposals

Most recently, the European Commission evaluated the impact of the 2013 Recommendation, assessing whether further EU action is needed. In this context, the European Commission launched a 12-week Public Consultation running from 22 May 2017 to 15 August 2017.[23] This consultation aimed 'to collect information on stakeholders' practical experiences with collective actions, both injunctive and compensatory as well as on situations, where collective action could have been appropriate, but was not sought'.

Additionally, 'the U.S. Chamber Institute for Legal Reform (ILR) has commissioned a survey of the "state of play" in 10 Member States (including all of the largest economies) and covering 16 separate collective redress mechanisms'.[24]This survey addresses the 'litigation abuse' issues. Consequently, 'it contains a particular emphasis on where collective redress

[23] For further information see 'Call for evidence on the operation of collective redress arrangements in the Member States of the European Union', available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539,: Deadline: 15 August 2017 (Accessed November 2017).

[24] U.S. Chamber Institute for Legal Reform, 2017: 2.

mechanisms might be vulnerable to abuse, and on safeguards to mitigate against these abuses'.[25] This survey concludes that the opt-out model may contribute to unmeritorious litigation, especially when the third party litigation funding drives the 'possibility of claims inspired mainly by entrepreneurial lawyering or "investors" in litigation being greatly swollen, so that the value of their potential winnings will also swell. Experience has shown that the main beneficiaries in such scenarios are typically the lawyers, with consumers often getting nothing of value'.[26]

This survey expresses deep concerns about the risks of the opt-out models, especially when collective redress is captured by hedge funds or private equity interests. In such situations, the litigation costs through 'third party funding' can induce opportunistic claims filed to serve the funders' interests rather than to compensate consumers. 'Increasingly, financial investors (often private equity or hedge funds) are identifying, organising, instigating and managing cases by marketing to victims and then hiring and paying lawyers, all in exchange for a significant percentage of the recovery'.[27] The survey therefore suggests some third-party litigation funding safeguards, such as 'Implementing Licensing Through a Government Agency'.[28]

Even though the survey highlights the risks arising from the opt-out model, Portugal and the Portuguese opt-out experience lie outside the survey's scope. The question (not answered by this survey) is whether the Portuguese opt-out model facilitates the opportunistic claims risk.

D. 'A New Deal for Consumers' and the representative action

Recently (April 2018) the Commission presented a proposal titled 'A new deal for consumers', which aims to strengthen consumer rights and to improve enforcement tools. Regarding consumer rights' enforcement, the Commission rejects (once again) the US-style class actions. According to the Commission, the representative model is the best way to enforce consumer rights and is the 'European way'. The European Commission wants to avoid unmeritorious claims (according to the Commission, one of the major risks of the US-style model). The representative action will be open to non-profit consumer organizations who act 'on behalf of a group of consumers that have been harmed by an illegal commercial practice'. According to the European Commission draft 'New Deal for Consumers', representative actions will not

[25] U.S. Chamber Institute for Legal Reform,2017: 2.
[26] U.S. Chamber Institute for Legal Reform,2017: 4.
[27] U.S. Chamber Institute for Legal Reform, 2017: 29.
[28] U.S. Chamber Institute for Legal Reform, 2017: 5.

be open to legal firms. The European Commission suggests that law firms are reward driven organizations, which can induce the unmeritorious litigation risk. It is not clear why the representative model, as it is presented by the European Commission, avoids the unmeritorious litigation risk.

The 'New Deal for Consumers' proposal is wider than the private enforcement of competition law, but when implemented, it can have impact on this field. According to the European Commission, representative actions are the future of consumer rights enforcement in the European Union. Once again, the European Commission refuses US-style class actions and rejects opt-out collective redress. However, it is important to stress that US-style class actions have influenced some European legal systems in the field of private enforcement of competition law and the opt-out model constitutes a part of some European countries' legal experiences, including Portugal.

IV. Challenging the European Commission – the spread of opt-out models in Europe

A. The opt-out model makes part of the European legal experience

It is expected that the Recommendation will trigger some legal reforms within the European national legislation on collective redress, mainly in the field of private enforcement of competition law.

However, the legal reforms endorsed by this Recommendation depend on a political choice or political decision. Of course, the recommendation aspires to be a driving force for bringing the national rules on collective redress closer together. According to the draft Recommendation, harmonization or legislative approximation will be achieved not through mandatory directives but by soft law that suggests the principles that might be adopted by each national jurisdiction.

Given that the Recommendation is a *soft law instrument*, it is appropriate that each Member State makes a legal assessment of the effectiveness of the Recommendation's provisions. In spite of the European Commission rejecting the opt-out model, fact is that it is part of the European experience and tradition. According to the U.S. Chamber Institute for Legal Reform survey's findings, 'the following are opt-out or hybrid mechanisms: Belgium (Collective Redress Actions), Bulgaria (Proceedings in Collective Actions), Germany (KapMuG), Netherlands (WCAM), Spain (Collective Actions), the UK (CAT) and the UK (Representative Proceedings). Except for the Spanish system, these opt-out or hybrid systems have all been introduced

since 2005, which could indicate a possible shift away from opt-in systems in recent years.'[29]

Gaudet points out that Swedish, Norwegian, Danish, and Dutch experiences contradict several reasons given in the Commission's White Paper for favouring opt-in over opt-out class actions. Lacking persuasive reasons to reject Europe's most powerful mechanism, the Commission should take a hard look at opt-out class actions (Gaudet, 2008, p. 107).

Portugal has adopted the opt-out model consistently since 1995. Pursuant to Article 15 of the LAP (Law of *Actio Popularis*), the claimant party is formed based on the non-exclusion of persons who have been harmed. Under Belgian law, it is for the judge to decide whether an action can be based on an opt-in or opt-out model. This legal possibility does not exist in Portuguese law. The judge has no authority to choose the model on which the *actio popularis* is based.

Under the British Consumer Rights Act 2015 (Bass & Henderson, 2015, p. 716), the Competition Appeal Tribunal must state in the collective proceedings order whether the collective proceedings are opt-in or opt-out. Consequently, the Competition Appeal Tribunal has the power authority to decide that the proceedings will follow the opt-out model, which is more appropriate in situations involving many consumers with small claims.[30]

B. The opt-out model – advantages, incentives and risks

There is a basic consensus that the opt-out model remains controversial, despite its implementation in several European legal systems. Literature intensively explores its merits, risks and shortcomings.

Legal and economic literature identifies the main risks of the opt-out model (Delatre, 2011, p. 44). Summing up such risks:

a) The opt-out action *is expensive*. This objection stems from the USA experience where lawyers' contingency fees, the cost of certification and the cost of distributing the compensation increase litigation costs.

b) The opt-out model implies the principal-agent problem. This criticism focuses on the risk that rather than the represented group, the settlements negotiated by the plaintiffs mainly benefit their own interests. According to this criticism, the represented consumers do not have effective resources to monitor the conduct of the lead plaintiff or the lawyers and this situation could trigger a conflict of interests.

[29] U.S. Chamber Institute for Legal Reform, 2017: 38.

[30] See Section 47 (B) 2 and Section 47(B)(4).

c) The opt-out model does not grant the right to a 'day in court', meaning that consumers are not granted procedural rights. Consumers who do not opt-out are bound by decisions they have not expressly consented to, because the opt-out model only requires passive consent.

d) The opt-out model favours or triggers unmeritorious litigation. This objection stems directly from the USA experience with class actions, where some legal and cultural factors favour unmeritorious or frivolous litigations aimed to force the defendant to settle the action. Yet, it is relevant to understand whether unmeritorious litigations are an opt-out outcome or, on the contrary, whether they stems from a convergence of legal, historical and cultural factors.

The *claimant's passive/active consent* is a critical issue in competition collective redress actions. 'In the opt-in mechanism, the potential victim of an infringement is expected to actively join and potentially participate in the action, but is allowed not to, which implies remaining passive. This is called active-consent. It will require at least some, if not considerable, effort on the victim's part. The victim will therefore have to surmount several obstacles every step of the way, one of which is simply his or her own reluctance to participate in something as serious as a lawsuit. In the opt-out model, the potential victim is automatically opted-in, and is expected to remain passive – although nothing forbids him or her from taking a more active role in the action – but is authorised to expressly opt-out. This is called passive consent. In the former, action allows one to join the procedure, whereas in the latter, inaction allows one to remain part of the procedure' (Delatre, 2011, p. 45).

In the context of small claims, private enforcement of competition law faces the issue of rational consumer apathy, which guides towards an under-enforcement of the right to be compensated for the damage arising from the breach of competition law. In such a context, the opt-out model may contribute: *a*) to potentially better serve corrective justice; *b*) to override 'consumer apathy'; *c*) to increase the rate of participation in competition collective redress actions.

On the other hand, the opt-in model: *a*) is a deterrent against unmeritorious lawsuits; *b*) promotes meritorious claims; *c*) encourages defendants to contest unmeritorious claims; *d*) grants procedural rights to claimants and; *e*) is an expression of the active consent of the claimant.

Literature suggests that the opt-in model is deterring meritorious claims and complainants. 'In this particular context, the opt-in class action ceases to be neutral and actually becomes a deterrent rather than an incentive' (Delatre, 2011, p. 46). Empirical data show the low participation rates achieved by the opt-in models. In fact, statistics demonstrate that a relevant number of victims do not opt-out, but an overwhelming majority of potential victims tend not to

opt-in (Delatre, 2011, p. 48). Mulheron, in her survey of the opt-in group and representative actions in Europe, finds that, overall, the rate of participation in opt-in actions is on average lower than 1% (Mulheron, 2008, p. 154).

These data are especially important when we consider that small claims are sensitive to consumer rational apathy effects and, therefore, when there is little economic incentive to bring the cartelists to the court.

V. Rewards and safeguards of the Portuguese opt-out collective redress action

A. Competition law infringements and compensation of the injured consumers

It must be recognized that a wide range of factors can contribute to the effectiveness or ineffectiveness of a concrete collective redress legal regime. This is a very complex balance because, on one hand, there are efficiency requirements and, on the other, there are individual rights, particularly procedural rights. The assessment of this balance varies according to the legal choice on collective redress made by each of the legal regimes.

Article 52(3) of the Constitution of the Portuguese Republic, entitled 'Right to petition and right of *actio popularis*', states that 'Everyone is granted the right of *actio popularis*, including the right to apply for the applicable compensation for an injured party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to: a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; b) Safeguard the property of the state, the autonomous regions and local authorities'.

These constitutional provisions must be substantiated by ordinary law. At the level of ordinary law, the *actio popularis* is regulated by Law no 83/95 of 31 August (hereinafter; LAP)[31] It precedes the European Commission Recommendation on collective redress since it was published on 31 August 1995 and came into force 60 days afterwards (Machete, 1996, 269). Concerning the areas covered by collective redress (scope of application), Article 1(2) LAP states that the interests protected by *actio popularis* are public health, environment, quality of life, consumer rights, cultural heritage, and public domain.

[31] This law has been amended by Decree-Law No 214-G/2015 of 2 October.

Under Portuguese Law, a popular action may not be used indiscriminately, but only to protect meta-individual interests materially qualified by the Constitution or the law. The *actio popularis* endeavours to protect *diffuse interests* and collective interests, defined as 'supra–individual' (that is, above the individual), together with homogeneous individuals (that is, fragmented) interests or rights.

Competition is not expressly included in the list of the interests covered by the *actio popularis*. Furthermore, the Portuguese Competition Law (Law no 19/2012, 8 May) does not provide for collective redress mechanisms. In spite of this legal silence, one must argue that the Portuguese legal regime on *action popularis* can also be used to seek compensation for damages arising from infringements of competition law, at least when consumer protection is at stake (Abreu, 2011, p. 108).

The Portuguese legal regime allows the private enforcement of competition law through the compensatory *actio popularis*. The legal grounds that sustain this position are: *a*) references in the Portuguese Constitution and in Article 1(2) LAP are not exhaustive (Rossi & Ferro, 2013, p. 49–50); *b*) the Supreme Court confirmed this point of view; *c*) Article 1(2) LAP clarifies the meaning of the expression 'consumer rights' used in Article 52(3) of the Constitution of the Portuguese Republic 'when defence of popular action is admitted in order to prevent, terminate and legally prosecute infringements of the "protection of the consumption of goods and services"' (Correia, 2010, p. 112).

The Preliminary draft proposal for a law transposing the private enforcement directive,[32] presented by the Autoridade da Concorrência, clarifies this question. Article 19(1) of the Preliminary Draft proposal states that 'Actions for damages as a result of infringements of competition law may be brought under Law No 83/95 of 31 August, as amended by Decree-Law No 214-G/2015 of 2 October, and the following paragraphs also apply to them'.

Given the particularities of the *actio popularis*, the LAP establishes special rules of legal standing to sue. According to the LAP, *any natural person* is entitled to legal standing to sue provided they are in full enjoyment of their civil and political rights. Under the Portuguese legal regime on *actio popularis*, a company (such as a SME) that is a client or consumer of the undertaking responsible for the competition infringement may not file an *actio popularis* as the lead plaintiff.

The *actio popularis* may be filed by associations and foundations whose articles of association focus on the promotion of interests recognized by

[32] http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta_Publica_PrivateEnforcement.aspx. For a critical examination of the Autoridade da Concorrência Preliminary Draft, see Costeira, 2017, p. 175, ff.

Article 1 LAP, regardless their direct interest in the outcome of the action (Article 2(1) LAP). It seems that neither Article 52(3) of the Constitution nor Article 2(1) LAP 'impose any requirement of material connection between the citizen that initiates the action and the infringement in question (meaning, e.g., that a citizen need not have personally suffered damage as a result of the antitrust infringement in order to have standing to initiate an *actio popularis'* (Rossi & Ferro, 2013, p. 50).

According to Article 19(2) of the Preliminary Draft, the standing to bring actions for damages as a result of infringements of competition law under Law no 83/95 of 31 August is recognized in 'Associations and foundations whose aim is consumer protection' and 'Associations of undertakings whose associates are injured by the infringement of competition law in question, even if their statutory object does not include the protection of the competitive process'.

Legal standing to sue is also granted to local authorities, which can seek compensation for the injured persons living within the territorial boundaries of the local authority (Article 2(2) LAP). Finally, legal standing to sue is recognized in the Public Prosecution Service[33](Article 16 LAP).[34]

The Portuguese legal system does not have a requirement regarding either the 'numerosity' of the members or the 'adequacy of representation' (a requirement that the persons who represent the group of claimants will fairly and adequately protect the interests of the class) (Martins, 1996, p. 112).

Furthermore, according to Article 14 LAP, the plaintiffs, on their own initiative, without the need for a mandate or express authorization, *represents all the other holders* of the right or interests in question who do not opt-out. Consequently, according to the Portuguese legal regime, the association, the consumer or the client who files the *actio popularis* against the defendant (company) will *represent* all the consumers/clients who suffered damage because of that infringement and did not opt-out.

B. The Portuguese opt-out model – rewards and risks

From the several European legal experiences on opt-out collective redress actions, one may conclude that there are differences which identify each of

[33] According to Article 219(1), of the Constitution of the Portuguese Republic, 'the Public Prosecutors' Office has the competence to represent the state and defend the interests laid down by law, and, subject to the provisions of the following paragraph and as laid down by law, to participate in the implementation of the criminal policy defined by the entities that exercise sovereignty, exercise penal action in accordance with the principle of legality, and defend democratic legality'.

[34] See also Article 31 of the CPC.

the experiences. Consequently, it is important to analyse the Portuguese opt-out model to assess the risks arising from it and the rewards provided by it.

Article 15 LAP sets forth the consumer's right to opt-out. Article 19 of the 'Preliminary draft proposal for a law transposing the private enforcement directive'[35], presented by the Autoridade da Concorrência, addresses 'collective redress', but it does not accept the European Commission Recommendation on implementing the opt-in model. The Portuguese legal system continues to follow an opt-out model, in spite of the opt-in based Commission Recommendation.

To enable them to opt-out, potential claimants are informed about the filing of *actio popularis* through announcements published in social media or through public notices (Article 15(2)(3) LAP).[36] These publications serve the interest of each claimant by letting them decide whether they want to exercise the right of self-exclusion or not. This decision must be taken within the deadline fixed by the judge, within the period fixed for the presentation of evidence or within a similar stage in the proceedings.

A decision not to opt-out is assumed to equal the acceptance of the proceedings. In mass harm situations, it may be admitted that the *actio popularis* will cover consumers or clients who are not aware of their right to full compensation for the loss, because: *a*) the announcements will not identify all the injured parties; *b*) the consumer is not aware of the loss; *c*) the consumer has no access to the announcements. In all these situations, the consumer or client will be part of the group represented by the applicant.

'One of the main criticisms of the opt-out mechanism is its alleged cost' (Delatre, 2011, p. 49). Under this perspective, the opt-out model makes the collective redress expensive, considering lawyers' contingency fees, the costs of the certification and the costs of distributing the compensation.[37]

Some of these costs (typical in the USA opt-out experience) do not exist under the LAP, because it does not provide for a preliminary certification mechanism regarding the entitlement to take action, nor does the Portuguese legal system allow lawyers' contingency fees. Additionally, the LAP provides for an inexpensive regime for court costs (Article 20).[38]

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[35] http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta_Publica_PrivateEnforcement.aspx. For a critic examination of the Autoridade da Concorrência Preliminary draft, see Maria José Costeira, *supra* note 90 at 175–184.

[36] Gouveia & Garoupa, 2012, point out that 'poster or press may not be the best way to notify potentially interested parties when those interests might be diffused (especially for well-defined homogeneous groups of individuals).'

[37] See White Paper Impact Study, n. 16, 570.

[38] According to the European Commission White *Paper on Damages actions for breach of the EC antitrust rules*, Brussels, 2 April 2008 COM (2008) 165 final, 'Member States could also

Another opt-out model risk is related to the 'Principal-agent Problem', considering that the represented consumers do not have effective resources to monitor the conduct of the lead plaintiff or the lawyers, and this situation could trigger a conflict of interests. The LAP thus endows the court and the Public Prosecution Service with the authority to be the 'gatekeeper' of the sound development of the *actio popularis* (Articles 13, 16 LAP).

It is alleged that the opt-out model does not grant the 'right to a day in court', saying that this model of collective redress does not grant the procedural rights of consumers. In fact, consumers *who do not opt-out* are bound by the *res judicata* (Article 19 LAP). Under Portuguese Law, plaintiffs are only allowed to opt-out up until the end of the production of evidence stage. Additionally, Portuguese legislation does not recognize the right to opt-out from the settlement. Under other regimes, the plaintiffs may opt-out of the settlement.[39]

It is common knowledge that the opt-out model favours or triggers unmeritorious litigation, forcing the defendant to settle frivolous actions (the so-called 'blackmail settlements'). The Portuguese legal experience shows an *under-enforcement* of the consumer right to be compensated for loss caused by competition law breaches. In fact, the *Autoridade da Concorrência* has detected and punished several cartels. However, this outcome of the *Autoridade*'s activity did not facilitate the flow of collective follow-on actions.

The Portuguese legal experience is internationally mentioned as providing an incentive to get very high participation rates. In fact, Mulheron's study on the Portuguese experience (none of the cases studied were related to competition law infringements) estimates the rate of participation in opt-out class actions in Portugal to be close to 100%, considering the low number of victims who opt-out. Delatre finds the Portuguese legislation on *actio popularis* 'far reaching' and 'the closest equivalent in Europe to the US class action' (Delatre, 2011, p. 37). Hodges qualifies the Portuguese legal regime as 'the most liberal in Europe'.

In the Portuguese experience, as far as I know, there is only one case still pending where the plaintiff is claiming compensation for damage caused by competition infringements (Ferro, 2015, p. 1; Pais, 2016, p. 191). On 12 March 2015, the Portuguese Competition Observatory (a non-profit organization) filed a mass damages claim against Sport TV seeking to compensate over 600 000 clients for damage caused by restrictive practices. Under this *actio popularis*, the Portuguese Competition Observatory sought compensation for the damage caused to consumers who were excluded from access to the

consider introducing, where appropriate, limits on the level of court fees applicable to antitrust damages actions'.

[39] Article 7:908(2) of the Dutch Civil Code.

premium channel due to the price increase induced by a restrictive practice. The suit was filed on behalf of all consumers. However, it also sought to compensate the pay-television service consumers who were affected by reduced competition between 2005 and 2013 (Ferro, 2015, p. 1, 2016, p. 140).

In the Portuguese experience, on 27 May 2015, Cogeco Cable filed an action against Sport TV and its shareholders (NOS and Controlinveste), seeking compensation caused by the competition law infringement committed by Sport TV[40]. In the context of this action, last November 2017, the Lisbon Court of First Instance ('Tribunal Judicial da Comarca de Lisboa') lodged a request for a preliminary ruling to the Court of Justice (hereinafter; CJEU). The Portuguese Court referred six questions to the CJEU, mainly related to the possibility of invoking Articles 9(1) and 10(2), (3) and (4) of the Directive before the former, although the transposition period had not expired yet by the time the lawsuit was brought forward[41]. The questions referred by the Portuguese court are related to the horizontal direct effect of directives, the obligation of interpreting national law in conformity with EU law and the principle of procedural autonomy of the Member States, the principles of equivalence and effectiveness. It is the first time, the CJEU is been asked to give a ruling on Directive 2014/104/EU. This case can be a landmark. However, it is important to stress that none of the questions referred by the national court are related to collective redress. The case is still pending.

Considering the Portuguese experience on compensatory collective redress, one could conclude that it is not sufficiently powerful to trigger collective redress for competition claims.

C. Compensation distribution and claimant's representative reward – new approaches

Correia points out that the opting-out model and the compensation fixed on an overall basis represent two important factors for the effectiveness of the Portuguese legal regime. 'The possibility of fixing the compensation on an overall basis means that the perpetrators can be prevented from gaining advantage from the damage even when it is not possible to establish the exact extent of the individual damage suffered' (Correia, 2010, p. 112).

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[40] Request for a preliminary ruling from the Tribunal Judicial da Comarca de Lisboa (Portugal) lodged on 15 November 2017 — Cogeco Communications Inc v Sport TV Portugal and Others, (Case C-637/17). Official Journal of the European Union, C 32/14, 29.1.2018.

[41] At the national level, the Law n.º 23/2018, 5 June 2018, transposes Directive 2014/104/EU into the Portuguese legal system.

The LAP provides for the fact that, in a popular action, compensation may be awarded not only to individually identified interests but also to those that are not individually identified (Dias, 1999, p. 58). Typically, in the case of competition collective redress procedures, only some injured parties are individually identified during the proceedings, or perhaps none of them are identified at all. As Rossi and Sousa Ferro point out, 'in a great number of cases, it will simply not be rational to even attempt to take the option of individual identification of injured cases' (Rossi & Ferro, 2013, p. 56).

According to Article 22(3) LAP, 'the holders of interests who are identified are entitled to the corresponding compensation in accordance with the general rules of civil liability' and Article 22(2) LAP states that 'compensation for a violation of the interests of parties who are not individually identified is set globally'. The interpretation of these provisions is disputed in Portuguese legal literature (Rossi & Ferro, 2013, p. 57). The cases where an overall compensation sum may be awarded are also disputed (Rossi & Ferro, 2013, p. 57). This legal solution should be clarified for the sake of legal certainty.

The Portuguese LAP does not specify which authorities or entities are entitled to distribute the compensation to the injured consumers. This is a major issue. In cases where the court fixes an overall sum of compensation, it is crucial to identify the entities charged with distributing the compensation to the persons covered by *res judicata*.

Article 19 of the 'Preliminary draft proposal for a law transposing the private enforcement directive' clarifies the solution to this question. According to Article 19(6), 'The judgment shall identify the entity responsible for receiving, managing and paying the damages due to the injured parties not identified individually, which may be, in particular, the plaintiff or one or more of the injured parties identified in the action'. The Preliminary Draft does not clarify whether the entity or person who manages the compensation distribution will be rewarded, nor does it specify who will pay for the distribution of the awarded compensation. Assuming that the injured consumers will pay for this distribution service, one may wonder whether the compensation awarded by the court may be allocated to such payment.

D. Funding the litigation costs – are new financial incentives needed?

The Portuguese legal system follows the 'loser pays' principle, which diverges from the 'American rule'. Additionally, lawyers' contingency fees are forbidden under Portuguese law. 'Treble damages' are illegal under Portuguese competition law, since the loss is the limit of compensation that can be awarded to a consumer harmed by a competition law infringement. No less relevant is

the fact that the Law on *Actio Popularis* does not allow the plaintiff's lawyer to be rewarded by the damages awarded by the court. Additionally, the Portuguese legal system does not regulate third-party funding practices. It is open to question whether such practices are accepted by Portuguese law. The topic is addressed by literature (Duarte Gorjão-Henriques, 2015, p. 573) but this practice is absent from competition law collective redress actions.

The LAP sets forth a particular and affordable regime on court fees (Article 20 LAP). However, there are other litigation costs besides court fees, such as lawyers' fees, the cost of collecting information, economic expertise, *etc*.

Under current Portuguese law, the compensation awarded by the court will be distributed to the injured persons in accordance with the rules provided for in the law. Unclaimed damages will be delivered to the Ministry of the Justice (Article 22(5)), not to the plaintiff or to the lawyers' plaintiff.

In an innovative way, Article 19(7) of the 'Preliminary draft proposal for a law transposing the private enforcement directive' addresses the question of litigation costs. According to this provision, 'Damages not claimed by the injured parties within a specified period are to be paid to the plaintiff in respect of all or part of the costs, court fees, legal fees or any expenses incurred by the plaintiff in connection with the proceedings'. However, on 19 October 2017, the Council of Ministers approved draft law no 101/XIII which abolishes the provision allowing the plaintiff's litigation costs to be paid from unclaimed damages.

It is very important for legislation to correctly address the critical issue of plaintiff's litigation costs. When a competition collective redress is filed, the claimants who did not opt-out will benefit from the compensation awarded by the court, even though their contribution to the proceedings was zero. In fact, these passive members of the claimant group profit from others' procedural activism. The passive claimants obtain the benefit of compensation by free-riding.

In this context, it is important that the litigation costs, particularly lawyers' fees, do not economically demotivate plaintiff activism. In these circumstances, it is important to shape an accurate and transparent legal regime which allows the collective redress plaintiff to recover litigations costs. Otherwise, the litigation costs will constitute an economic disincentive to plaintiff activism.

One may be aware that 'Litigation abuse is fundamentally driven by financial incentives, so where representatives can profit, the risk of litigation being pursued for motives other than justice is real'[42]. So what is needed is that the 'balance of risks and rewards is essential to a reasonable, fair system of collective redress that does not encourage abuse'.[43]

[42] U.S. Chamber Institute for Legal Reform, 2017: 4.

[43] U.S. Chamber Institute for Legal Reform, 2017: 5.

The legal system must not tolerate unmeritorious litigation, opportunistic claims, and 'blackmail settlements'. Collective redress actions could be an important tool to obtain compensation for injured consumers. Under the Portuguese *actio popularis*, although the certification rules are liberal, the risk of litigation abuse is low because the rules governing the plaintiff and lawyers' reward are very strict.

VI. Conclusions

Consistently since 1995, the Portuguese law on *action popularis* has applied the opt-out model, regardless of the concrete circumstances of the claim or of the claimants. Under Portuguese law, the claimant party is formed based on the opt-out model and the judge does not have the authority to decide whether the *actio popularis* follows the opt-in model or the opt-out model. The European Recommendation did not compel a paradigm shift in Portuguese regulation on the formation of the claimant party.

There is no single European tradition on collective redress, only several national experiences. Some of those experiences follow the opt-out model to varying degrees, even though the European Commission Recommendation favours the opt-in model for compensatory collective redress.

It is disputable which advantages does the opt-out model actually have. The article argues that opt-out models solve the *crucial economic problem* caused by many consumers or clients suffering a small loss because of competition law infringements. Under those circumstances, it is rational to be apathetic, because it is very likely that the cost of filing for compensatory damages will exceed the recovery obtained from the defendant. Such rational apathy of the parties injured by competition law infringements favours the wrongfully acting companies by not extracting their illegal gains from them. By not requiring the active consent of each of the claimants, the opt-out model is able to override consumer rational apathy.

Additionally, the opt-out model potentially better serves *corrective justice*, because it may induce the retrieval of the illegal benefits arising from the competition law infringement and, consequently, it may contribute to a more efficient allocation of resources. Additionally, the opt-out model may help increase the rate of participation in competition collective redress actions.

The opt out model has disadvantages which are well known. From the *legal perspective*, the main risk arises from the passive consent of consumers. The opt-out model does not require the active consent of each consumer bound by the proceedings; it is taken that not opting-out means that the consumer

consents to the decisions taken by the lead plaintiff. This is in fact risky, because the consumer right to be compensated is managed by the lead plaintiff, even in cases where the consumer is not aware that collective redress has been filed, and therefore has no information on which to base a decision to opt-out. This risk is mitigated through effective announcements on collective redress, which disseminate accurate and transparent information to consumers potentially bound by *res judicata*. New information and communication technology can be a helpful tool to reach the highest number of claimants. This might help the collective redress legal regime contribute to safeguarding the procedural rights of consumers.

However, it must be stressed that litigation abuse, frivolous and unmeritorious claims, the 'excesses' alleged by the European Commission stem from *specific financial* incentives which reward the lead plaintiff and their lawyer. One may conclude that litigation abuse risks are not a necessary outcome of every opt-out system; rather, this risk must be assessed considering both the concrete opt-out legal regime and its rewards and safeguards. To understand this complex balance between economic incentives and safeguards it is surely important to learn from the US class actions experience, based on empirical evidence. At the same time, it is crucial to understand whether the concrete feature of a given opt-out model favours litigation abuse.

The Portuguese opt-out compensatory collective redress system does not contain financial incentives which favour abusive and unmeritorious litigation: *a*) punitive damages are, in general forbidden; *b*) 'treble damages' are illegal; c) lawyers' contingency fees are illegal; *d*) Portuguese law adopts the 'loser pays' principle and rejects the 'American rule'; *e*) the compensation awarded by the court is allocated, not to reward the lead plaintiff's lawyer, but to compensate consumers injured by the competition law infringements; *f*) third party litigation funding practices are absent from the competition collective redress actions.

Since 1995, the Portuguese legal experience tests the opt-out model of collective redress. In Portugal, empirical evidence shows an under-enforcement of consumer right to seek full compensation for the damage or loss caused by a competition law infringement. The Autoridade da Concorrência activity on cartel detection and punishment failed to boost follow-on compensatory actions. Additionally, to my knowledge, there are no reported cases of unmeritorious or frivolous litigation. The still pending mass damages claim filed by the Competition Observatory against Sport TV is partially a follow-on action based on the competition law infringements detected by the Autoridade da Concorrência.

The issues of litigation costs and the plaintiff's lawyer's reward are relevant to the effectiveness of collective redress. Under the LAP, it is forbidden to reward the plaintiff's lawyer from the compensation awarded by the court.

It is fair for the plaintiff to be compensated for the expenses entailed by the proceedings. An affordable legal regime on legal costs is not enough, because passive consumers will get free-riding compensation. To compensate the plaintiff fairly and transparently for the expenses caused by the *actio popularis* proceeding is a crucial issue that should be granted in order to improve private enforcement of competition law.

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Can an Ideal Court Model in Private Antitrust Enforcement Be Established?

by

Dominik Wolski*

CONTENTS

* PhD in law, Assistant Professor at Katowice School of Economics, attorney-at-law; e-mail: wolski_d@yahoo.pl. Article received: 10 August 2018; accepted 19 November 2018.

Abstract

Any discussion of private antitrust enforcement usually focuses on substantive law and proceedings applicable to private antitrust cases. Those elements are important, however, the efficacy of both public and private enforcement relies upon rules of law (substantive and procedural) along with their application. The latter constitutes a substantial aspect affecting the institutions which make decisions in private antitrust enforcement cases, namely the relevant courts. The enforcement of competition law is inextricably intertwined with the economy and markets. As a result, antitrust cases are demanding for non-specialist judges, who usually do not have enough knowledge and experience in the field of competition. Even if the Damages Directive has already been implemented in all EU Member States, there is still room for discussion about developing an optimal court model for the adjudication of private antitrust enforcement cases. In the aforementioned discussion the issue of the binding effect of decisions made by the European Commission (EC) and National Competition Authorities (NCAs) in private enforcement cases, as well as the experience of judges stemming from the number of cases they have resolved, cannot be missed. Bearing this in mind, the main aim of this paper is to analyse the model of competent courts operating in private antitrust cases in twenty selected countries including the US, the UK and the vast majority of EU Member States. Taking into account that a theoretically pure concept of an ideal model of relevant court operations presumably does not exist, it is essential to try to figure out what the main characteristics of the courts might be that can lead to effective private antitrust enforcement.

Résumé

Toute discussion sur l'application privée du droit de la concurrence se concentre habituellement sur le droit matériel et sur les procédures applicables aux affaires antitrust privées. Ces éléments sont importants, cependant, l'efficacité de l'application publique et privée repose sur des règles de droit (matériel et procédural) ainsi que leur application. Ce dernier constitue un aspect important affectant les institutions qui prennent des décisions dans les cas d'application des lois antitrust privées, qui sont les tribunaux compétents. L'application du droit de la concurrence est inextricablement liée à l'économie et aux marchés. En conséquence, les affaires antitrust exigent des juges non spécialisés, qui n'ont généralement pas suffisamment de connaissances et d'expérience dans le domaine de la concurrence.

Même si la directive 'dommages-intérêts' a été mise en œuvre dans tous les États membres de l'Union européenne, il reste encore des discussions sur la mise au point d'un modèle judiciaire optimal pour le règlement des affaires d'antitrust privées. Dans la discussion susmentionnée, la question de l'effet contraignant des décisions prises par la Commission européenne et par les autorités nationales de la concurrence dans les affaires privées, ainsi que l'expérience des juges découlant du nombre d'affaires résolues, ne peuvent manquer. Dans cet esprit, l'objectif principal de cet article est d'analyser le modèle des tribunaux compétents opérant dans les affaires antitrust privées dans vingt pays sélectionnés, y compris les États-Unis, le Royaume-Uni et la grande majorité des États membres. Puisqu'un concept théoriquement pur de modèle idéal d'activités judiciaires pertinentes n'existe pas, il est essentiel de tenter de déterminer quelles pourraient être les caractéristiques principales des tribunaux susceptibles de conduire à une application efficace des lois antitrust dans les affaires privées.

Key words: antitrust private enforcement; specialized, quasi-specialized and non-specialized courts; antitrust litigations; judges; jury; judicial review.

JEL: K21, K40

I. Introduction

Even though the Damages Directive (hereinafter; Directive)[1] has already been implemented in all European Union (hereinafter; EU) Member States,[2] this does not mean that discussions surrounding private antitrust enforcement triggered by the work preceding the Directive have come to an end. On the contrary, both in the US and the EU, a great number of academics and practitioners continue to discuss the rationale and efficacy of private antitrust enforcement models introduced in relevant States or organizations (like the EU). Some of them are of the opinion that the private enforcement model goes too far in imposing certain solutions, such as treble damages which can lead to over-deterrence (Jones, 1999, p. 80–81). Compensation fails because the actual economic victims are too numerous and remote from the violation, whereas deterrence is ineffective (Crane, 2010, p. 677). Therefore, the only

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union Text with EEA relevance.

[2] See Member States' communication on the European Commission website: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

way of effectively enforcing antitrust law is the public one (Wils, 2003, pp. 473–488). Those from the opposing camp claim that the treble damages rule effectively provides merely single damages. Consequently, they demand higher multipliers of damages to be adopted (Lande, 2004, p. 344; Lande, 2006, p. 6). This discussion seems to be never ending since interlocutors, proponents and opponents of a given model of private enforcement are not able to provide a definite and overriding argument, even if they reach for lofty concepts like consumer and social welfare or evoke empirical data (Lande and Davis, 2008).

The aforementioned discussion is very interesting in itself and very engaging, however, it mainly focuses on substantive law (for example rules of liability, quantification of damage, multiplier of damages, limitation periods, etc.) and proceedings (for instance disclosure of evidence, binding effect of NCAs' decisions, etc.). Even though those elements are of great importance, it should not be forgotten that the effectiveness of every type of enforcement, public as well as private, is the outcome of two key factors – rules of law (substantive and procedural) and their application. Therefore, even though the author of this paper is not about to question the time spent on analysing the rules which govern private enforcement, the model of court in the adjudication of antitrust litigations is also worth discussing.

Public antitrust proceedings are mostly pursued by various types of competition authorities, whereas bodies responsible for private antitrust enforcement are usually competent courts. The latter are in some cases specialized courts, but usually consist of generalist judges, and are therefore better or worse prepared to deal with competition-based cases. In these types of cases, law and economics are inseparable and specific training for judges, or as in the American jurisdiction also jurors, seems necessary. However, this either happens rarely or does not happen at all. The EU Member States decided to adopt various solutions ranging from ordinary civil courts to specialized courts in order to make decisions in private antitrust cases. Nonetheless we can learn from the following parts of this paper that even the notion of a 'specialized court' can be vague. Some of the countries involved, like the US, have long standing traditions of antitrust litigation, while some others, like most EU Member States, only recently began their serious adventure into the world of private antitrust enforcement. This means, in turn, that even if the directional decision has already been taken, there is still room for discussion of an optimal model of courts to adjudicate private antitrust cases. Furthermore, even though the Directive does not impose any particular solutions pertaining to the model of courts in private antitrust cases, this does not mean that its provisions are irrelevant. On the contrary – the binding effect of NCAs decisions, as well as guidelines regarding the quantification of harm, can significantly influence the

decisions made by courts dealing with antitrust litigations. Therefore, those are also issues discussed in this paper to the relevant extent.

Bearing this in mind, the main aim of this paper is to analyse the model of courts in several countries, and its development, in order to discuss the optimal option for antitrust damages claims. If such a model exists, it could become a template to be implemented in countries which are determined to substantially boost their own private antitrust enforcement. This paper analyses the models used by courts in twenty countries. Even though this is not a fully comprehensive study in methodological terms (it does not cover all EU Member States), considering the quality of the research sample – the study includes the US and the biggest EU economies – the author believes that this allows him to achieve the main goals of this paper.

The analysis contained in this paper is limited by the sources which were accessible at the time of writing, their contents and quality of the information they contain. However, the author believes that the data presented in this paper allows us to draw credible conclusions with respect to the model of courts in private antitrust cases. The paper also covers, to the relevant extent, the binding effect of NCAs decisions as well as makes some observations on the judicial review of such decisions. The latter issue is particularly relevant when discussing the need for specialized or non-specialized courts to adjudicate antitrust litigations. This is because it can reasonably be assumed that the courts that review NCAs decisions have more experience and knowledge in competition matters. As a result, they have more capability in dealing with competition litigation too. Therefore, this issue is discussed in this paper in the context of the need for specialised or non-specialised court involvement in private antitrust cases. Furthermore, in the last part, the author considers whether the creation of an optimal model of court in antitrust cases is possible at all. The paper does not discuss arbitration as one of the potential alternatives for resolving antitrust disputes.

II. The American Model of Antitrust Litigation

The US litigation-oriented model of antitrust enforcement is unique (Jones, 1999, p. 19), being the birthplace of private antitrust enforcement with an overwhelming number of litigations[3] – a factor which does not seem to be changing. Therefore this paper aims to start with a discussion of the US example. The structure of the authorities and courts competent in private

[3] With a rough number of 90% of private and 10% of private enforcement proceedings (see i.a. Jones, 1999, p. 16).

antitrust enforcement cases is complex. The complexity of the enforcement of US antitrust laws arises out of its decentralization (Jones, 1999, p. 14), as well as from the fact that enforcement is shared between various bodies at both State and Federal levels. Antitrust law in its private dimension is enforced by the Antitrust Division of the United States Department of Justice (hereinafter; DOJ), the Federal Trade Commission (hereinafter; FTC) and private individuals and entities, as well as the State Attorney General which can bring Federal antitrust suits on behalf of natural persons based on section 4C of the Clayton Act.[4] In the latter case, the State Attorney General can bring cases on behalf of each State and other public entities or on behalf of its citizens[5]. Additionally, irrespective of Federal law, in most US States, the State Attorneys General can initiate actions based on the antitrust laws of individual States[6]. The States themselves as well as, in some States, their Attorneys General, have also the authority to sue as *parens patriae* on behalf of State residents[7]. Generally, States hold *parens patriae* according to both Federal and State law, which empowers them to seek damages on their own behalf and on behalf of their citizens as consumers[8]. Regarding damages claims, the DOJ is empowered to bring civil actions in order to recover damages of the same type as a private individual or entity, should the United States government have been injured as a result of a violation (Sullivan and Hovenkamp, 2003, pp. 65–66; Sullivan and Grimes, 2006, pp. 930–931; Jones, 1999, p. 14).

According to section 4 of the Clayton Act, any person (individual, business, government), who has been injured as a result of an antitrust violation may sue to recover treble damages, costs of the legal action and Attorney fees (Sullivan and Hovenkamp, 2003, p. 70). Regarding the court of jurisdiction competent in antitrust litigations, sections 4 and 16 of the Clayton Act state that jurisdiction is exclusive to Federal district courts, officially titled the United States District Courts. These are the courts where most of private plaintiff complaints are filed initially (Hovenkamp, 2005, p. 343; Jones, 1999, p. 16; Saint-Antoine, Lewers, Hutchison, Bullard and Michelen, 2016). Antitrust cases are usually brought to a trial court, presided by a single judge; that judge or a jury composed of randomly chosen ordinary citizens makes the initial decision in the case. In civil cases, antitrust litigations included, each party (plaintiff as well as defendant) may require the resolution of the case by a jury. This rule follows the Seventh

[4] Clayton Antitrust Act, 1914, c. 323, 38 Stat. 730 (see also Jones, 1999, pp. 14–16).

[5] *State Antitrust Enforcement Handbook*, American Bar Association, 2018, p. 9.

[6] *Ibidem*, p. 15 and Jones, 1999, p. 16.

[7] *State Antitrust Enforcement…*, p. 9 and p. 15. Some States can also empower other entities to bring civil State-law antitrust lawsuits. See *Ibidem*, p. 16.

[8] The concept of *parens patriae* originally arises from English constitutional systems as a 'father of the country'. For more see *State Antitrust Enforcement…*, p. 25.

Amendment to the Constitution of the United States preserving the right of trial by jury (Jones, 1999, p. 22). In a jury trial, the judge determines the law and gives the jury oral and written instructions how to apply the law to the factual circumstances of the case. The jury applies the law to the facts; its verdict must be unanimous. It is worth emphasising that neither judge nor jury have specific expert knowledge in economic matters – antitrust legislation included. The litigants usually have to teach jury members specific aspects required for them to make a competent decision. Moreover, in antitrust cases, expert witnesses, economists, accountants, etc., are very often appointed (Jones, 1999, p. 22). Bearing in mind the above mentioned characteristics of Federal district courts adjudicating the vast majority of antitrust cases, they should be perceived as non-specialized courts in the field of antitrust and its private enforcement.

A party unsatisfied with the decision of a district court can lodge an appeal to one of thirteen circuit courts of appeal, officially titled the United States Courts of Appeals. In case of a conflict between circuits, usually the Supreme Court decides. It is worth noting that Federal courts of appeal have no jurisdiction empowering them to review decisions issued by State courts (Broder, 2005, pp. 6–7; Jones, 1999, pp. 20–21). Finally, cases can be directed to the Supreme Court of the United States. This court, as the highest court in the US, exercises appellate jurisdiction over the thirteen Federal courts of appeal (Broder, 2005, pp. 6–7; Jones, 1999, p. 20; Saint-Antoine, Lewers, Hutchison, Bullard and Michelen, 2016). Additionally, in situations involving several more or less similar cases brought forward in different districts, the Judicial Panel on Multidistrict Litigation can decide on the consolidation of such cases before a single court (Broder, 2005, pp. 6–7; Saint-Antoine, Lewers, Hutchison, Bullard and Michelen, 2016).

Regarding further issues relating to the interplay between the Federal and State enforcement level, it is worth noting that it has been held that a prior State decision may operate as a bar to subsequent Federal antitrust claims, and that subsequent Federal antitrust courts should consider the preclusive effect of a prior State judgement with regard to the preclusion law of the State court (Sullivan and Hovenkamp, 2003, p. 72; Sullivan and Grimes, 2006, pp. 946 and 949)[9]. Furthermore, there is also an interesting development of inter-State commerce theory analysed in several meaningful judgements, starting with *E.C. Knight Co., 156 U.S. 1, 12 (1985)* (Sullivan and Hovenkamp, 2003, pp. 77–78). The nitty gritty of the discussion is that a Federal antitrust law-based claim can be brought only if the conduct in question has the form of inter-State commerce, or one that affects such commerce (Sullivan and Grimes, 2006, p. 983).

[9] See also *Marrese v. American Academy of Orthopedic Surgeons*, 47 U.S. 373 (1985).

As mentioned above, US courts dealing with antitrust damages claims are ordinary courts competent to deal with cases other than antitrust too. These are non-specialized courts deciding in antitrust matters, even if their record of antitrust cases is striking. Therefore, even having experience in dealing with antitrust cases, neither judges nor juries are specialists in the fields of the economy or, in particular, in competition law. Bearing this in mind, it is worth noting that Federal agencies (as the key enforcers) have substantial impact upon the development of the law, setting guidelines for Federal and State courts, State enforcement officials, private litigants and attorneys. This is because Federal agencies have brought many ground breaking cases in this field (Sullivan and Grimes, 2006, p. 930). As a result, courts resolving antitrust litigations, even if non-specialized, take guidance from the practice of Federal enforcement agencies. Notwithstanding the foregoing, the Antitrust Division of the DOJ occasionally can file an amicus brief to the Federal courts, which is, however, likely to happen when the case reaches the Supreme Court (Sullivan and Grimes, 2006, p. 932). It is also worth mentioning that while a well-developed and resulting in great awards for the winning plaintiffs, the costs of the US non-specialized-model of antitrust litigations are high with respect of both time and money (Gotts, 2018, p. vii).

III. Is the UK the Hub for Antitrust Damages Claims?

The UK, Germany and the Netherlands are becoming the main 'hubs' for antitrust litigations in Europe (Gotts, 2018, p. viii). This does not mean that the venues accessible to plaintiffs are centred on those countries. Since the British model of courts competent in antitrust cases has its specificity and significantly differs from the others, it is discussed separately. From this perspective it is worth noting that over the last years, there has been an explosion of cartel damage litigations in British courts (Robertson, 2017, p. 2). The accumulation of antitrust litigations may also result from a demonstrable willingness of British courts to deal with cases that have sometimes only a small connection with the UK jurisdiction. This means, in turn, that in practice UK courts usually find themselves competent if the claimant proves successfully the concept of a so-called 'anchor defendant', namely a company domiciled in the UK. This relates in particular to cartel cases where it is enough in order to obtain UK jurisdiction to find that at least one company from the cartelists is domiciled within the UK territory (Gelmini, 2017, p. 3).

The current model of courts which deal with antitrust damages actions in the UK, which has been in existence since 1 October 2015, was established by

the amendments to the Competition Act 1998[10] introduced by the Consumer Rights Act 2015[11]. As a result, there are two courts competent in antitrust litigations, namely the High Court (hereinafter; HC) and the Competition Appeal Tribunal (hereinafter; CAT). Therefore, both types of actions, stand-alone and follow-on, can be brought to either the HC or the CAT. However, whereas the HC has jurisdiction over England and Wales only, the CAT's jurisdiction extends across the entire UK (Adkins and Beighton, 2016, p. 1; Slaughter and May, 2017, p. 4). Private antitrust actions can also be transferred between the courts (the HC and the CAT) within the discretion of the relevant forum (Adkins and Beighton, 2016, p. 13). Regarding the HC, antitrust litigations are heard by either the Chancery Division or the Commercial Court of the Queen's Bench Division (Adkins and Beighton, 2016, p. 2). Considering the need for specialized and non-specialized courts in antitrust cases, the most important aspect of antitrust litigations is the composition of the court. When adjudicating, the HC usually consists of a single judge who is a lawyer (normally a barrister) (Slaughter and May, 2017, p. 5). As a result, the HC seems to have a traditional, legalistic approach in terms of competences and training required from persons who decide in private antitrust cases. With regards to the acceleration of private enforcement actions in British courts, this trend has been observed in the HC as well, where the number of cases has increased significantly[12]. In relation to the possibility of challenging a judgement issued by the HC, if a party to the proceedings is unsatisfied with the judgement, it can lodge an appeal based on fact or law to the Court of Appeal. Furthermore, in cases of general public importance, there is the possibility of filing an appeal from the Court of Appeal to the Supreme Court (Adkins and Beighton, 2016, p. 41).

The CAT was established by Section 12 and Schedule 2 to the Enterprise Act 2002[13], which came into force on 1 April 2003 – however, its role significantly increased once the constrains placed previously on pursuing stand-alone actions were repealed, as a result of the reform implemented by the Consumer Rights Act 2015. Therefore, having no intention to undermine the significant role of the HC in private antitrust enforcement, there remains the unquestionable fact that the CAT is becoming the most popular venue for antitrust litigations. The number of cases being brought to the CAT has been increasing, not to mention some cases that are transferred from the HC to the CAT, additionally enlarging this number. This trend does not seem likely to change in the future,

[10] http://www.legislation.gov.uk/ukpga/1998/41/contents.

[11] http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted. See also Adkins and Beighton, 2016, p. 1.

[12] Competition Appeal Tribunal, Annual Report and Accounts 2016/2017, p. 13.

[13] https://www.legislation.gov.uk/ukpga/2002/40/contents.

since if any party pursues monetary compensation (damages or sum of money) in any part of the UK, the claim can usually be brought before the CAT.[14] Therefore, the number of antitrust litigations before the CAT – actually only a part of the CAT's jurisdiction[15] – is expected to continue to grow[16]. It is also worth mentioning that despite many procedural similarities between the aforementioned venues, there are some significant differences too. One of the important differences is the less legalistic and more flexible approach of the CAT to resolving antitrust damages claims.

As this paper is mainly, even if not entirely, focused on the role of courts in antitrust litigations, one of its most important aspects is the composition of the court dealing with litigations. In the case of the CAT, this is the outstanding feature in comparison to other models of courts discussed in this paper. Antitrust claims are heard in the CAT by a panel of three people consisting of one person who is a lawyer (the chairman of the tribunal) and other two non-lawyers (ordinary members). Those people are chosen from a list of experts from fields such as economics, accountancy, business and other competition and market-related fields[17]. The important role of the experts involved in resolving antitrust litigations, who have an equal voice with the chairman when deciding about the case[18], is very often emphasised as the CAT's distinctive feature. This element distinguishes the CAT from other courts hearing antitrust cases, the HC included. This is also the main reason why the CAT is perceived as a specific, specialized body particularly competent in competition litigations with a remarkable record of cases resolved. Please see the official website of the UK government: 'The UK Competition Appeal Tribunal (CAT) is a specialist judicial body with a cross-disciplinary expertise in law, economics, business and accountancy, whose function is to hear and decide cases involving competition or economic regulatory issues'[19].

Considering the aforementioned characteristics of the CAT in the context of an ideal model of court dealing with antitrust damages claims, a few issues are worth drawing attention too. There is a lot of enthusiasm surrounding the CAT and its role as the major venue for private enforcement of competition law in the UK. The decision of the UK government on the creation the CAT to deal with antitrust litigations is perceived to be 'the most significant and

[14] http://www.catribunal.org.uk/242/About-the-Tribunal.html.

[15] Full jurisdiction of the CAT includes collective actions and appeals against decisions of the Competition and Markets Authority (CMA) and by designated sector regulators see: Competition Appeal Tribunal, Annual Report and Accounts 2016/2017, p. 2–3.

[16] See *Ibidem*, p. 5.

[17] See i.a. http://www.catribunal.org.uk/242/About-the-Tribunal.html and Slaughter and May, 2017, p. 4–5.

[18] Competition Appeal Tribunal, Annual Report and Accounts 2016/2017, p. 6.

[19] https://www.gov.uk/government/organisations/competition-appeal-tribunal.

positive development in the field of private antitrust enforcement in the UK since the advent of the Competition Act 1998 and the creation of the CAT' (Barling, 2013, p. 4). This became the case particularly after the reform that allowed the CAT to judge not only follow-on but also stand-alone types of claims[20]. The constraints which existed previously caused claimants to lack the capability to sue the violator if the action was not preceded by a decision of a competition authority confirming the infringement, as well as other procedural difficulties – these were subsequently strongly criticised (Barling, 2013, p. 5–6). As a result, the aforementioned extension of the CAT's power is welcomed by judges and other practitioners (Freeman, 2016, p. 9–10). Furthermore, another source of enthusiasm involves the CAT's ability to deal with antitrust cases involving economic and business knowledge and experience in the field of competition, due to the mixed law and economics composition of the panel. The specialization of the CAT eliminates the risk of resolving antitrust cases by judges who are not familiar with competition law and related issues (Robertson, 2017, p. 2). However, in all fairness, it should also be noted that while the judgements of the CAT include economic analyses encompassing a wide range of antitrust-related issues and anti-competitive practices, not every assessment of the CAT is fully endorsed by experts outside the CAT. These include, for example, the CAT's analysis of discriminatory terms of contracts for the supply of coal[21], calculation of loss caused by the abuse of a dominant positions in relevant markets[22], or incorrect application of the legal test for excessive pricing (Reger, 2018). However, the latter judgement faced criticism regarding the wrongness of the CAT's assumption about the economic value of products and – as the critics state – defective concept of 'fair prices'. As said, critics argue that reasonably behaving entrepreneurs will always seek to maximize profits, which has nothing to do with 'setting prices that bear a reasonable relation to the economic value of the product.' As a result, 'it is difficult to grasp the economic meaning of unfairness' (Reger, 2018, p. 2–3).

The conclusion mentioned above is undoubtedly interesting and worthy of further discussion in the field of competition in its various aspects, both private and public. Irrespective of this criticism the author of this paper believes that the legal and economic experience of the CAT's panel is of great importance when resolving antitrust disputes. Judges' lack of experience in economics can

[20] Competition Appeal Tribunal, Annual Report and Accounts 2016/2017, p. 2.

[21] See *Enron Coal Services Ltd. (in liquidation)* v. *English Welsh & Scottish Rail Way Ltd.* (http://www.catribunal.org.uk/237-3346/1106-5-7-08-Enron-Coal-Services-Limited-in-liquidation.html).

[22] *Albion Water Limited* v. *Dŵr Cymru Cyfyngedig* (http://www.catribunal.org.uk/238-6629/1166-5-7-10-Albion-Water-Limited.html).

cause great inefficiency when deciding private antitrust cases. It can result in poor quality of judgements too. Therefore, whereas it is hard to say that any model is ideal, certainly the UK model including specialized court dealing with antitrust litigations is worth considering[23].

IV. Antitrust Litigation in the Netherlands and Germany

1. The Netherlands

As mentioned before, apart from the UK, the Netherlands and Germany are the EU Member States with the most developed antitrust damages actions as compared to other EU Member States (Kuijpers et al., 2015). In the Netherlands, however, roughly a decade ago, when one of the reports preceding the Directive was being drafted, the number of cases in which the plaintiffs were awarded damages was limited (Van Themaat, Hettema and Buruma, 2004). Over the years, starting from the time of the aforementioned report, the situation with respect to the courts that have jurisdiction to hear antitrust damages claims has not changed.

In the first instance, a plaintiff can file their complaint to one of the civil courts – Sub-District Court or Civil Court – depending on the amount of damages sought. Appeals against judgements issued by the courts of first instance can be lodged before the Civil Court (from the Sub-District Court) or the Court of Appeal (from the Civil Court) (Van Themaat et al., 2004, p. 2). The Netherlands did not implement special jurisdiction, neither courts nor tribunals, to deal with antitrust damages claims. As a result, there are no specialised courts to hear private antitrust enforcement cases (Van Themaat et al., 2004, p. 2; Leeflang, Kuijper, 2013, p. 94). However, even without specialized courts, the Netherlands became one of the most preferred venues to file cases based on competition law violations in Europe. The significant number of antitrust litigations in Dutch courts presumably results from the relatively low costs of proceedings, as well as the expertise and pragmatic approach of the judiciary (Cornelissen, Dempsey, Knigge, Sluijter, Van Themaat, 2018, p. 206). Relevant is also the interesting development of Dutch courts regarding their jurisdiction, 'anchor defendant's rule' included (Cornelissen et al., 2018, p. 188–189; Kuijpers et al., 2015, p. 2–3). This extension of jurisdictional power can additionally increase the number of cases being brought before Dutch courts.

[23] See more about this debate in Poland and the arguments for the need of specialized courts in antitrust litigations Berrnatt and Gac, 2017, p. 11.

2. Germany

Unlike in the vast majority of EU Member States, Germany has a long and wide spread legacy of private antitrust enforcement. Over the last decade, in particular following the 7th Amendment of the Act Against Restraints of Competition, which came into force on 1 July 2005, German courts have gone on to register several hundred private antitrust cases every year (Buntscheck and Stichweh, 2015, p. 154; Peyer, 2010, p. 9 and p. 27). Furthermore, currently almost every cartel investigation conducted by the German competition authority is followed by antitrust damages claims (Zuehlke, 2018, pp. 109–110). Regarding competent courts, we find ordinary German civil courts dealing with antitrust litigations. This means that there are no specialized courts or tribunals resolving antitrust disputes in Germany. In the first instance, depending of the value of the case (up to or above 5000 Euro), respectively either local or regional courts deal with competition litigations. However, bearing in mind the generally significant value of antitrust cases, plaintiffs usually bring their cases to regional courts. Appeals against first instance judgements may be filed to the Higher Regional Court and then, based on points of law, to the German Federal Supreme Court (Zuehlke, 2018, p. 111; Buntscheck and Stichweh, 2015, p. 154).

In spite of the lack of formal antitrust specialization in German courts regarding competition matters, an interesting development in this respect is worth mentioning. German Federal States (*Lands*) are authorised to designate one regional court to deal with antitrust cases for the district of several regional courts. Since the States usually exercise this right, there is a limited number of courts specifically dealing with antitrust litigations in Germany (Buntscheck and Stichweh, 2015, p. 154). This results in a practical antitrust specialization and expertise of the pre-selected courts, instead of a formal one. Furthermore, the courts tend to assign antitrust cases to one or a limited number of panels. As a consequence, all panels dealing with competition law cases are practically specialized in the field of private antitrust enforcement. Therefore, many courts dealing with antitrust cases possess wide knowledge and experience in antitrust litigations (Wach, Epping, Zinsmeister and Bonacker, 2004, p. 3).

Subsequently, despite the lack of a formal status, the specialization of German courts in antitrust litigations based on experience should not be questioned. It is worth noting, however, that this type of specialization based on experience – called 'repeat exposure' to antitrust litigations – is debatable[24].

[24] See remarks regarding the ability of generalist judges to cope with sophisticated economic issues in private antitrust cases even though they have economic training and 'exposure' to antitrust litigations Baye and Wright, 2010.

The aforementioned experience is reflected in a significant number of antitrust litigations being dealt with by German courts. This number cannot easily be matched by other EU Members States. As a consequence, due to experience in antitrust law, plaintiff-friendly rules, a comparatively short duration of the proceedings and their moderate costs (Buntscheck and Stichweh, 2015, p. 154), as well as wide reach of availability in terms of extraterritoriality rules (Zuehlke, 2018, p. 112), German courts have become one of the jurisdictions of choice for many claimants in antitrust cases from other EU Member States (Zuehlke, 2018, p. 109–110). Even considering differences within legal frameworks, the similarity between Germany and the UK is noticeable.

V. Court Models in other European Union Countries

Courts competent in private antitrust cases in other EU Member States are discussed in the following sub-sections. These are the States where private enforcement is not as developed as in the examples discussed above. Nevertheless, the situation in many of them is changing significantly, in particular upon the implementation of the Directive. Unlike the previous section, this one is split into several sub-sections due to the number of Member States being discussed herein. The division is based on the criteria of specialized, quasi-specialized and ordinary courts.

1. Specialized and quasi-specialized courts

1.1. Portugal

In Portugal the number of private antitrust enforcement cases is not significant, however, some indicators of an upcoming change, in particular a few private antitrust cases, are noticeable (Anastácio and Anastácio, 2018, p. 237). Before the implementation of the Directive, recently transposed by means of Law 23/2018, 5 June, ordinary civil courts were empowered to judge private antitrust cases (Anastácio and Anastácio, 2018, p. 238). The new law changes this system and grants exclusive jurisdiction in the first instance to the Competition, Regulation and Supervisory Court that is to decide in actions for damages based on violations of competition law[25]. Appeals regarding decisions made by this court can be filed to the Appellate Court. The latter

[25] See i.a. at the time of the draft of the new law: De Sousa e Alvim, 2017, p. 215; Anastácio and Anastácio, 2018, p. 239 and 248.

court's decisions can, in turn, be reviewed by the Supreme Court (Anastácio and Anastácio, 2018, p. 239). However, even considering the fact that Portugal decided to set up specialized jurisdiction to review antitrust damages cases, and the significant role of the Portuguese Competition Authority in promoting private antitrust enforcement, bearing in mind the uncertainty around litigation costs and the financial crisis, it is unlikely that the number of antitrust cases will significantly grow in the near future (Anastácio and Anastácio, 2018, p. 249).

1.2. Spain

The Spanish model of jurisdiction in antitrust damages claims has recently evolved as well. Until 2007, allowed were only private actions based on domestic competition law preceded by final and definitive decisions issued by the Spanish Competition Defence Tribunal. Thus, only follow-on actions were available to plaintiffs seeking compensation to recover damage caused by a violation of competition law. This rule, finally repealed in 2007, resulted in significant obstacles and delays in pursuing private antitrust litigations (Marcos, 2013, p. 2–3). The existence of a factual delay was confirmed in one of the studies, which identified 323 cases in Spain in the period between 1999 and 2012. 94% of them constitutes stand-alone cases, while only 18 cases are follow-on (Marcos, 2013, p. 8). Interestingly, only one case out of the 323 was brought by consumers (De Ávila Ruiz-Peinado, 2016, p. 1). Commercial courts were created in 2004 to deal with private antitrust cases based on Articles 101 and 102 TFEU, that is four years before the aforementioned rule was finally dropped making it possible for plaintiffs to bring stand-alone actions. Eventually, those courts are to deal with antitrust litigations both kinds of domestic cases as well as those based on EU competition law (De Ávila Ruiz-Peinado, 2016, p. 5). Another interesting observation regarding courts making decisions in antitrust damages cases indicates that 66.25% of the cases have been decided by the Provincial Court of Appeals while only 24.5% went to the Supreme Court (De Ávila Ruiz-Peinado, 2016, p. 10)[26]. Recently, development of private antitrust enforcement has not changed significantly, however there are several important cases being reviewed by Spanish courts at the moment (Gutiérrez and Arranz, 2018, p. 277–278).

The law implementing the Damages Directive, namely the Royal Decree-law 9/2017, of 26 May (RDL 9/2017) (Gutiérrez and Arranz, 2018, p. 279), did not change existing rules regarding jurisdiction in antitrust cases. The rules are, however, not uniform and can cause some doubts in their practical application. While according to the general principle, commercial courts hear

[26] The gap results from pending proceedings that were not yet resolved when the study was drafted.

antitrust damages claims, both stand-alone and follow-on cases (De Ávila Ruiz-Peinado, 2016, p. 13; Gutiérrez and Arranz, 2018, p. 280), there are some antitrust-related cases that are reviewed by ordinary civil courts. The latter takes place when a defendant invokes competition rules to challenge a plaintiff's complaint. In these cases, ordinary civil courts have jurisdiction, instead of commercial courts (Gutiérrez and Arranz, 2018, p. 280).

It is also worth noting that commercial courts are meant to be specialized courts to deal with antitrust cases (De Ávila Ruiz-Peinado, 2016, p. 13; Gutiérrez and Arranz, 2018, p. 280), which can cause some doubts in the juxtaposition with courts which, in some Member States, are exclusively specialized in antitrust matters. The most characteristic example of this is the CAT in the UK. Moreover, Spanish judicial rules make it possible to file follow-on actions in ordinary civil courts, provided that they are limited to seeking damages and therefore do not differ from any other civil damages claim (Gutiérrez and Arranz, 2018, p. 280). This can only cause another question regarding the actual specialization of Spanish courts in antitrust-related cases. Appeals from decisions of the courts of first instance can be lodged before the Provincial Courts and, finally, to the Supreme Court following a standard civil procedure.

Analysing the Spanish model of jurisdiction in antitrust-related cases, it is worth noting that in some cases courts used economic analysis in order to quantify damages ('economic estimation of damages') or, when necessary, even for other purposes in the proceedings (De Ávila Ruiz-Peinado, 2016, p. 39; see also Delgado and Perez-Asenjo, 2011). Therefore, as the authors of one of the studies pointed out, the courts handle the cases quite well, with adequacy and pragmatism. This, in turn, made it possible to detect, and in some cases to reject, actions that were brought only strategically, with no substantial merit (De Ávila Ruiz-Peinado, 2016, p. 32–33)[27]. This shows good prospects for future developments of private antitrust enforcement in Spain (Gutiérrez and Arranz, 2018, p. 289).

1.3. Italy

In Italy, upon the publishing of the Green Paper[28], a very interesting discussion emerged about those empowered to pursue private antitrust litigations. This issue is closely related to the type of courts available to plaintiffs to bring their private antitrust actions. The primary question was, if the right to file a complaint is available only to undertakings, directly addressed by

[27] See about strategic abuse of antitrust law in litigations McAfee and Vakkur, 2004.

[28] Green Paper Damages actions for breach of the EC antitrust rules Brussels, 19.12.2005, COM(2005) 672 final (accesible at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672 &from=EN).

competition law, or also to consumers, that can benefit from private antitrust enforcement. There were several different – in some cases even contradictory – judgements on this subject, judgements of the Italian Supreme Court included, swinging between giving and not giving this possibility to consumers. The opinion of the Italian doctrine referring to the *Courage v. Crehan*[29] case was also divided. It had some significance in relation to the court competent in antitrust-based litigations too (Castronovo, 2007, p. 107–112).

From that time, Italy has come a long way and the discussion outlined above has lost its significance. As early as 2015, before the implementation of the Directive, the Italian Supreme court set up some guidelines in the *Cargest* case for Italian judges dealing with private antitrust cases. According to these guidelines, judges should use in antitrust proceedings tools provided for by the Italian Civil Procedure Code, such as expert witnesses and requests for documentation and information addressed to private and public entities (Raffaelli, 2018, p. 165). The current model of courts competent in private antitrust actions was established by the Italian Legislative Decree No. 3/2017,[30] which came into force on 3 February 2017 implementing the Directive. Unlike the previous model, in which all business courts across Italy had such jurisdiction, according to the new law the three Companies Tribunals located in Rome, Milan and Naples are specialized courts having exclusive jurisdiction in antitrust cases of both kinds, stand-alone and follow-on (Toffoletti and De Stefano, 2018, p. 7; Raffaelli, 2018; p. 167). The judgements of the tribunals can be challenged before the Court of Appeal. The appellate court has the power to fully review the merits of the case. Then, the judgement of the Court of Appeal can be challenged before the Supreme Court but only on points of law (Toffoletti and De Stefano, 2018, p. 25).

The specialization of the tribunals competent in antitrust cases is welcomed as antirust actions need specialized judges to review all their aspects covering not just the law but also their economic, business, market aspects, etc. Furthermore, due to this specialization, the duration of the proceedings in antitrust cases is expected to be shorter (see also: Raffaelli, 2018, p. 167; Toffoletti and De Stefano, 2018, p. 12).

1.4. France

The number of private antitrust cases in France is relatively low (Oster, 2018, p. 100). This can be surprising considering the scale of the French economy and market. The development of the French model of courts competent in antitrust litigations is very interesting too. Even considering that

[29] See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0453.

[30] The Official Journal of the Italian Republic, General Series No. 15, of 19 January 2017.

the French Competition Council (hereinafter; FCC) has the mandate to only deal with cases that represent the general interest at least in some part, it was quite common for a plaintiff representing private interests to file a complaint directly to the FCC. This way the FCC was becoming a specialized court in private antitrust enforcement cases, due to the fact that more than half of them were brought by firms, competitors and other victims. Therefore, there was a need to debate and to review that hybrid status of the FCC, which has been caring out a specific type of private enforcement (Idot, 2007, p. 90–91).

Another part of French developments constitutes the discussion of courts competent in private antitrust cases. It is mainly related to civil courts, which include those dealing with commercial matters, however, some issues concern administrative courts as well (Idot, 2007, p. 91–92). As a consequence, another discussion took place, this time pertaining to the need for specialization of courts in competition-related cases, as it happened previously in the case of intellectual property claims. Eventually, several courts were selected in order to deal with private antitrust enforcement cases, however, neither the number nor the geographical location was satisfactory enough. The latter was particularly important since the selected courts were not located in the most important economic areas. The same disappointment concerned the number of appeal courts. It was expected that at least eight were going to be chosen, whereas ultimately only one, the Court of Appeal of Paris, was appointed (Idot, 2007, p. 92). The aforementioned discussions and the following changes in the French court system, relating to its ability to efficiently resolve private antitrust cases, resulted in a significant improvement of the system. There are also examples of cooperation between the French competition authority and courts where advice was being given by the FCC to the courts regarding, among others, the definition of the relevant market (Idot, 2007, p. 92–93).

Currently in France, upon the adoption of Ordinance 2017-303 and Decree 2017-305 of 9 March 2017 that implemented the Directive, antitrust-based private actions can be brought before commercial or civil courts. Within these entities, courts specialised in hearing competition damages claims have been appointed. The actions are headed to the commercial court if the dispute is between companies or commercial entities. If this is not the case, civil courts have jurisdiction to hear the claim[31]. The aforementioned rule is, however, not uniform due to the engagement of administrative courts. Where a public entity is involved, as a violator or a victim, an action can also be brought before administrative courts (Oster, 2018, p. 100–102). If the party is not satisfied by the judgement, then it can lodge an appeal based on a point of fact or law before the Court of Appeal. In private antitrust cases, the only

[31] *Competition Litigation in France* (https://globalcompliancenews.com/antitrust-and-competition/competition-litigation-in-france/).

competent court to review these judgements is the Paris Court of Appeal, if the judgment is delivered by a lower court specialized in competition law matters. If the party is to challenge the judgement of the Court of Appeal, then, only based on a point of law, it may lodge a further appeal to the Supreme Court. Judgements delivered by administrative courts can be challenged before the Administrative Court of Appeal and then to the Council of State[32].

1.5. Bulgaria

In Bulgaria there were some controversies pertaining to the value and nature of antitrust damages claims, which led to a dual approach to courts competent in antitrust litigations. Usually cases with the value of the claim below approximately 12 500 Euro are to be reviewed by district courts (single judge, ordinary procedure); cases with a higher value of the claim are heard by a provincial court (panel of three judges). However, if a private antitrust case was qualified as commercial disute – based on its value and nature – then it would be directed to a provincial court under the procedure for commercial disputes. Irrespectively of the aforementioned aspect of competence between district and provincial courts, there is no specialized court in Bulgaria to deal with private antitrust enforcement claims. As a consequence, Bulgarian jurisdiction can be qualified as a quasi-specialized as well as a non-specialized one. Interestingly, Bulgarian courts refused to proceed with stand-alone private antitrust cases and only accepted private claims for cases that follow decisions of the Bulgarian competition authority (Petrov, 2017, p. 33–34).

1.6. Croatia

Croatia, like Bulgaria, implemented the rule under which private enforcement cases are being directed to commercial courts. These are specialised courts having experience in commercial disputes, a fact that should help them resolve complex competition-related issues. Nevertheless, the idea of antitrust specialisation within commercial courts was abandoned after limited consideration (Butorac Malnar, 2017, p. 61–62).

1.7. Latvia

Latvia set up a quasi-specialized court, namely the Riga city Latgale district court, in order to resolve private antitrust disputes. The intention is to ensure that antitrust claims are being reviewed by experienced and knowledgeable

[32] *Competition Litigation in France…*

judges. There is, however, one problem with this approach. While the judges in the Riga city Latgale court – after specific training and some experience in dealing with competition litigations – will be ready to deal with antitrust claims with experience and knowledge, their judgements can only be challenged before the Riga Reginal court of appeal. The latter is, in turn, an ordinary civil court not specialized in competition litigations. There is also the possibility to file for cassation to the Supreme Court (Jerneva and Druviete, 2017, p. 160).

1.8. Lithuania

Lithuania established the Vilnius Regional Court as the exclusive first instance court to hear private antitrust cases as early as 2004, the time when Lithuania joined the EU. This means that this court already has some experience in reviewing competition-based private cases. However, its exclusive power is not fully recognized by other courts and, as a result, some cases can be directed to other courts, mainly administrative ones. The latter situation can particularly happen when at least one State-owned entity is involved in the trial. This means, in turn, that despite the aforementioned specialization, there is still some theoretical and practical vagueness relating to jurisdiction in antitrust litigations. Appeal from the first instance judgement can be heard by the Court of Appeal of Lithuania and, afterwards, under the cassation procedure, an extraordinary appeal can be submitted to the Supreme Court of Lithuania. Nevertheless, if the case was adjudicated in the first instance by an administrative court, then the appeal can be lodged to the Supreme Administrative Court as the final forum to review the case (Mikelėnas and Zaščiurinskaitė, 2018, p. 184–188). As a result, despite Lithuanian lawmakers' intention to appoint specialized jurisdiction in competition-based private claims, there is still tension and ambiguity relating to the forum in such cases.

1.9. Romania

Unlike the aforementioned examples of special jurisdiction, there were originally no specialised courts to decide on antitrust litigations in Romania. Therefore, not surprisingly, the lack of experience of judges of lower courts in the field of competition law was emphasised (Mircea, 2017, p. 238). This situation has recently changed. According to the new rules implementing the Directive – the Government Emergency Ordinance No. 39/2017[33] – the exclusive jurisdiction over the award of damages to individuals in cases of violations of Articles 5 and 6 of the Competition Act and Articles 101 and 102

[33] Government Emergency Ordinance No. 39/2017, the Official Journal of Romania, Part 1, No. 422 of 8 June 2017.

TFEU belongs to the Bucharest Tribunal and, consequently, to the Bucharest Court of Appeal (Ion, Ambrozie and Nistor, 2018, p. 252).

1.10. Slovakia

In Slovakia there are quasi-specialized courts in matters relating to the economy and competition that are the subject of litigation. These courts are the District Court in Bratislava II in first instance, and the Regional Court in Bratislava to review the appeals from the first instance judgements. The second instance judgements can be challenged before the Supreme Court. The aforementioned specialization is though questioned for several reasons, mainly the fact that all courts should resolve all types of cases (civil, commercial, family, etc.), as well as the fact that many matters relating to business, commerce and unfair competition are being dealt with by other courts too. This means, in turn, that the specialization of the court assigned to antitrust litigations is dubious (Blažo, 2017, p. 250–251).

1.11. Slovenia

Slovenia does not have specialized courts dealing with antitrust damages claims. Nevertheless, antitrust litigations are qualified as commercial due to its competition protection nature. This means that these cases may be brought before the district courts in the first instance, instead of local courts that generally have the competence to adjudicate civil cases in the first instance. Usually, a single judge reviews the commercial case unless a panel of three judges is appointed due to the complexity of the case. An appeal from the first instance judgment can be lodged to the high courts (panel of three judges), and then, under specific conditions (only questions of substantive law and serious breaches of procedure), the case can be reviewed by the Supreme Court (Vlahek and Podobnik, 2018, p. 272–274). Nevertheless, the aforementioned commercial specialization does not mean that there is a particular specialization for competition damages claims. Thus Slovenia does not have courts that have particular specialization in reviewing competition law issues in civil proceedings.

2. Ordinary jurisdiction

2.1. Austria

In Austria, as in other European States, the number of competition law-based litigations is constantly growing after the implementation of the Directive. There is no specialized court to adjudicate private antitrust

litigations. The amendment to the Austrian Cartel Act, introducing new rules governing private antitrust damages claims, does not change the rule according to which ordinary civil courts resolve antitrust disputes (Elsner, Zandler and Kos, 2018, p. 42). As a result, it is worth noting that Austria, even though it implemented the Directive, is not perceived as an attractive forum for antitrust litigations (Elsner et al., 2018, p. 50).

2.2. Czech Republic

The Czech Republic did not establish any courts specialized exclusively in competition matters to hear antitrust litigations. Therefore, according to its civil procedure rules, regional courts with a single judge deal with competition-based cases in the first instance. These courts have the jurisdiction to deal with more complex cases also, antitrust litigations included. An appeal from a regional court can be lodged to a superior court with a panel of three judges. There are eight regional and two superior courts in the Czech Republic. The judgement of a superior court can be challenged, by way of an extraordinary appeal, before the Supreme Court under specific circumstances (Petr, 2017, p. 89).

2.3. Estonia

Specialized courts to deal with antitrust damages claims were not appointed in Estonia. Therefore, competition law-based litigations are being reviewed by civil courts.

2.4. Hungary

In Hungary, like in Estonia, specialized courts were not appointed either. Irrespective of the value of the case, regional courts have exclusive competence to deal with antitrust litigations. An appeal against their judgements can be lodged to a regional court of appeal. Furthermore, the Hungarian Supreme Court reviews extraordinary appeals if filed by one or both of the parties (Pärn-Lee, 2017, p. 111; Miskolczi Bodnár, 2017, p. 137).

2.5. Poland

When implementing the Directive, Polish lawmakers did not decide to appoint special jurisdiction to resolve antitrust disputes. However, unlike in the ordinary civil procedure, regional courts have exclusive jurisdiction in this type of litigations in the first instance (whereas according to ordinary

procedure, district courts are to deal with civil cases in the first instance). The idea behind this exception is to direct competition-based litigations to regional courts as these have more expertise and are more experienced to handle complex cases. Judgements of the regional courts can be challenged before the appeal courts and then, under specific circumstances, an extraordinary appeal can be lodged to the Supreme Court. Thus there are no specialized courts to deal with antitrust litigations in Poland, even if the idea of specialized courts or chambers having competition law and economic knowledge has been considered (Piszcz and Wolski, 2017, p. 215)[34].

VI. How Binding Effect and Judicial Review of NCAs Decisions Can Affect Adjudicating in Antitrust Litigations?

The aforementioned two elements very often accompany discussions regarding private antitrust enforcement. This is because these factors seem to affect the way the courts decide in antitrust litigations, or at least, can have some influence on the judicial decisions. Sometimes the same courts adjudicate antitrust litigations and review NCAs decisions. In relation to the binding effect of NCAs decisions, it is worth noting that, first, the judicial approach has been changing over the years and, second, how this approach differs between Member States. The change that happened between the pre-Directive era and afterwards is radical, however, some important questions are still waiting to be resolved. Regarding judicial review of NCAs decisions, the tendency to refer to EU and national courts in the context of private antitrust enforcement seems to be natural. This pertains particularly to the scope of judicial scrutiny when reviewing NCAs decisions in relation to fact findings, their assessment, as well as the legal grounds of a decision in question in both stand-alone and follow-on types of cases. Bearing this in mind, the author's intention is not to discuss the binding effect and judicial review of NCAs decisions in all the States being mentioned above. Instead, this section of the article aims to discuss the development and the state of play of the aforementioned elements based on selected examples and the main rules of a given legal system.

To begin with, in the American model of private antitrust enforcement, there is no rule establishing the binding effect of prior administrative agency decisions, namely the Federal Trade Commission. This, however, does not mean that the court in antitrust litigation cannot recognize the findings or

[34] See also critical remarks regarding the lack of special jurisdiction Bernatt and Gac, 2017, p. 11.

a prior FTC decision, but the determination if those findings, or any part of a decision, have probative value in private litigation is left to the discretion of the court[35]. For such determination, the key is to satisfy the requirements of collateral estoppel (primary that the issue was identical, there was full and fair opportunity for the party to litigate, the factual finding was essential for the decision, the judgement was valid and final)[36]. In case of civil lawsuits following criminal investigations, there is a possibility for a claimant to rely on the DOJ's investigations and convictions[37]. Furthermore, section 5(a) of the Clayton Act sets forth rules on *prima facie evidence* in relation to the final judgement or decree rendered in any civil or criminal proceedings brought by the United States. Regarding foreign tribunals' decisions, they may have preclusive effect in US proceedings provided that the judgement or its findings meet requirements of impartiality and due process[38]. The latter rule had practical relevance in proceedings before the US District Court for the District of Columbia where the court considered the EC's findings in the antitrust litigation involving bulk vitamins[39] (Saint-Antoine, Lewers, Hutchison, Bullard and Michelen, 2016).

With respect to judicial review of FTC decisions[40], the party that is addressed as violating antitrust law can lodge an appeal against a FTC decision to the U.S. Circuit Court of Appeals. The appellate court reviews both legal and factual grounds of the decision in question. There is, however, the assumption in the American model of antitrust enforcement that the agency has superior competences in questions of fact, whereas the reviewing court has superior competence in issues of law (see Laguna de Paz, 2012, p. 8; Merril, 2010, p. 389). The courts use the standard of 'substantial evidence test'. In the aftermath of a judicial review of a FTC decision, the court can affirm it, modify it or set it aside. Then, if the party dissatisfied with the court's decision is granted a Petition for Certiorari, it can bring the case before the U.S. Supreme Court. Otherwise, the Appellate Court's judgement becomes final[41].

In the UK, before the transposition of the Damages Directive, the claimant could rely upon the findings of a competition authority (both the UK Competition and Market Authority (hereinafter; CMA) and the EC) as

[35] See *BoDeans Cone Co v. Norse Dairy Sys. LLC, 678 F. Supp. 2d 883, 897 (ND Iowa 2009)*.

[36] See also *United States v. Utah Const & Min Co, 384, 422 (1966)*.

[37] See *Hinds Ctv, Miss v. Wachovia Bank NA, 700 F. Supp. 2d 378, 394-95 (SDNY 2010)*.

[38] See *United States v. Kashamu, 656 F. 3d 679, 683 (7th Cir 2011)*.

[39] See *In re Vitamins Antitrust Litig, 320 F. Supp. 2d 1 (DDC 2004)*.

[40] FTC issues cease and desist orders in two instances – first is Administrative Law Judge and then, the findings are being controlled by the panel (FTC Full Board).

[41] For more about 'substantial evidence test' and its application by the U.S. courts see Bernatt, 2017.

proof of a breach[42]. Starting from 1 October 2015, both the HC and the CAT are bound by final decisions of the CMA and the EC. In relation to decisions of NCAs of other EU Member States, following the Directive, these decisions constitute *prima facie* evidence of a breach of competition law before the UK courts (see more Adkins and Beighton 2016, p. 26–27 and Nazzini, 2015, p. 80–91). Decisions taken by the CMA based on the Competition Act 1998 and Articles of 101 and 102 TFUE are being reviewed by the CAT[43]. As discussed in this article, this is also the court of jurisdiction competent in private antitrust litigations.

Before the transposition of the Directive, the approach of the French judiciary to the issue of a possible influence of findings taken in a prior decision of a NCA was based on the civil concept of fault within the meaning of tort law. As derives from case law, the courts differ in their decisions depending whether the authority that issued the decision was the EC or the French Competition Authority (hereinafter; FCA). In the first example, the courts recognized that a breach of competition law confirmed in an EC decision is deemed as fault in antitrust litigations (due to Article 16 of Regulation 1/2003[44]). By contrast, if the findings came from a FCA decision, this was not consider as fault.

Over the years this situation has been changing and findings of the FCA were increasingly recognized as having probative value in private antitrust cases. Even in stand-alone cases, however, the French Commercial Code gives the right to the plaintiff to ask the court to request the FCA, as *amicus curiae*, for its opinion with respect to competition-related aspects of a litigation (for example, if an undertaking has a dominant position). Therefore, even not having binding effect as stated in section 9(1) of the Damages Directive, findings of an infringement of competition law could assist the plaintiff considerably in proving fault in antitrust litigations (Lenoir, Plankenstainer and Truffier, 2015, p. 128–129; Thill-Tayara and Asins, p. 169 and 178). Upon the transposition of the Damages Directive, the infringement of competition law established in a decision of the FCA and EC (or court of appeal) that cannot be further challenged has binding effect in private antitrust litigations (the infringement is deemed as irrefutably established). With respect to decisions of competition authorities from other EU Member States, their findings are deemed to constitute *prima facie* evidence (Oster, 2018, p. 105).

In relation to the judicial review of FCA decisions in the French model, they are subject to the jurisdiction of civil court (the Court of Appeal), except

[42] See Department for Business Innovation & Skills (2016).

[43] See Competition Appeal Tribunal, *Annual Report and Accounts 2016/2017*, p. 2.

[44] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25).

merger control decisions that are being reviewed by the Council of State (administrative jurisdiction). When reviewing administrative decisions, the civil court examines facts and law and, as a result, can declare a FCA decision void. If it does so, then the court has to replace or modify the decision in question. (Laguna de Paz, 2012, p. 8–9). The Paris Court of Appeals has exclusive jurisdiction to challenge FCA decisions. This model derives from the assumption that experienced courts that usually hear cases from the area of commercial, civil and criminal law are already well-suited for reviewing FCA decisions (Petit, 2009, p. 107–110). Considering the French civil courts-based model, it is worth noting that the Court of Justice's landmark decision in the *Tetra Laval* case[45] did not change the courts' standard of judicial review in France. Despite the Court of Justice's recommended 'selected' review, whereby courts' scrutiny should target only a limited set of features of EC decisions, French courts maintain their standard of judicial review. As a result, French courts, based on well-established principle of procedural autonomy, apply a more stringent standard of review of FCA decisions than this set out by the Court of Justice in the *Tetra Laval BV* case (see more Petit, 2009, p. 105–124).

Like in France, in Italy before the transposition of the Directive by the Legislative Decree No 3/2017, facts established in a decision of the Italian Competition Authority's (hereinafter; ICA), even though considered as privileged evidence, were not binding in private enforcement cases. The court had to assess the merits of the case autonomously from any assessments made by the administrative authority. This was because of the distinction between the role of the courts (resolving conflicts between persons) and the competition authority (controlling the market in the public interest). In practice, the findings of the ICA are relied upon by Italian courts, in particular its economic assessments. Consequently, due to the evidential value of the findings, it was very difficult to rebut the findings of the ICA for the parties, even though in principle those findings were not binding for the judge (Tardella and Maggiore, 2004, p. 24–25). Upon the transposition of the Directive, a final decision of the ICA has binding effect in civil proceedings (Toffoletti and De Stefano, 2018, p. 2). Differently to most of the above mentioned examples, in Italy decisions of the ICA are being reviewed by administrative courts (*Consiglio di Stato*). This administrative body controls both the law and facts (Laguna de Paz, 2012, p. 9).

In the past, final Statements of the German Competition Authority (hereinafter; GCA) had to be accepted by civil courts, but the courts usually did not consider themselves bound by legal and fact findings established in

[45] *Case C-12/03 P Commission v. Tetra Laval BV [2005], ECR I-987.*

GCA decisions. Still, the courts were aware that they should not rule against decisions of the EC stating that certain conduct constitutes a violation of EU competition law (see Wach et al., 2004, p. 17). In the wake of the 7th amendment to the German Act Against Restrains of Competition (AARC) that came into force 1 July 2005, civil courts are bound by the decisions of the GCA, the EC and the NCA of another Member State on the infringement of competition law (see Wach et al., 2004, p. 17; Peyer 2010, p. 12). In relation to judicial review, the parties can appeal a GCA decisions to the Düsseldorf Higher Regional Court. Judgement of this court can be further challenged before the Federal General Court of Justice in Karlsruhe (The Bundeskartellamt in Bonn, p. 36).

In Poland, the prejudicial nature of administrative decisions, decisions of the Polish Office of Competition and Consumer Protection (hereinafter; OCCP) included, was not regulated by law but derived from jurisprudence. However, the prejudicial character of OCCP decisions was rather common in Polish legal doctrine, provided that the decision is final and cannot be further challenged (Jurkowska, 2010, p. 74). The need for comprehensive findings in OCCP decisions and the courts' rulings in competition-related cases has been confirmed by the Polish Supreme Court too (Jurkowska-Gomułka, 2013, p. 289). This rule was eventually established as a result of the transposition of the Directive into the Polish legal system. With respect to the decisions of NCAs from other Member States, Polish lawmakers considered that there is no need to adopt a specific regulation due to currently existing rules in the Polish Code of Civil Proceedings (hereinafter; PCCP). This is, however, controversial considering the different nature of 'prima facie evidence' as stated in section 9.1 of the Directive, and 'factual evidence' according to Article 231 PCCP (see Bernatt and Gac, 2017, p. 9–10). Decisions of the OCCP are being reviewed by the Court of Competition and Consumer Protection. This is a civil court and its review is based on a *de novo* character, which means that the court examines all aspects of the decision, that is, law and facts (Bernatt, 2016, p. 101). The judgements of this court can be challenged before the Courts of Appeal and then, only based on points of law, before the Supreme Court.

This section of the paper is basically aiming at considering if the binding effect and the way of judicial review of NCAs decisions adopted by the courts can significantly affect their decision making process when handing down judgements in private antitrust enforcement cases. To begin with, the binding effect of NCAs decisions can theoretically limit the court's engagement in the analysis of 'pure' competition matters, such as the relevant market, a practice that allegedly can fail to comply with competition law, and the nature of the infringement in question itself. Relief for the court in cases where the court is only to establish the damage and causation between the infringement and

the damage is clearly stated in the reasonings. This is because the relation between a given practice (allegedly anticompetitive) and competition law, the facts and the scope of the infringement included, is to be established by the NCA in its decision[46]. In particular from the perspective of section 9.1 of the Directive, the role of the court in this respect is simply to follow the relevant NCAs decision. Nevertheless, this is the case only in follow-on law suits.

Conversely, in stand-alone cases (not preceded by a NCAs decision), the court must carry out the aforementioned analysis on its own, in order to establish if all conditions of civil liability meet, or not the level required to hand down a judgement in favour of the plaintiff. Even though follow-on cases are dominating private antitrust enforcement, these are not the only cases being brought by plaintiffs. As a consequence, even considering that stand-alone cases are less frequent, a fact that has not been proven[47], every court dealing with private antitrust enforcement cannot avoid scrutinising competition-related issues in its practice. Obviously, courts doing their job can or even should rely upon previous NCAs' decisions and analysis included therein. This, however, does not release any court from establishing the relevant market, type of infringement and its scope, as well as other conditions of liability in stand-alone private antitrust cases. This means, in turn, that while binding effect can be considered as the 'smart tool', meant to support the victims of anticompetitive conduct in antitrust litigations, it does not make a significant difference to the ability of courts to deal with complex competition cases. The courts should also continue the use of expert opinions if necessary, in order to assess their results in relation to a particular case. Extensive knowledge, experience and practice of judges when adjudicating private antitrust cases is constantly needed, irrespective of the binding effect of NCAs decisions and its role in follow-on cases.

The second issue that has been discussed in this section, namely judicial review of NCAs decisions, is directly framed within the discussion that pertains to the model of court in private antitrust cases. Based on the judgements that have been mentioned above, as well as the practice of judicial review in the EU and the US, two scopes of court intervention when reviewing competition-related matters of NCAs decisions have to be distinguished. The first one, which can be called 'restrained', is limiting the scope of judicial analysis when it comes to the nature of the infringement of competition law, the market and

[46] See e.g. *Enron Coal Services Ltd. (in liquidation)* v. *English Welsh & Scottish Rail Way Ltd.*, Case No. C3/2010/0404 at [8] and [50] and *Deutsche Bahn AG & ORS v. Morgan Crucible Company PLC & ORS*, Case No. C3/2011/1995 at [37] (retrieved https://www.catribunal.org.uk/sites/default/files/1173_Deutsche_Bahn_Court_of_Appeal_Judgment_310712.pdf).

[47] By contrast, in Germany in the period between 2005 to 2007 stand-alone cases were dominating (see Peyer, 2010, p. 35–39).

the economy. It focuses primarily, albeit not exclusively, on other conditions of civil liability, namely damage, its quantum and causation. This approach following the *Tetra Laval BV* case in the EU, is being discussed in American legal doctrine in relation to judicial deference and the 'substantial evidence test' in judicial review undertaken by the U.S. Circuit Courts of Appeal (Bernatt, 2017).

The second approach is more open for analysis of all aspects of antitrust damages claims in general, in particular competition and civil law-related matters and the nature of the competition law infringement[48]. As a result, it does not seem to be a too far reaching conclusion that the courts, in so far as they are more open for competition, market and economy, have greater knowledge and experience when dealing with complex antitrust litigations, stand-alone in particular. Additionally, even the Court of Justice and the courts of the Member States, not to say the Polish Supreme Court, are not fully comprehensive in their guidelines pertaining to the role of courts in judicial review of NCAs decisions, fact findings, competition law infringements, market and economic matters, as well as other aspects of competition law violation[49].

In order to present an even more complicated picture of the issue, it is worth noting that, as one of the studies of judicial review of EC decisions finds, what really matters in judicial review is the origin of judges and their legal education. While judges with a common law background are more flexible in their analysis and adjudicate more in favour of the undertakings, judges with continental legal background, mainly French, are stricter. Thus, they decide more often in favour of EC decisions being questioned before the Court of Justice (Zhang, Liu, Garoupa, 2017, p. 25–26). Having said that, very often the quality of judgements rendered by judges deemed to be experts in competition-related matters is not satisfactory enough (see Polish example Bernatt, 2016, p. 106).

One of the disappointments that comes from this brief analysis derives from the fact that, if we look into it even considering such landmark decisions as *Tetra Laval BV*[50], it turns out that there is still a lack of a unified, comprehensive approach to this issue. The ways adopted by courts in EU Member States differ, and no agreement has been reached at this point. Paradoxically, judicial review of NCAs decisions, even if it does not constitute any part of private antitrust enforcement, seems to be more important for the quality of judgements than the binding effect of NCAs decisions in antitrust litigations. Considering different goals of public and private enforcement in general, the most important aspects of both types of cases are common. These are mostly

[48] See discussion in Petit, 2009 based on French example.

[49] See e.g. discussion in Bernatt, 2016 and Laguna de Paz, 2012.

[50] See also Petit, 2009.

findings regarding the infringement of competition law and the quantum of damage caused by the infringement. For this reason, the experience of the courts in reviewing NCAs decisions should play an important role in antitrust damages claims too. This is also the reason why some authors claim that Polish lawmakers made the wrong decision regarding the model of court in antitrust litigations, when they chose ordinary civil courts rather than the Court of Competition and Consumer Protection (Bernatt and Gac, 2017, p. 11). The latter court reviews the decisions of the OCCP and, for at least a decade, acquired knowledge and experience in the field of competition and consumer protection. As a consequence, it seems to be a well-suited venue to adjudicate private antitrust cases. As stated above, however, even this court is not always doing its job properly when analysing competition-related matters. Moreover, like the Polish lawmakers, the legislators in several other EU Member States decided to use a model of court where the judicial review of NCAs decisions and deciding on private antitrust claims is split between different types of courts. The ability of generalist judges to deal with complex competition cases is limited, as the authors of one of the studies found (Baye and Wright, 2010).

As a consequence, considering all the aforementioned aspects of the binding effect and judicial review of NCAs decisions, drawing any clear conclusions regarding the relation between these aspects and the ability of courts to deal with antitrust litigations seems to be very difficult. One is, however, relatively certain, a great part of the task and its fulfilment by the courts depends on the skills and the ability of individual judges. The more open-minded the judge, the more flexibility and readiness there is to overcome the barriers of a traditional way of judging, the more efficient private antitrust enforcement is, irrespective of the type of court chosen.

VII. Is Any Model of Court Really Ideal?

The chart below contains the juxtaposition of specialized, quasi-specialized and non-specialized courts in the Member States discussed in the previous sections of this paper. Having said that, the aforementioned distinction should not be interpreted in an isolated manner but needs some respective comments. For example, considering the differences between commercial and specialized courts, it is very difficult to draw an unequivocal division. Even if commercial courts are not particularly specialized in the narrow, specific area of competition law or private antitrust enforcement, their understanding of economy and market-related issues really matters. The court's acquaintance of market structures, market rules, market indicators and market relations can

significantly help when resolving antitrust litigations. Therefore, the distinction made in this chart is based on the subjective assessment and assumptions of the author. This is because very often it is hard to grasp the factual nature of a court, in particular the panel adjudicating antitrust cases. Therefore, the aforementioned distinction is debatable and the author is open for further discussion and possible changes of the qualification already made. As pointed out above, the chart should be always construed together with comments pertaining to the model of jurisdiction in a particular State.

Having in mind the results of this short study and considering its limitations too, it is very difficult to draw any clear conclusions with respect to the 'ideal' model of court in private antitrust cases. In the US, where antitrust litigations are developed the most, specialised courts dealing with antitrust actions have not been appointed. Indeed, the members of the panel, that is both the judge and the jury, do not possess extensive knowledge of either competition law or the economy. Nonetheless, as we can observe from the US antitrust litigation legacy, this characteristic does not disturb the great prospects of a plaintiff's success in litigation. As a result, the number of cases where the plaintiff was awarded damages is striking. For obvious reasons, expert witnesses are also necessary as well as the judges' practical experience, which plays an important role in litigations too.

Unlike the US example, the UK has both, a specialized court (the CAT) and a significant number of successful antitrust litigations. Even if the UK model is not an ideal one – assuming that it is not possible to set up any ideal model of court at all – it is certainly worth considering. This is in particular the case for those countries where private antitrust enforcement, even having implemented the Directive, is not developed enough. In the author's opinion, the British system could be a role model for some of them, Poland included. Paradoxically, in two other EU Member States with a significant number of antitrust litigations and very good prospects for their further development, no specialised court to resolve antitrust disputes has been established. These countries are the Netherlands and Germany. It is, however, worth noting that despite the lack of formal specialization, it is hard to question the factual specialization of German courts which arose out of good management within the judicial structure and procedure.

The model of jurisdiction in antitrust cases in the rest of the European States is not uniform, stretching between all types of courts mentioned in the chart below. Although the development of private antitrust enforcement differs among the States, neither of them experiences a significant number of antitrust litigations. For this reason, it is very difficult to build a causal link between the type of court and such development in a given State. The proportion of Member States with a specialised and quasi-specialized courts

on the one hand and those having non-specialized courts on the other is fifty-fifty. In some cases of factual specialization, knowledge and expertise stem from practical experience in dealing with antitrust litigations.

When discussing the ideal model of court in private antitrust cases and judges' economic knowledge and experience, the findings from one of the studies conducted in this field are worthy of attention. The study is based on the US experience, where a non-specialised model of courts is used. Assuming that every antitrust litigation is a 'battle of the experts', the authors draw several interesting conclusions with respect to the relation between the economic training of judges and the appeal rate of a given court's decisions. Surprisingly enough, the results of the study show that in simple cases the economic training of judges can serve better quality of judgements, whereas in complex antitrust cases it does not help at all. Probably even more surprisingly, 'repeat exposure' to antitrust litigations, which stems from long practical experience of judges, does not significantly help either. As a consequence, only a combination of more advance economic training and the use of experts can serve better quality of judicial decisions (see Baye and Wright, 2010, p. 21–23). This is another factor that increases the complexity of the issue discussed in this paper.

State	Specialized	Quasi-specialized (commercial)	Non-specialized
1. USA			
2. UK			
3. Netherlands			
4. Germany			
5. Portugal			
6. Spain			
7. Italy			
8. France			
9. Austria			
10. Bulgaria			
11. Croatia			
12. Czech Rep.			
13. Estonia			
14. Hungary			
15. Poland			
16. Latvia			
17. Lithuania			
18. Romania			
19. Slovakia			
20. Slovenia			

VIII. Closing remarks

As mentioned above, the short study contained in this paper does not provide a satisfactory answer to the question about the ideal model of court that can be applied to handle antitrust damages claims. The main reasons for this conclusion were outlined in Section VII of this paper. One of the most important insights from it is the following. It is almost impossible to build causation between the type of court – whether specialised or not – and the development of private enforcement in a particular State. The American, British, German and Dutch examples, in juxtaposition with other EU Member States, is the most apparent example here. Nevertheless, it is also hard to question that the knowledge and experience of judges can have a positive effect when adjudicating private antitrust cases. This feature can be, in turn, the result of the same court reviewing decisions of the NCAs as well as deciding in antitrust litigations. The most characteristic, but not exclusive, example of this is the British CAT.

Having said that, in opinion of the author, the idea of specialized courts dealing with antitrust litigations should not be omitted, as it happened in some Member States, Poland included. The specialization of courts, either formal or at least factual ('repeat exposure') matters even if some authors are sceptical about this conclusion (Baye and Wright, 2010, p. 21–23). Therefore, particularly in countries aiming for a better development of antitrust litigations, the creation of a private antitrust litigation-specialized court should be seriously taken into consideration. The CAT can serve as a role model here, not meaning that it should be applied in its entirety since every State has its own legal specificity and culture.

For obvious reasons, a discussion of the model of jurisdiction competent in antitrust litigations cannot miss some elusive aspects, which affect the development of private antitrust enforcement too. One of them is the 'state of play' with respect to the litigation culture in a particular country. This can enhance, or not the development of antitrust litigations. Finally, it is worth emphasising that there are at least a few countries with a great private antitrust legacy and courts that handle antitrust litigations very well. As a consequence, those that do not have a similar experience can learn a lot from this legacy.

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The Influence of Economic Theories and Schools on Competition Law in terms of Vertical Agreements

by

Zbigniew Jurczyk*

CONTENTS

Abstract

The paper aims at showing the influence and the views espoused by economic theories and schools of economics on competition policy embedded in antitrust law and conducted by competition authorities in the field of vertical agreements. The scope of the paper demonstrates how substantially the economization of antitrust law has changed the assessment as to the harmfulness of vertical agreements. The analysis of economic aspects of vertical agreements in antitrust analysis allows one to reveal their pro-competitive effects and benefits, with the consumer being their

* Dr hab. in economics, Associate Professor at WSB University of Wrocław (Poland); e-mail: zbjur@op.pl. Article received: 1 July 2018; accepted: 28 October 2018.

beneficiary. The basic instrument of the said economization is that antitrust bodies draw on specific economic models and theories that can be employed in their practice. Within the scope of the paper, the author synthesizes the role and influence of those models and schools of economics on the application of competition law in the context of vertical agreements. In presenting, one after another, the theories and schools of economics which used to, or are still dealing with competition policy the author emphasises that in its nature this impact was more or less direct. Some of them remain at the level of general principals and axiology of competition policy, while others, in contrast, delineate concrete evaluation criteria and show how the application of those criteria changes the picture of anti-competitive practices; in other words, why vertical agreements, which in the past used to be considered to restrain competition, are no longer perceived as such. The paper presents the models and recommendations of neoclassical economics, the Harvard School, the Chicago and Post-Chicago School, the ordoliberal school, the Austrian and neo-Austrian school as well as the transaction cost theory.

Résumé

L'article vise à montrer l'influence et les vues véhiculées par les théories économiques et les écoles d'économie sur la politique de la concurrence inscrite dans le droit de la concurrence et menée par les autorités de la concurrence dans le domaine des accords verticaux. La portée de l'article montre que l'économie du droit de la concurrence a considérablement modifié l'évaluation de la nocivité des accords verticaux. L'analyse des aspects économiques des accords verticaux dans l'analyse antitrust permet de révéler leurs effets et avantages pro concurrentiels, ayant le consommateur comme leur bénéficiaire. L'instrument de base de ladite économisation est que les organismes antitrust font appel à des modèles économiques spécifiques et des théories qui peuvent être utilisés dans leur pratique. Dans le cadre de cet article, l'auteur résume le rôle et l'influence de ces modèles et de ces écoles d'économie sur l'application du droit de la concurrence dans le contexte d'accords verticaux. En présentant, l'un après l'autre, les théories et les écoles de l'économie qui étaient ou sont encore aux prises avec la politique de la concurrence, l'auteur souligne que cet impact était plus ou moins directe. Certains d'entre eux restent au niveau des principes généraux et de l'axiologie de la politique de concurrence, tandis que d'autres, au contraire, définissent des critères d'évaluation concrets et montrent comment leur application modifie le tableau des pratiques anticoncurrentielles; en d'autres termes, l'article évalue pourquoi les accords verticaux, qui dans le passé étaient considérées restreindre la concurrence, ne sont plus perçus comme tels. L'article présente les modèles et les recommandations de l'économie néoclassique, de la Harvard School, de la Chicago and Post-Chicago School, de l'école ordinaire, de l'école autrichienne et néo-autrichienne, ainsi que de la théorie des coûts de transaction.

Key words: economization of competition law; vertical agreements; economic efficiency; competition policy models and schools.

JEL: K21, K42, L10, L40.

I. Introduction

The competition policy addressing vertical agreements represents a continuous challenge in terms of the extent to which antitrust authorities may carry out administrative intervention into this type of agreements. Vertical agreements cover a very broad range of products and services as well as types of vertical cooperation. In choosing vertical agreements undertakings substitute market transactions for close, long-term vertical contracts or a less specific legal form which is comprised of agreements between businesses operating on two different levels of the market – upstream and downstream. These are broken down into vertical agreements of an upstream type, which arrange cooperation between suppliers of raw material and spare parts and manufacturers of finished products, as well as a downstream type made up of manufacturers of final products and their distributors. However, vertical agreements, in compliance with antitrust law, are not based solely on more or less specific civil contracts. They are also largely an outcome of certain business practices that have been developed, and behaviors of firms that go beyond the rules of civil law. What may constitute the basis for such agreements in light of competition law are regulations, instructions, recommendations and the sharing of economic information.

Economic theories concerned with the issue surrounding vertical agreements consider them mainly from the perspective of deficiencies, involved in the operations of the market mechanism, seeking to remove those deficiencies through the application of one of the available forms within which an economic activity can be organized, with the form being more market-based, or based on a firm, or an intermediate form accompanied by the use of vertical agreements. Vertical agreements represent a hybrid form of business organization, which is a rational alternative in relation to the other two forms. On account of them having possibly an anti-competitive goal or effects, vertical agreements, or to put it more precisely, vertical restraints have become an important area of operation of antitrust authorities, safeguarding the competition model arising from antitrust law.

According to R. Posner, the antitrust policy addressing vertical agreements represents the most pertinent issue which the present day antitrust authorities must face (Posner, 2005, p. 229). This challenge was brought about by the

rapid economization of competition law. Inculcating into the work of antitrust authorities the principle of referring to economic theory and analysis in their assessment, and not relying solely on the legal interpretation of the prohibitions laid down in antitrust law, had the effect that vertical agreements gradually ceased to be viewed in such a restrictive way, which after all used to be a mandatory practice until the end of the 1980s.

In the process of competition law economization the importance of the well-known in literature theories and schools of economics varies rather significantly. The aim of this paper is to show the role and the extent of the influence exerted by neoclassical economics, the Harvard School, the Chicago and Post-Chicago School, the ordoliberal school, the Austrian economics as well as the transaction cost theory, on the application of competition law with regard to vertical agreements.

II. The scope and effects of the economization of competition law

Vertical agreements seen as a hybrid way of organizing business activity encompass a broad range of products and services and types of vertical cooperation. Moreover, they are the preferable and dominant form in which contemporary business functions. The reason why they are the major focus of antitrust authorities is that in restricting economic freedom of weaker partners they simultaneously undermine free competition. A positive aspect in this respect is that vertical agreements increase economic efficiency of both manufacturers and distributors, while being the carrier of consumers' benefits contained in sales-related services that are being expanded by distributors. Hence, had it not been for numerous vertical restraints imposed on distributors, this efficiency would not be possible to achieve. This is exactly the problem which antitrust authorities must face, and which vertical agreements generate, that is, should competition law protect small and medium-sized enterprises, thus safeguarding their economic freedom and free competition, or whether the objective of exercising the law is to assess the behavior of enterprises in terms of their economic efficiency.

The provisions of antitrust law do not divide the prohibited agreements between firms into horizontal and vertical. Pursuant to the provisions, those agreements are prohibited whose aim or effect is to eliminate, restrain or distort competition on the relevant market. Thus, in order to claim that a particular practice restrains competition, it is not necessary to demonstrate that both premises occur simultaneously. In assessing an agreement, its aim becomes the priority, and only when the aim of the agreement concluded is not known,

the effects are examined, that is, the practicalities (realities) of the agreement. This way of evaluation, which gives priority to the aim of the agreement, where there is no requirement to refer to its effects, may render antitrust analysis as an endeavor that is purely abstract in its nature, being defined on the basis of a grammatical interpretation of the provision and a hypothesis, devised on the basis of this standard, that an anti-competitive behavior is at play. In the decision-making practice, the severability of these premises affords the authorities enforcing antitrust laws much discretion and subjectivity in their assessment as to the unlawfulness of the alleged anti-competitive agreements, which the authorities derive from presumed intentions and not from the impact of these agreements on real competition. This is because such assessment is only possible when the actual market effects are weighed, in other words, when both the negative and positive effects are assessed. What provides a remedy for this discretion and disregard for the reality in the assessment of a particular agreement is a comprehensive economization of competition law.

The economization of competition law consists of resolving antitrust issues defined by competition law through the following:

1. referring to economic theories, models and categories while settling antitrust cases;
2. applying, in an antitrust analysis, tools and methods relevant to economics;
3. investigating real market effects of practices subject to the assessment.

The attention of antitrust authorities is drawn first and foremost by downstream agreements, that is, the distribution segment based on long-term contracts and arrangements, which organize the cooperation between manufacturers and retail distributors under the systems of selective distribution, exclusive distribution or franchising and agency contracts. Among the clauses included in vertical contracts, establishing the aforementioned distribution systems, there are also price and non-price clauses. Those which are contrary to antitrust law restrain intra-brand competition, create artificial barriers to entry, facilitate the conclusion of horizontal agreements. On the list of prohibited practices, for a dozen or so years, there was resale price maintenance – RPM, which is comprised of minimum and maximum prices, recommended and fixed prices. Moreover, on the list with the most important non-price practices one could find agreements whose outcome is the boycott of sales, advertisement and promotion of the competitor's products, bundling, tying, exclusive dealing agreements and most-favored clauses.

Diverse views exist on the benefits and negative implications of vertical agreements. Still, the ever greater role played by economic considerations in antitrust analysis since the 1980s has had the effect that the benefits revealed

through this analysis proved much bigger than it had been argued in the past and, crucially, they frequently tend to outweigh the negative effects. Consequently, at the current stage of the application of competition law, only a few practices among those mentioned earlier are still viewed as restraining competition, whereby substantial differences are to be discerned between the United States and the European Union in this respect. The most important one consists of the extent to which the essence of those practices is explained through an in-depth economic analysis. While in the United States the rule of reason is preferred, what holds primacy in Europe is still the per se illegality rule, which is, assessing those agreements in terms of whether or not their form and content comply with the hypothesis of the rule of law prohibiting the conclusion of such agreements on account of their aim or effect.

Nevertheless, the economization process of competition law unfolding on both sides of the Atlantic for 30 years has had the effect that today only very few cases involving vertical agreements are a major concern to be tackled by antitrust authorities. These are in the first place arrangements referring to the application of minimum and sticky RPM, location clauses restricting sales markets for distributors, clauses prohibiting or restricting online sales and most-favored clauses (Jurczyk, 2016, pp. 244–353).

III. The influence of neoclassical economics

Neoclassical economics did not deal directly with competition policy based on competition law. Still, it is its models that the two schools of economics, which have had the greatest impact on concrete competition policies draw on, namely the Harvard School and the Chicago School. The two most useful models of neoclassical economics will be recalled here: the double marginalization problem and the free-rider problem. These models identify considerable benefits that the vertical integration of firms can yield, which may provide the basis for exempting them from the prohibition on these agreements.

1. Double marginalization model

Neoclassical economics is the first one to tackle vertical agreements; it is, however, not in the context of the application of competition law but on account of the reasons which induce businesses to vertical integration and because of the effects this integration has on competition. The double

marginalization model explains why firms strive for vertical integration. The way the model explains this is that firms seek to reduce the inefficiency which is the outcome of the market power held by firms operating on the upstream or downstream market, or on both markets concurrently. Their market power allows these firms to charge an autonomous mark-up on each of these levels, which, in turn, has the effect that on the market thus structured the mark-up included in the price is charged twice. The inefficiency on such market is especially high when a pure monopoly exists at the level of production and a separate pure monopoly at the level of distribution, that is, in a situation when monopolies operate on the markets which are dependent vertically (two-sided monopolies). This market structure allows each monopoly to set monopolistic prices separately. A monopolistic manufacturer adds its monopolistic mark-up to the costs of production, while a retailer monopolist adds its monopolistic mark-up to the price paid to the manufacturer. In the vertical externality, the market price of the product is then higher than its marginal cost while the sales volume is smaller. Furthermore, aggregated profit is also smaller in relation to the profit which would have been made if the mark-up was to be set jointly and not independently.

Moreover, the phenomenon of double marginalization will disappear when vertical integration takes place following a vertical merger between firms operating on different levels of the market and only one firm is established (one monopoly). The removal of the mentioned inefficiency may also unfold in the form of multi-annual vertical contracts, under which firms agree on setting maximum resale price maintenance and refrain from charging their own mark-up separately. In doing so, they are enabled to maximize their total profit by increasing production and lowering the price. In this setup, as J. Tirol asserts, with reduced market prices and increased production, an integrated industry generates more profit than an non-integrated one (Tirole, 2003, pp. 17–175). This is because integrated firms, while setting a monopolistic trading price, will take into account accordingly the manufacturer's cost of production. The prices following the integration will be lower, which in turn will be to the consumers' advantage. As P. Joskow argues, this is a classic example of the general principle according to which a single monopoly is better than a chain of monopolists. And that is why vertical integration and nonstandard vertical agreements constitute substitutable mechanisms which solve the problem of including profit markup twice in the price (Joskov, 2005, pp. 323–325).

The problem of double marginalization is broader and occurs not only in the setup of a two-sided monopoly, but also in more realistic market conditions when, at both separated levels of the market, monopolistic competition is at play, that is, when firms operating on those markets hold considerable market

power. Also within such competition, the way to eliminate or reduce double marginalization is provided by vertical integration or a substitutable solution in the form of vertical agreements between firms, as has been demonstrated above. The aim of vertical integration in this kind of a market setup is to avoid double distortion of prices, which occurs when firms add their own price-cost margin at each level of production. Therefore, on the market where at every level of its organization, that is, at the level of production and the level of sales, pure monopolies or entities with considerable market power operate, a single monopoly is better than a chain of independent monopolies.

The economic model of double marginalization was what contributed to the fact that the end of the twentieth century saw antitrust bodies refrain from regarding maximum resale price maintenance as monopolistic prices being entirely prohibited by competition law. The model, however, does not answer the question as to the benefits of minimum and sticky resale price maintenance in vertical agreements. The search for the positive aspects of this kind of prices should, according to some economists, be linked to the producers' interest and their efforts to increase demand, which, however, requires from them the creation of incentives that would prompt retail distributors to make extra investments (Marvel, McCafferty, 1984, pp. 346–359).

2. The free riding model

The free riding model formulated by L. Telser is the best known and useful economic model which depicts the benefits to be drawn from sticky and minimum prices in vertical agreements. The model outlines the benefits consumers gain when retailers of a particular product or service, who do not compete on price thanks to minimum resale price maintenance, invest more resources in the development of sales-related services following a higher markup (Font-Galarza, Maier-Rigaud, Figueroa, 2013, p. 4).

The model shows how the minimum RPM set by the organizer of a distribution network eliminate the unfair competition between retail distributors generated by the negative market practice of free riding, while revealing how the same minimum resale price maintenance is conducive to the development of sales-related services provided by distributors and to increased retail sales.

The effect of free riding takes place when those who first and foremost benefit from the seller's effort, aimed at promoting goods, developing pre-sales services and training employees, are rivals who having incurred no additional thus-related costs can offer lower prices than those given by the seller making investments and can therefore attract customers. This

demonstration of unfair competition brings about negative effects for both the manufacturer and the consumer. In the situation when the free riding effect occurs, no retail distributor will be interested in providing the necessary, from the manufacturer's point of view, level of sales-related services, that is, if the benefits are reaped mainly by the seller who invests neither in the development nor in promotion of those services. The manufacturer, in turn, seeing his sales falling, it being the outcome of the free riders' negative behavior, and in consequence his profits falling, will seek nothing else but to raise retail prices.

According to L. Telser, without setting minimum RPM the varying level of services rendered by distributors will depend on their individual costs and the demand function. Moreover, with minimum RPM the manufacturer can require from his distributors to provide consumers with an optimal level of pre- and post-sales services. Thus, as Telser argues, the minimum RPM is often the best solution for developing intra-brand competition between distributors, with the competition being based on the quality of the commercial services provided to consumers. The minimum price has already a sufficient markup included which makes it possible to finance the development of those services. Creating sales-related services, which provide consumers with new values, will be possible as long as the costs do not exceed the minimum or sticky prices set by the organizer of the distribution network (Telser, 1960, pp. 86–87).

Telser built his model having adopted the hypothesis that current demand depended on a wide range of sales-related services offered by retail distributors. The development of those services, on the other hand, depends on whether distributors can be convinced to bear the costs of additional investments needed for the development of those services. What constitutes an incentive for distributors to bear the additional expenses is the very minimum RPM, which guarantees that distributors will have sufficient revenues to engage in commercial investments. Through the development of sales-related services, the minimum RPM provides consumers with new values, increases the volume of consumer information and thereby increases sales, non-price competition and intensifies inter-brand competition. These positive results arising from the application of minimum resale price maintenance are possible to achieve because it is this resale price maintenance that eliminates the unfair intra-brand competition brought about by a market offence in the form of free riding. That is why in an efficient system of minimum and sticky resale prices, the retail distributor who lowers the price must be aware of the fact that he faces the risk of no longer being delivered goods by the manufacturer. This threat is to encourage distributors to provide an optimal level of services. The assumption that lies behind this arrangement is that when all sellers apply the same prices, which include the cost of the optimal quality services provision, then they are forced to mutual non-price competition. In circumstances when

minimum or sticky RPM are in force both manufacturers and consumers benefit. L. Telser's model, which provides a rationale for the existence of minimum prices under vertical agreements has, so far failed to be recognized and employed on a bigger scale in the practice of antitrust authorities.

In 2007, the US Supreme Court made a landmark ruling on setting minimum resale prices in vertical agreements in the Leegin case.[1] It was the first time that the Court stated in its verdict that in assessing minimum resale prices one should abandon the rule of *per se* illegality and follow the rule of reason, that is, the economic criteria of judgment which make it possible to demonstrate that benefits derived by consumers from minimum resale prices outweigh their costs. By giving this verdict, the Supreme Court clearly showed that Telser's was one of those models which could be used to show the positive effects of minimum RPM for competition and consumers.

Nevertheless, despite the many years that have passed since the Leegin ruling, Telser's model, which justifies the setting of minimum prices in vertical agreements, has so far failed to be recognized and applied more broadly in the practice of antitrust authorities in the United States and the European Union. In the United States, apart from federal antitrust laws, also state regulations apply. It is precisely the states that largely uphold the prohibition on the use of minimum RPM in vertical agreements, contrary to the position of the Supreme Court and the government authorities. The same goes for the EU. The inflexible view of the Member States is derived from the firm stance of the European Commission, which has not changed its attitude developed in the 1970s and 1980s. According to the then jurisprudence, minimum RPM is absolutely contrary to Article 101(1) TFEU on account of its anticompetitive goal (Jurczyk, 2016, pp. 257–268). RPM continues to be seen by the Commission and European courts as hard-core restrictions of competition; this attitude has not been altered by Regulation No 330/210[2] currently in place on the block exemption from the ban on uncompetitive agreements. This is despite the fact that a group of advisors from the Chief Economist Department of the Directorate-General for Competition proposed that RPM be included in the rule of the *de minimis* market share, which would exempt it from the ban laid down in Article 101(1) TFEU, if the individual share held by the company in the relevant market did not exceed 15%.

[1] *Leegin Creative Lether Prods, v PSKS, Inc*, U.S. 877, 2007.

[2] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ 23.04.210.

IV. Vertical agreements according to the Harvard School model

The Harvard School built its competition policy model in the 1950s, with E. Mason and J. Bain being its chief originators. The members of the school believed that markets functioned in a defective way and therefore antitrust law was important and should be employed to protect, in the first place, small businesses. In fact, in devising the tenets and objectives of American competition policy, the school summarized and drew conclusions based on the results coming from the activity of government and judiciary antitrust authorities. While creating the theoretical framework for competition policy, the school relied on the structure- conduct-performance paradigm, it being the research focus of the theory of industrial organization. The structural factors include, among other things, the structure of the relevant market, entry barriers, production costs, diversification of products shaping market behavior and practices of firms, which in turn exert influence on market outcomes such as profitability, production volume, pricing, innovations. This paradigm shows that the prime factor which determines the level of market competition for a given industry, and the firms' performance achieved thanks to this competition, is the structure of the market. And vice versa; every firm can impact to some extent its future market position through its performance (Shepherd, 1986, p. 23).

According to Mason, the term 'monopoly' is used as a standard of evaluation and of defining a situation that is against the public interest. Competition, on the other hand, is seen as a situation that is in line with the public interest. By inference, protecting the competitive elements of the market and restraining monopolistic power should be in the public interest, for monopolistic elements such as price discrimination, agreements, predatory prices or dishonest advertising are ubiquitous. Mason also argued that economic analyses of monopolistic situations in competition models were of little use for antitrust law because they could lead to a conflict, since it was not possible to separate the damage suffered by the competitor and the nature of the damage suffered by the public (Mason, 1937, pp. 34–49).

As the Harvard School attributed market structure with key importance, while stressing the firms' economic independence and autonomy which should not be distorted by other stronger competitors' arrangements between firms, including the vertical ones, which may have a negative impact on the market structure, destroying the structure relevant to the functioning of effective competition, creating barriers of entry, or restraining the commercial autonomy of firms linked vertically to a more powerful manufacturer. At the time when the Harvard School used to exert a decisive influence on the way competition

policy was conducted, many vertical restraints were prosecuted and perceived as a violation of the competition principles laid down in antitrust law. At a time when the principles of antitrust policy devised by the Harvard School were applicable, what was deemed to be unlawful vertical agreements were clauses constituting: tying arrangements prohibiting the distributor from selling within the area of another licensed distributor or opening an additional retail establishment within the area designated to him, prohibiting the sales or promotion of products of competitive firms, as well as all cases of applying resale price maintenance.

What it expected of antitrust laws was to become a guardian of those attributes. Moreover, it saw the causes of market deformation in excessive market power, and the agreements of monopolistic undertakings which, as a result of creating barriers to entry, generating excessive economic concentration, eliminating inconvenient competitors from the market and constraining trade independence of undertakings related vertically with a stronger producer, were destroying the structure appropriate for the functioning of free competition. In the age of the Harvard School, vertical agreements were perceived as reprehensible as cartel agreements.

Throughout the years dominated by the Harvard School, the actions of American antitrust authorities were thus very stringent, while the list of banned practices very long. This is why the impact exerted by the school on the operations of American antitrust bodies within the antitrust doctrine has been met with considerable criticism. This was a time which saw plenty of misconceived proceedings and rulings, both on the abuse of a dominant position and on concluding agreements allegedly restraining competition. Such a victim of the Harvard School doctrine was, among others, the Borden Company, accused by the Federal Trade Commission (FTC) of selling condensed milk of a similar quality to different purchasers at a varying price, although the company's market share was barely 11%. In this case, the FTC took the side of the less effective and smaller milk producers. Although the Commission dropped the charge eventually, the proceeding lasted no less than 10 years until 1967. A misconceived proceeding was also brought against Brown Shoe[3], a small shoe manufacturer which was forced to resale the franchise stores it had acquired earlier. Despite the benefits to consumers, this transaction was seen as monopolizing the market. The fate of Sylvania company, a small TV set producer, is yet another case in which proceedings were initiated against a company for prohibiting, under its vertical agreement, one of its distributors to open a division in the state where Sylvania had already had a distributor. Sylvania's stubbornness, however, led to its being cleared of all charges by

[3] Brown Shoe Co. v. U.S., 370 U. S. 294.

the Supreme Court; yet it was not before 1977 when in a landmark verdict the Court finally recognized that this kind of restrictions were admissible in vertical agreements.[4]

Assessed as particularly damaging in the antitrust history was the Alcoa case. In 1939, the Justice Department charged the company with illegal monopolization of the market and demanded that the company be broken up. At the first instance, the District Court accepted the company's line of defense, which argued that the company owed its position to effectiveness and innovativeness, and did not agree to the company's breakup. In 1945, however, this ruling was overturned by the Court of Appeal, which, although admitted that Alcoa was effective, still argued that skills and innovativeness excluded competition, and so effectiveness could not provide legal justification for monopolization.[5]

Another case worth recalling was that of AT&T, a telecom company. Assessed with hindsight, it was as one of the most misconceived and damaging cases in US antitrust law enforcement. In 1974, the Justice Department, after 18 years of observation, accused AT&T of abusing its dominant position on the telecommunication market by conducting activities which restrained competition with a view to further monopolizing the market. The claim against the company was that it was precisely to this end that it had been using, among other things, profits from its subsidiary Western Electric, generated on a regulated market, to subsidize the operating costs of its network (cross subsidization) on the non-regulated market. The trial that lasted many years eventually led to a consent decree between AT&T and the Justice Department in 1982.[6] It entailed exempting AT&T from the ban, in force since 1956, on launching new business activities on the non-regulated market and, in return, the company was to be broken up into 22 regional scattered companies providing local and regional services (Bell operating companies). In January 1984, the monopolist was finally broken up into eight parts. AT&T could continue providing long-distance telephone services, while the 22 Bocs were consolidated into seven independent regional operators. In 1987, the Court denied Bocs the possibility to provide long-distance services and to manufacture telephone equipment, maintaining that the companies still enjoyed a monopolistic position on the local markets (Pinheiro, 1987, pp. 303–306).

4 Continental Television v. GTE Sylvania, 433 U.S. 36 1977.
5 U.S. v. Aluminium Company of America, 148 F. 2nd., 1945.
6 U.S. v. AT&T, 52 F. 131, 1982.

V. Vertical agreements according to the Chicago School and Post-Chicago School

It is important to stress from the outset the difference between the Chicago School and other economic schools and theories in the context of conducting competition policy and enforcing competition law. The difference lies in the fact that its theory and views indicate directly how the state should implement competition policy in practice, how antitrust authorities should interpret and apply antitrust law, and where to look for and how to find and solve antitrust issues. Unlike the Harvard School, in this model of competition policy economics plays the key role.

One of the main premises of the school is that competition in industry,[7] even if it is a highly concentrated one, functions in a natural way, because of self-regulating and stable forces of industrial markets, provided there are no legal barriers to entry on those markets. Different levels of industry concentration, according to the Chicago School, result from the differences present in the structure of costs, which, in turn, are brought about by economies of scale and innovation, in other words, their source lies in higher efficiency. According to the school's tenets, competition between a few firms may be equally effective as that of a market with many firms.

The greatest and most enduring achievement of the Chicago School is bringing economics into antitrust analysis carried out by competition authorities, and the belief that the only goal of competition law that authorities should follow should be consumer welfare, with the only criterion for assessing the practices described by competition law being economic efficiency. This allows the application of competition law to be more coherent and predictable for businesses.

The Chicago School recommends that the efficiency criterion should be what in the first place guides antitrust bodies in their activities, for it considers the structural measures to be inadequate and ineffective. Hence, the school considers the concentration of firms to be neutral for competition processes, or even pro-competitive. Members of the school also undermined the importance of the durability of barriers to entry for competition processes. As worthy of attention of antitrust bodies, the school recognized only the practices within the scope of setting sticky prices in a cartel and the merger of large firms (Jurczyk, 2012, p. 39). As R. Bork writes, if the practice does not touch upon the issue of production restrictions, one should assume that its goal as well

[7] In competition policy the term 'industry' can be replaced by such terms as: line of business, branch, sector.

as effect is to create efficiency or some other neutral goal. In this case, the practice should be deemed to be compliant with the law (Bork, 1993, p. 122).

Antitrust bodies should therefore focus their work on eliminating horizontal agreements between monopolistic firms, since in other cases market forces will correct anti-competitive and inefficient market behaviors, thus re-establishing periodically market equilibrium. According to the Chicago School, vertical restraints, which in light of the Harvard School and ordoliberal economics are a thorn in the flesh of competition law and competition policy, not only present no antitrust problems but quite contrary, they manifest the firms' quest for greater economic efficiency and not for advantages through imposing restraints on competition.

Those views are not necessarily fully shared by many members of the so called post-Chicago School who perceive them as too naive, especially one that claims that market forces are capable of removing any deficiencies (Hildebrand, 2002, p. 151). Market deficiencies they see primary in insufficient market information and existing barriers to entry, which considerably restraints and impedes competition processes and, hence, the need for a significantly larger number of interventions on the part of antitrust authorities than that advocated by the Chicago School (Lande, 1994, pp. 631–644). However, they do share the school's view that a great many of vertical agreements previously assessed as anti-competitive, were in fact the result of aiming at higher efficiency, reduced transaction costs or avoiding the free-riding effect. Moreover, what is important is that just like the Chicago School, it recommends that in their proceedings antitrust authorities should not follow the per se prohibition rule while conducting an antitrust analysis of vertical agreements but the rule of reason based on the analysis of economic information, in particular in their assessment of the effects of the vertical practice in question. An arrangement that originally was assessed as anticompetitive in light of the per se rule, may, following further and more detailed analysis, prove that it does not violate competition principles, nor does it make the situation of consumers or suppliers worse – quite the contrary – it may even improve them.

It was thanks to the Chicago and Post-Chicago School that considerable economization of antitrust law could unfold, which has had a major influence on the assessment of vertical agreements over the last 40 years. Even at the end of the 1970s, vertical price and non-price restrictions were considered to be *per se* illegal. The output of both schools made almost all other vertical agreements, with minor exceptions, namely minimum RPM, legal, or, otherwise, they had to be assessed based on the rule of reason, that is, to examine the market behavior of undertakings from the point of view of their real impact on economic effectiveness. As a result of the antitrust law economization, the US

Supreme Court gradually began to remedy its mistakes from the past. The ban on using maximum vertical prices, established in 1968 through the Albrecht decision,[8] was eventually questioned in 1997 in the State Oil Co. ruling.[9] In its decision, the Supreme Court contended that maximum resale prices arranged between the producer and its authorized dealers should be settled according to the rule of reason. Ten years later, in the aforementioned Leegin ruling, the Supreme Court also questioned the illegality of minimum RPM. Thus, after 96 years the rule of the *per se prohibition*, applied for the first time with regard to minimum resale prices in the Dr. Miles Medical Co. decision,[10] ceased to be absolutely mandatory. The Supreme Court's interpretation given in this ruling, which held that the minimum resale prices in vertical trade relationships were unlawful because the manufacturer sought to use those prices to control the operations of distributors and sellers, thus leading to restraining competition among them, was no longer valid.

The economization of competition law triggered by the views espoused by the Chicago School also reached Europe. In the Guidelines on Vertical Restraints, the Commission sees that maximum RPM allow for avoiding double marginalization of profits and that the margin generated through minimum or fixed RPM can enable retailers to provide additional services, and so maximum RPM were deleted from the list of hard-core restrictions. Further to that, it sees the advantages of minimum RPM in combating free riding. The Commission adds, however, that although one can defend all types of restrictions under the law banning monopolistic agreements, the Commission is still skeptical for this defense to also extend to minimum resale prices, since, as it maintains, the negative effects always outweigh the positive ones.[11] In the similar vein, the CJEU, held, while referring to the Block Exemption Regulation, that this act should not exempt from the ban vertical agreements containing restrictions which are very likely to restrain competition and be to the detriment of consumers.[12] Thus, at least up to 2022 the economization of competition law in the EU will continue to diverge from the standard for assessing vertical restraints, which is based on consumer welfare, as recommended by the Chicago School.

[8] Albrecht v. Herald Co., 390 US 145,1968.

[9] State Oil co v. Klhan 522 U.S. 3. 1997.

[10] Dr. Miles Medical co. v. John D. Park&Sons Co., 220 U.S. 373, 1911.

[11] Commission notice – Guidelines on Vertical Restraints, OJ 19 May 2010, C 13/1.

[12] The Court of Justice decision of 6 December 2017, case file C-230/16, Coty Germany GmbH v. Parfümerie Akzente GmbH, ECLI:EU:C2017:941.

VI. Vertical agreements in the Austrian School's competition model

The most important premises and elements of the Chicago School outlined above on the subject of antitrust authorities' work are similar to the views espoused by members of the Austrian School, in particular by F. von Hayek, who argued that government interventions in the area of competition were hostile and worthless. The crucial responsibility of competition policy and antitrust laws should be ensuring the functioning of a free market. Hayek is even more radical on other issues pertaining to the implementation of competition policy itself. It is his view that the government should pass contractual law, commercial law and patent law, as well as laws on protection of industrial property, for which the guiding principle should be competition whatever the circumstances and allowing for no exceptions. In taking on such position, he was against antitrust law in the form adopted by Germany and also against establishing a separate antitrust body with discretionary powers. He believed that the state should confine its role to ensuring proper, clear and always reliable framework for the functioning of a free market without having to continuously intervene into this market (Cox, and Hübner, 1981, p. 30). In referring to the 'hampered market economy', as a negative model of the market economy in relation to the free market economy, L. Mises notes that state interventionism does not confine itself only to preserving the private ownership of the means of production and to protecting it against acts of violence and fraud. Government interventions go much beyond this area in that they force firms to use some portion of their production factors in a way in which they would never have done so, had they had the chance to follow only the dictates of the market (Mrowiec, 2017, pp. 34-35). State interventionism in the form of competition laws and the operations of antitrust authorities is one of those instruments which the Austrian School classifies as elements of a hampered economy. It is therefore rather obvious that a school which prefers free market economy, free of government economic interventionism is adamant in its opposition to an active antitrust policy run by the government and even thinks that such activity is harmful.

Moreover, the new Austrian economics, which refers to the Austrian School in that it assumes that competition (like new classical economics and monetary theory) does not imply a state of affairs arising from the equilibrium existing on a market of perfect competition, but instead sees it as a dynamic process, a tendency, a movement towards an equilibrium, argues that government interventions which go beyond the minimum level of needs merely heighten market imbalance. According to the new Austrian economics, only individual economic freedom and autonomous goals of firms deserve to be protected

by law. Here, freedom is perceived in two dimensions: as relationships between the state and private undertakings and the freedom between private undertakings themselves (Hildebrand, 2002, p. 157).

Despite the similarities between the Chicago School and the Austrian School as to their understanding of competition, the faith in market forces when solving market and competition problems, and thus a limited range of interventions in the market to be carried out by antitrust authorities, there is a fundamental difference between the schools in terms of the goal of competition policy. For the Chicago School, the sole and exclusive goal of competition policy, and simultaneously a criterion, a standard to be implemented in the practice of antitrust bodies, is consumer welfare, that is, making efficiency-based assessment of market behaviors displayed by firms from the perspective of the application of antitrust law. According to the concept of the Austrian School, on the other hand, what deserves to be protected by law is first and foremost private property and entrepreneurs' full economic autonomy and freedom.

Applying the concept of the Austrian School to the role of competition law, the conclusions drawn from such analysis in terms of vertical agreements are equivocal. On the one hand, this economics regards interventions carried out by antitrust authorities as harmful, for they distort spontaneous market forces set to eliminate any kind of disturbances unfolding in the competition process, with barriers to entry being an exception here as they should be dealt by the state; on the other hand, however, if its goal is to protect economic freedom and autonomy of private firms, in many cases this freedom is restricted under vertical agreements. This is largely the case with firms functioning on the downstream market (of distribution). After all, this type of agreements contains numerous clauses restricting their autonomy, which in light of competition law may be regarded as practices involving vertical restraints. This problem does not exist in antitrust analysis conducted according to the criterion identified by the Chicago School. In assessing these clauses within the framework of the rule of reason, the finding may be that they are actually pro-efficient and to the advantage of consumers.

VII. Vertical agreements in ordoliberal economics

According to ordoliberal economics, also known as the Freiburg School, established in the 1930s with E. Bohm and W. Eucken as its initiators, an economic order based on competition is what underlies economic welfare and stability. Competition, however, will not be able to fulfill this constructive

function if it is not given a proper form. The form of competition, which is to allow the economic system to generate those social aims, requires a vital market structure. In the view of ordoliberal economics, what ensures this desired market structure is a perfect competition which should be re-established and maintained (Eucken, 1959, p. 160). In such structure the market power of firms should get dispersed to the greatest possible degree.

Ordoliberal economics is, at this point, in accord with the liberal views that only market economy can ensure social welfare, freedom and justice. Its advocates the believe that in order to realize those aims, what is necessary is to include a stipulation in the constitution that market economy is the basis of the economic system. This legal measure will prevent the distortion and degeneration of competition processes with the results brought about by the market economy being justly distributed across the society, while keeping state intervention into the economy to the minimum (Hildebrand, 2002, 158). Antitrust laws and their enforcement, in line with the ordoliberal thought, should therefore be orientated first and foremost against monopolization of the market and against creating a monopoly, while focusing on controlling the activity of monopolies, cartel agreements and other anti-competitive business arrangements, including vertical agreements. As ordoliberal economics proved to be very influential in Europe in the 1950s, the fact that it regarded vertical agreements as major practices seeking to restrain competition played later a key role in the European Commission's competition policy, distinctive for its being very restrictive and embedded in numerous legal requirements, which was directed against those agreements.

The role of competition law in the ordoliberal concept is to create and control compliance with legal regulations governing competition and to maintain the conditions under which competition can develop (Kohutek, 2012, pp. 58–59). According to W. Eucken, competition devoid of regulations leads to anarchy, and ultimately to self-destruction. Competition constitutes the foundation of the market order, within the framework of a specific legal and ethical system, while placing an emphasis on creating institutional frameworks for the smooth functioning of the market. Competition law is thus vital in preventing the degeneration of competition processes. To this end, the law should ensure that the rules on competition are respected through creating and maintaining the conditions which ensure that competition can function efficiently (Gerber, 1994, p. 50). These conditions include the ability to compete freely, the protection of individual economic freedom and the protection of the competitive structure of the market that is appropriate for perfect (complete) competition.

With respect to its premises, the market structure and the aims and principles involved in conducting competition policy, the Freiburg School

displays similarities to the Harvard School. The behaviors of firms and market economic outcomes, including consumer benefits, are determined mainly by the market structure, concentration level and barriers to entry, which this school sees as a key problem for the functioning of competition. Both schools recognize that the goals of competition policy are manifold, while the government should remain active in this field. The approach espoused by the ordoliberal school in its evaluation of vertical agreements, just like that by the Harvard School, is therefore very restrictive. Thus, according to ordoliberal economics, many restrictions and obligations imposed under vertical contracts on firms operating on the downward market run counter to economic freedom, the autonomy of undertakings and the principles of perfect competition, and if so, they have to be regarded as reprehensible and competition restraining. The views of ordoliberal economics as to the enforcement of competition law, and the role to be played by antitrust authorities, have had a crucial impact on the shape of competition policy in terms of vertical agreements and also regarding other areas of the policy conducted by the European Commission, and by inference, the Member States. Firms which concluded such agreements believing that such arrangements had neither an anti-competitive objective nor effect, in order to obtain legal certainty in this respect had to notify them to the Commission. Only after having investigated the case in question did the Commission issue either a decision or a clearance when it proved that the conditions required for being exempted from the prohibition laid down in Union law were satisfied (Jurczyk, 2012, pp. 201–210). It was only in 2004 that this legal procedure, which referred directly to the pre-war provisions governing German cartel law, imposing on businesses the obligation to register cartel agreements, was completely abandoned.

The ideas of ordoliberal economics on the principles of conducting EU competition policy continue to be respected by the Commission, which is visible also in the aspect of vertical agreements. Not only does the Commission defend competition as the fundament of the single market functioning, but it also seeks to protect competition by protecting undertakings. In terms of vertical agreements, this is demonstrated by treating minimum RPM as hard core restrictions, as well as by having rejected the proposal of the Chief Economist of Directorate-General for Competition calling for exempting all vertical agreements, including price agreements, from the ban on vertical agreements when the market share of an undertaking does not exceed 15%.

VIII. Vertical agreements in the transaction cost theory

In the theory of transaction costs, the basic analytical unit in the research on economic organization is transaction and its costs. As such the theory highlights in a particular way the studies on management in a situation when transactions are removed from the market and are placed under unified governance, that is, when changes in ownership take place, as well as changes in terms of incentives and governance structures (Williamson, 1998, pp. 395–396). In other words, when in place of market transactions a hierarchical organization (a firm) is established as being more efficient in eliminating transaction costs related to the conclusion and implementation of contracts, search for market information and opportunism. Moreover, the transaction cost economics emphasizes that the size of the firm, through the absorption of market transactions, cannot grow indefinitely, for the process of supplanting the market is accompanied by an increase in transaction costs arising from coordination and management. In literature these costs are sometimes broken down into transaction market costs, managerial and public costs (Staniek, 2005, p. 25). K. Arrow, who has been credited with introducing the concept of transaction costs, associated those costs with the costs involved in the functioning of an economic system, perceived as a separate type of costs in relation to production costs, them being the focus of neoclassical analysis (Willimason, 1998, pp. 22 and 32). H. Demsetz's definition is more narrowed down, rendering the essence of transaction costs in that he defines them as the exchange of property rights (Demsetz, 1968, p. 35). Transaction costs – in these economists' views – hinder, and in some particular situations block market information. Here the fundamental thought appears that of Hayek, to be further elaborated by Coase, that the market does not operate free of charge. This author believes that the flaws of the market result from transaction costs, which K. Arrow compared to the friction in physical systems. K. Arrow argued, however, that given that 'market failure is not absolute; it is better to consider a broader category that is of transaction costs, which in general impede and in particular cases completely block the formation of markets' (Arrow, 1969, pp. 48–49). Transaction costs – as it is believed – can also hinder an efficient reallocation of resources, if certain transactions have failed to be carried out (Colomo, 2012, p. 545).

The costs of market operation arise largely from searching for information concerned with the investigation of price relationships. The second type of costs involved in market transactions are those pertaining to contract conclusion. They are made up of costs incurred while finding a contractor, negotiating contract terms and conditions (prices, delivery times and payments, delivery

insurance, contractual penalties) and the costs of resolving disputes arising under the contract. The third type of costs of market operation mentioned by transaction cost economics stems from market uncertainty, as a variable constantly present in different segments of the market. This uncertainty comes from price fluctuations and changes, insufficient knowledge of the behavior of competitors, contractors and consumers, as well as the asymmetry of the information held by market participants. This third type of transaction costs encompasses costs which one could refer to as the costs of contract implementation (Cooter and Ulen, 2012, p. 88).

Improvement of economic efficiency, which economics boils down to economizing on market operation costs, is where the focus of transaction cost economics is centered. Transaction costs should be economized by 'assigning transactions (which differ in their attributes) to governance structures (the adaptive capacities and associated costs of which differ)' (Williamson, 1998, pp. 31–32). This cost saving is thus located within the field of product exchange and governance, and consists of the formation of market structures that are more hierarchical and integrated. The behaviors and decisions aimed at economizing on costs have to lead to supplanting the market exchange with structures and mechanisms proper for a firm. The structures of economic organization which display a greater degree of hierarchy and integration lower the costs, in that they reduce or eliminate uncertainty and opportunistic behavior of distributors and suppliers. These non-market modes of economic organization, perceived as an alternative for economizing on transaction costs, may therefore unfold through restraining effective competition and monopolizing the market, in other words, through supplanting the market by the structure of firms.

In the process of internalization, that is, conducting the mentioned transactions within a single firm, the hazards involved in the market disappear. Next to these borderline modes of organization, one can, however, encounter also intermediate modes (mixed) which are not fully hierarchical and where integration between supplier and buyer is embedded in contracts containing clauses which limit, to a greater or lesser degree, the autonomy of suppliers supplying materials and sellers of products provided to end-users. These agreements lower economic uncertainty and transaction costs in relation to vertical cooperation based on market transactions. These are the self-same agreements which underpin the operation of selective distribution networks and franchising, which are so dominant in today's sales of technically complex products, branded and valuable products to end-users. Thus, economizing on transaction costs can unfold at the price of competition deterioration. It is in such circumstances that competition policy intersects with transaction cost economics. While assessing agreements which bring about such effects,

transaction costs saving could provide the reason and rationale behind having them exempted from the prohibition on restrictive agreements.

In traditional competition policy, any kind of subject-based and territorial restrictions included in vertical agreements were regarded as anti-competitive practices. Transaction cost economics took a different view on those restraints. It assumed that those practices were aimed at protecting transactions and thereby reducing transaction costs. Declining transaction costs are one of the potential benefits that vertical integration may yield.[13]

There is no doubt that the emergence of transaction cost economics has allowed antitrust analysis of vertical agreements to be expanded towards their assessment being carried out more on the basis of the rule of reason than that of per se illegality, that is, to weigh the effects arising from restraining competition and the benefits arising from reduced costs and increased efficiency, of which a considerable portion should also be enjoyed by consumers. Therefore, in the context of the transaction cost theory, many restrictive clauses included in vertical agreements such as exclusive dealing, exclusive distribution, resale price maintenance, tying, bundling are no longer seen and assessed solely in terms of market monopolization (that is, price arrangements, barriers to entry, discrimination) on account of their possible cost savings.

With respect to employing directly transaction cost economics in competition policy and law, the costs calculation presents certainly a hindrance. Nevertheless, it should not prevent the perception of vertical restraints, as proposed by transaction cost economics, where those restraints are perceived as seeking to eliminate uncertainty, counteracting opportunism and economizing on costs, to be considered and taken into account in the antitrust analysis conducted by competition authorities. At the same time, this assertion ought to be complemented in that references to transaction costs made in specific cases by American or EU competition authorities are rather theoretical and intuitive, without drawing on empirical evidence. Savings generated within those costs are mentioned as positive effects, which are to compensate for competition restraints arising under agreement that, however, are not directly associated with a specific type of transaction costs. This statement can be found in the Commission Regulation for the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices, in which, for example, it was laid down that certain vertical agreements can be exempted from the prohibition if they can lead to a reduction in the transaction and distribution costs of the parties.[14]

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[13] Guidelines on the assessment of non- horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 2008, 256/6.

[14] Commission Regulation of 20 April 2010 for the application of Article 101 (3) of the Treaty to categories of vertical agreements and concerted practices OJ L 102/2010.

Notwithstanding the foregoing, competition policy became, in terms of vertical agreements, one of the areas where the achievements of transaction cost economics can be applied in practice. That is so because the majority of endeavors seeking to economize on transactions costs concentrate on distribution. Consequently, transaction costs, as an analytical tool in antitrust cases, also undermined the negative effects of leveraging (Williamson, p. 33), which is to monopolize a related market not yet monopolized, as well as they provide new arguments in support of viewing vertical prices as never anti-competitive in their effects. This position – as H. Hovenkamp writes – places the theory of transaction costs somewhere in the middle, although slightly closer to Chicago's position than that espoused by the Harvard School (structural), which has always displayed a hostile attitude towards leveraging, and the traditional leverage theory (Hovenkamp, 2010, p. 8).

The American and EU antitrust authorities incorporated relatively early the transaction cost economics into their competition policy as a further useful tool in an economic analysis assessing the restrictions included in vertical agreements. With respect to the United States, the first decision on vertical agreements in which a reference to the concept of transaction costs is made concerns the already mentioned Supreme Court verdict in the GTE-Sylvania case. That the views of transaction cost economics were taken into consideration by the court can be found in the Court's statement that 'vertical restrictions of various forms have been widely used in our free market economy.' Moreover, a clear reference to transaction cost savings can be encountered in the reasons given for the verdict by the Supreme Court in the Broadcast Music, Inc. case. Applying the rule of reason, the Supreme Court discerned benefits in the vertical agreements which it examined in the reduced number of individual transactions and easier access to the base of the songs concerned.[15]

Microsoft also cited transaction costs when seeking to justify its sale to PC producers of a Windows 98 and Internet Explorer bundle. In its defense against the charge that the company in this way, using its market power held on the operating systems' market, aimed at building a strong monopolistic position also on the web browser market, Microsoft argued that this kind of sale could provide end users with value in that by buying products in a bundle they would incur reduced transaction costs and avoid other inconveniencies. However, the argument citing transaction costs was accepted neither by the US Justice Department nor by the District Court,[16] to which this high-profile antitrust case went.

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[15] Verdict in Broadcast Music, Inc v. Columbia Broadcasting System, Inc 441 U.S. 1 (1979).

[16] U.S. v. Microsoft Corp., 87 F. Supp.2d30 (D.D.C. 2000) and U.S. v Microsoft Corp., F 3.d 34, 56 (D.C. Cir. 2001).

In its decision-making practice, the Commission also invokes transaction cost savings as an argument for the agreement concerned not to fall within the prohibition of Article 101(1) TFEU. At this point, one could mention four Commission decisions where transaction costs were a valid criterion in the assessment of a particular agreement according to the legal rules laid down in this Article.[17] The best known Commission decision is one made in the UEFA Champions League case. In the decision, the Commission contended that failing to conclude the agreement on selling jointly the rights to broadcast the Champions League matches, TV operators interested in buying those rights would have to incur considerably higher transaction costs. The fourth decision pertains to the quantitative distribution system of Land Rover motor vehicles, which the EU antitrust authorities examined as a result of Land Rover refusing to authorize Auto 24 SARL as a distributor of this brand of motor vehicles. In the Auto 24 SARL verdict, the Court of Justice, referring, among other things, to the transaction cost rank in distribution systems adopted the following stance: 'Vertical agreements falling within the categories defined in this Regulation[18] can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimization of their sales and investment levels.'[19]

In evaluating the relevance of the transaction cost analysis for antitrust cases, one should, however, note that it is not a practice that is frequently applied by the European and US competition authorities.

IX. Conclusions

Integration efforts of businesses, both those which incorporate previously independent firms and those consisting of specific long-term contracts, are dictated by efficiency goals based on the benefits to be derived from scale, scope, synergy effects arising from the same research and development

[17] Commission Decision of 5 February 1992, 92/204 IV/31.572 and 32.571 – Building/the Netherlands, 1992, OJ L 92/1; Commission Decision of 8 October 8 2002 COMP/C2-/38.014 – IFPI Simulcasting 2003. OJ L 107/58; Commission Decision of 23 July 2003 COMP/C.2 – 37.398 – UEFA Champions League, 2003, OJ L29/25.

[18] The Regulation cited refers to Commission Regulation (EC) No 1400/2002 of 21 July 2002 on the application of the Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.

[19] Court of Justice judgment of 14 June 2012, file case C-158/11 *Auto 24 SARL v. Jaguar Land Rover France SAS*.

center, development and implementation of common and uniform marketing programme for advertisement, promotion and pricing policy, or using the same know-how. In vertical integration, the source of synergy is the reduction of transaction costs arising from the opportunism of contractors operating independently and from thus-related risk. The effects of synergy, the efficiency, will also be brought about by specialization, when, for example, the manufacturer acquires control of a specialized entity within the scope of distribution and marketing.

The aforementioned efficiency considerations, looking for ways to economize on transaction costs, as well as consumer benefits derived from vertical agreements, demonstrated because of the progressing economization of antitrust law, have had the effect that today vertical agreements are largely assessed according to the rule of reason, in other words, according to how they will impact the market and consumers, rather than according to the per se illegality rule, which is an assessment carried out from the point of view of the aim of the agreement, with the rule being strictly applied in horizontal agreements and particularly in cartel agreements.

The discussion conducted in the paper shows that in their ponderings the salient schools of antitrust policy, such as Harvard, Chicago and ordoliberal, neglected the factors exerting influence on the functioning of efficient competition and further to that, while providing the grounds for their assessment of antitrust cases that involved vertical agreements, they neglected the achievements of the transaction cost theory, despite it being available at the time. The schools remained faithful to efficiency understood and described by neoclassical economics, failing to include directly transaction cost economics in their discussion on the manifestations of efficiency. As H. Hovenkamp notes, in the model of 'free riding' (Hovenkamp, 2010, p. 7) devised by L. Telser, one can see clearly the interface between the Chicago School and transaction cost theory when it comes to vertical agreements. The explanations as to the efficiency of the application of resale price maintenance presented in the model are essentially a form of transaction cost analysis. As Hovenkamp maintains, although Telser did not use Coase's theory for his basis, his famous paper on RPM refers to alternative costs, mechanisms allowing distributors to provide additional services. To illustrate the point, Telser asserted that a firm could choose between its own distribution and a distribution through independent firms, depending on the cost relation between those choices (Telser, 1960, pp. 86–87). The manufacturer could try to use contractual provisions to require that optimal services be provided by the distributor, however, monitoring and the distributor's costs thus related could render this solution unattractive. That is why the resale price mechanism is often the best option allowing distributors to compete between one another

through launching new services as long as their costs do not affect the resale price maintenance (Telser, 1960, p. 90).

In evaluating the impact of economic theories and schools presented herein on competition law applied with respect to vertical agreements, one should note that although the views on the harmfulness of vertical agreements to the functioning of efficient competition are quite differentiated in the theory of economics, they still share a common idea. Economics and economic analysis as regards the application and enforcement of competition law by antitrust authorities should play a key role, with some of those theories, as the Austrian School, going as far as to consider competition law to be false or even harmful and therefore leaving competition matters exclusively to economics. The economization process of competition law started by the Chicago School, despite the opportunism of antitrust authorities, is thus still ongoing. With respect to vertical agreements, as indicated in the paper, the process reduced significantly the catalogue of vertical practices and clauses supposedly restricting and being contrary to the rules of competition law. Although if one were to take into consideration the international universalism and international coherence of competition policy and competition law, as well as antitrust cases, then the economization process (which is for antitrust authorities to be guided by economic efficiency in their evaluation process of vertical agreements) is more visible in the practice of American rather than EU antitrust bodies, and ultimately in the practice of the Member States.

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The Concept of Unity in the Competition Law System

by

Kamil Dobosz*

CONTENTS

* Ph.D. in Law, attorney at law, affiliated to Uniwersytet Pedagogiczny im. Komisji Edukacji Narodowej w Krakowie; e-mail: kd1906@op.pl. Article received: 1 June 2018; accepted: 28 September 2018.

Abstract

The paper presents four pillars of competition law that can be recognised in the European Union and Member States, namely EU competition law, national competition law *sensu stricto*, national competition law *sensu largo* and competition rules *sensu largissimo*. In order to demonstrate that this multi-faceted and complex system is able to work in an orderly manner, it is considered in relation to various concepts, particularly unity, uniformity and effectiveness. Nevertheless, the concept of unity serves as a focal point for the observations. The perspective of the EU single market plays a part also, enhancing the call for unity. With regard to discussed threats for unity, possible solutions are proposed in the final part of the article.

Résumé

L'article traite de quatre piliers du droit de la concurrence qui existe dans l'Union européenne et dans les États membres, à savoir le droit de la concurrence de l'UE, le droit de la concurrence national au sens strict, le droit de la concurrence national au sens large et les règles de la concurrence au sens large. Afin de démontrer que ce système multiforme et complexe est capable de fonctionner de manière ordonnée, il est considéré en relation avec divers concepts, notamment l'unité, l'uniformité et l'efficacité. Néanmoins, le concept d'unité sert de point focal pour les observations. La perspective du marché unique de l'UE joue également un rôle, renforçant l'appel à l'unité. Dans la dernière partie de l'article, des solutions possibles aux menaces discutées pour l'unité sont proposées.

Key words: Unity; EU competition law; principle of effectiveness; uniformity; national competition rules *sensu stricto*; national competition rules *sensu largo*; competition rules *sensu largissimo*.

JEL: K21

I. Introduction

How broad is the scope of competition law in the European Union and its Member States? Does the complex nature of this legal landscape entail some difficulties? Are there any practical ramifications stemming from this comprehensive system? What instruments could be utilised to ensure it works properly? The paper attempts to answer these questions. To this end, the possible pillars of competition law are classified first. The irreconcilable interests each of the pillars aims for are noted as well. Accentuated references to public procurement law and their intersection points complete/complement

this pattern. Besides, the Polish perspective serves as an epitome showing how complicated the domestic competition legal order can be. The paper covers also a number of cases as examples which demonstrate how, in practice, Member States may fail to apply relevant competition rules or to inter-mix them. Moreover, the paper covers also other incongruences in relation to the paradigms of competition law. The concept of unity, defined beforehand, is proposed to tackle all indicated pitfalls of competition law. Moreover, the concepts of uniformity and effectiveness as well as the EU single market perspective reinforce efforts to guarantee that the competition law pillars are not in disorder. To accomplish unity, several desiderata are described in the final part of the paper.

1. EU competition law

Obviously, EU competition law has to be discussed firstly. It consists of an array of legal acts, such as Regulation 1/2003[1], Directive 2014/104/EU[2] and related relevant domestic acts.[3] As regards the latter ones, they pertain to those Member States' acts that are destined to facilitate the application of EU (substantive) norms in proceedings before domestic authorities and courts.[4] To differentiate them, a useful hint is that they may be subject of an assessment of the Court of Justice in a relatively unfettered way, particularly through the lens of principle of effectiveness. Therefore they simply serve to ensure, from the technical side, that EU provisions can be applied effectively. In further considerations, the EU law perspective may be overwhelming due to its unquestionable position, the principle of supremacy and the impact it exerts at, actually, all competition regimes across Europe.

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014, p. 1–19.

[3] Not to mention the case-law.

[4] Since EU competition law covers virtually no procedural norms for proceedings before national courts and authorities.

2. National competition law *sensu stricto*

The second paradigm is associated with national competition law governing rules applicable to undertakings[5] embroiled in anticompetitive conducts, either of minor relevance, as they are not the subject of interest from the EU competition law perspective, or which are covered by the application of domestic competition law in parallel with EU competition law.[6] To keep it as simple as possible, these domestic competition rules are equivalent to Articles 101 and 102 TFUE[7]. For this reason, they can be applied in a parallel manner with the provisions of the Treaty – otherwise they would constitute a different legal basis. Let's call them the national competition rules *sensu stricto*.

In terms of application of substantive competition law, it is the metha-norm of the inter-state trade criterion that delineates situations when solely national competition law *sensu stricto* can be applied, and when EU competition law can be enforced as well. Simplifying, they both can collectively be called 'antitrust law'. Likewise, they both belong to the core of – what is commonly referred to as – competition law, in contrast to another package of rules described directly below.

3. National competition law *sensu largo*

Other national rules related broadly to competition law, but comprising the third pillar in this regard, have been named here 'national competition law *sensu largo'*. More concrete examples will be discovered below, in this section a brief general picture ought to be presented.

National competition rules *sensu largo* serve when the prerequisites to apply antitrust law are not met, often due to its severity.[8] Alternatively, they are chosen by authorities in replacement of EU competition law or national competition rules *sensu stricto* in order to potentially circumvent them. This may happen if specific circumstances cannot be assessed in one fashion only.

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[5] Due to the comprehensive nature of the paper and variety of legal acts covered therein, I will be using interchangeably the following notions 'undertaking', 'company', 'firm' and 'entrepreneur', although it should be remembered that they may not fit a legal micro-system of the concrete legal acts studied individually.

[6] Providing that a concept of single barrier is not established in a given jurisdiction: Komninos, 2008, p. 66–67.

[7] Treaty on the Functioning of the European Union. Consolidated version [2010] OJ C 83/47.

[8] For instance, the prerequisites of abuse of dominance are severe contrary to national rules on combating unfair competition.

The national authority decides then to avoid the antitrust regime in favour of – for instance – a less complicated evidence presentation procedure. Even if the criterion of inter-state trade is satisfied, an assessment that the case is not of antitrust nature releases authorities from many procedural and technical obstacles. Thus these legal rules can work out where antitrust law fails. Not to mention, if non-antitrust legal basis is chosen by the NCAs, they are not obliged to coordinate their operation with the European Competition Network (more Cengiz, 2010). It may fasten and simplify the proceedings what for the NCAs may be crucial.

4. Competition law *sensu largissimo*

Indisputably, antitrust law is commonly considered a separate branch of law. Some doubts regarding its specific institutions, whether they belong to penal or administrative law, are not capable of blurring this position. Moreover, many facets originating in antitrust law have spread to other fields of law. In terms of intersection points, there can be serious uncertainty because theoretically two sets of rules might be employed, either competition law or the other relevant field of law. From the angle of competition law, of utmost importance is the choice of its own set of rules, legal institutions, definitions, case-law etc. The reasons are obvious – to maintain an overall uniform and effective application of competition law. While this paper demonstrates how problematic such deviations from antitrust law may be, it is a call for unity that is needed to prevent further erosion of antitrust issues whenever they are dealt with in cases of other fields of law. Anyway, whatever field of law is examined, be it European or domestic, it should be treated with the concept of unity, providing that that field (inter)relates to competition law. Thus, collectively, those fields of law can refer to as competition law *sensu largissimo*.

II. Competition legal order in disorder

Undertakings bear the burden of compliance with EU competition rules, national competition rules *sensu stricto*, national competition rules *sensu largo* and competition law *sensu largissimo*, since they all together comprise the competition law system in the EU and Member States. Undoubtedly, the issues outlined above feature a multi-layer complexity as, in addition, they may appear as cases exclusively at the EU level, exclusively in one Member State but also in various Member States. The probability that the mechanisms

of such a complex system fail is extremely high; albeit it does not amount yet to the certainty that the discussed legal order is in disorder, but it is a justifiable conjecture. Besides, the notion of 'order' is not entirely clear either.

To proceed in an orderly manner, this paper proposes at once to utilise the concept of unity because the terms 'order' and 'unity' have more in common, as the definition below suggests. Therefore, there are the following steps to take: firstly, the concept of unity will be discussed *in genere*; secondly, various contexts motivating a call for unity will be demonstrated; and thirdly, from this perspective, the Polish legal landscape will be described as a concrete Member State example. As regards the more abstract part of unity, the concept of unity will be additionally confronted with two adjacent terms, namely uniformity and effectiveness. Before the conclusions are drawn, several desiderata aimed at the accomplishment of unity will be raised. It should be also mentioned that, due to the complexity of the researched area, the relationship between public procurement and competition law will serve as a representative example demonstrating to what extent various discrepancies exist in one legal space, although other relevant fields of law will be accordingly signalled as well.

III. The concept of unity

1. Attempting to define unity

M. Avbelj proposes to define unity 'as a legal order which is complete or entire in itself and, as such, allows only for a limited degree of diversity' (Avbelj, 2006). Seemingly, unity still leaves room for some degree of diversity. Its scope should be optimally narrow so as for the distinctions not to eradicate their functioning in one common legal space. Indeed, unity demands that all pertinent constituents and prongs of a legal system – in this case, competition law – are internally compatible. By the same token, lacunae in law are in clash with unity since the criterion of entirety is not satisfied. If some relevant sub-fields of law are located beyond the law at stake, it cannot be complete either.

Importantly for this definition, a crucial role is also played by the widely perceived competition law, referring to elements relatively remote from the core of antitrust as explained above. Even indirect connections may be seminal heeding a premise of entirety of a legal system, as M. Avbelj defines it.

Striving to seek a correct definition of the term 'unity' directly within the researched field of law, the undertaken approach should outreach the default association of EU competition law limited only to Articles 101 and 102 TFUE. Its breadth covers the norms of the Treaty as well as related secondary and

soft sources of law and yet the European Union competition system consists also of other provisions. Questions of compatibility and integrity of private and public enforcement (see more *inter alia* in Jurkowska-Gomułka, 2013, Hüschelrath, Schweitzer, 2014, Komninos, 2014 and Wils, 2017) do not constitute the entire picture of the competition law landscape either, although the expansion of the private paradigm triggered by the new directive[9] brings forth opportunities as well as jeopardises unity altogether. Taking it all into account, the aforementioned pillars had to have such a comprehensive scope.

The concept of unity cannot be considered a synonym for 'compatibility' or 'integrity'[10] either, since they are aimed at the internal coherence and cooperation between the relevant system's elements. Unity, on the other hand covers – aside these factors – also a top-down design in the lawmaking process in order to pursue intended goals. Pursuing EU economic law not only consists of accommodating an array of legal acts, but making them a legal and policy tool to achieve goals conceived beforehand. Similarly 'pluralism' cannot be recognised as an opposite notion to 'unity'.[11] It is quite the contrary – the competition law system is full of various legal institutions, as palpable in the context of its four dimensions. Thus it is that difficult to find a common denominator.

2. Unity as a tool to materialise the single market from the competition law perspective

The concept of unity can be easily justified on the grounds of a salient EU goal, which is the promotion of European (market) integration by means of law (see e.g. Cseres, 2005, p. 81-82). As Member States are obliged to attain it as well, unity shall apply to all dimensions of competition law. Indeed, if the pertinent legal acts comprising the competition law system were mutually 'coordinated', it would simply bridge the gaps in the cross-border prism of the European Union. The same denominator for the legal provisions binding in Member States would literally produce a great integration effect.

[9] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014, p. 1–19.

[10] Integrated (and sustainable) model of competition law enforcement in terms of its private and public paradigm was contemplated in Jurkowska-Gomułka, 2013, *passim*.

[11] Slightly different conclusion can be drawn in other fields of law – see e.g. A. Casanovas, 2001.

A peculiarity of EU law, particularly as it interacts with national sources of law, justifies a simplified approach in defining unity in comparison to other fields of law (see a thorough study devoted to unity in law generally: Prost, 2012). It should be remembered after all that European integration is a mainstay of the EU law system. When it comes to the EU competition law system, the economic emanation thereof is the level-playing-field for entrepreneurs as a consequence of the idea of a borderless Europe. This course has been recently confirmed in the proposal[12] for Directive ECN+" (Materna, 2018 and Sinclair, 2017), alternatively the Effectiveness Directive (Dobosz, Scheibe, 2017). That initiative can be hence identified as a signal that in terms of B2B formula the European Commission will engage in attempts to attain the single market[13] in a wider scope than ever before.[14] Thus it is necessary to ensure that both the EU and national rules are compatible to an extent that they do not create uneven conditions for business.[15] Otherwise no unity in law will be reached whatsoever. As a matter of fact, the shortage of methods employed to enhance and improve B2B in the EU may be perplexing, taking into account how EU antitrust law is insufficient to meet the expectations to attain the single market. It should be recalled that fostering the single market was entrenched in the EU competition law system for years.[16] Furthermore, the single market features the malleable nature (Weatherill, 2017, p. 2).

Unfortunately, EU antitrust law captures nowadays merely a fragment of the sequence of possible behaviours of undertakings. Just to illustrate – a dominant position cannot be reached easily, owing to the requirement of holding market power, a fact that results in a narrower scope of rules concerning abuse of dominance. The same story regards multilateral anticompetitive practices, as they still have to be qualified as sufficiently appreciable in order to fulfil the premise of an effect on EU trade. Thus the remainder is left to national legislations, a fact that may consequently generate discrepancies across Member States.

The debate on the single market reform is lively (see Koutrakos, Snell, Eds., 2017), but mostly focused on the four freedoms – against that backdrop,

[12] Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final.

[13] Simplifying, I use internal market and single market exchangeably.

[14] Needless to say, more attention could have been apparently noticed as regards consumers in lieu of companies – see e.g. http://europa.eu/rapid/press-release_IP-18-3041_en.htm (access 23-05-2018).

[15] Compare judgement of the Court of 14.09.2010, C-550/07 P *Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd v European Commission*, ECLI:EU:C:2010:512, para. 115.

[16] For instance see judgement of the Court of 01.06.1999, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, EU:C:1999:269, para 36.

this article forays that area along with broadly understood competition law. Similarly, a contention that EU antitrust law is focused on most important infringements can no longer be defended, because the concept of the single market rudimentarily contradicts a cross-border perspective in the EU (compare: K. Dobosz, 2018a). Besides, there is the European Union's interest in ensuring compliance with the rules on competition and the preservation of the unity of the single market, invoking an opinion of Advocate General Cruz Villalon[17] who, in turn, referred to EU case-law[18]. It has to be understood cumulatively, otherwise it would be pointless.

3. Struggles to attain unity from the multi-faceted perspective

Pursuing a goal of unity requires multiple efforts dedicated to EU competition law, the national competition law *sensu stricto*, the national competition law *sensu largo* and the competition law *sensu largissimo*. However, adjustments to other EU rules are necessary as well. Thus it should not only be expected to reconcile – for instance – how efficiencies are understood in light of Articles 101 and 102 TFEU in comparison to the control of concentrations[19] but – what is far more challenging – to do so whilst the EU public procurement norms are at stake, they are based in as close a manner on the EU competition law as is feasible. Conciliating EU antitrust law with other EU regulatory regimes is another staple of incremental demand for unity.[20] In this respect, reaching unity involves legislative initiatives as well.

Being limited merely to solving *ad hoc* problems – particularly in the course of the application of the law – does not address the unity issue in the long term. The current stage of EU law development requires, during the lawmaking process, a wide inclusion of interrelations emerging on adjacent fields, such as public procurement and antitrust. All the more, this applies to the domestic legal domain. The competition law system, for its own good, deserves much more than just a casuistic approach. It is unquestionable that

[17] Opinion of Advocate General Cruz Villalón delivered on 30 April 2013, Case C-518/11, *UPC Nederland BV v emeente Hilversum*, ECLI:EU:C:2013:278, para. 73.

[18] Mainly: judgement of the Court of 21.09.1999, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, para. 103 and judgment of the Court of 20.04.2010, Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas*, ECLI:EU:C:2010:205, para. 29.

[19] See Tosza, 2009 as well as OECD document: The Role of Efficiency Claims in Antitrust Proceedings, DAF/COMP(2012)23, available at http://www.oecd.org/competition/EfficiencyClaims2012.pdf (15-05-2018).

[20] Judgement of the Court of 23.01.2018, Case C-179/16, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato (AGCM)*, EU:C:2018:25.

the interpretation of EU competition law opens a range of options, that help attain unity, but the principle of certainty of law militates against such – too loose – solutions, especially when it could be quite easily handled by the lawmaking process.

Efforts to ensure that EU antitrust law remains seamlessly consistent with the EU, national and international intellectual property law constitutes another piece in the competition law puzzle (the impact of IP law on competition is amply elucidated in D. Miąsik, 2012, p. 106–143 and Raju, 2015, *passim*). A specific sectorial regulatory framework can be perceived in the same vein, albeit in addition it is generally governed by *ex ante* rules (just like the telecommunications sector – Stolarski, 2015, p. 30 *et seq.* and generally Hou, 2015). The Fintech revolution may raise antitrust concerns as well (see Stolarski, 2018). In so far as even consumer law, or other national laws of competition law *sensu largo*, feature potential confluence with EU competition law or national competition law *sensu stricto*, this issue has to be also addressed – otherwise the abovementioned casuistic approach will not be defeated. Moreover, national laws classified as competition rules *sensu largo* may play a major role in situations where EU competition law apparently fails. Hence it should not be abandoned. For example, possibly anticompetitive non-controlling minority shareholdings (Gassler, 2018) are largely overlooked by the EU competition lawmaker and its enforcers, whereas domestic laws are well placed to overcome such problems.[21] In fact, domestic laws may fit in a supplementary way to EU competition acts comprising additional and complementary tools in building the competition law system. The potential blemish is a lack of unity. This lesson has to be learned from relatively theoretical considerations, like from this paper, before failures will appear in practice.

4. Striving for unity in light of a 'sponge hallmark'

EU competition law undoubtedly covers a diversity of issues. The goals it protects, and the accompanying debate in this regard, seem to become a never-ending story. Nonetheless, as explained above, there are some firm prerequisites establishing whether the case is of EU nature or not. In an ideal world, it is a premise of interstate trade. On the other hand, awareness of the mere fact that each competition regime is susceptible to capture a vast number of aspects – a 'sponge hallmark' (Ezrachi 2017) – is not helping in

[21] Similar conclusion may be drawn to vexatious litigation which may be embraced by such national acts 'softer' than EU competition acts. As regards controversies aroused by vexatious litigation see Lianos, Regibeau, 2017 and Dudzik, 2013.

striving for unity with regard to the competition law system in the EU and its Member States. None of two competition regimes are alike, but due to their peculiarities, they may differ on many surfaces or in relation to many aspects. This appears to be the issue in the context of EU competition rules and national competition rules *sensu stricto*. If you add national competition law *sensu largo* and competition law *sensu largissimo*, it cannot be conceived what consequences such a concoction will have.

IV. Challenges of EU competition law enforcement

Broadly speaking, unity of competition law in the EU and its Member States includes also national legislation in so far as it overlaps with Articles 101 and 102 TFEU. Member States are authorised to maintain their own law according to Article 3 (2 and 3) Regulation 1/2003. It occurs, however, that Member States dare to go for legislation which is somewhat dubiously aligned with the EU antitrust regime.[22] For instance, the so-called 'Macron's Law' regulates MFN clauses much more restrictively than can be inferred from the case-law based on EU competition law, which does not leave any room for opposite adjudications from the EU side. A practical scope to justify national provisions on the grounds of Article 3 (2/3) Regulation 1/2003 is nebulous (see my further considerations: Dobosz, 2018b and Dobosz, 2018a).

Similarly, one of the practical cases that triggers doubts concerns the Bundeskartellamt's approach towards *Facebook*, where the German authority seemingly steered away from EU competition rules in favour of domestic norms (more Massolo, 2018). It should be borne in mind that considering the application of Article 102 TFEU, the inter-state criterion would be incredibly likely satisfied. Regardless of the controversies this approach brought about, it illustrates perfectly that, in fact, it is impossible to state categorically that a disputed behaviour can be assessed through the lens of EU or national competition law, be it *sensu stricto* or *sensu largo*.

As proven in literature (Botta, Svetlicinii, Bernatt, 2015 and Cseres, 2017, p. 184–185), some authorities did not go for the antitrust norms envisaged in the Treaties, a situation also called 'under-enforcement' of EU competition law (Malinauskaite, 2016, p. 28). Rather than EU rules, national equivalents were applied. This paper puts forward a similar problem also when a NCA refuses to choose Article 101 or 102 TFUE (and their national equivalents) with respect of a given misconduct. Instead, its decision is based on domestic competition

[22] See https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030978561&categorieLien=id (22.10.2018).

rules *sensu largo*, which became 'false substitutes' to EU competition law as well as national competition law *sensu stricto*. In other words, the burden of the application of the law is shifted from quantitative assessment, whether a case at issue is of EU nature, to a qualitative assessment, that the case belongs solely to the domestic domain, a result of a subsumption process. To prevent such failures, relevant legal acts have to be mutually coordinated so as to reach unity.

V. Practical usefulness in light of doubts around public procurement

EU public procurement law remains one of the realms most affected by competition aspects,[23] its particular approach to competition produces dissociating effects from the EU antitrust core. Employing antitrust terminology in the public procurement regime without any coordination hinders the accomplishment of unity's goal (compare Sánchez Graells, 2011, p. 11 *et seq.* and Priess, 2014). What's even worse, acute problems with Article 57(4d) Directive 2014/24/EU[24] represent striking *designata* for this contention (see Dobosz, 2017). Entrepreneurs fined for an antitrust delict (by competition authorities) may be excluded from the participation in public tenders in that Member State, but not in other Member States, in spite of having been sentenced for an anticompetitive behaviour in the common market (*ibidem*, p. 76–84). Besides, it is unknown whether the criterion of inter-state trade plays a role in terms of a possible exclusion of undertakings, although national competition rules may significantly deviate from EU competition law whilst being applied in a purely domestic case.

Nevertheless no one attempted to use this legal possibility so as to eliminate a competitor who committed an anticompetitive delict elsewhere. Hence, unfortunately, no case-law can be presented in this regard. Thus, much room remains for a further, rather theoretical, discussion. Moreover, taking into account the creativeness of legal counsels, such issues will pop up in practice sooner rather than later. Academia (see Sánchez-Graells, 2019, p. 4–8) did not come up with an unequivocal stance, especially as regards another similar premise of exclusion (Article 57(4c) of Directive 2014/24/EU). This raises a question whether competition law in the EU and Member States is indeed

[23] The common story of procurement law and competition law since the Rome Treaty is sufficiently described in Dzierżanowski, 2012, p. 19 *et seq.*

[24] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.03.2014, p. 65–242.

doomed to be disordered whenever competition aspects more or less remote from the core of antitrust are at stake?

VI. Unity through the lens of the Polish legal environment

When it comes to national jurisdictions, it is possible to find such legal acts that may interfere with each other shaping the competition law environment. Granted that there are serious inter-links between EU antitrust law and domestic legal acts, as well as other sources of law, in each country, and it is an extraordinary challenge to capture them at all. Goals of competition law may even differ depending on the country in question (Miąsik, 2012, p. 44 *et seq.*).

First, limiting itself only to domestic legal acts that are binding in Poland, the following laws should be listed:

- Act on competition and consumer protection (hereinafter; ACCP);[25]
- Act on combating unfair competition;[26]
- Act on combating the unfair use of superior bargaining power in the trade in agricultural and food products (hereinafter; Act on unfair use);[27]
- Act on claims for damages arising from competition law infringement;[28]

The catalogue above contains solely the most conspicuous acts between which the essential interaction is present. Moreover, it comprises merely domestic acts, whereas there are also *stricte* acts of the European Union that jointly affect the activities of undertakings in Poland. Hence as regards EU acts, these are as follows:

- Regulation 1/2003;
- Directive 2014/104/EU;
- other, including a 'Directive ECN+' providing that it will be eventually adopted and subsequently implemented.

Virtually all acts may be intertwined in terms of a few criterions. First, they restrain business activities from the angle of the whole competition law package of acts. Hence companies have to comply with an array of legal regulations, thwarting a breach of any of them. Normally, the same legal team specialises

[25] Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, tj. Dz.U. 2018 poz. 798.

[26] Ustawa z dnia 16 kwietnia 2003 r. o zwalczaniu nieuczciwej konkurencji, tj. Dz.U. 2017 poz. 419.

[27] Ustawa z dnia 15 grudnia 2016 r. o przeciwdziałaniu nieuczciwemu wykorzystaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi, Dz.U. 2017 poz. 67 ze zm.

[28] Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji, Dz.U. 2017, poz. 1132.

in this element of the legal space and provides services for the clients to bring about compliance. In addition, those norms directly or indirectly protect competitors, customers and small (and alternatively medium) companies.

Second, they may stipulate that one business conduct could be potentially a subject of a compliance process encompassing several acts (due to a confluence). It may apply to deeds which can be hypothetically outlawed as an abuse of dominance (Article 9 ACCP, Article 102 TFEU), misconduct in the food supply market[29], and a delict in the sense of the Act on combating unfair competition. Basically, a delineation between them may not be always feasible, as it certainly regards the latter in relation to other legal acts (Handig, 2006, p. 45–47). Certain factual situations recognised by one of the aforementioned acts may have key impact on the regime of another act. An illegal collusion between entrepreneurs, which was detected and sanctioned by a competition agency, both by virtue of EU and Polish regulations, may be subsequently brought before the civil courts in damages proceedings as well as treated as a premise that precludes the companies' participation in public procurement tenders. Not to mention that in terms of bid rigging, penal proceedings may be independently initiated against natural persons. The obviously outlined track may not be necessarily the same and may be prone to varying factors. In any event, the aforementioned legal possibilities in how to deal with certain behaviours clearly indicate a practical scope of the problems discussed in this paper.

Another, half serious, issue is that when one says 'competition law' in Polish (*'prawo konkurencji'*), no one really knows what is on the speaker's mind if there was no prior context mentioned. The reason is that it may pertain to public antimonopoly[30] law, unfair competition law or even consumer law and the private pillar of antimonopoly law (Bernatt, 2014). Due to the official name for the Polish competition agency, that is, *Urząd Ochrony Konkurencji i Konsumentów* (UOKiK – Polish Competition and Consumers Protection Office), it has been coined that 'competition protection law' is a synonym to public antimonopoly law. Even basic literature, namely M. Kępiński (Ed. 2014). *System Prawa Prywatnego. Tom 15. Prawo konkurencji*, Warszawa: C.H. Beck, was categorized in a book series dedicated to private law, despite containing chapters both on public and private law; moreover, 'competition law' was associated with several sub-fields of law. At any rate, stating 'competition law' in Polish has to be complemented by accompanying accurate information.

[29] Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain (COM/2018/0173 final – 2018/082 (COD)), mentioned above, providing adoption by EU institution, will change it.

[30] In Polish the word 'antimonopoly' is much more preferred than 'antitrust'.

Furthermore, it should be borne in mind that some of the undertakings' behaviours above are examined in administrative proceedings before the President of UOKiK and subsequently before the courts (if an appeal has been submitted). As regards another category of cases, concerning private claims in unfair competition's cases, proceedings before courts are the only option envisaged.[31] Hence, owing to such complicated and complex legal frameworks, the very role should be allocated to courts reviewing decisions adopted by the President of UOKiK, although judicial review in Poland in the field of competition law has not been assessed overly positively in recent literature (Bernatt, 2017). As regards behaviours consisting of market access foreclosure, they may be theoretically or practically pondered by courts on the basis of the ACCP and the Act on combating unfair competition (Mioduszewski, Sieradzka, Sroczyński, 2016), which would depend on the interest of the party seeking legal protection. Then it could even amount to a 'false substitute' assuming that the case at hand might be of EU nature.

Lastly, EU harmonisation of situations covered by the Act on combating unfair competition would at once prevent misunderstandings with regard to regulations destined to rule B2C relationships, as they supposedly appeared after publishing the judgement *Europamur*[32]. Among Polish scholars (Namysłowska, 2018), a firm stance was presented opposing a purview of B2B relationships with regard to Directive 2005/29/EC[33]. Unluckily, the Polish lawmaker decided years ago to establish a separate implementing act. For that reason, the directive was implemented into the Polish legal order by the Act on combating unfair commercial practices[34], overlapping the Act on combating unfair competition, which remained intact. Polish literature is replete with voices arguing against this *status quo* (e.g. Namysłowska, 2015). Perhaps it has to be an EU remedy to answer that issue.

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[31] Theoretically mediation or arbitration as well.

[32] Judgement of the Court of 19.10.2017, Case C-295/16, *Europamur Alimentación SA v Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia*, ECLI:EU:C:2017:782.

[33] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.06.2005, p. 22–39.

[34] Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym, Dz.U. 2007 poz. 2070.

VII. Unity and uniformity

Since May 2004, the number of authorities and courts entitled to fully apply EU competition norms significantly increased. Hence, the challenge to guarantee that decisions and judgements adopted within the European legal sphere are not in contradiction with each other emerged so as to satisfy the objective of uniformity. Heeding that the European Commission and the Court of Justice of the European Union (hereinafter; CJEU) on the EU level, as well as national authorities and courts on the Member States' level, are assigned with competences to enforce EU antitrust law, there are several layers susceptible to potential discrepancies. In this regard, it should be borne in mind that uniformity and unity have more in common – just as the Court of Justice[35] stated – the use of rules or legal concepts in national law and deriving from the legislation of a Member State may affect the unity of European Union (competition) law.

The issue of the uniform application of EU competition law was comprehensively discussed elsewhere (Dobosz, 2018). A viable non-uniformity may appear *stricte* during EU institutions adjudication process.[36] Another avenue to unacceptable non-uniformity regards the case-law of Member States when EU antitrust norms are chosen as a legal basis for the adjudication (just to mention the patchwork of decisions in the so-called *most favoured nation clauses* cases – see Szmigielski, 2016, 24–29 and Ezrachi, 2016). This can be distinguished in a twofold manner – as non-uniformity in judicature within one Member State's jurisdiction and non-uniformity perceived through the lens of the comparison between acts of applied law from two (and more) Member States. Likewise, some incongruence may be discerned in relation to a decision or a judgement of a Member State authority or court and a Commission decision or CJEU judgement (see Smits, Waelbroeck, 2006). Besides, it should be borne in mind that the mentioned categories of uniformity do not include cases in which Member States' authorities and courts failed to apply Article 101 or 102 TFUE, confining themselves solely to national provisions, although the criterion of inter-state trade has been, or might have been in

[35] Judgement of the Court of 14.09.10, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, ECLI:EU:C:2010:512, para. 115.

[36] For instance, some objections arouse with regard to the infringements 'by object' and 'by effect' after *Allianz Hungaria* judgement (judgement of the Court of 14.03.2013, Case C-32/11 *Allianz Hungaria*, ECLI:EU:C:2013:160). See e.g. opinion of Advocate General Wahl, delivered on 27.03.2014, Case C-67/13 P *Groupement des cartes bancaires*, ECLI:EU:C:2014:1958, para. 50 *et seq* as well as Zelger, 2017.

fact fulfilled (see in particular mentioned Svetlicinii, Bernatt, Botta, 2015 and Dobosz, 2018, p. 227–237).

In spite of the fact that it is not the first time when an attempt to ascertain the border between the concepts of unity and uniformity has been made (see Sauter, 2016, p. 397 *et seq.*), there is a common sense implying that 'unity' refers to binding law (legislation, soft law etc.) rather than the application of law, since the latter is secondary after all (except for the so-called lawmaking application of law – its characteristics, pros and cons were researched in Golecki, 2011). Espousing this stance, uniformity ought to correspond to the application (see also Skrzydło-Niżnik, 2001, p. 99) of EU competition law, whilst unity should be comprehended as a broader notion, but equally meaningful. Hence to obtain the unity of law, both the application of law and the lawmaking process are vital in order to attain a common denominator.[37] As regards the application of the law, unity will affect this process from a separate angle than uniformity (see also differentiated dimensions of uniformity in Dobosz, 2018, p. 25–26) – it should imply that acts of applied law will not contravene binding norms. The EU judicature takes a comparable position in respect of unity – as a term dedicated to sources of law.[38]

VIII. Unity and effectiveness

The principle of effectiveness (vel *effet utile*) comprises a pivotal constituent of EU law development since the very beginning of the so-called integration project (Półtorak, 2002, p. 42 and Biernat, 2000, p. 28). It was invoked innumerable times by the Court of Justice of the European Union whilst new challenges were being encountered or, generally, acknowledging compliance with antitrust norms or earlier case-law. Irrespective of its incumbent position in EU law *in genere*, the principle of effectiveness is considered a key factor in EU competition law also. Its presence is broadly represented both in the case-law[39] and EU secondary law acts (first and foremost *vide* proposal for Directive ECN+), not to mention its elaboration by the doctrine (e.g. Lianos,

[37] It can be also deducted from judgement of the Court of 28.06.2012, Case C-477/10 P *European Commission v Agrofert Holding s.a.*, ECLI:EU:C:2012:394, para. 32.

[38] Judgement of the Court of 21.02.1991, joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, ECLI:EU:C:1991:65, para. 18 and opinion of Advocate General Cruz Villalón, delivered on 26.06.2012, Case C-199/11, *European Union v Otis NV et al.*, ECLI:EU:C:2012:388, para. 49.

[39] From the recent examples – judgement of the Court of 23.11.2017, Case C-547/16 *Gasorba SL et. al. v Repsol Comercial de Productos Petrolíferos SA.*, ECLI:EU:C:2017:891, para. 29.

2016). Avoiding exaggerations, the principle at stake seems to be a *spritus movens* for the majority of changes in the EU competition legal order.

It may be also argued that effectiveness should be one of the upshots stemming from the unity of the competition law system. Likewise if relevant legal act are incompatible, their application[40] will be never effective in the long term. Noticing the illustration of the public procurement issue – if an undertaking punished by one national competition authority is still entitled to enter a public tender proceeding in another Member State in spite of the directive's premise (that is, Article 57(4d) Directive 2014/24/EU), the principle of effectiveness is undermined. The objectives that the legal framework was designed for, are obscure instead.

IX. Desiderata

Aside from some of the aforementioned, loosely set forth proposals and solutions, the desiderata listed below are to be briefly discussed.

1. Roles to cast by the CJEU

The missing piece in answering the struggles for the unity and effectiveness of the EU competition law system may be found in the function vested in the CJEU. In the event of an incompatibility between relevant acts, the CJEU is capable to impose an interpretation that stymies such a threat. As regards minor threats to unity, the margin for desirable interpretation will be well welcome. However, in reference to rudimentary differences between the relevant acts, the CJEU would need to weigh the principle of effectiveness and the principle of legal certainty (or even the principle of legitimate expectations). Thus the boundaries for CJEU intervention are not unlimited (compare with the thorough analysis in Marcisz, 2015, p. 130–152 and Conway, 2012, p. 97–171), a realisation that implies that the proper functioning of the legislature and, in consequence, legislation is the first and main concern. Some 'corrections' made in the course of adjudication should be available solely as the ultimate resort. Anyway, this desideratum is hard to come true as the CJEU may always choose another way (with respect of public procurement law and competition law see: Sánchez-Graells, 2019, p. 17).

[40] Opinion of Advocate General Geelhoed delivered on 27.04.2006, Case C-125/05, *VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S v Skandinavisk Motor Co. A/S*, ECLI:EU:C:2006:262, para. 36.

2. Towards bold EU harmonisation of all competition law pillars

Unity will be never satisfactorily attained until a divided model of competition law exists in the European Union and its Member States. There are tremendous differences[41] between Member States in the area of competition law where there are no EU rules governing certain domains (for instance, unfair competition misdeeds perceived within national competition rules *sensu largo*) or the cross-border criterion is not satisfied (such as invoking antitrust or merger control). The latter problem has been addressed to a certain degree in a number of cases by the CJEU.[42] Answering preliminary questions, the Court of Justice took a stance, despite the purely domestic nature of the cases in question (Dobosz. 2017a). I do maintain my reluctance with regard to this *ad hoc* approach, especially because the gist lies elsewhere. For the sake of the unity of competition law (including EU antitrust law), and the proper functioning of the single market, a single package of relevant EU regulations and directives ought to be established. As a general rule, EU law should exclusively regulate entrepreneurs' activities in the European Union by means of, widely understood, competition law. In the proposed model of EU competition law, Member States should be still competent to establish and apply their own, specific provisions, oriented at needs and problems typical for domestic markets, providing that they have been notified (and accepted) to the European Commission beforehand. A similar solution was inserted into Regulation 139/2004[43]. To illustrate from the Polish perspective, slotting allowances/fees may become subject of such a pre-approval from the Commission (see e.g. Modzelewska de Raad, Karolczyk, 2013). Notwithstanding the categories of competences set out in the Treaties, this proposal meets requirements of the principle of subsidiarity and proportionality. Even tackling potential political hurdles, the proposed model corresponds to current legal and economic circumstances, while the 'step by step' approach will not be that efficient any more.

Upon the condition that the EU competition law system covers all competition legal spheres (including the remaining three dimensions), heeding internal compatibility therein, the single market can materialise in its entirety.

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[41] Sticking to the Polish perspective, from time to time Polish authors point out the differences between the EU and domestic solutions in competition law – see e.g. Lenart, Kaczyńska, 2016, p. 37-41, Marek, 2016, p. 10 *et seq.*, Dudzik, 2015, *passim* and Sikora, 2016.

[42] As regards merger control see also a speech by Commission Vice-President Almunia, Weaving Europe's single competition area, European Competition Day, Rome, 10.10.2014, SPEECH/14/678, p. 5.

[43] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1.

While effectiveness is at stake, reinforcing NCAs under the proposal for Directive ECN+ may not be conducive to address all concerns raised around the competition law system. Resources, independence, prioritisation, as aspects worth improving via that legislative initiative, are regarded as modest and insufficient (Wils, 2017a, p. 80), much less when it comes to other legal acts such as those pertaining to unfair competition proceedings where disputes are between private parties without the involvement of the authorities. Therefore, on the basis of the observations of the intricacies of competition rules across the EU and its members, reaching unity is the lesson to be learned that must involve a broader harmonisation of EU competition law far beyond the narrow scope of antitrust (and merger control). Otherwise reprehensible business conducts may elude rigorous antitrust norms, leaving harmed entrepreneurs devoid of certain, precise and effective legal tools as should be guaranteed in a borderless Europe. Public interest will not be safeguarded then either. Likewise, coordinated legislative initiatives regarding incongruence such as the one between competition and procurement law are required for the sake of certainty of law and proper exclusions of undertakings accordingly to competition rules (EU or domestic) which they have violated.

Hence a provocative question – whether the range of various and incongruent legal solutions across the European Union within broadly understood competition law all the way meets the requirements of effective legal protection? Taking into account that the Court of Justice – as aforementioned – passed a series of judgements in response to preliminary questions in highly contentious cases (see more Dobosz, 2018, p. 77–78) where the meta-norm, namely the effect on inter-state trade criterion, was not fulfilled, it should be also possible to infer the competence of Court of Justice to assess that the non-EU part of the competition law system (namely the pertinent paradigms of competition law discussed in the paper) may be embraced by EU jurisdiction in terms of (a lack of) effective legal protection[44]. Let's interpret the principle of effective legal protection through the lens of the single market goal. All the flaws resulting from the discrepancies between Member States in the field of competition law may generate serious obstacles for entrepreneurs. That conclusion stands in opposition to the single market idea.

As it was stated, in purely domestic cases, the Court was bold enough to smoothly find and determine the EU law regime extensively, in spite of the lack of EU jurisdiction because the EU adjudicative powers are impactful and flexible at once. Therefore, although the principle of effective legal protection applies to EU law (see more Półtorak, 2015), due to the CJEU's limited access to cases and hence issues, it is the academia which should put

[44] As a partial emanation of the principle of effectiveness.

forward ideas extending beyond the *status quo*, even if the problematic realms concern national legal acts in lieu of the EU ones. Not to mention the EU acts which are incompatible with each other, such as competition and procurement law.[45] On this stage of EU law development, the EU competition legal system ought to capture the whole competition environment[46] and duly arrange it. A mere establishment of procedural norms for some cases[47] cannot be deemed effective while substantive norms differ, some of them even considerably.

3. Presumption – interpretation in line with EU competition law

An alternative, but of uncertain outcome, would be a presumption that any competition rules are interpreted through the prism of EU antitrust law.[48] That presumption would prompt interpreting competition law *sensu stricto*, *sensu largo* and *sensu largissimo* in line with EU competition rules. As regards national rules enforced in parallel with the EU ones, such an approach is in general already accepted, but as shown above it is not sufficient. In case of doubts on how a specific issue should be interpreted, the approach to introduce consistency with EU competition law ought to prevail. Building up the relationship in this way would categorically promote internal compatibility, and in consequence unity, since a common denominator would be known by all interested parties. However, a properly prepared network of administrative and judicial authorities competent to deal with a wide range of legal issues, so as to guarantee a realisation of the idea, is required anyway (compare: S. Kirchner, 2005).

Although presumptions may be utilized to increase effectiveness (Ritter, 2017), they cannot be employed freely. As a matter of fact, such presumptions are well placed when, both, sound counterarguments cannot be offered and a counterfactual assessment demonstrates that much more uncertainty emerges in absence of the presumption devised. On the other hand, presumptions do not fill the gaps in law, nor put relevant legal acts in order. Furthermore,

[45] Nonetheless the CJEU may activate in this sphere – see the newest opinion of Advocate General C. Sánchez-Bordon, delivered on 16.05.2018, Case C-124/17, *Vossloh Laeis GmbH v Stadtwerke München GmbH*, ECLI:EU:C:2018:316.

[46] The newest proposal of the European Commission, which came up recently concerning a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018)173, is a good example in this regard.

[47] I.e. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007, p. 40–49.

[48] What in fact I suggested when competition and procurement law interrelate – Dobosz, 2017.

inappropriate use of presumptions may bring effects more adverse than planned, as they concern the application of the law, which may be subject to potential non-uniformity (as explained above). Therefore, unity may take advantage of presumptions only to a limited extent.

X. Conclusions

The notion of competition law as such cannot be defined straightforwardly. Thus, four paradigms of competition law, either EU or national one, were differentiated. The interrelations between them deserved a separate study as cumulatively perceived competition law of the European Union and Member States appeared to be in disorder. As demonstrated, NCAs can go for an incorrect legal basis, choosing the most convenient one, as EU law does not encompass all competition related scenarios. Member States can establish legislative initiatives that raise doubts with respect of EU competition law and policy. Even juxtaposing EU and national antitrust rules with (EU) public procurement law, it is clear that they are far from compatibility, or better unity. Antitrust law similarly interrelates to IP law, consumer law etc. This remark is striking, taking into account that – for instance – regulating anticompetitive non-controlling minority shareholdings, domestic laws could work in favour of the whole EU. The Polish legal order served instead as an example demonstrating national jurisdiction that features a wide range of legal acts comprising an intricate competition law system.

To address all the concerns, the concept of unity was put forward. The scope of unity goes beyond such terms as 'compatibility' and cannot be easily conceived as an antonym of 'pluralism'. Unity involves a top-down design in the lawmaking process, in order to pursue intended goals as well as handling diverse aspects (which as such are not negative – compare Mulder, 2018). Its place in the European Union legal system can be indisputably justified through the lens of the single market – what is more, this approach is necessary to realise the internal market successfully (compare Ottanelli, 2016, p. 53). It has to be additionally stressed that striving for the internal market has recently gained much more significance and may not be as limited as before. Although in literature (Prost, 2012, p. 32–38) attention was paid to unification and universality alike, to attain a broad picture, the concept of unity was also enhanced by adjacent concepts of uniformity and effectiveness.[49] Hence related observations focused on the application of law.

[49] Regardless of the impossibility to draw clear borders between those terms – see also judgement of the Court of 4 October 2011, *Football Association Premier League Ltd, NetMed*

Finally, in order to solve – at least partly – the articulated problems, the paper proposes a desiderata. The first one pertains to the role the CJEU can play. Once a case of direct or indirect competition nature appears before the CJEU, EU courts should consider whether the provisions at stake could be interpreted so as to accomplish unity. A great drawback is that EU courts cannot choose which issues they can deal with on their own. Another solution regards a further EU harmonisation of all competition law pillars. The current *status quo* is not adequate to reach unity. Unfortunately, the Effectiveness Directive will not be sufficient in this respect either. An interpretation in line with EU competition via the established presumption constitutes the third desideratum. Every time national competition rules *sensu stricto*, national competition rules *sensu largo* or competition rules *sensu largissimo* are about to be applied, a competent authority has to ensure that relevant provisions and terms are not contrary to EU antitrust law and policy, not to mention its goals (compare Gal, 2017). Hence this idea relies on the supremacy of EU competition law.

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Article 108(2) TFEU as a Tool for the Commission to Bypass Article 258 TFEU Proceedings

by

Marek Rzotkiewicz*

CONTENTS

Abstract

The legal basis the European Commission (EC) choses for its actions when it finds a Member State's action (or inaction) to be in breach of its obligations stemming from its EU membership vary in different fields of law. This is particularly visible in State aid on one side, and general infringement proceedings on the other.
But the line between the general character of a possible infringement and that of State aid law is sometimes blurred and difficult to establish.

* Legal Advisor, Phd. The author works for the Faculty of Law and Administration at the University Cardinal Stefan Wyszyński in Warsaw, and for the Ministry of Foreign Affairs of the Republic of Poland, dealing with cases on State aid, as well as with cases concerning Energy law, including renewables. He acts on behalf of the Republic of Poland before the Union courts and is the author of numerous publications on EU law, both in Polish and in English. All views expressed in this text should be attributed solely to the Author and not to his employers. Comments are welcomed at m.rzotkiewicz@uksw.edu.pl. Article received: 13 June 2018; accepted: 21 September 2018.

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This article analyses if the EC does not abuse its powers when it chooses Article 108(2) TFEU, instead of Article 258 TFEU. A positive answer to that question is difficult to find and controversial. However, given the benefits the EC gains by taking action under Article 108(2) TFEU, it is visible that the EC's choice can be biased because of those benefits.

Resumé

La base juridique choisie par la Commission européenne en cas de procédures de violation des obligations du pays membre varie selon le domaine du droit. C'est particulièrement visible dans le domaine du droit des aides d'état d'un côté et en cas des procédures générales d'infraction de l'autre.
La différence entre la violation du droit des aides d'état et l'infraction de caractère général est pourtant vague et difficile à préciser.
L'objectif de cet article est d'analyser si la Commission ne dépasse pas ses compétences en choisissant l'article 108 alinéa 2 du Traité – et non l'article 258 – comme base juridique de la procédure d'infraction. Cette analyse prend en compte des possibles avantages que la Commission peut tirer du choix de l'article 108 alinéa 2 du Traité plutôt que de l'article 258 du Traité.

Key words: State aid; infringement proceedings.

JEL: K21; K41.

I. Introduction

According to Article 5(1) TEU, the limits of European Union competences are governed by the principle of conferral, which refers to the granting of powers to the EU to act in a certain area. If the EU intends to take action in an area where it is not accorded power, the act taken will be *ultra vires* and be of no effect (Craig, 2011, p. 395). The principle of conferral also means that any action taken by the Union[1] must have its legal basis (Craig and De Búrca, 2015, p. 322). This refers to any legal acts that bear legal consequences. EU legislation must be clear and its application foreseeable for all interested parties. For the sake of legal certainty, the binding nature of any act intended to have legal effects must be derived from a provision of European Union law, which prescribes the legal form to be taken by that act, and which must be expressly indicated therein as its legal basis[2]. Similarly, the choice of the legal

[1] Opinion 2/94, EU:C:1996:140, para. 24.
[2] Judgment *France v. Commission*, C-325/91, EU:C:1993:245, para. 26.

basis for a measure may not depend simply on an institution's conviction as to the goal pursued, but must be based on objective factors which are amenable to judicial review[3].

However, the mere existence of a legal basis does not suffice. Rather, it must be presented in an act taken, and the obligation to do so forms part of the duty to state reasons, an obligation deriving from Article 296 TFEU. A breach of the duty to present a statement of reasons constitutes an infringement of essential procedural requirements and may result in the annulment of an act[4]. A potential departure from that duty (the duty to refer to a precise provision of the Treaty) is permitted in exceptional cases, but only if the legal basis for the measure may be determined from other parts of the measure. However, an explicit reference is indispensable in cases where its absence leaves the parties concerned and the European Union courts uncertain as to the precise legal basis[5].

In light of the above requirements, the question arises: How much room for manoeuvre does the European Commission (hereinafter; EC) have in its choice of a legal basis for its actions, and more specifically, when may it choose Article 108(2) TFEU proceedings instead of Article 258 TFEU proceedings for proving a Member State's infringement? However, it must be noted that this question is not about whether the EC has the right to choose one of the above legal bases (that is whichever it regards as more suitable) if an alleged breach by the Member State infringes different obligations at one and the same time, for example Article 49 TFEU on the right of establishment and, at the same time, Article 107(1) TFEU on State aid. That issue has already been answered positively, and there is no need to dwell on it in this text. The main problem posed in this text reflects a different question: Does the EC have the right to choose Article 108(2) TFEU proceedings for its actions, instead of the Article 258 TFEU proceedings, if an alleged breach objectively does not touch upon State aid rules, but the EC believes it does?

The above question has been prompted by the decisions taken by the EC in which it found Hungarian[6] and Polish[7] acts of Parliament to be in violation

[3] Judgment *Commission v Council*, 45/86, EU:C:1987:163, para. 11.

[4] Judgment *Commission v Council*, C-370/07, EU:C:2009:590, para. 62.

[5] Judgment *Commission v Council*, 45/86, EU:C:1987:163, para. 9.

[6] Commission decision (EU) 2016/1846 of 04.07.2016 on the measure SA.41187 (2015/C) (ex 2015/NN) implemented by Hungary on the Health contribution of tobacco industry businesses, C(2016) 4049 final; Commission decision (EU) 2016/1848 of 04.07.2016 on the measure SA.40018 (2015/C) (ex 2015/NN) implemented by Hungary on the 2014 Amendment to the Hungarian food chain inspection fee, C(2016) 4056 final; Commission decision (EU) 2017/329 of 04.11.2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, C(2016) 6929 final.

[7] Commission decision of 30.06.2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector, C(2017) 4449 final.

of State aid rules. But the goal of this text is not about determining which side of the dispute (the Member State or the EC respectively) is correct in its position, that is whether or not the questioned national acts really infringed upon State aid rules. Some of the abovementioned decisions have been questioned before the General Court[8] (hereinafter; GC) and have yet to be adjudged. Notwithstanding this fact, for the sake of this article the general premise is taken that the national acts questioned in the abovementioned EC decisions not only do not infringe State aid law, but they do not involve State aid at all. This premise may eventually turn out to be false based on the results of the pending judicial disputes, but that should not diminish the importance of answering the main question in this text: Does the EC have the right to choose the Article 108(2) TFEU proceedings for its actions, instead of the Article 258 TFEU proceedings, if an alleged breach objectively does not touch upon State aid rules, but the EC believes it does? That question is general in character, while the abovementioned EC decisions are given in this text only as examples.

While the question posed in this text is not easy to answer in a short article of a general nature, the answer to it may contribute to the quest for clarification of the controversy over what constitutes the real goal of the actions taken by the EC (Schohe, 2004, p. 423). Is it about the need to maintain a level playing field on the Internal Market, or does it involve a quest for the limitation of national exclusive competences?

The present article also seeks to answer the question: Do Article 108(2) TFEU proceedings grant the EC any benefits (as opposed to Article 258 TFEU proceedings) which might influence its choice? If they do not grant any such benefits for the EC, then it would seem the EC would not have any incentives whatsoever to even consider potentially bypassing Article 258 TFEU proceedings.

Based on these premises, this text analyses the following issues: the role and place of the EC in the institutional context of the EU generally and in State aid law in particular (Section II); the characteristics of Article 258 TFEU proceedings (Section III); and the characteristics of Article 108(2) TFEU proceedings (Section IV). It also offers brief comments on the Hungarian and Polish decisions (Section V), as well as strives to analyse other examples of the EC decision-making practice in light of the Hungarian and Polish decisions (Section VI). Lastly it offers conclusions (Section VII).

[8] Cases T-20/17 and T-624/17.

II. The role and place of the EC in the institutional context of the EU generally and in State aid law in particular

The general status of the EC in the institutional context of EU law is governed by the TEU and TFEU Treaties, and more specifically by the Article 17 TEU and the Articles 244–250 TFEU. The EC ensures the application of the Treaties and of measures adopted by the institutions pursuant to them. It oversees the application of European Union law under the control of the Court of Justice (hereinafter; CJ). After the entry into force of the Treaty of Lisbon, the EC maintained its previous competences under the former Article 211 TEC on the application of the Treaties and on the application of European Union law, which essentially corresponds to its role as the guardian of the Treaties. However, the EC is an EU institution and undertakes the tasks conferred upon it. Thus the EC works on behalf of the Union, and not on its own, nor on behalf of any of the Member States (Mik, 2000, p. 184).

The EC's competences are not unlimited and it has only those competences which have been conferred on it by the Member States (Schohe, 2004, p. 423). The competences conferred on the EC cannot be wider than those competences that were conferred on the Union by the Treaties, and any competences that were not conferred to the EU in the Treaties remain within the competences of the Member States. (Kosikowski, 2014, p. 168). The EC's competences should also be analysed in the context of their performance, taking into particular consideration whether these competences are exclusive EU competences, or shared with the Member States.

Within the realm of State aid law, the EC enjoys exclusive competences with respect to examining the compatibility of national measures with the Internal Market[9]. It is the EC's sole competence and responsibility to declare whether or not a national measure that constitutes State aid is compatible with the Internal Market[10]. It does not matter for that examination, nor for the scope of the EC's competences, whether an aid was granted in the form of a tax measure or in the form of a non-enforcement of a public debt held by public creditors[11]. Nor does it matter whether a measure under examination is covered by a competence shared with the Member State or is an exclusive competence of the Member State. Even in those instances where Member States enjoy an exclusive competence over a particular field, for instance over direct taxation, they cannot carry it out in a way that would infringe European Union law. From the formal point of view, Member States enjoy

[9] Judgment *Steinike & Weinlig*, 78/76, EU:C:1977:52, para. 9.
[10] Judgment *PGE*, C-574/14, EU:C:2016:686, para. 32.
[11] Judgment *Commission v Poland*, C-331/09, EU:C:2011:250, para. 7.

exclusive competence over those areas that were not conferred on the Union, but this does not limit the Union's (and on its behalf the EC's) exclusive competences to examine national measures taken in those areas with respect to their compatibility with the Internal Market, as State aids.

III. Article 258 TFEU proceedings

When the EC finds a Member State's action (or inaction) to be in breach of its obligations stemming from its EU membership, it still has to obtain an official confirmation of that finding. The most obvious, and at the same time the most frequently used, tool for the EC to confirm a Member State's misconduct is an Article 258 TFEU proceeding (hereinafter; for the sake of this text, 'general infringement proceeding(s)'). By filing an action as a general infringement proceeding, the EC essentially seeks to obtain an official declaration from the CJ that the conduct of the Member State infringes EU law, and it seeks termination of that conduct (Lenaerts, Maselis and Gutman, 2014, p. 159).

But the general infringement proceedings themselves fulfil only the first of the above aims, as they only result in an official declaration, and do not necessarily terminate the Member State's misconduct. Although according to Article 260(1) TFEU, a judgment by the CJ obliges the Member State to take all the necessary measures to comply with the judgment, Member States often take their time to prolong the period during which they will meet their EU obligations. So it may be justifiably said that a termination of a breach is dependent on the Member State's will to follow the CJ judgment, as the CJ does not have the power in general infringement proceedings to impose specific measures to secure the effectiveness of its judgment[12]. Even if an action by the EC is confirmed, that is even if the CJ finds the Member State to be in breach of its European Union membership obligations, the CJ judgment confirming the general infringement proceedings is purely declaratory in nature (Lenaerts, Maselis and Gutman, 2014, p. 205). What's more, it is based on a presumption that a Member State found to be in breach of EU law will voluntarily terminate its misconduct. However, although this presumption is in theory justified under the principle of sincere cooperation stipulated in Article 4(3) TEU, in reality it is frequently a false presumption, as evidenced by the CJ case law[13].

12 Judgment *Commission v Germany*, C-104/02, EU:C:2005:219, paras. 48-51.

13 See, e.g., judgment *Commission v Portugal*, C-557/14, EU:C:2016:471; judgment *Commission v France*, C-177/04, EU:C:2006:173; judgment *Commission v Greece*, C-387/97, EU:C:2000:356.

It should be pointed out that such a judgment, even if based on a false presumption and leading only to a partial fulfilment of the EC's expectations, is nevertheless difficult to obtain. First of all, before the EC commences a general infringement proceeding, it has to undergo a long and cumbersome process which amounts to an extrajudicial phase of general infringement proceedings, during which the EC strives to clarify with the Member State all matters seen by the EC as inconsistent with EU law. Such a process is not easy for the EC, as Member States very often, if not always, maintain their position that there is no infringement from their side, and they are sometimes willing to change their position only after being presented with hard evidence. But in many instances the Member States are not willing to agree with the EC, even if they are presented with strong evidence of their misconduct. This may be understandable, as before filing an action to the CJ, the EC has to deliver a formal reasoned opinion to the Member State, which further extends the already lengthy period of time during which the Member State can play cat and mouse with the EC. Only after the Member State fails to meet the EC's expectations contained in a reasoned opinion can the EC file an action with the CJ.

But even though the judicial phase of the general infringement proceedings instituted by the EC can be finally concluded by a judgment in which the CJ finds the Member State to be in breach with its EU membership obligations, this does not yet conclude the matter, as the CJ's judgment is, as has been pointed out, only of a declaratory nature. Only after the Member State fails to fulfil an obligation to comply with such a CJ judgment can the EC bring the case before the CJ under Article 260(2) TFEU and seek an order whereby the Member State is to pay a lump sum and/or penalty payment (Peers, 2012, p. 33-64). It is only upon receipt of such a judgment of the CJ, together with the usually severe sanctions imposed[14], that the EC can at last terminate the Member State's breach of EU law. But as has been shown, it is by no means easy and swift for the EC to receive such a judgment, and when the Member State does not wish to voluntarily terminate its breach of EU law, it can take many years for the EC to finally force the Member State to change its conduct. But even then there is no actual certainty that the breach has really been terminated, as there are almost always consequences of the breach that have not been remedied.

Thus it is no wonder that the effectiveness of general infringement proceedings is frequently criticised (Wennerås, 2012, p. 145–175). First of all,

[14] In judgment *Commission v Spain*, C-278/01, EU:C:2003:635, para. 41, the CJ pointed out that the EC's suggestions cannot bind the CJ and merely constitute a useful point of reference. In exercising its discretion, it is for the CJ to fix the lump sum or penalty payment that is appropriate to the circumstances and proportionate both to the breach that has been found and to the ability to pay of the Member State concerned.

they are *ex post* proceedings, which may be instituted only after a breach has (allegedly) taken place, so they cannot prevent the breaches and the principal aim of such proceedings is to terminate them. Secondly, general infringement proceedings are judicial in nature, and thus lengthy and formalistic. Thirdly, they do not protect the interests of individuals, as individuals cannot initiate such a proceeding, and the judgments in which the CJ confirms a breach of the Member State's EU obligations has no direct consequences for the rights of individuals (Munoz, 2006, p. 51).

Lastly, general infringement proceedings are known as Article 258 TFEU proceedings precisely because they are based on Article 258 TFEU, which is situated in Part Six, 'Institutional and financial provisions', Title One 'Institutional provisions', Chapter 1 'The Institutions', Section 5 'The Court of Justice of the European Union'. The rules contained in Section 5 have a general scope of application and can be regarded as *lex generalis*. They are applied to all matters that are not regulated specifically in other parts of the TFEU. This applies to Article 258 TFEU.

It is small wonder then, having in mind all the above factors, that even the EC regards general infringement proceedings with scepticism and seeks measures that could help it to increase its effectiveness and the effectiveness of EU law. One of such measures can be found in Article 108(2) TFEU proceedings. However, the main hurdle for the EC to use such proceedings is that such proceedings can only be used in State aid matters, and have no general application to all types of infringements of European Union law.

IV. Article 108(2) TFEU proceedings

Unlike the general infringement proceedings, Article 108(2) TFEU proceedings can be regarded as *lex specialis*, which can be applied only to State aid matters. Article 108 TFEU is situated in Part Three, 'Union polices and Internal actions', Title Seven 'Common rules on competition, taxation and approximation of laws', Chapter 1 'Rules on competition', Section 2 'Aids granted by States'.

This means that the Article 258 TFEU proceedings cannot be applied for State aid matters, as they are subject to *lex generalis* proceedings. At the same time, this also means that in order for the EC to implement Article 108(2) TFEU proceedings to a certain infringement by a Member State, that infringement must concern State aid.

The principal aim of Article 108 TFEU, and that of the entirety of EU State aid law, is the prevention of distortions that may be caused on the Internal

Market by the granting of an incompatible aid[15]. If the aid has already been granted, such proceedings are aimed at the limitation of its negative effects on the Internal Market and the restoration of the situation that existed on the market before the aid was granted (Saryusz-Wolska and Kośka, 2010, p. 163). Thus the EC may prohibit the granting of such aid by the Member State[16] and/or issue an order to recover it and deprive its recipients of the benefits accruing from such aid (Jurkiewicz, 2008, p. 1176).

According to Article 108 TFEU, the EC maintains a constant review of all systems of aid existing or planned in the Member States. If the EC finds that aid granted or planned by a State is not compatible with the Internal Market, or that such aid is being misused, it can decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the EC. If the State does not comply with this decision within the prescribed time, the EC may, in derogation of the provisions of Articles 258 and 259, refer the matter to the CJ. These rules are supplemented by Council Regulation No 2015/1589[17], according to which, if the EC finds the aid to be incompatible with the Internal Market, it shall decide that the Member State concerned shall take all the necessary measures to recover the aid from the beneficiary[18]. If the EC finds a State aid to be incompatible with the Internal Market, it is bound to issue the recovery order unless it would be contrary to a General principle of EU law (Rzotkiewicz, 2013, p. 464–477). These characteristics of Article 108(2) TFEU proceedings clearly demonstrate, when compared to the general infringement proceedings stipulated in Article 258 TFEU, their superiority in terms of increasing the effectiveness of EU law, even if limited in scope to State aid matters only.

First of all, in contrast to general infringement proceedings, the proceedings stipulated in Article 108(2) TFEU can be applied not only *ex post* but also *ex ante*, as they can be instituted in order to *prevent* the granting of an aid, not only in order to terminate it. Secondly, the EC does not have to undergo lengthy proceedings equivalent to those in the general infringement proceedings, nor does it have to ask the CJ to declare a breach of EU law by the Member State concerned. Instead, it is the EC itself which makes such a finding, and the above-mentioned examples of the EC's Hungarian

[15] Judgment *Saxonia Edelmetalle and ZEMAG GmbH v Commission*, T-111/01 and T-133/01, EU:T:2005:166, paras. 113-114; judgment *ENI-Lanerosi II*, C-350/93, EU:C:1995:96, para. 22.

[16] Commission decision 90/555/ECSC of 20 June 1990 concerning aid which the Italian authorities plan to grant to the Tirreno and Siderpotenza steelworks (No 195/88 – No 200/88) (OJ 1990 L 314, p. 17).

[17] Council Regulation (EU) No 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 (O.J. EU L 248 of 24.9.2015, p. 9), hereinafter; 'Procedural regulation'.

[18] Article 16.1, first sentence, of the Procedural regulation.

and Polish decisions clearly demonstrate that the period during which the EC can make such a finding is much shorter. Thirdly, Article 108(2) TFEU proceedings give the EC additional tools when compared to those available under general infringement proceedings.

In Article 108(2) TFEU proceedings, the EC may, making use of its power to issue administrative decisions, issue a suspension injunction, and thus force the Member State to stop the application of the measures taken by its national parliament. The EC may even issue such an injunction, albeit only 'temporary', in its decision to initiate a formal investigation procedure[19]. It does not need to present any evidence that the measures taken by the Member State constitute State aid incompatible with the Internal market. Moreover, the national measure does not need to be State aid at all. It's enough if the EC considers it to be State aid, that it expresses doubts as to its compatibility with the Internal Market, and that it finds it necessary to issue a suspension injunction. Thus, the EC enjoys a large degree of discretion with respect to its competence to examine the compatibility of State aid with the Internal Market.

By issuing a temporary suspension injunction, and/or by expressing its negative position in its final decision, the EC may bar the Member State from undertaking national acts the EC does not favour. It does not matter what those acts are, such as acts of Parliament, nor that they are taken within the Member State's exclusive competence, for instance measures on direct taxation.

Regardless of the negative position of the Member States in such actions (as far as concerns the choice by the EC of the kind of proceedings it wishes to pursue), the EC's actions cannot be *contra legem*. The EC can take actions only within the scope of the competences conferred on it. But, at the same time, it's difficult to prove that such actions are not in line with the law. In fact, such actions are taken at the outer limits of the law, which shows that Article 108(2) TFEU proceedings give the EC discernible benefits as compared to those undertaken in the context of Article 258 TFEU proceedings.

There is thus a clear difference between Article 108(2) TFEU proceedings and the general infringement proceedings. In State aid cases, the EC does not have to undergo a long and cumbersome EU PILOT procedure in order to file an action with the CJ. Neither does it have to issue a reasoned opinion (Rzotkiewicz, 2016, p. 207). This shortens the duration of the proceedings considerably. In the Hungarian decision on the Health contribution of tobacco industry businesses, only three months passed from the moment when the EC expressed its first negative comments until the date it issued a suspension injunction. In the Polish decision on the tax on the retail sector the same time period was seven months.

[19] Art. 13.1 of the Procedural regulation.

In order to achieve a comparable result using the general infringement proceedings, the EC would have had to undertake long and cumbersome proceedings before it would even be allowed to file an action with the CJ. The EC also would have had to prove that the Member State breached EU law, while in Article 108(2) TFEU proceedings the EC puts the burden of proof on the Member State to show the legality of its actions under EU law. It is the Member State which must prove that the EC decision is flawed. In addition, it is not without significance that in State aid matters the EC enjoys a wide discretion.

In sum, if the EC has to apply the general infringement proceedings, instead of Article 108(2) TFEU proceedings, the period of time before the Member State would have to terminate its actions criticised by the EC would not be three months (as in Hungarian case), but perhaps seven years or more. And its final decision issued at such a later date would not eliminate the negative effects caused by a long infringement.

Thus the benefits which Article 108(2) TFEU proceedings accord to the EC cannot be denied. It is not unreasonable to imagine that the possibility of the EC suspending the application of national measures it deems unacceptable may *de facto* lead to the imposition of the EC's own solutions on the Member States. In the case of the Polish decision on the tax on the retail sector, the EC made 'a suggestion' that a single (flat) tax rate on retail sales of all undertakings involved in retail trade in Poland would be compatible with the Internal Market[20].

V. Brief comments on the EC Hungarian and Polish decisions

In both, the cases on Hungarian taxes and on the Polish tax on the retail sector, the EC, in its decisions to open the formal investigation procedure, took the preliminary view that national taxes under the EC's examination constituted State aid within the meaning of Article 107(1) TFEU. What's more, the EC stated that it had strong doubts that these measures could be declared compatible with the Internal Market. At first glance, a statement of this kind might appear peremptory, but in fact such a statement is a precondition to the issuance of a decision to initiate the formal investigation procedure. And in all the above-mentioned Hungarian and Polish cases, in its final decisions the EC has confirmed its preliminary views as to the existence of State aid in the national acts under its examination, as well as on the incompatibility of such aid with the Internal Market.

[20] Commission decision SA.44351, paras 49 and 54.

At the same time, however, there are strong grounds to believe that in its above-mentioned decisions on the Hungarian taxes and on the Polish tax on the retail sector, the EC departed from its usual decision-making practice. The main argument put forward by the EC in favour of the statement that the national taxes under its examinations constituted State aid was the fact that those taxes featured progressive rates. It was not the amount or the level of the tax rates, but the very existence of progressive tax rates. This is particularly noteworthy, as the existence of progressive tax rates is not, in and of itself, regarded as a proof of the existence of State aid. Progressive tax rates are commonly used in many countries, and generally they do not raise objections as to their compatibility with the EU law on State aid. For example, the progressive turnover tax rates applied by Spain or France do not raise such doubts on the part of the EC.

While the examination of national measures as to their compatibility with the Internal Market rules on State aid is of course the sole competence of the EC, that does not mean that in exercising its competence the EC is beyond any control[21]. It does mean, however, that the EC is well within its rights to find that the Spanish and French taxes differ from those implemented by Poland and Hungary, and that this was the main reason that the EC's findings in these cases were different. The EC is also within its rights to declare that there is a need to change its previous decision-making practice. However, the EC must, in the first instance, produce evidence in its statement of reasons demonstrating that there are such differences between the national taxes under the EC's examinations, and secondly it must explain clearly and unequivocally why it was necessary for it to depart from its earlier decision-making practice[22].

The lack of clarification by the EC with respect to the existence of such evidence, or to explain the need to make a departure from its decision-making practice, raises doubts about the real goals the EC promotes in its examinations under State aid rules. Given the EC's intention to maintain a level playing field on the Internal Market, the EC should not dismiss lightly voices arguing that the taxes which it questions in some countries are similar to taxes in other countries for which the EC does not express any need for an examination. Of course one must be aware that during infringement proceedings a Member State cannot plead before the CJ that another Member State also breaches the law. However, the acceptance by the EC of such a fact (even silently, that is, by non-enforcement of State aid rules against some States) may imply that a national measure under the EC's examination is also compatible with EU State aid law. The EC is a guardian of the Treaties.

[21] Judgment *Buczek Automotive*, T-1/08, EU:T:2011:216, para. 99; judgment *Sytraval*, C-367/95 P, EU:C:1998:154, para. 63.

[22] Judgment *Dansk Rørindustri*, C-189/02 P i in., EU:C:2005:408, para. 209.

Whatever were the genuine motives of the EC's choice of the legal basis for its actions, namely, if it was the need to eliminate the infringement caused by the Member State or if it was designed as a tool to make a Member State act in accordance with the will of the EC, it must be concluded that State aid law generally, and Article 108(2) TFEU proceedings in particular, are indeed perfect tools to attain such an aim. This may be illustrated by the suspension injunctions issued by the EC in these decisions. The very issuance of such decisions cannot be criticised by anybody, as the EC may issue them when it finds them necessary, and it is the EC which makes that decision. But at the same time such an injunction is a very exceptional tool[23] with a huge impact on the Member State's interests. Therefore it should be diligently reasoned by the EC, which it failed to do in the above-mentioned decisions.

VI. Analysis of other examples of the EC decision-making practice in light of the Hungarian and Polish decisions

The finding that Article 108(2) TFEU proceedings are indeed a perfect tool to attain goals different from those limited to maintaining a level playing field on the Internal Market, after incompatible aid is granted, and the above-mentioned doubts concerning the Hungarian and Polish decisions do not, however, warrant a general conclusion that the EC in fact sometimes, or even often, exceeds its competence by choosing Article 108(2) TFEU proceedings. In order to verify whether such a statement is accurate it is necessary to find other examples of a practice of this kind by the EC.

In the *Hervis* case[24], which also concerned Hungarian turnover taxes with progressive rates, the EC did not express any doubts as to the compatibility of those taxes with State aid law. Although that case arose from a request for a preliminary ruling under Article 267 TFEU, and the questions put forward by the national court did not refer to Article 107(1) TFUE[25], it may be assumed that that would not stop the EC from expressing its doubts if it believed, as it stated in the above-mentioned Hungarian and Polish decisions, that taxes with progressive rates generally violate State aid law.

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[23] Since the time when the possibility to issue a suspension injunction was stipulated in EU legislation (Regulation 659/1999), to the time when the injunction was issued in its Polish decision, the EC has issued such an injunction only eleven times.

[24] Judgment *Hervis Sport- és Divatkereskedelmi Kft./Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*, C-385/12, EU:C:2014:47.

[25] They referred to Articles 18, 26, 49, 54 to 56, 63, 65 and 110 TFEU.

The Spanish taxes, mentioned above as an example of a situation wherein the EC did not express any willingness to examine them, were also adjudged by the CJ only after a request for a preliminary ruling was put forward by a national court[26]. Although those taxes did not formally feature progressive tax rates, the national legislation provided that only establishments with a sales area exceeding 2500 m^2 were taxed. In the above-mentioned Hungarian and Polish decisions, provisions of this kind were treated by the EC as an additional 0% tax rate benefiting entities exempted from taxation, which taken together with the other rates amounted to progressive tax rates. The Spanish tax was eventually found by the CJ not to constitute State aid, but only after Spain presented evidence that the environmental impact of retail establishments is largely dependent on their size. The larger the sales area, the higher the attendance of the public, which results in greater adverse effects on the environment. Consequently, a condition, such as that adopted by Spain, relating to sales area thresholds in order to distinguish between undertakings with a greater or lesser environmental impact was found to be consistent with the objectives pursued.

It should be noted that although the Spanish tax was eventually found not to constitute State aid, that finding was not made by the EC, which instead simply informed the complainants that it had closed its investigation and would take no further action on the complaint. It is arguable whether the conclusion adopted by the EC not to examine the case was justified, since the CJ reached its own similar conclusion only after conducting a full analysis.

Other decisions of the EC do not provide conclusive evidence whether progressive tax rates are generally regarded as a violation of State aid law, as the EC stated in the above-mentioned Hungarian and Polish decisions. But they also do not provide any evidence to the contrary, nor refute the possibility that the EC may use Article 108(2) TFEU proceedings in an abusive manner. However, from an analysis of EC decisions it seems that only in the above-mentioned cases (the Hungarian and Polish cases) has the EC reached a finding of the general selectivity of progressive tax rates. Such a conclusion is not evident in any of the decisions before the Hungarian and Polish cases, nor in any thereafter (to date). In fact, as can be seen from the EC website[27], there are many national taxes with progressive tax rates that the EC does not seem to have a problem with.

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[26] Judgment *Asociación Nacional de Grandes Empresas de Distribución (ANGED)/Generalitat de Catalunya*, C-233/16, EU:C:2018:280.

[27] http://ec.europa.eu/taxation_customs/tedb/splSearchResult.html

VII. Conclusions

The above considerations justify the view that the Article 108(2) TFEU proceedings provide considerable advantages for the EC in its pursuit to terminate a Member State's infringement of EU law when compared to its tools in the general infringement proceedings. First and foremost, Article 108(2) TFEU proceedings allow the EC to terminate, in a relatively short time, the breach caused by a Member State. The above-mentioned examples of the Hungarian and Polish decisions show that it may take the EC as little as three months to issue a suspension injunction and to make the Member State terminate its conduct. In contrast, if it had used the general infringement proceedings the EC would have needed many years to force the Member State to change its actions.

The EC gains yet additional advantages by instituting Article 108(2) TFEU proceedings. It may change its legal status during a potential legal battle before the EU courts. Instead of filing an action under the general infringement proceedings with the claim that the Member State breached EU law, which the EC would have to prove, the EC may issue an administrative decision in which it simply finds a Member State's action to constitute State aid which the EC suspects to be incompatible with the Internal Market (that is, a decision to institute a formal investigation procedure). In such a decision, the EC may also include a temporary suspension injunction which, although temporary, is binding on the Member State. In addition, the Member State has to prove before the GC that the EC decision is flawed, and that by issuing it the EC itself breached EU law. The subject of the GC's examination is not the Member State's conduct, but the EC decision.

The above factors indicate that the EC may well be inclined to use Article 108(2) TFEU proceedings instead of the general infringement proceedings. Such a choice is of course limited only to those cases which may contain a State aid element. However, as the EC has the exclusive power under EU law to conduct an examination of the compatibility of State aid with the Internal Market, the EC may always say that it finds a national measure to constitute such aid, and it believes that such aid is incompatible with the Internal Market. Even if the Union courts finally rule that there was no State aid in the national measure in question, the EC may simply say it erred, but was within its competences.

Still, the current decision-making practice of the EC does not provide conclusive evidence that the EC in fact abuses its competence by choosing Article 108(2) TFEU instead of general infringement proceedings. However, given the scarcity of EC decisions in which it reached a conclusion against

the general selectivity of progressive tax rates (only in the above-mentioned Hungarian and Polish decisions) when confronted with many national taxes with progressive tax rates (which are presented on the EC website), the obscurity of the issue remains. That obscurity is only strengthened by the lack of justification – in the statement of reasons for the above Hungarian and Polish decisions – about why the EC (for the sake of those decisions, and only those decisions) formulated a general statement against the general selectivity of all turnover taxes with progressive rates. The EC did not, in fact, provide any evidence that those decisions refer to actions different than those taken by other Member States. Therefore, although the analysis presented in this paper does not warrant a conclusive statement that the EC in fact abuses its powers by using Article 108(2) TFEU proceedings instead of the general infringement proceedings, it does warrant the observation that the EC may be inclined to do so because of the many advantages it thereby gains.

Thus the findings set forth above justify a premise that the manner in which the EC enjoys its competences should be closely observed.

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E S S A Y S

(Why) Did EU Net Neutrality Rules Overshoot the Mark? Internet, Disruptive Innovation and EU Competition Law & Policy

by

Oles Andriychuk*

CONTENTS

Abstract

This essay raises a number of theses in support for a more liberalised approach to EU Net Neutrality rules. It offers a graded system of levels of regulatory intervention, arguing that *soft* Net Neutrality rules are capable of meeting all positive objectives of regulation without causing the problems generated by *hard* Net Neutrality rules, such as those currently in place in the EU. *Hard* Net Neutrality rules prevent Internet Service Providers (ISPs) from making disruptive innovations. Meanwhile, they enable some Content and Application Providers (CAPs) to monopolise many markets via (disruptive) innovations, resulting in newly established dominant positions which have, in many instances, been abused. The hypothesis of the essay is that loosening the rules on Net Neutrality would create competition between ISPs and CAPs as well as (which is even more important) between different CAPs for

* Dr Oles Andriychuk, Senior Lecturer in Internet Law, University of Strathclyde, UK; e-mail: oles.andriychuk@strath.ac.uk. I am grateful to participants of the 22nd Annual EU Competition Law and Policy Workshop Disruptive Innovation and Implications for Competition Policy (EUI, Florence, June 2017) and in particular to Bill Kovacic, Giorgio Monti, Mel Marquis and Ioannis Lianos for their inspiring thoughts and criticism on the hypothesis of this paper. The usual disclaimer applies. Article received: 8 June 2018; accepted: 25 September 2018.

limited premium speed traffic. Such newly established competition could remedy some antitrust conundrums faced by EU competition enforcers and sectorial regulators vis-à-vis disruptive innovators in the area of electronic communications.

Resume

Cet article soulève un certain nombre de thèses en faveur d'une approche plus libéralisée aux règles de l'UE concernant la neutralité du Net. Il offre un système progressif de niveaux d'intervention réglementaire, affirmant que des règles non contraignantes de la neutralité du Net sont en mesure de répondre à tous les objectifs positifs de la réglementation sans causer les problèmes engendrés par les règles contraignantes, telles que celles actuellement en vigueur dans l'UE. Les règles contraignantes de la neutralité du Net empêchent les fournisseurs de services Internet de développer des innovations perturbatrices. Dans le même temps, ils permettent à certains fournisseurs de contenus et d'applications de monopoliser nombreux marchés via des innovations (perturbatrices), donnant ainsi lieu à des nouvelles positions dominantes, qui ont souvent fait l'objet d'abus. L'hypothèse de l'article est que desserrant les règles sur la neutralité du Net créerait la concurrence entre les fournisseurs de services Internet et les fournisseurs des contenus et d'applications, ainsi que (ce qui est encore plus important) entre les différents fournisseurs des contenus et d'applications pour le trafic de vitesse limitée premium. Cette concurrence nouvellement établie pourrait remédier à certains problèmes de concurrence soulevés par les autorités de la concurrence de l'UE et les régulateurs sectoriels vis-à-vis des innovateurs perturbateurs dans le domaine des communications électroniques.

Key words: Disruptive innovation; electronic communication; Net Neutrality; Net Prioritisation; EU Competition Law; sector specific regulation and other ex-ante regulatory tools; Internet Service Providers (ISPs) vs. Content and Application Providers (CAPs); proactive competition policy.

JEL: K21

I. Introduction

It would be hard to find opponents of Net Neutrality when taken in its broadest political sense. Indeed, who would argue against universal access to the Internet; information qua fundamental societal value; or the idea that everyone should have the opportunity to communicate with a global audience? The rhetoric of Net Neutrality, its conversion into a political manifesto of 'digital liberty', into an existential precondition of the Internet as such, has

created a caricaturised image of the discussion, a dichotomised conception of 'good guys' and 'bad guys': Progress, Openness, and Inclusiveness vs. Conservatism, Narrow-mindedness, and Selfishness. The power of the slogan of Net Neutrality can perhaps be easily compared with the rhetorical omnipotence of another polysemic term 'consumer welfare'. Due not least to this effective conversion of what is primarily an economic interest into the language of political activism, human rights and public interests, the proponents of Net Neutrality have succeeded in transposing its key principles and premises into sector specific regulations on both sides of the Atlantics. However, shifted from the domain of political activism to economic reality, the issue of Net Neutrality immediately becomes much more nuanced with both parties to this debate having their stronger and weaker sides. Some of them will be addressed in this essay.

An intense discussion on Net Neutrality is often connected with another topical regulatory issue in the area of information technology: disruptive innovation. Both themes and both policies are usually seen as being mutually supportive: Net Neutrality encourages disruptive innovation, enabling risky and innovative newcomers to outperform incumbents, and this process in turn contributes to further strengthening of the idea of Net Neutrality. This essay does not share such a view. Or rather, it argues that this is only part of the story. The other side of the story has two key components: first, it claims that *hard* Net Neutrality rules distort disruptive innovations on the telecom side of the business; second, some of these disruptive innovations cause concern for European antitrust regulators. It is thus unclear, why such innovators should continue to receive such preferential treatment from the regulators, getting, essentially, absolute protection from competition coming from telecoms. The essay puts forward and develops several hypotheses, which seek to decompose this illusory synergy between Net Neutrality and disruptive innovation, arguing that loosening the rules on Net Neutrality, and giving Internet Service Providers (hereinafter; ISPs) more flexibility with traffic management, would strengthen inter-/ and intra-sectorial competition, which would benefit consumers, industrial growth and disruptive innovation itself.

This paper raises a rather provocative question: whether (and if so, then to what extent) the current regulatory perplexity, with which European authorities approach competition-related problems associated with disruptive technologies in the area of the Internet, has been created or at least facilitated by Net Neutrality regulation. Or perhaps less controversially: can softening the rules on Net Neutrality counterbalance the current situation by facilitating an emergence of disruptive innovators on the side of Internet Service Providers? If the answer to this question is affirmative, then it is possible to ask another, more important, question. Namely, whether the current dominance of

disruptive innovators on the content side of the market could be challenged by the market's invisible hand; and whether ISPs could be encouraged by proactive sector specific regulation to launch/reinforce competition in this sector by triggering their key tool: traffic speed gradation.

The assumption supporting this essay is quite straightforward: if one of the key challenges of contemporary competition policy[1] is in designing effective regulatory tools capable of addressing the unprecedented growth in dominance of disruptive technologies in the Internet, then a solution could possibly be offered by the leading competing industry: telecoms. Alternatively, at least that regulators should intervene in the organic competitive process between content and application providers (hereinafter; CAPs) on one side and ISPs on the other only with a particular delicacy; intervene only in a manner, not giving explicit priority to one industry over another, let alone prohibiting ISPs from taking part in disruptive innovation outright through the imposition of *hard* Net Neutrality rules.

An important caveat should be entered at the very outset. This essay does not advocate the view that the principle of Net Neutrality is wrong in itself or that the opposing approach – Net Prioritisation – is a panacea for the problems associated with antitrust regulation of disruptive technologies in the area of the Internet. The argument is much more modest and nuanced and it is primarily apagogical. I argue that the very nature of disruptive innovation is based on the notion of unpredictability; that it is usually created in a competitive environment similar to Hayek's 'competition qua discovery procedure', which is inherently driven by Smith's idea of 'the invisible hand'. Because disruptive innovation is by definition unpredictable and because it is driven by markets' 'spontaneous order', all/many/some of its shortcomings, which currently puzzle most antitrust regulators, should be left for the markets' self-correction. Instead of adopting this approach, regulators in the EU and US have chosen a completely different route, giving categorical priority to one industry (CAPs) over the other (ISPs), wrongly believing that disruptive innovation streams exclusively from the former, considering the latter as merely a 'dumb pipe'. Regulatory bonuses such as Net Neutrality, have given priority to the CAPs, many of whom have used it successfully to become disruptive innovators and gain positions of super-dominance in their relevant markets. In other words, regulators' unprecedented benevolence to one industry at the cost of the other has contributed substantially to the emergence of a situation wherein many disruptive innovators have themselves become a headache to antitrust authorities. Potential ISPs competitors, who could be expected to

[1] I use the term 'competition policy' broadly, implying traditional reactionary tools such as antitrust as well as more proactive mechanisms like mergers and *ex ante* sector specific regulation.

counterbalance such super-dominance by using the mechanism of market forces, have been effectively disabled from these attempts by *de iure* or *de facto* prohibition of Net Prioritisation. Net Prioritisation is in itself an effective tool of competition, which could rearrange the whole architecture of Internet commerce – a particularly powerful proposition in a time of growing synergy and hybridisation of ISPs and CAPs across the Internet.

II. Scale of regulatory intervention

The variety of regulatory options can be visualised as a line with gradual levels of regulatory interference, where Level 0 is the most liberal and Level 6+ is the most paternalistic. Current EU rules on Net Neutrality are set on Level 5B. The essay argues that they have to be moved up to Level 5A.[2]

Level 0 – being a genuine *laissez-faire* (hands off) approach with full reliance on the Schumpeterian process of creative destruction;

Level 1 – *laissez-faire* + contract law and public security;

Level 2 – adding also *ex post* antitrust rules;

Level 3 – adding also *ex ante* merger control;

Level 4 – adding also *ex ante* sector specific regulation prohibiting discrimination, throttling and other forms of traffic downgrade (*soft* Net Neutrality rules and respective rejection of *hard* Net Prioritisation rules);

Level 5 – adding also a prohibition of any type of traffic prioritisation (*hard* Net Neutrality rules and respective rejection of both *hard* and *soft* Net Prioritisation rules);

Level 6 and ***Level 6+*** – various types of dirigisme or planned/command economy.

This essay explicitly differentiates between two types of conduct, which *hard* Net Neutrality rules respectively prohibit: reactionary and proactive.

The *former* (reactionary) is in general a counterproductive reaction on the part of ISPs to various disruptive initiatives launching by CAPs. The reaction is related mainly to blocking, throttling or discrimination of disruptive goods and services which threaten the established business models of the incumbents (for example VoIP vs. fixed line). Arguably, these practices could be dealt with effectively by such classical *ex post* antitrust tools as Articles 101; 102 and 106 TFEU, but *ex ante* prohibition of such conduct in the form of soft Net Neutrality rules (Level 4) does not appear to be particularly problematic.

[2] *Infra*.

The *latter* (proactive) is a completely different mode of conduct. It refers to ISPs' exploration of (disruptive) business models using traffic prioritisation technologies as leverage. Prohibition of such practices is enacted by *hard* Net Neutrality rules (Level 5B). Its aim is not to protect disruptive technologies from a hostile reaction of incumbents, but rather to prevent ISPs from engaging in disruptive technologies themselves. Criticism of Level 5B regulation is the key argument of this paper and so a more detailed elaboration of the argument is required.

Conventional wisdom suggests that CAPs should innovate (disruptively) in the area of content and application creation and ISPs should be active in the sphere of delivering the traffic. In reality, however, the activities of both these super-industries are interdependent. Hybridisation of the Internet implies direct expansion and interpenetration of CAPs in the area of electronic communication and that of ISPs in the sphere of creating or distributing content. The links between the two industries are even more obvious, when attention is shifted from *inter*-industry to *intra*-industry competition, namely when the conduct of ISPs influences competition within the CAPs industry and vice versa. It is precisely here where one can observe the first fallacy of *hard* Net Neutrality. The fallacy is based on the (wrong) assumption that *inter*-industry competition is more important than *intra*-industry one. This is done in keeping with the dominant view on the subsidiary role of *intra*-brand competition in comparison with the *inter*-brand one. But competition within an industry *is* an *inter*-brand competition itself, and thus the ability of ISPs to bring new dimensions to this competition is invaluable (though seldom explored or even articulated). At this point, another incorrect assumption should be deconstructed, namely, the view that all CAPs are united against the idea of *soft* (let alone *hard*) Net Prioritisation and that they firmly support the principles of *hard* (and of course *soft*) Net Neutrality. In some sense, they do indeed appear to be united but this unity has features surprisingly similar to cartel collusion. The introduction of traffic prioritisation would open enormous opportunities for *inter*-brand competition within the CAP industry. This competition would lead to new (disruptive) business models, enabling CAPs to compete within a completely new area of merit: the speed with which their content can be consumed by end-users. This new dimension of competition would be capable of rearranging the current state of affairs in the CAP business, by definition creating new winners and new losers. But rather than exploring these new commercial horizons, which would offer an excellent tool to reach new consumers and create new competitive advantages, each individual leading CAP has chosen a different path: they united in a proxy-war against these technological modifications (and by association against ISPs). With the help of human rights activists, political campaigners, industrial lobby

groups and catchy slogans, something, which is an inherently commercial issue, has been presented to the public as an (ultimate) fight for free Internet. In other words, the key stakeholders understood that while a new reality would create numerous winners and losers within the CAP industry, the industry as a whole would be worse off, as Net Prioritisation would essentially imply a transfer of some net revenues generated by CAPs to ISPs.

It would be very difficult (though not impossible) to find arguments in support of *hard* Net Prioritisation (prohibited by Level 4 intervention). Indeed, targeted practices of speed downgrading, throttling and similar limitations associated with the 'free riding' problem, appear to be more disproportional, the more defensive and selective they are. Yet the campaigners for Net Neutrality succeeded in advocating for much stronger and much broader regulation, the regulation, which covers most aspects of *soft* Net Prioritisation (Level 5 intervention).

Another important clarification is necessary at this point: ***Level 5*** intervention is not homogeneous either. It implies at least four paradigmatic layers of prohibition: layers A, B, C and D.

Layer A intervention is the least controversial – it envisages that ISPs would operationalise their traffic management capacity at the expense of non-prioritised end users, simply offering higher speed to selected CAPs by lowering the speed for all others. However unrealistic this practice appears to be (especially in the areas with at least some meaningful competition between IPSs), and however anticompetitive it would be from the perspective of *ex post* antitrust (that is a Level 2 intervention), yet its explicit prohibition does not raise fundamental objections from most of the ISPs these days.

Layer B, by contrast, is particularly problematic. It implies the reverse scenario: most of the traffic remains unmanaged and all end-users receive their Internet access at normal speed. Some fraction of the whole traffic (for example 5%), however, is allowed to be delivered at a higher speed. This premium speed service would be offered to CAPs (not end-users) for a fixed charge or percentage of the revenue generated as an outcome of such specific contracts between ISPs and CAPs. This mechanism has a potential to rearrange the way in which the Internet is consumed, and to reshuffle the strategic roles of the key stakeholders in the Internet as business. Leaving aside the political rhetoric of Net Neutrality, the motivation of CAPs to prevent this option is directed at this very point. So essentially, the economic essence of the Net Neutrality movement is centred precisely here. The following part of the essay analyses it in more detail. It will explain why shifting the regulatory cursor from Level 5B (where it is now) to Level 5A might increase competition, boost (disruptive) innovation, contribute to the benefits of consumers (both in terms of welfare and choice), and help to address antitrust problems associated with

the abusive conduct of many disruptive innovators on the CAP side of the business.

Layer C and ***Layer D*** are less controversial. They constitute instances, in which proponents of *soft* Net Prioritisation already secured at least a partial victory in Europe. Layer C concerns the ability of ISPs to provide some priority as regards their own content or content streamed by ISPs (or integrated companies) themselves. Layer D leaves room for ISPs to provide some prioritisation to such *specialised services* as telemedicine, driverless cars and other highly innovative and highly specialised models. Some of the traffic management necessary for the delivery of such services is currently envisaged at an EU regulatory level.

III. EU Net Neutrality Rules

The Possible formats of Net Neutrality have been debated in Europe for over a decade (Maniadaki, 2015, pp. 35–36; Alexiadis and Cockcroft, 2014). On 25 November 2015, EU Telecom Single Market (hereinafter; TSM) Regulation was adopted.[3] The Body of European Regulators for Electronic Communications (BEREC) is required to monitor compliance of individual Member States with the requirements of the TSM Regulation.

The TSM Regulation puts forward 'common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users rights' (Article 1). These common rules can be subject to some traffic management limitations, related mainly to effective technical management of the network.[4]

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[3] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), OJ L 310, 26.11.2015, p. 1–18.

[4] Article 3(3) of the TSM Regulation: '[ISPs can implement] reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic.

Such measures shall not monitor the specific content and shall not be maintained for longer than necessary. Providers of internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary'.

In other words, the TSM Regulation provides explicit and unequivocal support for *soft* Net Neutrality rules (Level 4),[5] but not all elements of *hard* Net Neutrality rules (Level 5) are protected by it. In particular, it explicitly reserves the room for Level 5D (specialised services) Net Prioritisation[6], as well as offering some implicit toleration towards Level 5C services (prioritisation of content/application offered by ISPs' own platforms). It also enables reasonable traffic management in the case of public policy exceptions related to the integrity and security of the network and the eventual avoidance of its congestions. For obvious reasons, these exemptions go beyond the scope of this discussion.

But even a creative interpretation of some provisions of the TSM Regulation leaves no room for Level 5B of Net Prioritisation – the level, an open recognition of which would entail a paradigmatic shift in the business of the Internet, and which constitutes the central argument of this essay, which advocates for its necessity. Level 5A is protected in full and the essay offers no amendment in this respect.

IV. Parallel reality: a business model without Net Neutrality rules

As became obvious in the introduction, this essay does not share the popular belief that the Net Neutrality movement is motivated by political slogans about Internet democracy and universal access. Distancing ourselves from this appealing and viral rhetoric, we can see two very powerful and mutually dependent industries: ISPs and CAPs, coming to grips over the future architecture of the Internet and over the role each industry will play there. They confront each other in a very dynamic time, in which the market positions they manage to secure today will define their economic power for decades.

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[5] Recital (11) of the TSM Regulation: 'Any traffic management practices which go beyond such reasonable traffic management measures, by blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories of content, applications or services, should be prohibited.'

[6] Article 3(5) of the TSM Regulation: 'Providers […] shall be free to offer services other than internet access services which are optimised for specific content, […] where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality. Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.'

Under the current format of the Internet, content from CAPs is delivered to end-users by ISPs in, essentially, a non-differentiated way. This implies that CAPs compete for end-users between themselves. ISPs do not participate in this process. They compete for end-users on quality and price only at the users' *last* mile. They are not allowed to compete at the end-users *first* mile. Powerful triggers of competition, such as the offer of premium speed traffic to selected CAPs, have been artificially removed from the competitive options of ISPs by explicit Net Neutrality regulation. This situation is pathological. In its stylised form it would be similar to prohibiting restaurants to compete with each other using the Google Maps service as it 'infringes' 'Restaurant Neutrality' principles.

Without such rules many ISPs would be able to offer CAPs an option of delivering their content to end-users at higher speed, which would obviously strengthen the market position of those CAPs in the click-and-watch Internet universe. Such a service would not be discriminatory if only a tiny proportion (for example 5% of all traffic processed by the ISP) were eligible for such differentiation. By analogy, flying with business-class is non-discriminatory for the remaining passengers if only a tiny proportion of seats is envisaged for this option (it would become discriminatory if a dominant airline would sell business class tickets as the default option). *Reductio ad Absurdum*, higher prices, paid by end-users for higher speed at the 'last mile' could also have some impact on neutrality, but nobody is labelling this as discriminatory. But the same optional practice done by CAPs is seen as the utmost evil of the Internet.

A counterargument to this scenario would be a hypothesis that premium speed would be used only by top CAPs, which would make the gap between them and the rest of CAPs even bigger. First of all, the very idea that regulatory intervention can be used to shape the exact format of a particular industry requires robust justification. The burden of proof is on the proponents of Net Neutrality. Second, the premium speed option could be regularly accessed by newcomers, which would lower barriers to entry and can be generally seen as procompetitive. Third, even if accepting the assumption that premium speed will be primarily used by powerful CAPs, they would be mainly using this tool in their competition between themselves (and not between them and smaller CAPs). This would encourage (disruptive) innovation, increase competition and contribute to positive viewer experiences. Fourth, even if the format is inaccessible for smaller CAPs, these CAPs would still be able to deliver their content at normal (non-premium) speed as is the case with Net Neutrality rules. Fifth, the availability of such option would have a positive impact on (disruptive) innovation techniques used also by ISPs, as they would transform themselves from a 'dumb pipe' mission to a proactive Internet industry.

From the perspective of antitrust enforcers and sector specific regulators disruptive innovation is a double-edged sword. On one hand, we all know that innovation is an inevitable component of human progress and prosperity, that most of our policies are designed to protect and encourage innovation. On the other hand, we also know that many disruptive innovators cause competition-related problems. Another incarnation of Bork's *antitrust paradox*: the more powerful/successful the innovator becomes the higher potential he gains to harm competition.

In a classical Net Neutrality rhetoric, proactive ISPs are seen as obstacles for innovation. The classic rent-seekers vs. free-riders dilemma has been solved by regulators in favour of the latter. But the CAPs did not stop at this *soft* Net Neutrality imperative (prohibition of defence against free-riding), going further, preventing ISPs from incentives to use their natural competitive advantage: traffic speed; to innovate in the area of their specialisation. Disruptive innovations in the sector of ISPs have been sacrificed for the benefits of disruptive innovations in the sector of CAPs. Enabling ISPs to take a more proactive position would boost the hybridisation of platforms and means of content delivery.

What appears to be particularly striking is that CAPs criticise *soft* Net Prioritisation rules despite the fact that these rules would enable another important element of competition between CAPs themselves, as the ability to deliver content to end-users at higher speed is a very appealing marketing tool and a very powerful factor in designing new commercial models to the detriment of competitors and to the benefit of consumers. Surprisingly (?), instead of exploiting these options in trying to be the first, CAPs as an industry has opted for a radical opposition to such technological improvement, using influential lobby groups to shift regulatory attention to the illusionary problems of human rights and scaremongering the public with aggressive political campaigns for 'Internet freedom'.

Schematically, such behaviour among CAPs is very similar to the conduct of members of cartels, who opt for joining their efforts in achieving benefits for the industry as a whole to the detriment of competition between different members of the industry. The surprising unity of CAPs in rejecting such a powerful instrument of competition within the industry can be explained by their coordinated action. Something which is essentially an important factor of *intra*-industry competition between CAPs has been re-interpreted by presenting it as a battle *between* CAP and ISP industries (which is also true… half-true).

V. Conclusion

This essay argues in favour of loosening the regulatory mechanism of Net Neutrality from Level 5B to Level 5A (the specific nature of these levels has been discussed in Section II of the paper). *Soft* Net Neutrality (5A) rules suffice to protect the CAPs industry from the discriminatory actions of ISPs. *Hard* Net Neutrality (5B and below) rules are too bold and unreserved. *Hard* Net Neutrality discourages ISPs from (disruptive) innovation; prevents end-user choice, disallowing access to premium content at premium speed; and it infringes competition between CAPs on the grounds of speed with which their content is delivered to end-users. Overall, *hard* Net Neutrality rules provide a disproportionally beneficial regulatory environment for one industry (CAPs) at the cost of another (ISPs), disentangling the latter's ability to innovate disruptively in a market with very high economic, technological and social potential. The essay further provides differentiation of Level 5 regulatory intervention, explaining that the economic gist of the Net Neutrality debate is focused between Layers A and B of Level 5, namely, between traffic *discrimination* vs. traffic *prioritisation*. Traffic is differentiated *in a discriminatory way* (Layer A) when premium speed is granted to the detriment of most of the end-users. Such a practice is correctly prohibited. Traffic is differentiated in a form of *prioritisation* when only a tiny fraction (for example 5%) is offered by ISPs to CAPs at a special rate. Such practice does not affect network capacity or the general speed of all end-users, who consume the remaining 95% of traffic, as this mode of provision is, in turn, primarily an outcome of ISPs' incentive to invest and innovate, derived from their ability to generate additional profits and explore new markets. Premium speed charge is offered not to end-users, but to CAPs, which encourages competition within this industry.

Even if CAPs passed on some of their additional costs to consumers, they would do it in a competitive environment; consumers will always be able to opt out of premium speed by simply not downloading the relevant content; consumers would get in return 'premium' speed; and finally, those CAPs who chose this model would be very likely to generate additional profits by gaining higher market share. As a result, the necessity of passing any substantial costs on to consumers would remain hypothetical rather than real. Even in the worst case scenario, these costs would be fractional and incomparably smaller than the benefits generated for end-users and society as a whole. Most consumers would be unaffected. Most of those affected would be affected positively. ISPs would get regulatory permission (sic!) to innovate. Competition within the CAP industry for quicker delivery of their content and applications to end-users would be incentivised (if not created from scratch) – these are the

quite likely consequences of shifting the regulatory cursor from Level 5B to Level 5A.

Even a symbolic number as regards prioritised traffic, such as 5%, is capable of stimulating ISPs to explore this business model and to trigger competition in the CAP industry. This is a sector of the economy that, until recently, has been considered by regulators as deserving preferential treatment, and which has increasingly demonstrated features surprisingly similar to other industries, which competition enforcers and regulatory authorities deal with on a regular basis.

The essay is based on a conceptual analysis. The suggested number of 5% is taken as a symbol of the necessity to leave at least some room for this business model open. If regulators are unhappy with 5%, they can move it to 1% of the traffic. Disruptive innovations take place in all spheres of human activity. The law is not immune to this process. Allocating even a tiny regulatory space for this model could test its feasibility and effectiveness. The scope can always be managed by regulators accordingly. What is important is not to abandon this business model outright. Such a complete prohibition of Level 5B is disproportional, unjustified and based only on successful policy activism on the part of this complex side, the part (however innovative it appears to be), which in this particular instance has chosen to sacrifice competition for stability, a choice in itself very suspicious from the perspective of competition law and policy. If it succeeds, this model could also remedy some of the antitrust related problems in the area of CAP as it would create new challenges for most of the dominant CAPs. Furthermore, this remedy would be generated by genuine market forces streaming from a different industry, in essence, allowing the market to correct regulatory errors.

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Marketplaces Restrictions and Selective Distribution after *Coty Germany*

by

Patrycja Szot and Ana Amza*

CONTENTS

* Patrycja Szot, LL.M., PhD, Warsaw Bar; e-mail: p.szot@lawyer-competition.eu; Ana Amza, LL.M.; e-mail: anna.amza@yahoo.com. All views expressed in this article are strictly personal. Article received: 16 July 2018; accepted: 24 September 2018.

Abstract

This article discusses the framework of selective distribution agreements within EU competition law following the *Coty Germany* case and the EU Commission's 2017 E-commerce report. It argues that the judgment removed, in essence, the limitation of sales via online platforms from the 'by object box'. In respect of luxury goods, the ban is considered not to infringe competition law at all. In this context, the article addresses one of the judgment's key points: what constitutes a 'luxury good' and evaluates to what an extent this definition can be practically applied. The authors also embark on the conditions under which the restriction is considered proportionate (when applied to non-luxury goods) and point to the risk of divergent interpretations of platform bans across member states. To illustrate the latter, several examples are given from national case-law. The considerations are completed with a brief look at problematic restrictions on the use of price comparison tools.

Résumé

Cet article traite de la distribution sélective dans le cadre de la législation européenne sur la concurrence suite au jugement *Coty Germany* et au rapport de la Commission Européenne sur le e-commerce datant de 2017. De l'avis des auteurs, ce jugement a exclu de la catégorie «restrictions par objet» la limitation

des ventes sur des plateformes tierces. Par contre, en ce qui concerne les produits de luxe, cette restriction n'est pas considérée comme une violation du droit de la concurrence. Dans ce contexte, l'article aborde l'un des points clés du jugement: la définition legale d'un produit de luxe, et évalue dans quelle mesure cette définition est applicable en pratique. Les auteurs s'intéressent également aux conditions sous lesquelles la restriction des ventes sur des plateformes tierces (pour les produits non luxueux) est considérée proportionnée et soulignent le risque d'interprétations divergentes au sein des états membres. Pour illustrer ce point, plusieurs exemples tirés de la jurisprudence nationale sont donnés. L'article aborde enfin brièvement les problèmes de restrictions relatives aux comparateurs de prix en ligne.

Key words: Coty; platform ban; selective distribution; distribution of luxury goods; distribution of branded goods; restriction of online sales; e-commerce; restriction on passive sales; price comparison tools; marketplace restriction.

JEL: K21

I. Introduction

The development of the Internet, and the increasing switch of consumers from shopping in brick and mortar shops to virtual ones, was bound to raise issues in a variety of fields, not least of which competition law. *Coty Germany*[1] is one of the cases which promised to clarify the position of selective distribution agreements in the era of modern e-commerce, an issue that figures highly on the agenda of the European Commission as well as national competition authorities. By looking at theoretical concepts in a practical fashion, this paper aims to facilitate a proper understanding of the implications of *Coty Germany* in the context of current developments. It invites, therefore, the reader to ponder upon recurring issues such as legality of platform bans or other e-commerce related restrictions, that is, the use of price comparison tools in selective distribution, how to identify/define luxury products, and how this classification is bound to impact restrictions included in selective distribution.

The above concepts are discussed in the next paragraphs of this article in the following order. After a brief introduction to the facts of *Coty Germany*, the authors proceed to analyse what in their perspective represents the most significant aspects of the judgment in the context of e-tailing. Firstly, the effects approach to marketplace bans proposed in *Coty Germany* is discussed.

[1] Judgement of 6.12.2017, Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941

Secondly, the scope of the complete 'exemption' provided for luxury goods and the definition of the latter is considered. Thirdly, the authors reflect on arguments in favour and against platform bans. Fourthly, the position of other restraints such as a restriction on the use of price comparison tools (hereinafter; PCT) is briefly analysed. Lastly, the authors discuss several examples of national cases relating to platform and PCT bans and conclude with closing remarks.

In the authors' view, the ruling effectively removed the restrictions on sales via online platforms from the 'restriction by object box', irrespective of the nature of the goods concerned. Hence, such restrictions may benefit from exemptions. In the context of selective distribution of luxury goods, the CJEU went further and decided that a platform ban is outside the scope of Article 101 TFEU. The ruling also ended the discussion on whether the protection of a luxury image can be a legitimate objective of selective distribution (and platform bans), and reaffirmed the CJEU's harsh position on limitations of online advertising, including by the use of price comparison tools. Nonetheless, businesses will continue to face uncertainties concerning the use of platform bans and other e-commerce related restrictions within the framework of selective distribution. The primary reason behind this conclusion is that national authorities and courts may continue to assign different weights to arguments relating to those restrictions based on diverse interpretation of facts (for example, if the given good is luxury or when defining product markets) or expected effects of the constraint under examination. The brief overview of national case law predating and from the time of *Coty Germany* and findings of the EU Commission's (hereinafter; Commission) recent survey on E-commerce, only reaffirm this supposition. The Commission will need to reflect on these developments and challenges in upcoming review of its guidelines on vertical restraints.

II. Facts of *Coty Germany*

Coty Germany (hereinafter; Coty) sells luxury cosmetics through a selective distribution system (hereinafter; SDS). 'The sales locations of its authorised distributors must comply with a number of requirements relating to their environment, décor and furnishing.'[2] The aim of this requirement and similar standards imposed in relation to the selection and presentation of goods and advertising was to highlight and preserve the luxury status of Coty's products.

[2] See Press Release No. 132/17 on *Coty Germany* retrieved from https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170132en.pdf (accessed on 30.06.2018).

Parfumerie Akzente (hereinafter; Akzente), an authorized distributor in this system, sold Coty's brands in its brick and mortar shops. Akzente also carried out online distribution through its own website as well as through a third party platform, Amazon. Following the 2010 vertical block exemption reform, Coty revised the terms of its SDS so that authorized distributors would no longer be allowed to sell Coty's products by means of 'the recognizable engagement of a third party undertaking which is not an authorized retailer'[3] such as the Amazon marketplace. Akzente refused to comply with these new rules. In this situation, Coty took legal action that ultimately resulted in the Superior Regional Tribunal of Frankfurt referring four questions to the Court of Justice of the European Union (hereinafter; CJEU).

Firstly, the referring court sought to clarify, whether SDSs for luxury goods that primarily aim to preserve the luxury image of such contract goods are prohibited under Article 101(1) TFEU.[4] Secondly, whether imposing platform bans, that is barring members of such SDS from using third party electronic marketplaces in a manner discernible to the public (and irrespective of whether the quality standards are contravened), infringes Article 101(1) TFEU. By question three and four, the referring court wished to determine whether such marketplace bans are to be interpreted as a restriction of the retailer's customer group within the meaning of Article 4(b) of the Vertical Block Exemption Regulation (hereinafter; VBER)[5], or a restriction of passive sales to end users within the meaning of Article 4(b) VBER, which are 'by object' restrictions of competition law.

The CJEU's conclusion was that (under certain conditions) SDS designed in essence to preserve the luxury image of the contract (luxury) goods, including when providing for marketplace bans that serves the same objective, is not restrictive of competition (as it falls outside of Article 101(1) TFEU altogether). By the same token, marketplace bans should not be viewed as limiting passive sales or the retailer's customer group.

[3] See para. 15 of *Coty Germany*.

[4] *Consolidated version of the Treaty on the Functioning of the European Union* of 13 December 2007 (OJ 2012 C 326, p. 47–390).

[5] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1–7).

III. Marketplace bans are not by object restrictions

1. Coty's platform ban does not restrict passive sales or retailer's customer group

Coty Germany can be divided into two parts. One concerns the use of selective distribution and the marketplace restriction in distribution of luxury products; the second one covers the nature of the marketplace restriction (whether it meets characteristics of a 'by object' restriction of competition). The automatic connotation of *Coty Germany* is that it makes it easier to restrict platform sales of luxury goods under SDSs because it takes out such distribution from the scope of Article 101 TFEU (the first issue mentioned above).[6] It is, however, the CJEU's statement that a platform ban is not a restriction of passive sales or retailer's customer group that is more important in this judgment. This is because there are strong arguments supporting the view that this conclusion should not be limited to luxury goods and as such has broad practical significance. Therefore, contrary to the order of answers provided by the CJEU, the authors chose to consider this issue first.

Constraints on sales to end users and customers group to whom the distributor may sell are generally found to limit competition by their very nature (that is, irrespective of the effects they produce) and for this reason are referred to as 'by object' restrictions (as opposed to 'by effect' restrictions). VBER black-lists provisions restricting passive sales and limiting the ability of selective distributors to reach end customers. As a result, an agreement that contains clauses to that effect is entirely disqualified from benefiting from the block exemption.[7] At the same time, it is dubious whether an agreement containing such provisions could be cleared based on an individual exemption under Article 101(3) TFEU.

The ban on third party platforms, as imposed in Coty's SDS, was perceived as possibly amounting to a passive sales restriction because in 2009 the CJEU found in *Pierre Fabre*[8] that a clause indirectly prohibiting online sales was

[6] See discussion concerning this aspect in section IV below.

[7] Pursuant to Article 4(b) and 4(c) VBER, the exemption laid down in Article 2 VBER does not apply to vertical agreements which have the object of restricting the territory in which, or the customers to which, a buyer party to the agreement can sell the contract goods or services, or restrict active or passive sales to end users by members of a selective distribution system operating at the retail level of trade.

[8] Judgment of 13.10.2011, Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECLI:EU:C:2011:649.

the equivalent of a limitation of passive sales.[9] In that case, the supplier of branded cosmetics and personal care products required that the products be sold in the presence of a qualified pharmacist (a condition evidently impossible to meet online).[10]

In the CJEU's view, a ban on sales through third party platforms, as imposed by Coty, did not go so far as to limit passive sales or to restrict the distributors' group of potential customers. The court based this conclusion on several premises, the first one being that contrary to the facts in *Pierre Fabre*, Coty allowed to certain extent the marketing of its products via the Internet. The distributors in *Coty Germany* could trade online using their own electronic shop windows dedicated to the authorized store. This option was not insignificant in view of the fact that according to the E-commerce Report[11], own online shops continue to be the main e-distribution channel (a circumstance noted by CJEU earlier in the judgment). Additionally, Coty's distributors could sell using an unauthorized third party platform, provided such platform was not discernible to customers.

Secondly, the distributors could advertise online, including on third party platforms, and use search engines that could direct customers to their own online window. Both options indicated that generally Internet sales were allowed.

Lastly, it was not possible to identify the users of a third party platform as a customer group separate from all online shoppers. This presupposes that the limitation could not be effective because it would relate to a group that is not definable. In view of all above arguments, the CJEU concluded that Coty's provision did not preclude online sales in general – it excluded only a 'specific kind of Internet sale'.

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[9] A prohibition of online sales was also found to hinder the free movement of goods and therefore rejected in such cases as Judgment of 11.12.2003, Case C-322/01 *Deutscher Apothekerverband*, ECLI:EU:C:2003:664 and Judgment of 02.12.2010, Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete*, ECLI:EU:C:2010:725. Both of these cases were referred to in para. 44 of *Pierre Fabre* to remind that 'the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products' could not justify exclusion of online distribution.

[10] The case was referred to the CJEU by the cour d'appel de Paris hearing appeal from the French Competition Authority's decision. This authority issued at that time a series of decisions finding that prohibiting online sales in SDS infringes competition law. Many commentators argued that the ruling lacked solid economic foundations and that the decision was driven by the policy choice to promote e-commerce. In particular, there was vivid inter-brand competition and no risk of market foreclosure (see Schmidt-Kessen, 2018, p. 4, Monti, 2013, p. 489, Colangelo and Torti, 2018, p. 10).

[11] The Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry {SWD(2017) 154 final} (hereinafter; E-commerce Report), retrieved from http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (accessed on 30.06.2018).

2. Platform bans should be assessed based on the 'by effect' approach and may benefit from exemptions

The CJEU's conclusions on the general nature of a platform ban have two very significant consequences. Firstly, post-*Coty* a marketplace ban should not be considered as a 'by object' competition constraint. In view of this fact, such a restriction may potentially be harmful to competition, but it should be assessed based on the effects that it has produced or has the potential to produce. Secondly, a platform ban provided as part of a SDS is capable of benefiting from the block exemption as defined in VBER.

Should the CJEU ascertain that platforms bans restrict passive sales or customers' group, it would practically outlaw platform sale restrictions (except for those concerning luxury goods). In the current situation, the suppliers of non-luxury products wishing to rely on them have, therefore, two options.

Smaller networks may benefit from the block exemption. Pursuant to VBER, anticompetitive effects are thought not to arise as long as the supplier's and the distributors' respective market shares do not exceed 30% of the relevant market (some variations are allowed) and certain other conditions set out in VBER are met. Within these limits, all the SDSs free of restrictions characterised as 'by object' are presumed competition compliant. What is of particular importance in this context is that this presumption of legality has a very broad reach. As commentators emphasize, the benefits of VBER apply uniformly to all distribution systems, independently of the nature of the contract product, whether it is a luxury, branded or other product (Colangelo and Torti, 2018, p. 4; Ibanez Colomo, 2017b).[12] Hence, in principle, the safe haven of VBER is available to a given SDS even if it entails products that are not thought to justify the introduction of selective distribution systems under the case law developed based on the *Metro I* and *Metro II* judgments.[13]

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[12] These authors point to para. 176 of the European Commission Guidelines on Vertical Restraints (OJ 2010 C 130, p. 1–46) (hereinafter; Vertical Guidelines): 'The [VBER] exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the [VBER] is likely to be withdrawn.'

[13] Judgment of 25.10.1997, Case C-26/76 *Metro-SB-Großmärkte GmbH & Co. KG v Commission*, ECLI:EU:C:1977:167 (*Metro I*); Judgment of 22.10.1986, Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission*, ECLI:EU:C:1986:399 (*Metro II*). In broad terms, these rulings and further case law, in particular Judgment of 25.10.1983, Case 107/82 *AEG-Telefunken AG v Commission*, ECLI:EU:C:1983:293, recognized that certain products, due

This is provided that such exemption has not been formally withdrawn, which can happen only if appreciable anticompetitive effects occur. Hence, VBER potentially block exempts a wide range of SDSs and diverging product categories, including those that do not require specialized distribution for reasons of their particular characteristics.

In turn, the suppliers and distributors (of non-luxury products) excluded from the benefits of the block exemption, by reason of their considerable market shares, will have the option to rely on an individual exemption in order to defend their marketplace restrictions.[14] However, unlike in case of systems falling under VBER, networks where recourse to selective distribution lacks sound justification risk being considered as infringing competition. The reason behind this logic is that in cases of 'plain' products that can be distributed without specialized customer assistance and which do not require specific investments (for example, because strong brand recognition is of secondary importance for commercial success) it will be difficult to argue that a marketplace restriction brings about sufficient efficiency gains and so meets the test of Article 101(3) TFEU.

Commentators emphasize that from the economic standpoint the vertical restriction is justifiable if it is necessary to shield distributors from free riding. The risk of the latter occurs if the distribution objectively requires material downstream investments (that is, investments on the part of the distributors and not suppliers, the latter should not be shielded by vertical restraints).[15] The need for such investments is not in principle limited to the distribution of luxury products or even the distribution of branded products; what counts in this context is that the distributors bear the risk of someone free riding on their efforts to boost sales.[16] It is fair, however, to assume in view of the above that such investments will likely arise in the context of products that, in the meaning of established case law, are thought to necessitate recourse

to their special characteristics such as technological complexity, require specialized distribution (i.e. where customer service is ensured) and justify the imposition of restrictions that limit price competition. This is so because such purely quantitative SDSs do not limit Article 101 TFEU at all, provided some conditions (set out in footnote 37 below) are met. Whish and Bailey point out that other goods that typically justify recourse to selective distribution are products where brand image is of primary importance and newspapers due to their extremely short shelf-life (Whish and Bailey, 2015, p. 680–682). For detailed explanation of *Metro* doctrine see also Jones and Sufrin, 2016, p. 789–794.

[14] Alternatively, they may argue that in case of their networks, a marketplace restriction does not limit competition or does so only insignificantly, e.g. because use of platforms in case of their products is negligible.

[15] For more on the free-riding problem see point V.1. below.

[16] See Eymard and Labate, 2018, p. 29, who raise these arguments while considering whether platform bans should be excluded from the scope of Article 101 TFEU altogether, and not just if they could be exempted based on Article 101(1) TFEU.

to selective distribution (because of their nature) and will be rare in case of other products.

3. Is a platform ban a hardcore restriction if applied in relation to non-luxury goods?

Some commentators have considered whether the CJEU's conclusion that a platform ban is not a restriction of passive sales or customers' group should be limited to the distribution of luxury goods.[17] This interpretation presupposes that the ban on sales through third party platforms imposed in relation to selective distribution of non-luxury goods could constitute a hardcore restriction.

The CJEU's response should not be confined to such situations.[18] The primary reason supporting a broader reading of the *Coty Germany* is that the CJEU justified its reasoning by circumstances unrelated to the nature of the distributed good. Namely, the fact that online sales were not entirely precluded because distributors could use their own websites, or rely on the services of third party platforms (as long as their use was not discernible to the customers), use online advertisement tools, as well as the fact that it was impossible to single out platform shoppers from other customers. Additionally, when the CJEU mentions in this part of the judgment *Pierre Fabre*, it differentiates it from *Coty Germany* precisely due to the same fact (that Coty's provision did not amount to a complete restriction on online sales) and not the circumstance that, according to CJEU, the contract goods in *Pierre Fabre* lacked the status of luxury goods.[19]

Secondly, it is clear from the way in which the referring court framed its question that it sought to clarify whether general platform restrictions could benefit from the block exemption (there is no reference to the status of the goods in questions three and four). This corresponds to the fact that, as already emphasized, the benefits of VBER can be claimed irrespectively of the nature of the good. Hence it would not make sense to say that one product category can profit from VBER because of its special character (luxury products) while

[17] See e.g. the discussion following Ibanez Colomo's, 2017b post.

[18] Cisnal de Ugarte and Stefano, 2018, p. 29; Colangelo and Torti, 2018, p. 20; Ibanez Colomo, 2017b; Wijckmans, 2018 expressed a similar view. As Ibanez Colomo emphasizes, 'the question of whether the practice restricts active and/or passive selling over the Internet does not depend on whether the agreement is about running shoes or luxury handbags instead. This is in fact apparent from the analysis of the Court in *Coty Germany*' (Ibanez Colomo, 2017b).

[19] The latter circumstance was noted only in the context of answers provided to the first and the second question.

other products (non-luxury products) cannot, despite the fact that a priori the nature of the good is not a precondition for VBER to apply.[20]

Thirdly, in the light of the economic arguments mentioned above, it is better to concentrate on the size of downstream investment and correlated risk of free riding, rather than make a categorical classification of restrictions based exclusively on the differentiation between luxury and other products. This is notwithstanding the fact that it can be normally expected that luxury goods do require such investments. The challenge here is, however, not to deprive too easily of the benefits of VBER or an individual examination those products that require distributors' special efforts for other reasons than their luxury status or some branded products, which often will exhibit the same characteristics as luxury goods. Hence, it is more reasonable to examine the effects on competition of restrictions imposed in the context of non-luxury products before concluding on their legal nature, instead of setting them almost automatically aside as a difficult 'by object' category.

Some room to argue for a narrow reading of *Coty Germany* (only platform bans relating to selective distribution of luxury goods are not 'by object' restriction) provides the linguistic interpretation of this ruling. This is because in this part of the judgment the CJEU referred to the luxury status of Coty's products and mentioned the nature of the goods in the narrative of the final response. Even if the references are occasional, they are there despite the fact that the status of the goods was not mentioned in the questions asked.[21] One may wonder if there was special intention to do this. A straightforward explanation may be that the CJEU simply limited the interpretation of EU law to the circumstances of the case at hand (so it corresponds to the context of a specific clause and specific distribution system that was clearly focused on creating and preserving the luxury aura of the contract product). After all, the CJEU practice of redefining preliminary questions is quite frequent. In any case, the overall logic of the response provided and other arguments discussed above, support a broad reading of the conclusions made.

In Ibanez Colomo's view, although narrow interpretation of *Coty Germany* is wrong, litigation on this point cannot be ruled out (Ibanez Colomo's, 2017b). This is so in particular because some national competition authorities may

[20] Additionally, there would be no need to confirm that platform bans in SDS for luxury goods are not hardcore restrictions of competition, if the CJEU considered them not to infringe Article 101 TFEU in the first place. However, as the CJEU explained at the beginning, it gave it answer in the event that the referring court ascertained in view of the facts of the case at hand that it does not meet the conditions outlined in the response to question one and two.

[21] See *Coty Germany*, para. 20(3–4), 62–65 (indirect reference by invoking 'the clause at issue') and 69.

insist that online marketplace bans relating to non-luxury goods should be viewed as a hardcore restriction of competition.[22]

4. The relevance of search engines and online advertising

Proper understanding of *Coty Germany* requires considering whether the inclusion of other conditions mentioned by the CJEU that concern the use of the online environment (that is, the use of search engines, sales via own e-shop or use of online advertising, in particular on third party platforms) is relevant to the assessment of the platform ban.[23]

The answer to that question is in the affirmative, although it is not clear how much importance should be attached to each individual option, except for sales via own shop window. The authorization of the latter seems indispensable for a marketplace restriction to escape the qualification of an indirect prohibition of Internet sales in general.

Similarly, the possibility of using online search engines appears crucial in the modern world of e-commerce. Imposing a ban on a specific e-channel (such as marketplaces) and simultaneously excluding the general use of search engines for the benefit of other e-channels (such as own e-shops) could in fact deprive the distributors of real possibility to sell online. Combination of such restrictions could, therefore, produce results comparable to a complete ban on all Internet channels.

As regards online advertising options, it should be noted that in the context of exclusive distribution, a ban on general Internet advertising is considered a 'by object' restriction, as opposed to online advertising clearly targeting a customer group or a territory reserved for another distributor.[24] However, no restrictions on sales to end users (whether final or professional end users) are allowed within selective distribution. 'Within a [SDS] the dealers should be free to sell,

[22] Andreas Mundt, the President of the German Competition Authority (hereinafter; GCA), which issued a number of decisions declaring the use of platform bans in SDS as illegal (see section VII.1. below), said on 06.12.2017 that the GCA's 'decisional practice relates to brand manufacturers outside the luxury industries. Our preliminary view is that such manufacturers have not received carte blanche to impose blanket bans on selling via platforms.' The CJEU 'made great efforts to limit its judgment to genuinely prestigious products.' 'At first glance, we see only limited effects on our decisional practice' (as reported by Newman, 2017b).

[23] Cisnal de Ugarte and De Stefano point out that in *Coty Germany*, the CJEU has assessed the legality of a specific clause in a specific set of circumstances. Therefore, a SDS that contains stricter restrictions might need to be scrutinized in light of *Coty Germany*, and that provisions that affect online sales should not be assessed in isolation from each other (Cisnal de Ugarte and De Stefano, 2018, para. 29, 42).

[24] See para. 51, 53 and 56 of the Vertical Guidelines.

both actively and passively, to all end users, also with the help of the internet' (Vertical Guidelines, para. 56). Hence, there is a strong possibility in a SDS that the restrictions on online advertising (whether targeted at specific customers or not) will be considered a hardcore restriction. A restrictions relating specifically to advertising via third party electronic platforms could be defendable only if it is justified by the concerns for quality standards[25]. It is unclear, however, how the complete ban on advertising via marketplaces would impact the assessment of the ban on sales through such platforms. At the very least, it could bring a particular ban on marketplace sales closer to a disproportionate restriction in the course of the assessment under Article 101(3) TFEU.

Note that in the E-commerce Report, the Commission stated that **absolute** marketplace bans should not be considered a hardcore restriction. The remark was made in the context of *Coty Germany*. It was not, however, clarified what the Commission meant by an **absolute** ban, namely a ban as foreseen by Coty, which as the CJEU eventually found was not an absolute ban, or a prohibition that could go even further than the Coty's ban, for instance to exclude the possibility to advertise on third party platforms.[26]

5. Risk of diverging approaches to exemptions

Some wording in *Coty Germany* suggests that in individual cases, an assessment from the perspective of Article 101(3) TFEU requirements, or the availability of the block exemption provided for in VBER, may vary depending on the category of the distributed product and between member states. The primary reason for such a conclusion is that the CJEU's view on the restriction of sales through third party platforms was partly based on the results of the Commission's 2017 E-commerce Report.[27] The E-commerce Report indicates that over 90% of the retailers surveyed operate their own online stores[28], which continues to be the main online distribution channel. This is despite the fact that the use of marketplaces has increased over time. In such circumstances, the

[25] This is because the operators of a SDS are allowed to impose quality standards relating to the use of an Internet site and to the advertisement, see para. 54 and 56 of the Vertical Guidelines.

[26] See para. 41 and 42 of the E-commerce Report as well as further remarks in footnote 29 below.

[27] See para. 54 of *Coty Germany*. The CJEU did not expressly refer to these findings in responses to questions three and four but it repeated in these responses its conclusion that Coty's ban did not completely prohibit Internet sales. The latter was formed in response to the two first questions and took account of the E-commerce Report.

[28] While 31% of the respondent retailers rely on both: marketplaces and their own websites and only 4% sell uniquely on marketplaces (see para. 39 of the E-commerce Report).

CJEU could ascertain (as the Commission did in the E-commerce Report[29]) that the platform ban in question does not amount to a *de facto* restriction of Internet sales (or, by the same token, to a passive sales restriction).[30]

However, the Commission also noted in the E-commerce Report that the intensity of use of online platforms varies between member states[31], the product category and the size of the retailer (SME retailers being the group that tends to make a larger proportion of their sales via marketplaces in comparison to larger retailers). Therefore, it is possible that in some member states marketplace ban would have greater bearing on consumer choice than elsewhere.[32] The effect could be additionally magnified by the fact that online platforms may be the main online distribution channel for certain product categories.[33] As practitioners note, those specific characteristics could remove some distribution systems from the scope of the block exemption (in particular if product markets are defined narrowly) or lead to a withdrawal of VBER's safe haven.[34]

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[29] '[T]he findings indicate that marketplace bans do not generally amount to a de facto prohibition on selling online or restrict the effective use of the Internet as a sales channel irrespective of the markets concerned.' See also comments in section III.1 (1.2). above concerning the reference to the 'absolute' market in the E-commerce Report.

[30] See para. 39 of the E-commerce Report. However, the intriguing question is, first, if same disproportion exists if shares are calculated based on sales value, e.g. in reference to the Gross Merchandise Value generated. Second, if the current distribution pattern is not somewhat affected by the widespread requirement to maintain own online shop and increasing hostility of some SDS towards the distribution through third party platforms. Ezrachi notices the correlation between the use of online marketplaces and the popularity of marketplace bans, stating that the use of the latter will intensify with growth of e-commerce (Ezrachi, 2017). Interestingly, according to para. 28 of the E-commerce Report the restriction on selling on marketplaces is the second most popular vertical restriction (18% of the respondent online retailers faced such a restriction). However, this accounts for both: absolute bans as well as restrictions on selling on marketplaces that do not fulfil certain quality criteria (see para. 40 of the E-commerce Report).

[31] Germany, where 62% respondent retailers used the marketplaces, being the leader followed by the UK (43%) and Poland (36%); see para. 39 and 41 of the E-commerce Report.

[32] This is taking into account that the scope of e-commerce markets continues to be national, see Schmidt-Kessen, 2018, p. 8 and sources quoted by him. The Commission in the recent decision in Google Shopping defined the market for general search services and the market for comparison shopping services also as national in scope (see decision of the Commission of 27.06.2017 in case AT.39740 Google Search (Shopping).

[33] See the statistics in para. 454 of the Staff Working Document, according to which professional sellers selling clothing and shoes on a marketplace account for, on average, 25% of all sellers on a marketplace (the most represented category followed by 'other' (15%) and 'consumer electronics' (12%).

[34] Based on Article 29 VBER. See Vinje, Paemen and Nourry, 2017 and para. 43 of the E-commerce Report.

The above consideration reveals a risk that disadvantages stemming from a platform ban could not apply uniformly across the EU. In particular, marketplaces with a smaller reach, that is, national marketplaces, may receive less support than the ones already well established globally. In extreme situations, this could further shift the competition balance to the benefit of the latter and strengthen potential market power inequalities.[35] The risk of such indirect market tipping is further increased by the specifics of two-sided markets and network effects, where market success depends on whether the platform is able to attract a certain minimum number of users (a phenomenon referred to as an initial critical mass hurdle).[36]

IV. The luxury of being a luxury

1. Legitimate nature of selective distribution and platform bans designed to preserve the luxury image of contract goods

1.1. Metro Conditions

The majority of the judgment in *Coty Germany* concerns the analysis of whether the selective distribution systems primarily designed to preserve the luxury image of the contract goods could fall outside of the scope of Article 101 TFEU altogether, including when they provide for the platform bans. The CJEU answered this question in the affirmative and, by this statement, accorded privileged status to luxury goods in the context of distribution.

In the first place, the CJEU assessed the legality of the system in general. The CJEU confirmed that the marketing of luxury goods legitimately justifies the use of a selective distribution system and that such a system is not prohibited by Article 101(1) TFEU as long as the conditions are met for a purely qualitative SDS, as established in case law.[37] The CJEU, quoting

[35] See Schmidt-Kessen, 2018, p. 8.

[36] Evans and Schmalensee analysed this phenomenon in detail, concluding that two-sided platforms must attract a sufficient number of users on both sides of the market to launch successfully (Evans and Schmalensee, 2010).

[37] I.e. conditions established in *Metro I* and restated in *Pierre Fabre* that is: 'resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary' (para. 41 of *Pierre Fabre*).

the trademark case *Copad*[38], recognized that an aura of luxury bestowed on the product by an alluring and prestigious image is an essential quality that distinguishes such goods from others, and for this reason it is equally important as the good's material characteristics. Therefore, an aura of luxury, and the means of creating, sustaining and reinforcing it, such as special distribution requirements imposed in the SDS, are worthy of protection. The CJEU clarified also that the *Pierre Fabre* judgment[39] should be read against specific circumstances of that case. *Pierre Fabre*, the CJEU emphasized, had not established a statement of principle whereby the preservation of a luxury image could no longer justify use of selective distribution (in respect of any goods, including luxury).[40]

In the second place, the CJEU assessed the individual provision in SDS, namely a platform ban. Also here the CJEU confirmed that a platform ban may constitute a legitimate requirement for the selective distribution of luxury goods. The CJEU, after recognizing the legitimate nature of the clause[41], considered in detail if the ban was proportionate, that is, whether it sought to preserve an essential characteristic of the contract goods (luxury image) in (i) an appropriate and (ii) least restrictive manner possible (meaning that it did not go beyond what was necessary to attain that goal).

In the court's view, the restriction was appropriate, firstly because it ensured that the goods in question are associated solely with the authorized distributors (and creating such an association is an inherent characteristic of selective distribution). Secondly, the clause allowed the supplier to effectively monitor whether the distribution requirements are adhered to. In this respect, the CJEU noted that absent a contractual relationship with a third party platform, the supplier would be unable to enforce compliance and so prevent possible deterioration of the image of the product caused by inappropriate

[38] Judgment of 23.04.2009, Case C-59/08 *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)*, ECLI:EU:C:2009:260.

[39] Para. 46 of this judgment to be exact, according to which: '[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU'.

[40] See para. 34–35 of *Coty Germany*. The CJEU concluded that the assertion in para. 46 of *Pierre Fabre* related 'solely to the goods at issue in the case that gave rise to that judgment and to the contractual clause in question in that case.' (para. 34 of *Coty Germany*). The meaning of the *Pierre Fabre* judgment was therefore confined to clarifying that the need to preserve the prestigious image of cosmetics and body hygiene goods cannot legitimately justify a complete exclusion of such product from online distribution. The statement clearly defines the limits of the *Pierre Fabre* ruling.

[41] The individual requirement is of legitimate nature if, according to the general principle, it is applied in a non-discriminatory manner to all distributors, it pursues a legitimate objective, such as preservation of the luxury image of the contract goods and is objective and qualitative in nature.

presentation. Thirdly, online platforms are channels primarily designated for the distribution of goods of all kinds, therefore the clause sought to ensure an appropriate (selective enough) sales environment.[42] The provision was also not overly restrictive as the ban did not preclude the use of platforms in a non-discernible manner, or sales in the distributors' own e-shops, or the use of search engines and online advertising.

1.2. The rationale behind the protection of the image of luxury goods

The first two arguments relating to the appropriate nature of the provision resemble the logic of the *Copad* judgment, which was a trademark (hereinafter; TM) case. This justification heavily relies on the rationale behind TM protection, in particular the indication of origin and protection of values associated with the origin such as brand reputation. For these reasons, it is to some extent inconsistent (not that the authors disagree with the premises of TM protection). It is simply not true that a supplier would have no means of enforcing compliance with the distribution requirements *vis-a-vis* third parties (here, an online platform). Trademark licences and the *Copad* judgment itself provide such grounds (according to that judgment, a supplier may prevent a third party reseller from trading in goods that the reseller acquired[43] from a selective distributor in contravention of SDS' conditions). Additionally, private law offers a wide range of measures that can make

[42] It is interesting to note in this context that some Internet marketplaces create specialised zones dedicated to the sale of branded goods. This market development was noted by the French Competition Authority (see discussion in section VII.4 below). Would the exclusion of such services also stand the CJEU's scrutiny? Would evidence confirming the customer's high-standard experience be sufficient to consider such ban disproportionate? The answer to this question depends on the courts' appetite for sealing the distribution of exclusive goods from the online environment. Ezrachi argues that the proportionality of the marketplace bans raises doubts when legitimate qualitative concerns can be addressed effectively by modern marketplaces. He says that in those circumstances, such a ban would be just a tool limiting price competition (Ezrachi, 2017). Petropoulos expressed a similar view (Petropoulos, 2018, para. 79–80). In turn, Bagdziński questions the added-value of platform restrictions aiming exclusively at protecting the product presentation, while the e-shops of authorized distributors do not offer any enhancement in the quality of the service (Bagdziński, 2018, p. 126).

[43] In this case ownership of goods was effectively transferred from the selective distributor to the reseller, whereas this would not normally be the case when the distributor sells his contract goods via an e-platform. Therefore, under the *Coty Germany* facts, the supplier's case against a third party platform selling goods in contravention of the SDS's requirements would be even stronger (as the restriction would relate to goods owned by an authorized distributor, a party to the SDS).

certain contractual provisions effective against third parties.[44] Lastly, Coty's SDS allowed distribution via a third party platform as long as its use was not recognizable to the customers. Following the CJEU's approach, in such case the enforcement of SDS' requirements would be equally difficult.

Perhaps, one of the rationales behind Coty's restrictions, which was not discussed in the judgment, is related to the scale of sales.[45] The scale of sales via third party platforms on one hand makes it difficult for the supplier to survey compliance with the distribution requirements. On the other, it may dilute the aura of luxury, because as Roumeliotis notes, the more available a brand is, the less luxurious it becomes, therefore commoditizing luxury brands on the middle market risks diluting their luxury status (Roumeliotis, 2015).

Moreover, marketplaces are about transparency that creates downwards pressure on price. It does not go well together with the fact that the distribution of luxury goods may be characterised by the Veblen effect, an economic phenomenon named after the American economist Thorstein Veblen (Gulcz, 2002, p. 34).[46] The effect describes a reversed price – demand relation where, in contrast to typical market rules, high prices of luxury goods generate additional demand because such goods are a high status symbol and are used to convey the appearance of success. To put it bluntly, for some customer categories it would be less interesting to possess a Gucci hand bag if it would cost less and be available to everybody.

A conclusion that stems from the above is that in the case of luxury goods, creating scarcity may generate added-value, even if it helps maintaining high prices. Recognizing this kind of interrelation is challenging in the world of competition. This argumentation also comes dangerously close to quantitative restrictions that, as a rule, are not considered to fall outside of Article 101(1) TFEU. The above circumstances may explain why the CJEU retreated in *Coty Germany* to the familiar language of TM protection.[47]

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[44] Ezrachi notes that even if the manufacturer has no direct control over the marketplace (be it a traditional shopping mall or an electronic platform), it may hold the distributor accountable for a failure to comply with legitimate requirements (Ezrachi, 2017).

[45] The other one would be the value of investments made in creating the product's renown and protection of different techniques used to achieve it. Those have been addressed indirectly by reference to the Copad language, it seems.

[46] For an illustrative explanation of the paradox see: https://www.investopedia.com/terms/v/veblen-good.asp (30.06.2018).

[47] Schmidt-Kessen considered *Coty Germany* a welcome reconciliation between competition and trademark law rationales. He argued that after *Pierre Fabre*, competition law started to run dangerously counter rules and main values behind TM laws. The judgment eased that tension by recognizing that 'brand image protection, at least for luxury goods, can constitute a legitimate aim for an SDS under EU competition law' (Schmidt-Kessen, 2018, p. 8).

2. Practical implications

2.1. Protection of the image of a luxury good is a legitimate objective

The CJEU findings, provided in responses to the fist and the second questions, confirmed that the protection of a luxury image is a legitimate objective that may justify recourse to SDS. Bernard argues that it also put on equal footing authorized distributors and the electronic marketplaces, in the sense that distribution through marketplaces is possible only if the later belongs to the authorized network (Bernard, 2018, p. 35).

2.2. Simplified verification track for luxury goods

Most of all, however, the ruling took the selective distribution of luxury goods, including those that provide for limited platform bans, out of the scope of Article 101(1) TFEU. Such provisions, like other qualitative requirements typically imposed in SDS, do not limit competition.[48] The practical meaning of this part of the judgment is that it accorded a privileged status to the distribution of luxury goods. Namely, the suppliers of such goods profit from a simplified verification track: when creating the distribution system they do not have to consider whether the system is capable of disproportionately affecting competition and to look for additional justifications that would outweigh its possible detrimental effects. Their systems are simply presumed legitimate as long as the conditions set out in *Coty Germany* are met.

More importantly, the benefit applies irrespective of how big the supplier's and the distributors' market shares are. This is a clear advantage when compared to distribution systems that are subject to the standard Article 101 TFEU test, especially when considering that some of them are also removed from VBER because their market shares exceed the 30% threshold. Additionally, it can be expected that online sales restrictions will continue to be carefully scrutinized due to their potentially considerable impact on the markets. The latter circumstance will increase challenges that SDSs for non-luxury goods will be faced with, for example, how to define their relevant markets and so

[48] Wijckmans emphases that the qualitative restrictions in SDSs are outside the realm of Article 101(1) TFEU because they are objectively justified. Additionally, he points out that *Coty Germany* confirms that 'objective justification theory is essentially linked to the nature of the goods or services at hand', whereas the nature of the product is irrelevant for the application of the block exemption benefit provided for in VBER. The objective justification theory also differs from the ancillary restraints concept. The latter are not restrictive of competition only and as long as the objectives of the main agreement (to which they are ancillary) do not restrict competition (Wijckmans, 2018, p. 2).

assess market shares. Post-*Coty*, networks designed for luxury goods are free of these concerns.

2.3. Recourse to exemptions (mixed systems, goods with unclear status)

The above advantages are, however, available provided that all of the SDS' requirements are purely of a qualitative nature and the contract goods are luxury. It will be still necessary to meet the standard Article 101(3) or VBER tests in order to escape competition law risks where the luxury nature of a contract good is contestable or difficult to prove (as may be often the case in view of the uncertainties around the definition of 'luxury', as discussed in the next section).

The same holds true in case of mixed systems (applying qualitative and quantitative criteria) or failing to meet *Metro*-based requirements set out in *Coty Germany*. The reason behind this statement is that solely those selective distribution systems that implement exclusively qualitative requirements fall outside the realm of Article 101(1) TFEU. In practice, however, qualitative requirements are often combined with quantitative ones, and the nature of some of them is not obvious. For example, such requirements as: minimum sale or minimum percentage of turnover, purchase requirements, sales targets, minimum stocks or requirements to stock the complete range of products, as well as promotion requirements may all qualify as indirect quantitative restrictions.[49]

2.4. The brands at the beginning of their market circle and 'commonized' brands

Now the practical question that remains is how to apply this system when a given brand is at the beginning of its market life. We speak of situations when the producer decides from the outset that he intends to create a luxury brand. He is, however, at the beginning of the process and has no empirical evidence available to support claims of luxury (because there is no aura of luxury as yet). The opponents of the liberal approach would reason that in this kind of situation any brand would argue for luxury status so it can implement platform bans. These concerns are not warranted.

Firstly, for practical reasons not every brand will aspire to such prestige. Secondly, even in the early phases of market life it should be possible for the producer to provide consistent evidence that supports the product concept such as, for example: designs, corresponding product and service standards, adequately high marketing budgets and strategies, targeted clients, etc. In

[49] See para. 175 and 179 of the Vertical Guidelines and Whish and Bailey, 2015, p. 634.

sum, it should be up to the individual producer to decide its own branding and marketing strategy, but he should be prepared to produce consistent evidence to support his claims. If a producer commits to create a product that stands out, that he wants to be exclusive, he should have the right to decide in what conditions it is to be sold.[50]

Thirdly, and most importantly for practitioners, it should not be difficult to advise such a client because of the possibility of reaching to VBER. Usually such a producer would not have high market shares and so would be capable of benefiting from the block exemption. There would be enough time to create an aura of luxury and corresponding evidence before the VBER's market share limits are exceeded, and the need to resort to a defence based on the 'luxury' status (that is, the *Coty Germany* exception) materializes.

The situation would, however, be more difficult in cases of established luxury brands with possibly high market shares that have been subsequently commoditized and so lost their prestigious status. We refer here to a risk mentioned by Roumeliotis, as discussed in point III.1. above. In this situation, the recourse to Article 101(3) TFEU could be a viable alternative, as normally the change in the brand's status will not remove the free riding risks materializing at the distributors' level.

3. How to define 'luxury'?

Notwithstanding the advantages of the system described, the challenge about *Coty Germany* is that the CJEU has neither defined the term 'luxury product', nor provided straightforward indications on how to delineate this product category. A sort of guideline regarding what exactly constitutes a luxury product can be pieced together from the previous case law and different opinions of Advocates General. What seems to be a recurring wording is 'that the quality of luxury goods is not simply the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury'.[51] This unquestionably does not provide a clear-cut

[50] Therefore, the CJEU's suggestion that cosmetics and body hygiene products such as Pierre Fabre's ones could not aspire to be luxury goods will not always prove correct.

[51] CJEU Press Release No 132/17 of 06.12.2017, retrieved from: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170132en.pdf (accessed on 30.06.2018). The definition of luxury goods was also discussed in para. 39, 45 of judgement of 04.11.1997, Case C-337/95 *Parfums Christian Dior v Evora*, ECLI:EU:C:1997:517; in para. 24–26 of *Copad* and in para. 114–115 of Judgement of 12.12.1996, Case T-19/92 *Groupement d'achat Edouard Leclerc v Commission of the European Communities*, ECLI:EU:T:1996:190.

set of criteria allowing one product category to be neatly differentiated from another.

A number of factors and corresponding questions may help to define the good's status. For example, is the proportion of the value derived from the aura of luxury to the material worth or quality of the product relevant?[52] Whose perspective would be decisive in that regard, would consumer surveys constitute sufficient evidence of the status? Does the consumers' main purchasing incentive have to be the good's luxury status? Should local conditions and preferences be taken into account, including disparities across the member states?[53] Would the proportion between the product price and the production cost be of any relevance? What bearing should the advertising costs (typically high in cases of luxury goods as it is a renown-creating factor that impacts consumer preferences) have? What is the relevance of the distinction between 'luxury' products and 'premium' ones and how to distinguish them?

On the latter point, Heine points out that a genuinely 'luxury' product has certain intrinsic, identifiable characteristics: extremely high price, aura of exclusivity, its custom make of 'royal' materials and the limited target group of clients ('select few'), (Heine, 2012). Baicoianu explains that a premium product on the other hand, although still priced higher than the average good, is accessible to a wider array of consumers, both price-wise and distribution-wise (Baicoianu, 2013).

Roumeliotis differentiates the two categories in the following way: 'A luxury brand is very expensive, exclusive and very rare – not meant for everyone […]. Authentic luxury brands compete on the basis of their ability to invoke exclusivity, prestige and hedonism to their appropriate market segments not the masses. […]. If luxury brands are related to scarcity, quality and storytelling, then premium goods, on the other hand, are expensive variants of commodities in general: i.e. pay more, get more. These brands are less ostentatious, more rational, accessible, modern, best in class, sleek design, and manufactured with precision.' (Roumeliotis, 2015).

These concepts refer to a number of helpful but uneasy to measure criterions, which only illustrate the challenges that business will have in applying *Coty Germany*. The above and many other questions will be tackled by national courts and competition authorities on a case by case basis with the risk of differing results across the member states.

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[52] A. Mundt in his capacity of the President of the GCA suggested while commenting *Coty Germany* that the meaning of the term is confined to products 'whose whole point is to convey an aura of luxury' (See Cisnal de Ugarte and Stefano, 2018, footnote 126; Newman, 2017b and footnote 22 above).

[53] E.g. a specific product might be considered as a luxury in one member state and just as a branded good in another, due to different shopping patterns and affordability levels.

4. Are selective distribution and platform bans designed to preserve the image of non-luxury products outside of Article 101 TFEU?

The differentiation between luxury goods and premium ones brings up, however, a more fundamental question namely whether the CJEU's findings on the legality of selective distribution and platform bans should extend beyond the category of luxury products (similarly to the view that platform bans are not a hardcore restriction).

The way in which the referring court framed its first and second question and the language used in responses to them leave no doubt that the CJEU's conclusions are restricted to luxury goods. Many commentators argue, however, for a broader application. Ibáñez Colomo points out that trademark law protects all producers, including those supplying non-luxury goods, and there is no reason why EU competition law should be different. Conveying a particular image, he says, may be also important for the latter companies (Ibáñez Colomo, 2017b).

Economists reason that it is the size of the investments and the parties' market shares, rather than the nature of the good, that matter while determining the impact of vertical restraints on competition. Moreover, branded and premium products often will exhibit the characteristics that the CJEU has recognized in *Coty Germany* as worthy of protection (Eymard and Labate, 2018; Harvey, 2018). According to Harvey's reading of *Coty Germany*, the CJEU singled out 'luxury' goods by reference to two circumstances: (i) the way the goods are displayed impacts the strength of the product's allure, image and reputation and (ii) the latter affects in turn the good's actual quality. He argues that the same interrelation arises in the case of a wide range of branded goods (and across the entire brand, instead of in relation to an individual product category within the brand), (Harvey, 2018). His conclusion is based on simplified economic models measuring customers' purchasing behaviour and the relevance of investments in advertising and marketing.

Nonetheless, the current system appears reasonably balanced. The protection of a luxury image is simplified, in that it benefits from a presumption of legality (as SDS and platform bans aimed at protecting it are altogether outside the realm of Article 101 TFEU). Broad protection of the image in the case of other (non-luxury) brands is also ensured by VBER, but it requires more thinking after a certain level of market power is exceeded, that is, the manufacturer's or the distributors' market shares grow above 30% (Article 101(3) TFEU analysis). This is reasonable given the importance of market power in the assessment of vertical restraints in general and the significance of platform bans in particular.

In this system the term 'luxury product' should be construed with care for at least two reasons: Firstly, even if some products fail to qualify for the status, it will be still possible for them to profit from exemptions. At the same time, application of general rules will make it easier to monitor the true effects of platform bans that such SDS may now entail, and to prevent an overly broad application of this restriction. Secondly, the arguments based on added-value generated by scarcity and the aura of luxury interrelation[54] do not apply to all branded products. Without it, the product and the value it represents would not exist at all. This justifies a privileged position of truly luxury products without prejudging, however, admissibility of similar restrictions for other products.

V. Pros and Cons of platform bans

It is interesting to have a brief look at the main arguments that the opponents and the advocates of platform bans advance in support of their positions. A better understanding of the interest at play helps to identify potential efficiencies and reductions in competition, which will have to be weighed each time a specific platform ban does not qualify either for the *Coty Germany* exception or the block exemption benefit.

1. Price transparency v. free-riding

The opponents of online marketplace bans claim that they 'deprive European sellers of more opportunities and consumers of more choice and price competition.' (Greenfield, 2017b). One of the key arguments in favour of marketplaces is that by reducing search costs they make it easier to compare prices and offers. Marketplaces therefore increase price transparency and diminish information asymmetry, hence they intensify intra- and inter-brand competition to the advantage of customers. It is argued that in such a situation suppliers are not able to take advantage of ill-informed consumers (Ezrachi, 2017). Instead, suppliers have to win the customer by offering additional benefits or increasing the quality of their service. The net result may be downward pressure on prices and an increase in competition by quality, for instance by offering additional services such as free or faster delivery

[54] See section IV.1 above.

options, additional advice, etc.[55] The benefit could be lost when e-commerce is channelized into independent websites and offline shops.

On the other side of the arena, stakeholders argue the opposite. Colangelo and Torti, state in a broader context of Internet restrictions that even if online distribution is a particularly powerful means of driving price competition, it does not mean that restrictions relating to it are always more problematic than those relating to less price-oriented distribution channels (Colangelo and Torti, 2018, p. 10). The authors emphasise (after Buccirossi, 2015) that in some cases selling online may have a detrimental impact on competition focused on quality and provision of ancillary services (Buccirossi, 2015, p. 770; Colangelo and Torti, 2018, p. 10). Buccirossi points out that 'selective distribution is frequently motivated by the need to prevent distributors from focusing only on price competition' (Buccirossi, 2015, p. 752). That objective has been recognised in the *Metro I* and *Metro II* rulings, where it was held that price competition can give way to competition on quality. The courts endorsed therein the price limitation, because it was essential to safeguard the existence of specialized distribution, including by ensuring reasonable profit margins required to cover the cost of investing in a high-quality service.

These concerns are reflected in the E-commerce Report. The Commission notes that increased pressure on price (resulting from the move to online distribution in general) may adversely affect competition on quality, innovation and brand by way of the free-riding effect.[56] Allowing unrestricted show-rooming (a situation where a customer views the goods in a traditional shop but purchases them online) undermines the retailers' incentive to invest in a high quality service.[57] The ultimate result may be a reduction in inter-brand competition as the quality, innovation and brand image are the main driving force behind it. The latter are also the major concerns for maintaining the visibility of businesses in the mid and long term.[58]

[55] As the Commission Staff Working Document reveals, retailers generally believe that the limitation on the use of platforms will remove downwards pressure on retail prices and eventually stabilise them to the advantage of traditional trade and the manufactures' own online distribution (see para. 456 of the Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry {COM(2017) 229 final}, (hereinafter; Staff Working Document), retrieved from http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf (accessed on 30.06.2018).

[56] Such effect occurs when consumers buy from retailers who do not invest in the quality of service and instead pass on the resulting cost-savings to consumers by charging lower prices (Buccirossi, 2015, p. 751).

[57] Such hold-up problems are best solved by restraints limiting intra-brand competition that, at the end of the day, are in the interests of manufacturers and customers. Otherwise, a low mark-up may lead to under-investment in service quality (Colangelo and Torti, 2018, p. 13).

[58] See para. 12 of the E-commerce Report.

One should not overlook in the context of the above considerations that, on the one hand, increased price transparency is a characteristic of e-commerce in general and not only of marketplaces. Therefore not all the above advantages are lost in cases of marketplace bans in SDS that do not preclude other means of online sales, as was the case in *Coty Germany*. On the other hand, the retailers may react to intensified price competition by adopting price-obfuscation tactics, such as making the price difficult to interpret, for example by creating multiple versions of products.[59] Additionally, some sources indicate that online prices are not necessarily lower than the offline ones (Duch-Brown and Martens, 2015, p. 3, 22–23).

2. Aggregation of consumer demand

It is also claimed that virtual marketplaces help to aggregate consumer demand. The effect is achieved by providing the customers with a high quality, trust-generating shopping experience, convenient infrastructure and by use of different advertising and marketing tools, among other things. The benefits stretch over both ends of this two-sided market. Customers are able to find in one place a wide variety of products that comprise not only the goods they are specifically looking for, but also those that accidentally attract their interest and hence create an additional demand. Sellers profit from traffic generated by other merchants to market their goods and make them visible to a greater number of potential buyers and to expand their offer.

The characteristic of marketplaces may, however, clash with the distribution and brand image strategies of manufacturers.[60] It is worth noting in this context the theory of silent thinking considered by Colangelo and Torti as developed by Helfrich and Herweg, 2017 (Colangelo and Torti. 2018, p.14). According to this theory, consumers are more willing to pay for (expensive) branded goods in a high price environment, because in such environment they are focused rather on quality than on price. It implies that manufacturers have an interest to restrict online (low price) sales, which can be a questionable strategy from the perspective of customers' interest.

3. Access to the market and cross border trade

Marketplaces are considered to generate economies of scale that improve access to markets. The platforms offer expertise (technological and often

[59] See in more details Buccirossi, 2015, p. 755.
[60] See para. 14 of the E-commerce Report.

commercial) otherwise unavailable, in particular to smaller market players. In simple words, those users may rely on the marketplace's ready-made infrastructure, such as the interface design or payment systems (Colangelo and Torti, 2018, p. 8). As Greenfield (quoting J. Kucharczyk, President of the Computer and Communications Industry Association (hereinafter; CCIA)) emphasize, this generates new opportunities. For instance, the marketplaces' offer of quality apps, enables the sellers to use mobile devices as a new marketing channel (Greenfield, 2017a). Moreover, it is claimed that online marketplaces help to increase cross-border trade.[61]

Overall, it is said that marketplaces make it easier to start an online business as they do not require high investments upfront. Online businesses in general have lower stock and logistics costs (Duch-Brown and Martens, 2015, p. 3). However, the use of the marketplace further helps to mitigate some of the costs and risks associated with e-commerce. The leitmotiv of the German Competition Authority is that thanks to marketplaces small and medium retailers can compete on an equal footing with larger retailers and manufacturers. The latter increasingly compete with own retailers online.[62] As argued in the Adidas and ASICS decisions,[63] on one hand customers favour marketplaces because of proven customer experience, the system of endorsements and trusted payment methods. On the other hand, offers from smaller retailers' own online shops are invisible if they are not powered by marketplaces where customers normally initiate their search. Marketplaces make it possible for smaller retailers to compete for higher ranks in general search engines results, otherwise dominated by large retailers and manufacturers.

The sceptics of marketplaces advance in turn that marketplaces increase the risks related to reputation and brand-image, including sale of counterfeit products. Additionally, this distribution channel does not ensure sufficient pre- and post-sales service, which in the long run can be detrimental to specialized distribution.

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[61] 'Online marketplaces make the digital single market a reality today by enabling sellers to reach consumers across the EU.' (Greenfield, 2017a). The Staff Working Document indicates that about a third of the retailers that responded to the questionnaire consider use of marketplaces to be one possible way of expanding their sales abroad. In general, the results suggest that marketplaces facilitate cross-border sales and that retailers that sell (also) via marketplaces are more likely to sell abroad (see para. 360 and 446 of the Staff Working Document).

[62] See comments from the President of GCA, Andreas Mundt as reported in Altrogge, 2017; Hunter, 2017.

[63] See section VII.1 below.

VI. Price comparison tools

1. PCT Pros and Cons

The Commission noted in its E-commerce Report the increased use of vertical restraints that is linked to the growth of e-commerce. The restriction on the use of price comparison tools is the fifth most popular one[64], and possibly next in line to be assessed by the courts. PCT restraints may take different forms. The Commission notes limitation: (i) to use, sell or promote on any PCT (total ban or requirement to receive prior approval from the supplier[65]) or (ii) on PCT that is specifically targeted at customers in other territories; (iii) to actively provide data feeds (price and product information) to PCTs; (iv) to use PCTs that present individual products and prices instead of focusing on the whole range of a given manufacturer's products; (v) to use the brand name, information, images provided by the manufacturer or (vi) making use of PCT dependent on certain quality criteria.[66]

The concerns voiced in relation to PCTs and marketplaces are often similar. Manufacturers fear that PCT focus on price competition and may make customers increasingly price sensitive, resulting in downward pressure on prices and reduced margins. This undermines the retailers' incentives to invest in service quality[67] and limits the sellers' ability to differentiate from others in terms of scope and quality of service. For these reasons, the PCT may be detrimental to brand image and consumer choice in the long run, in particular by reducing the number of specialized retailers (both traditional and online). The latter, having a higher cost structure, may have difficulties in matching the prices if the retailers are undercutting 'each other's prices to feature prominently on price comparison tools'.[68] It is also noted that PCT may give an unfair boost to second hand and counterfeit products, which rank higher in the search results.

[64] See para. 15 of the E-commerce Report. The proportion of retailers that have agreements containing a restriction on the use of PCTs is the highest in Germany (14%) followed by the Netherlands and Austria (13%), while it is quite low in Poland (7%) and France (6%). This corresponds with the proportion of retailers actually using a PCT, which in Germany is only 34% (the third lowest) and 48% in the Netherlands. The highest proportion is 61% (France) and 55% in Poland (third highest). Austria comes as a surprise, as it is the second (58%), despite the quite high proportion of retailers having such restrictions (see para. 521 and 526 of the Staff Working Document).

[65] The Commission thinks that a requirement to receive prior approval equals an outright ban.

[66] See para. 528 and next of the Staff Working Document.

[67] E.g. such aspects as delivery/return options, luxurious image, quality, features and style (para. 535 of the Staff Working Document).

[68] See para. 537 of the Staff Working Report.

Some manufacturers note, however, the positive impact of PCTs, because customers rely on them when making purchasing decisions and PCTs provide helpful product and seller reviews. They also make it easier to find authorized dealers and enhance brand visibility online.[69]

The restriction on PCT was discussed in the German ASICS case,[70] as ASICS prohibited its authorized distributors from linking their own websites to price comparison engines. The GCA considered that it was seriously undermining the ability of small and medium distributors to compete in the online world because PCTs have been important for making their offers visible. Therefore, the restriction was considered to be a 'by object limitation' of passive sales, unrelated in any way to quality requirements and 'not justified as a measure to protect brand image.'[71]

2. The Commission's stance concerning PCTs ban

According to the Commission, an absolute ban on price comparison tools may amount to a 'by object' restriction on passive sales and the retailer's customer group under Article 4(b) and (c) VBER. However, milder limitations are covered by VBER. For example, restrictions based on objective qualitative criteria in SDSs or restricting the use of tools specifically targeted at a territory or customer group reserved within exclusive distribution (the two may not be used simultaneously, though).

The Commission, noting that PCTs further facilitate price competition on the Internet, based its view primarily on two considerations. Firstly, the tools increase the retailers' visibility and allow the generation of traffic to the retailers' own websites. Thanks to PCTs, customers can at a very low cost find and compare the offers of different sellers. Limiting these options would make it more difficult for the retailers to reach out to customers outside their physical trading area, including attracting customers to the authorized distributors' own online stores.[72] In general, an absolute PCT ban risks undermining the benefits of the Internet that allows increasing visibility of authorized dealers.

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[69] Ibid., para. 534.

[70] The decision is discussed in more detail in section VII (1.2.) below.

[71] See ASICS Summary Decision, p. 8 (for detailed references see footnote 93 below).

[72] This has to be read in the context of the growing direct presence of the manufacturers, a phenomenon noted in the *ASICS* decision discussed below and by Ezrachi (Ezrachi, 2016). The retailers, including authorized ones, increasingly have to compete not only with other brands but also with own suppliers, who benefit from better visibility and price flexibility, among other things.

Secondly, price comparison tools are not a distinct online sales channel, and it is not there that competition takes place. 'The actual sale generally does not take place on the website of the price comparison tool, but on the website of the retailer to which potential customers are directed […] at which point the connection to the price comparison tool ends.'[73] In this respect, PCTs are different from marketplaces and do not affect authorized distribution systems (Colangelo and Torti, 2018, p. 20). Presumably, this fact is to diminish the risks stemming from increased focus of PCTs on price competition (not quality) and fear that it limits the sellers' ability to differentiate from competing offers. The Commission discarded the latter concerns about brand image by pointing out that more than 90% of PCTs improved the quality and image of the service. The upgrading included optimization of search relevance and interfaces as well as enhanced product presentation, fraud monitoring and customer protection.[74]

3. Practical implications

The Commission seemed to treat PCTs as an advertising tool rather than a distribution mode of its own. The arguments presented in support of PCTs as compared to marketplaces are somewhat unconvincing, as the main feature of marketplaces is also enhanced price transparency and offer visibility (as argued by the GCA in the Adidas and ASICS cases).

The practical consequences of this approach are that first, absolute bans on PCTs will not benefit from VBER and will be difficult to defend under Article 101(3) TFEU. Secondly, manufacturers have to carefully draft any quality requirements in order not to qualify for an absolute PCT ban. Thirdly, any quantity-based restrictions may be prone to disqualification. Lastly, and more generally, it confirms that any limitations that come close to a restriction on promotion and advertising in the online environment risk being perceived as restraints on passive sales unless explicable in light of the Vertical Guidelines (as already pointed out in section III.4 above).

VII. National examples

There are several decisions from courts and authorities of Germany, the Netherlands and France concerning marketplace bans that either predated or

[73] See para. 516 of the Staff Working Document.
[74] See para. 540 of the Staff Working Document.

followed *Coty Germany*. German jurisdiction is not only the one from which the *Coty Germany* case originated, but also the one that has delivered quite a substantial number of decisions relating to marketplace and PCTs bans. This is not surprising in view of the fact that Germany has the highest proportion of retailers using marketplaces.[75] This case law is illustrative in the context of the previously mentioned risk that post-*Coty* disparities may continue to appear at national level in respect of marketplace bans. It also highlights the bearing that different facts may have on the assessment of platform bans, for instance the importance of the marketplace status (whether it was admitted to the SDS or not) or if concerns for reputation are uniformly applied online and offline (ban on sales via marketplaces v. authorisation of sales in offline discount shops).

1. German Competition Authority cases

1.1. Adidas Decision (sportswear)

The GCA initiated proceedings against Adidas AG (hereinafter; Adidas) after having received complaints regarding Adidas's changes to its SDS introduced in 2013. According to the amendment 'consumers could not call up the [distributors'] site via or through a third-party platform if the logo of the third party is visible.'[76] In effect, this provision banned sales via third party platforms; only the use of marketplaces such as Zalando (closed marketplaces[77]) was allowed.

The GCA, disregarding the Logo Clause from the Vertical Guidelines, para. 54[78], held in Adidas Decision[79] that a per se ban on sales via online marketplaces constitutes a restriction of competition within the meaning of Article 101(1) TFEU. The authority found that such a blanket ban was not based on qualitative criteria, which would serve the objective purpose

[75] See para. 452 of the Staff Working Document.

[76] Adidas Summary Decision, p. 1.

[77] In these marketplaces, the retailers' offers are integrated with the platform-operator's shop.

[78] Under VBER, a supplier operating an SDS is allowed to impose certain conditions for the online sale of its products by authorized distributors. A 'logo clause' that concerns marketplaces, is one of the examples given to illustrate this point. Pursuant to it, 'the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.'

[79] Decision of 27.06.2014, Case B3-137/12 (hereinafter; Adidas Decision). The summary decision is available here: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2 (30.06.2018) (hereinafter; Adidas Summary Decision).

of protecting the brand image. The authority's primary concern was that Adidas ultimately restricted the number of consumers that its distributors could reach via the Internet, in particular small and medium distributors. As the authority emphasized, the latter cannot afford expensive nationwide advertising and are consequently dependent on being discovered by consumers by means of marketplaces.[80] Listing and advertising on general search engines was not a viable alternative as they are usually dominated by large retailers or manufacturers. Only listings from marketplaces could compete with the latter for higher ranks.

Furthermore, the GCA considered that Adidas could not justify the ban by reasoning that only experience with closed marketplaces was adequate, because customers' needs for professional advice vary depending on the product. Marketplaces (particularly bigger ones) are favoured due to the convenience and reliability of other customer reviews; they are also considered 'safer' and more trusted. The restriction was, therefore, ignorant of consumer preferences. Adidas could deprive customers of their favourite distribution channel only if the restriction would effectively remedy free riding problems, but that was not the case here. In this respect, the authority noted that free-riding occurs in the online and offline environment and it was for Adidas to provide within its system the sufficient incentives for the distributors to invest in brand presentation and customer advice rather than to disregard customer choice.[81]

The GCA concluded that both intra- and inter-brand competition were restricted and the prohibition could not benefit from an exemption because there were no efficiency gains to compensate for the limitation in price competition; moreover, consumers did not benefit from it. The restraint was inefficient (as it did not solve the free-riding problem) and, in any case, less restrictive alternatives were available.[82] The investigation closed in the end with Adidas making satisfactory changes to its system.

1.2. ASICS Decision (running shoes)

ASICS introduced a SDS in Germany, which prohibited the distributors from (i) using the ASICS' brand for online advertising, (ii) cooperating with PCTs and (iii) selling via online marketplaces.

[80] Ibid., p. 4. It was argued that the distributors own online shops are invisible to the customers unless they are powered by the marketplaces search engines, where the customers usually initiate their search.

[81] Ibid. Additionally, an aggravating circumstance in this case was that the same technique and restrictions were imposed by other participants in the sportswear market.

[82] Such as qualitative criteria applicable to marketplaces ensuring that offers of authorized distributors are recognizable. Ibid., p. 5–6.

The GCA found in the ASICS Decision,[83] the first two constraints to be hardcore restrictions of competition (limitation of sales to end usurers). They both had the effect of considerably reducing the opportunity and capacity of authorized distributors to advertise online and consequently to reach end consumers. In particular, the distributors' online offers were considerably more difficult to find, because they could not use the ASICS' brand in Internet-specific search and sale functionalities.[84] Furthermore, the restrictions could not be explained by TM protection considerations or effectively address free riding (which, if at all exists, was rather online than PCT-specific). The GCA also held that the *Metro I* criteria were not fulfilled, because the requirements were not purely qualitative in nature.[85]

With respect to the marketplace ban, the authority considered that it could amount to a restriction of competition by object that cannot benefit from VBER or from an individual exemption, but refrained from ultimately pronouncing on this issue.[86] In reaching this preliminary conclusion, the authority employed a similar reasoning as described in the Adidas case. It was held that the restriction posed a considerable barrier to sales to end customers, affecting particularly SMEs which are dependent on being found by consumers via third party platforms. The GCA found that the ban on online sales was not indispensible in order to protect the brand image[87], neither was it appropriate to address free riding. In the latter context it was for instance unclear how the ban would contribute to finance advisory services. ASICS could have instead provided financial support to aid the provision of such services, or simply require that online retailers maintain an offline store. In any case, ASICS could have imposed less drastic measures, for example by requiring that an option to limit search to authorized dealers is made available.

This decision was upheld by Bundesgerichtshof (federal supreme court for civil and criminal matters) in relation to findings on the first two restrictions

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[83] Decision of 26.08.2015, Case B2-98/11 (hereinafter; ASICS Decision). The summary decision is available here: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2 (accessed on 30.06.2018), (hereinafter; ASICS Summary Decision). For a discussion of the ASICS Decision refer to De Jong, 2016.

[84] I.e. use the brand 'in key-words in paid search engine advertisement, for the placement of advertisement on third party websites and within the context of backlinks for search engine optimisation' (ASICS Summary Decision, p. 4–5).

[85] Ibid. p. 5.

[86] Ibid. p. 2. The GCA deemed this question to be irrelevant since the other two restrictions have been classified as 'hardcore' and the entire system was, therefore, void.

[87] In fact, it considered that marketplaces do not necessarily harm product presentation or brand reputation and anyway, a manufacturer could enforce specific quality requirements based on his contractual relationship with the distributors (Ibid. p. 11).

shortly after the *Coty Germany* ruling was rendered.[88] The judgment received mixed comments, in particular because the Bundesgerichtshof held that the PCT ban is a hard-core restriction of sales to end-users without asking for guidance from the CJEU. Commentators note that the judgment could run counter to the logic behind *Coty Germany*, because the latter finds that concerns for the luxury status of a product legitimately justify limiting sales via some, but not all, on-line channels (Hazelhoff and Neuhaus, 2018). The Bundesgerichtshof discarded those doubts, since it endorsed the GCA's strict interpretation of *Coty Germany*, namely that it applies only to luxury goods (which, it found, ASICS products are not), (Kleine, Schaper and Lemberg, 2018).

Interestingly enough, ASICS ceased to apply the provisions that GCA has questioned before the case closed. The authority decided nonetheless to issue a declaratory decision because it would facilitate possible claims for damages in private enforcement actions.

2. Other German Cases

2.1. School Bags cases

There are two judgments concerning marketplace bans imposed in the framework of selective distribution of school bags that had opposite results (Schmidt-Kessen, 2018).[89]

The first was decided by the Higher Regional Court in Karlsruhe on 25 November 2009 (case 6 U 47/08 (Kart), *School Bags*). This judgment arose from a dispute between a distributor and a manufacturer when the latter refused to supply the contract products because the distributor was selling them on eBay, contrary to the provisions of their selective distribution agreement. The court held that the *Metro I* criteria were fulfilled in this case, consequently removing the selective distribution agreement from the scope of the application of competition law. The court ultimately 'came to the conclusion that the producer's interest of not having sold its goods over eBay, which had a quality-reducing 'flea market' image, outweighed distributors interest of using eBay as a convenient selling platform.' (Schmidt-Kessen, 2018, p. 308). The fact that some of the products were also traded in brick

[88] *Judgment of Bundesgerichtshof* of 12.12.2017, Case KVZ 41/17.

[89] Section 2 is based in particular on the short overview of those decisions by Heinz, 2016 and Schmidt-Kessen, 2018, p. 308–309.

and mortar discount shops did not conflict with this justification as they were only products from older collections.[90]

In the second judgment of 19 September 2013 (2 U 8-09 (Kart), *School Backpacks and Bags*), the Higher Regional Court in Berlin reached the opposite conclusion and held the contested marketplace ban to be illegal. It decided that although the *Metro I* criteria could have removed the SDS from the scope of the application of competition law, it failed to do so because the criteria have been applied in a discriminatory manner. '[T]he producer had sold some of the remaining stock through physical (offline) discount stores, [therefore] it could not claim that sales over eBay would harm the image of its branded products, because online and offline environment had to be treated alike to benefit from a Metro I type exemption.' (Schmidt-Kessen, 2018, p. 309). Additionally in this case, the need to protect the product image was not justified as schoolbags are not products that signal any special social status (as opposed to clothes or watches).[91] In the view of the Court, the ban constituted a hardcore restriction (Article 4(b) VBER), hence could not qualify for a block exemption.[92]

2.2. Functional Backpacks (Deuter)

The case concerned the ban on selling Deuter backpacks via Amazon. The Higher Regional Court in Frankfurt in its judgment of 22 December 2015 (11 U 84/14 (Kart)) held that prohibiting distribution of high quality sports backpacks via a third party platform was justified under the *Metro I* criteria. In particular, it was necessary to ensure the appropriate customer service and to signal the high product quality of the backpacks (Schmidt-Kessen, 2018, p. 309). Sufficient customer service could not be provided when selling on marketplaces and was incomparable with assistance provided online and off-line within the SDS. Additionally, customers often were unaware that the products were being sold by the distributor and not Amazon. The court also

[90] In 2009, the Higher Regional Court in Munich in its judgement of 02.07.2009, Case U (K) 4842/08, also considered an eBay ban as imposed legally because it did not amount to a general prohibition of online sales (see comments from Heinz, 2016; Seifried, 2013).

[91] See comments from Seifried, 2013. See however comments regarding watches in the footnote 92 below.

[92] Similarly, the Higher Regional Court in Schleswig in its judgment of 05.06.2014 in case 16 U (Kart) 154/13 (Casio cameras) had decided that marketplace (such as Amazon) and auction sites (as eBay) bans are illegal because they foreclose the retailers from markets. Marketplaces are important for them to compete with other sellers. Justification based on the fact that cameras are a technologically complicated product and therefore require sales advice was rejected. It was, however, important in this case that Casio was not operating an SDS. See Damm, 2014; Der Betrieb portal, 2014; Heinz, 2016; Wilde Rechtsanwälte, 2014.

noted that Deuter applied the requirement in a non-discriminatory manner as Amazon was not its authorized distributor (Seifried, 2016). The court held, however, that the PCT ban provided for by Deuter in its SDS was illegal.

3. Dutch Nike Case

Nike European Operations Netherlands (hereinafter; Nike) operated a selective distribution agreement, whereby Nike products were to be sold only on the sites of authorized distributors, including authorized online marketplaces such as Zalando.[93] Action Sports, an authorized distributor of Nike began selling the contract products on Amazon, which was not an authorized distributor of Nike. For this reason, Nike found that Action Sport was in violation of the terms of the SDS, terminated its cooperation with Action Sport and sought a declaratory judgment confirming the legality of this decision and Nike's distribution policy.

The Dutch District Court of Amsterdam[94] decided the case before *Coty Germany* but has relied on the opinion of Advocate General Wahl issued in *Coty Germany*. The court found that in the framework of the SDS, prohibiting sales of luxury goods on unauthorized online marketplaces is deemed consistent with Article 101(1) TFEU, provided certain criteria are satisfied. It then established that Nike products are luxury products and, referring to AG Wahl's opinion, held that in this case the restriction was justified in order to protect the luxury image of the products (Kmiecik, 2017). Action Sport sold the contract products on the site of an unauthorized third party, therefore it was irrelevant whether Amazon met the quality standards imposed under the SDS. Had Amazon fulfilled those criteria and wished to join Nike's SDS, Nike would have to admit Amazon based on the principle that qualitative criteria have to be applied in a non-discriminatory manner. As Kmiecik emphasized, the court did not consider the possibly of applying quantitative criteria and possible recourse to VBER (Kmiecik, 2017).

4. French cases

In 2007, the French Competition Authority (hereinafter; FCA) issued a decision concerning e-distribution of cosmetics and hygiene products that examined practices of several suppliers in the para-pharmaceuticals

[93] For a case description and analysis, see Desmedt, 2017; Kmiecik, 2017; Ten Have, 2017.

[94] Judgment of 04.10.2017, Case C/13/615474 / HA ZA 16-959, available at: https://www.recht.nl/rechtspraak/uitspraak?ecli=ECLI:NL:RBAMS:2017:7282 (accessed on 30.06.2018).

sector.[95] The FCA recognized in this decision that the suppliers operating SDS may prohibit sales via marketplaces in order to prevent illegal parallel trade or sales of counterfeit products and to protect product image. This authority took account of the fact that marketplaces failed to ensure that the identity of the seller is apparent to the buyer.[96]

In its later notice concerning E-commerce (hereinafter; the 2012 Notice)[97], the FCA emphasized however that the above position concerning platform bans was not definitive. It stated that such restraints may amount to an illegal restriction of competition.[98] This would be the case, in particular, when the marketplaces satisfy qualitative requirements, for example by creating zones (e-boutiques) reserved for authorized distributors. Jalabert-Doury notes that the latter view was reaffirmed in the FCA's decision of 23 July 2014 concerning Samsung's marketplace ban relating to the distribution of home electronics.[99]

More recently, Cour de cassation has revealed a tolerant approach towards marketplace bans. It annulled the decision of the Court of Appeals that rejected the request to stop the commercialization of Caudalie's cosmetics via a third party marketplace, which violated the prohibition of resale outside of SDS.[100] Ferrier pointed out that the judgment indicates that a platform ban may be exempted from the prohibition of vertical restrictions (Ferrier, 2017, p. 111). This contrasts with the GCA's strict approach to marketplace bans (Blanchard, 2018, p. 20).

VIII. Conclusions

The key implications of *Coty Germany* and recent developments concerning e-commerce restrictions, in particular findings of the E-commerce Report, are the following.

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[95] Décision n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle, retrieved from http://www.autoritedelaconcurrence.fr/pdf/avis/07d07.pdf (accessed on 30.06.2018).

[96] Ibid., para. 104.

[97] Autorité de la concurrence, Avis n° 12-A-20 du 18.9.2012 relatif au fonctionnement concurrentiel du commerce électronique, retrieved from: http://www.autoritedelaconcurrence.fr/pdf/avis/12a20.pdf (accessed on 30.06.2018).

[98] Ibid. para. 354.

[99] Jalabert-Doury, 2018, p. 7. See Décision n° 14-D-07 du 23 juillet 2014 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits bruns, en particulier des téléviseurs, para. 181, 184, retrieved from: http://www.autoritedelaconcurrence.fr/pdf/avis/14d07.pdf (accessed on 30.06.2018).

[100] Judgment of 13.09.2017, Case *Caudalie c/ eNova santé* no 16-15.067.

In the first place *Coty Germany* affirms that it is legitimate to use selective distribution to ensure the maintenance and creation of the image of luxurious goods (provided long-established *Metro* conditions are met). This confirms a narrow understanding of the *Pierre Fabre* judgment. Moreover, under same conditions, platform bans applied in those systems do not hamper competition. In other words, selective distribution of luxury products, including when providing for marketplace bans, is not restrictive of competition at all, that is, it falls outside of the realm of Article 101 TFEU.

Second, platform bans applied in relation to other products, that is, in selective distribution of non-luxury products, may restrict competition. However, *Coty Germany* removed marketplace bans from the category of most serious restrictions of competition (the 'by object box'). This is because the CJEU confirmed that platform bans should not be viewed as limiting passive sales or the retailer's customer group. In this situation, platform bans for non-luxury products should be assessed based on the effects they produce, or risk to produce. Should such anticompetitive risks materialise, the SDS for non-luxury products providing for platform bans may still be considered compatible with competition law based on either individual or block exemption.

The availability of an individual exemption will most likely require demonstrating the existence of significant downstream investments (investments on the distributor level) that justifies the need for protection against free riding. Generally, it can be assumed that it will be easier to successfully argue for an individual exemption in case of platform bans used in relation to branded products and products that traditionally are considered to justify the recourse to selective distribution. By contrast, platform bans concerning products that normally do not need specialised distribution (and related significant downstream investments) are unlikely to stand the test of Article 101(3)TFEU and its national equivalents.

The law as interpreted in the light of *Coty Germany*, appears more flexible in case of platform bans provided for in smaller networks where the parties' market shares do not exceed 30% and so may benefit from the block exemption. The primary reason behind it is that the benefits of the block exemption are limited by market share thresholds (30% with some variations), rather than by the nature of the contract good. Therefore, VBER by force of presumptions upon which it is based, applies to marketplace bans introduced in relation to any product and independently of the scope of downstream investments as long as its general conditions are met. This is of course notwithstanding the possible withdrawal of the benefits of the block exemption under VBER.

In the light of the above, luxury products benefit from a privileged treatment. Limitations on sales via marketplaces in case of those products comply with

competition law irrespectively of the supplier's or the distributors' market shares and without the need to reach for the block exemption. Suppliers of other products will need to justify the specific market definitions and the parties' market shares before they rely on VBER (or an individual exemption since there the size of market shares may influence the assessment). The special status of luxury products may be explained by assumption that those products normally require considerable investments and a specific interrelation between price-scarcity and the value of the product.

The suppliers of luxury products will, however, continue to have recourse to VBER (if market share and other conditions so permit) in cases of systems that combine quantitative and qualitative selection criteria, or when the luxury status of the product is in doubt or is difficult or time consuming to prove. The challenges concerning the determination of the status of the contract goods can be quite frequent, given the CJEU's silence on what exactly constitutes a 'luxury' good, and the fact that it has been left for the national courts to assess. The multitude of possible challenges that are likely to arise when defining what is a 'luxury' good, stand among the reasons why post-Coty diverging approaches across member states to platform bans cannot be excluded.

The above reading of *Coty Germany* corresponds with the Commission's views expressed in the E-commerce Report, according to which platform bans are not hardcore restrictions of competition, whereas PCT bans are. In the context of platform bans, the Commission has not made any reservations concerning the nature of the contract product. However, as discussed and illustrated by the national case law recalled earlier, a broad interpretation of *Coty Germany* may be questioned in some jurisdictions, in particular by the GCA.

An alternative stance is that platform bans may amount to hardcore restrictions if applied in relation to non-luxury products. The authors do not share such view, mostly because the CJEU has not justified its stance on marketplace bans by arguments related to the goods' nature. The CJEU was rather focused on the limited character of Coty's prohibition (both in terms of sales and advertisement options) and the fact that marketplaces are only one of several ways to sell online, and not even the main one (as the E-commerce Report has revealed). Furthermore, broader interpretation of *Coty Germany* is justified by the arguments advanced by economists.

The lesson stemming from the CJEU's approach is such that, firstly, if marketplaces are considered, they should not be combined with a restriction on sales via the distributor's own site or with restrictions on on-line advertising. In general, e-commerce related restraints should not be assessed in isolation from one another. Moreover, it is apparent from the line of reasoning employed by the CJEU, as well as the Commission in the E-commerce Report, that

limitations akin to restrictions on advertisements, including PCTs and the use of search engines, will continue to be viewed with hostility.

Secondly, there are greater risks that anticompetitive effects are established (or the likelihood of such) in case of products that significantly depend on marketplace distribution. The latter circumstance is, again, one behind fears that approach to marketplace-related restrictions will continue to differ across the EU.

In any case, platform bans will have to be applied carefully, because the limits between an absolute ban on online sales and limitations imposed in relation to selected online channels may be difficult to define. Perhaps the upcoming review of the Vertical Guidelines will shed more light on those as well as on new issues. For instance, it will be interesting to see how the Commission will approach the emerging practice of certain marketplaces to create high-standard services dedicated to branded products.

Overall, the system established post-Coty seems to be reasonable. It privileges to certain extent luxury goods, but does not prejudge the legality of restrictions applied in relation to other goods that can broadly benefit from VBER. The system allows therefore for closer surveillance of restraints applied in relation to non-luxury products when considerable levels of market power are attained.

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What's New in Western Balkans?

by

Dragan Gajin*

CONTENTS

Abstract

Western Balkan jurisdictions (Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia (FYROM)) are often outside the focus of the competition community in the EU. This paper aims to rectify that, by providing an overview of the most interesting competition law developments in these jurisdictions during 2017. The overview will show that, despite similarities in their competition legislation, the observed jurisdictions differ when it comes to their priorities in competition law enforcement: while for some the accent is on merger control, for others it is on antitrust. The paper also highlights certain peculiarities of the observed jurisdictions, even though they are all based on the EU model. These include the existence of a notification system with respect to individual exemptions of restrictive agreements in three out of the four observed jurisdictions.

* Competition law expert and an attorney registered in Serbia and New York; Partner and the head of the competition practice at Doklestic Repic & Gajin, a full-service law firm based in Belgrade, Serbia; Visiting Lecturer at the University of Szeged, Hungary; e-mail: dragan@gajin.rs; blog: www.gajin.rs. Article received: 23 August 2018; accepted: 28 August 2018.

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Résumé

Les juridictions des Balkans occidentaux (Serbie, Monténégro, Bosnie-et-Herzégovine et Macédoine (ARYM)) souvent ne sont pas au centre du débat sur la concurrence d l'UE. Cet article vise à remédier à cela, en donnant un aperçu des plus intéressants développements du droit de la concurrence dans ces pays au cours de 2017. La vue d'ensemble indique que, en dépit des similitudes dans leur législation sur la concurrence, les juridictions observées diffèrent en ce qui concerne leurs priorités en matière d'application du droit de la concurrence: alors que pour certains l'accent est mis sur le contrôle des concentrations, pour d'autres il est sur la concurrence. L'article met également en évidence certaines particularités des juridictions observées, même si elles sont toutes basées sur le modèle de l'UE. Ceux-ci comprennent l'existence d'un système de notification en ce qui concerne les exemptions individuelles des accords restrictifs dans trois des quatre juridictions observées.

Key words: Western Balkans; EU; competition law; individual exemption; merger control; antitrust; restrictive agreements; abuse of dominance.

JEL: K21

I. Introduction

Competition law developments in Western Balkan jurisdictions[1] are usually outside the focus of EU observers in this field. This is understandable – individually, all these countries are fairly small, especially in terms of their economic strength. Nevertheless, interesting things are going on there as well, as this short overview will show.

The competition laws of all four countries are very similar, in particular with respect to substantive rules. This comes as no surprise, as all these countries have based their competition legislation on the EU model, as part of their proclaimed goal of joining the EU. As part of the EU accession process, each of these countries has concluded a Stabilization and Association Agreement with the EU, which, inter alia, provides a legal basis for the approximation of local competition regimes with the EU model.[2]

[1] For the purpose of this article, these are: Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia (FYROM).

[2] On this topic, see more in: Kojovic T. & Gajin D. (2012). Vertical Restraints under Serbian Competition Law: A Comparison with EU Law, *European Competition Law Review 33*(8), 357–366.

Another factor which connects these four jurisdictions is that they all used to be part of Yugoslavia, a fact that additionally contributes to the similarities of their legal systems. Specifically, while after the break-up of the former Yugoslavia the legal systems of Yugoslav republics started diverging, this divergence has not been dramatic, since all of them (at least declaratively) are focused on bringing their legislation in line with the EU acquis.

Despite all the similarities, the competition laws of the Western Balkan jurisdictions also have their peculiarities, especially when it comes to the way the competition rules are applied in practice. For instance, in some of the jurisdictions the focus of the local national competition authority (hereafter, NCA) is on antitrust, while in others it is on merger control. Also, some of the jurisdictions provide for self-assessment of restrictive agreements, while others still require a notification to the NCA.

A period of one year is a good interval for providing an overview of what is going on in a specific jurisdiction and that is what this article will focus on. Specifically, the article will present an overview of the 2017 activities of Serbia's Commission for Protection of Competition (hereafter, Serbian NCA), Montenegro's Agency for Protection of Competition (hereafter, Montenegrin NCA), Bosnia and Herzegovina's Competition Council (hereafter, Bosnian NCA), and Macedonia (FYROM)'s Commission for Protection of Competition (hereafter, Macedonian NCA). Certain developments from 2018 will also be mentioned, though they will not constitute a focus of this paper.

This article will cover antitrust (restrictive agreements and abuse of dominance) and merger control, with State aid remaining a topic for an article of its own. Further, Serbian developments will be given most attention, as it is by far the largest of the four countries and with, arguably, the most active NCA in the region.

II. Serbia

In the field of antitrust, the Serbian NCA was active both with respect to restrictive agreements and the abuse of dominance.

Restrictive agreements

During 2017, the Serbian NCA issued three infringement decisions in the area of restrictive agreements and opened three new cases.[3] This represents

[3] The statistical data concerning the activity of the Serbian NCA is based on information available on the NCA's website (http://www.kzk.gov.rs/).

a slight increase in the NCA's activity compared to 2016, when the watchdog issued two infringement decisions and opened three investigations.

Infringement decisions

In March 2017, the NCA issued a decision establishing that two Serbian cooking oil producers, Vital and Victoriaoil, had entered into a restrictive agreement.[4] The watchdog found that a cooperation agreement between the parties was restrictive as it limited and controlled the production of cooking oil in Serbia. The case is particularly interesting since it did not concern a restriction by object and so the NCA undertook to show that the agreement produced negative effects on the market. Both producers were fined 0.33% of their respective annual turnover (in absolute terms, the fine for Victoriaoil was approximately EUR 200,000 and for Vital EUR 70,000).

The other two infringement decisions both came at the very end of the year.

The first concerned the imposition of minimum resale prices of sportswear.[5] Apart from the distributor N Sport, the NCA also investigated (and fined) 14 retailers which had an agreement with N Sport with a minimum resale price obligation. The distributor was fined approximately EUR 140,000 (0.62% of its relevant annual turnover), while the retailers were fined between 0.2% and 0.29% of their respective annual turnovers (in absolute terms, the highest of those was approximately EUR 130,000).

Finally, the NCA established the existence of bid rigging concerning the overhaul of rail vehicles.[6] Specifically, four service providers had agreed on the terms of their bids in order to ensure that each of them was awarded at least a part of the tender. Famously, the collusion between the parties included a meeting at a cafe in Belgrade. Each of the undertakings was fined 2% of its respective annual turnover on the Serbian market (in absolute terms, the fines ranged between approximately EUR 12,000 and EUR 42,000).

New investigations

Apart from closing pending investigations, during 2017 the NCA also opened some new ones.

The first case the watchdog opened last year concerned alleged bid rigging in public tenders for the supply of hygiene products to the Serbian Ministry of Defence.[7] Five companies in total have been included in the investigation so far.

The NCA also started investigating Imlek, the largest Serbian dairy, and Kruna-Komerc, a Serbian dairy products trader.[8] The authority is alleging that

[4] Resolution of the Serbian NCA No. 4/0-02-58/2017-1 of 13 March 2017.
[5] Resolution of the Serbian NCA No. 4/0-02-89/2017-31 of 1 December 2017.
[6] Resolution of the Serbian NCA No. 4/0-02-76/2017-21 of 8 December 2017.
[7] Conclusion of the Serbian NCA No. 4/0-02-402/2017-1 of 22 May 2017.
[8] Conclusion of the Serbian NCA No. 4/0-02-418/2017-1 of 31 May 2017.

the companies had engaged in bid-rigging by coordinating their commercial behaviour with respect to a public procurement bid.

Finally, the NCA opened an investigation concerning vertical price-fixing by an importer of Škoda cars to Serbia and 19 of its dealers/repairers.[9] According to the watchdog, the agreements between the importer and the dealers all contain a provision which maximizes the rebate which the respective dealer is allowed to grant to the buyer when participating in public tenders.

Individual exemption: towards self-assessment?

Serbia still has a system of individual exemptions of restrictive agreements which requires a prior notification to the NCA – comparable to the system which existed in the EU under Regulation 17/62. Over the last couple of years, the number of exempted agreements has been around 20 annually. The trend continued during 2017, with 21 individual exemptions.[10]

However, individual exemptions based on a notification may soon be a thing of the past. Specifically, the NCA has hinted in 2018 that the new Competition Act, which is currently being drafted, will eliminate the notification system and instead introduce self-assessment of restrictive agreements. Since this possibility has also been mentioned before, it remains to be seen whether this time it will actually be realized.

Abuse of dominance

Closed cases

During 2017, the Serbian NCA closed two abuse of dominance cases: in one instance it established an abuse of dominance while in the other it closed a case which had been earlier suspended based on commitments.

The infringement case concerned excessive pricing by a company operating a bus station in central Serbia.[11] The company was vertically integrated, in that it also acted as a bus operator. The NCA established that the price which the station operator was charging bus operators for station services was excessive, as the costs which could be allocated to the service in question justified a price of only a little more than half of the price actually charged.

The NCA also definitely closed an investigation it had launched against the Serbian state railways back in 2013, which was suspended in 2016 based on commitments offered by the railways.[12] The alleged infringement consisted of the investigated company preventing access to its railway infrastructure

[9] Conclusion of the Serbian NCA No. 4/0-02-417/2017-1 of 31 May 2017.

[10] According to the Serbian NCA's annual report for 2017 (available at: http://www.kzk.gov.rs/kzk/wp-content/uploads/2018/05/Godisnji-izvestaj-KZK-za-2017-godinu.pdf).

[11] Resolution of the Serbian NCA No. 5/0-02-90/2017-131 of 23 October 2017.

[12] Conclusion of the Serbian NCA No. 5/0-02-57/2017-4 of 22 September 2017.

to other undertakings. In November 2017, the watchdog confirmed that the railway company has fulfilled its commitments and accordingly definitely closed the abuse of dominance probe.

New investigations

In 2017 the NCA opened three new abuse of dominance investigations.

In May 2017, the NCA launched an investigation against Frikom, the largest Serbian ice cream manufacturer.[13] The NCA alleged that Frikom had been giving incentives to its customers to purchase ice cream exclusively from Frikom. The incentives allegedly consisted of rebates and money payments to retailers in order to keep them from purchasing ice cream produced by Frikom's competitors.

Then, in September 2017, the NCA started investigating the operator of a bus station in northern Serbia for illegal discrimination.[14] The bus station operator is a vertically integrated undertaking, owning not only the bus station but also a bus company. It appears that the watchdog is treating the bus station operator as a dominant undertaking, which was charging its related bus company more favourably than the competitors of this bus company.

Finally, in November 2017, the NCA started another bus station case, this time against the operator of a bus station in southern Serbia.[15] This company also serves as a bus operator. Here as well, the NCA alleged illegal discrimination by the bus station, in that the service fees charged by the bus station favour its own bus operator compared to non-related operators.

Merger control

The first fine for gun-jumping in Serbia

Perhaps the most important event related to merger control in Serbia during 2017 was that the NCA issued its first ever fine for gun-jumping. Specifically, the fined undertaking had failed to notify to the watchdog a change from joint to sole control in a transaction where the Serbian merger notification thresholds were exceeded.[16]

The NCA fined the infringing company EUR 56,000 or 0.25% of the undertaking's turnover in the relevant year, which was far below the ceiling of 10% of the turnover. It remains to be seen whether this was an isolated case of the NCA going after gun-jumping or whether this trend will continue in 2018 as well.

The number of merger decisions once again surpasses 100

[13] Conclusion of the Serbian NCA No. 5/0-02-414/2017-1 of 29 May 2017.
[14] Conclusion of the Serbian NCA No. 5/0-02-581/2017-1 of 22 September 2017.
[15] Conclusion of the Serbian NCA No. 5/0-02-724/2017-1 of 17 November 2017.
[16] Resolution of the Serbian NCA No. 6/0-03-23/2017-11 of 12 July 2017.

During 2016, the Serbian NCA reached an important milestone, as the number of merger decisions since its formation surpassed 1,000.[17] Annually, the watchdog examines around 100 mergers, and 2017 was a continuation of this trend, with as many as 139 merger clearances.

Such a large number of merger decisions is down to the fact that Serbia has extremely low merger notification thresholds, which are triggered even in the case of extraterritorial concentrations with little or no effect in Serbia. To put this into perspective: during 2017, almost half of the clearance decisions concerned transactions where the target was either not at all present in Serbia, or its presence was negligible.

One Phase II opened, one closed, one abandoned

During 2017, the NCA opened only one Phase II merger investigation, pertaining to the planned acquisition of a Serbian yeast producer (owned by the American Alltech) by the French giant Lesaffre.[18] The in-depth investigation came due to a market overlap in Serbia. The watchdog eventually cleared this transaction in February 2018, though with some strings attached.[19]

Earlier in 2017, the NCA had also closed one Phase II investigation that it had started back in 2016. Specifically, the NCA conditionally approved the takeover of I.KOM, a Serbian cable operator, by its rival Serbia Broadband (SBB).[20] The most important condition was for SBB to divest the parallel secondary network infrastructure in areas where the networks of the parties overlapped.

Finally, during 2017 the NCA abandoned its *ex officio* investigation into a potential gun-jumping by the Serbian subsidiary of Banca Intesa.[21] When opening the investigation, the NCA alleged that the bank should have notified the acquisition of an office building in Belgrade.[22] In the end, however, the NCA did not find any wrongdoing by Banca Intesa and abandoned the case.

III. Montenegro

During 2017, the activities of the Montenegrin competition authority continued to be focused on merger control, with antitrust enforcement a bit in the shadow. In the authority's own words, one of the main obstacles towards

[17] Based on data available in the annual reports of the Serbian NCA.
[18] Conclusion of the Serbian NCA No. 6/0-03-653/2017-1 of 10 October 2017.
[19] Resolution of the Serbian NCA No. 6/0-03-94/2018-6 of 6 February 2018.
[20] Resolution of the Serbian NCA No. 6/0-03-01/2017-26 of 13 March 2017.
[21] Conclusion of the Serbian NCA No. 6/0-03-80/2017-4 of 27 January 2017.
[22] Conclusion of the Serbian NCA No. 6/0-03-191/2016-1 of 12 February 2016.

a more effective competition law enforcement in Montenegro is the procedure for imposing fines for competition law infringements.[23]

Antitrust: NCA performs a dawn raid

Perhaps the most exciting event in Montenegrin antitrust during 2017 was a dawn raid performed in March by the NCA. Based on scarce information the NCA provided about the event, the targeted company was Sava Trans, based in Cetinje.[24] The official NCA statement revealed only that the company was cooperative during the raid, but did not provide further information what the raid was about.

The NCA's annual report for 2017 is still to be published, and so it is not known at the moment how many antitrust proceedings the watchdog started during 2017 (if any). Presumably, the NCA started at least one official investigation during this period (in the case where it performed the dawn raid).

Also related to antitrust: same as in Serbia, there is no self-assessment in Montenegro for individual exemptions of restrictive agreements – you need to notify such agreements to the NCA in advance to be able to escape a prohibition. On this front, it seems 2017 was a quite year in Montenegro, with only one individual exemption published so far.

Lack of power to impose fines hampering the effectiveness of NCA activities?

One of the issues the NCA has consistently complained about is the perceived ineffectiveness of the system for imposing fines. Specifically, the Montenegrin NCA does not have the power to impose fines – it can only initiate misdemeanour proceedings before a misdemeanour court. And competition law enforcement before such courts has so far had mixed effects – to say the least.

Inadequately short limitation periods for competition law infringements are another problem perceived by the Montenegrin NCA. According to the authority, combined with the procedural rules allowing parties to challenge not only the final decision but also other decisions the NCA renders during a proceeding, the current limitation periods hinder the effective enforcement of competition law and should be extended.[25]

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[23] See Montenegrin NCA's Annual Report for 2017 (available at: http://www.azzk.me/1/doc/ostala%20dokumenta/Izvjestaj%20o%20radu%20AZZK%20za%202016.pdf).

[24] Statement of the Montenegrin NCA of 22 March 2017 (available at: http://www.azzk.me/novi/joomlanovi/171-saopstenje-ovlascena-lica-agencije-sprovela-nenajavljeni-neposredni-uvid).

[25] See Montenegrin NCA's Annual Report for 2017 (available at: http://www.azzk.me/1/doc/ostala%20dokumenta/Izvjestaj%20o%20radu%20AZZK%20za%202016.pdf).

Phase I clearances continue to dominate merger control

Unlike the antitrust sphere, in the field of merger control the NCA renders decisions on a regular basis. Based on what has been published so far, the Montenegrin NCA rendered 37 merger decisions during 2017. All decisions were unconditional Phase I merger clearances.

Such a high number of merger decisions (in comparison to the size of the economy) is the result of low merger notification thresholds applicable in Montenegro, which lead to around 30 merger cases each year. For instance, the NCA issued 33 merger decisions in 2015, 28 in 2016, and, as mentioned, that number reached 37 in 2017.[26]

NCA to assume State aid powers

Until recently, apart from its NCA, Montenegro also had a watchdog in charge of the enforcement of State aid rules. The special State aid authority was abolished in 2018, and State aid powers were transferred to the NCA.[27] It remains to be seen how this will affect the watchdog's enforcement zeal in the 'traditional' competition law spheres – restrictive agreements, abuse of dominance, and merger control.

IV. Bosnia and Herzegovina

NCA gets new members

In Bosnia and Herzegovina, perhaps the most significant event of 2017 was the appointment of new members of the Competition Council, the country's competition authority. The NCA has six members, appointed for a period of six years, with each member presiding over the Council during one of those six years.[28]

[26] According to the information available on the website of the Montenegrin NCA (http://www.azzk.me).

[27] Law Amending the Law on Protection of Competition (Official Gazette of Montenegro, No. 13/2018).

[28] Law on Competition (Official Gazette of Bosnia and Herzegovina, Nos. 48/05, 76/07 and 80/09 (hereafter, Bosnian Competition Act), Article 22).

Focus remains on antitrust

Quasi-private antitrust enforcement?

Bosnia and Herzegovina is an interesting competition law jurisdiction, with a focus on antitrust rather than on merger control. This is in contrast with Serbia, Montenegro, and Macedonia, where merger decisions dominate – due to the low merger notification thresholds applicable in those jurisdictions.

Also, what contributes to the high level of antitrust activity of the Bosnian NCA is that, in Bosnia and Herzegovina, an antitrust proceeding can be initiated not only *ex officio* by the NCA, but also upon request of an interested party (complainant). In practice, the majority of the cases is initiated by complainants, and this state of affairs could even be qualified as quasi-private antitrust enforcement (which deserves to be addressed in more detail on some other occasion).

Infringement decisions are a rare animal

Despite the relative ease when it comes to initiating infringement proceedings, infringement decisions are quite rare in Bosnia and Herzegovina. For instance, based on information available on the NCA's website, the NCA initiated as many as eight restrictive agreements proceedings in 2017, while it did not establish any infringements in the form of a restrictive agreement.

The situation is similar with respect to the abuse of dominance: seven such proceedings were started in 2017, but only one infringement decision was rendered.

Individual exemption: notification

Like Serbia and Montenegro (and unlike Macedonia), Bosnia and Herzegovina still has a notification system for individual exemptions of restrictive agreements.

According to information available on the NCA's website, during 2017 there appear to have been at least two such notifications: one was granted and the other rejected. The latter was rejected on procedural grounds, since the NCA found that the agreement was not restrictive, as it was between related parties.

Merger control: dismissed notifications dominate

Unlike Serbia, Montenegro, and Macedonia, where a transaction can be notifiable even if the target had no turnover in the respective jurisdiction, in Bosnia and Herzegovina the target needs to be present on the local market in order for the merger notification duty to arise. Due to this, the number of merger decisions in Bosnia and Herzegovina is naturally lower than in the three other Balkan jurisdictions.

Specifically, judging from what is available on the NCA's website, during 2017, there seem to have been only two Phase I clearances; additionally, one clearance was granted after a Phase II probe. This number could be higher, since some merger decisions might have not been published on the NCA's website. Nevertheless, that number cannot rise dramatically and should be much lower than in the neighbouring jurisdictions (as noted, in Serbia there were as many as 139 merger clearances in 2017).

What is also characteristic about Bosnia and Herzegovina is that one of its merger notification thresholds is based on market shares.[29] Due to this, the parties might not always know with certainty whether their transaction is 'notifiable' or not. As a result, more careful parties notify their transactions and leave it to the authority to decide whether there is a notification duty or not. As evidenced by information on the NCA's website, the NCA dismissed during 2017 at least eight notifications as no notification obligation had existed.

An ethnic veto in Bosnian competition law enforcement?

A peculiarity of competition law enforcement in Bosnia and Herzegovina is what could be called an 'ethnic veto'. This is since, for a decision of the NCA to be adopted, at least one representative of each of the three major ethnic groups in Bosnia and Herzegovina must vote for it,[30] which can lead to a blockade in the watchdog's decision-making process.

Based on information from the NCA's website, at least two such blockades occurred during 2017, as the NCA failed to reach a decision in one merger control case and in one abuse of dominance case. As a result, the notified concentration was 'cleared' by virtue of the law and the abuse of dominance case had to be closed.

It remains to be seen whether we will experience this in 2018 as well, or whether the decision-making process will be changed in that respect.

V. Macedonia (FYROM)

Antitrust: breweries pay millions of euros in fines

According to the news section of the website of the Macedonian NCA, 2017 was the year for the Macedonian NCA to go after breweries. It fined two of them, both for hardcore vertical restraints.

[29] Bosnian Competition Act, Article 14, paragraph 1, item b).

[30] Bosnian Competition Act, Article 24, paragraph 2.

The first fine went to Pivara Skopje AD (Skopje Brewery). Specifically, the NCA ordered the brewery to pay EUR 5.8 million for having price-fixing clauses in contracts with its distributors in the period between 2012 and 2017.

The second fine was for Prilepska Pivarnica AD (Prilep Brewery). This brewery got a fine of EUR 2.7 million for vertical price-fixing and the use of non-compete clauses of indefinite duration. The Macedonian NCA considers both as restrictions by object.

Individual exemption: self-assessment

Unlike the three other Western Balkan jurisdictions, Macedonia has switched from a notification system to self-assessment of restrictive agreements. Will other countries in the region follow suit? It remains to be seen – the next country in line to adopt self-assessment appears to be Serbia (see the relevant section above).

Merger control: the highest number of decisions ever?

The Macedonian NCA publishes its decisions with a certain time lag. Due to this, until the annual report for 2017 is made available, it is not possible to perform an in-depth analysis of the authority's merger control activities. Nevertheless, what is indicative is a high number of merger decisions.

At the moment, the NCA's website features 38 merger decisions, all unconditional Phase I clearances. This number will certainly rise, since not all 2017 decisions have been published yet. So far, 2015 was the year with the highest number of merger decisions in Macedonia with 42. This number may well be surpassed in 2017 – only five additional clearances from 2017 will be sufficient for that.

State aid

Same as Montenegro, and unlike Serbia and Bosnia and Herzegovina, Macedonian NCA also has State aid powers. Nevertheless, as with the other observed jurisdictions, State aid developments in Macedonia deserve to be addressed separately.

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Recent Developments Regarding the Conduct of Dawn Raids in Poland. The Case of Subsequent Searches of Copied IT Data

by

Marta Michałek-Gervais*

CONTENTS

Abstract

2017 brought about a significant and long awaited change in the rules applicable to dawn raids in Poland. After many years of being criticized by scholars and practitioners, the practice of the President of the Office of Competition and Consumer Protection – consisting of the subsequent review of electronic data copied during an inspection at the authority premises and without the presence of a representative of the inspected undertaking, has been finally overruled by the Court of Competition and Consumer Protection. Even thought there are still several improvements that need to be made in order to guarantee the full respect of fundamental rights of inspected undertakings in the Polish legal order, the Court ruling incontestably constitutes a significant step in strengthening the legal position of inspected undertakings in Poland.

* Dr. Iur.; legal adviser at Clifford Chance (Warsaw), e-mail: marta.michalek-gervais@cliffordchance.com. Article received: 11 June 2018; accepted: 30 June 2018.

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Resumé

En 2017 les règles applicables aux perquisitions en Pologne ont été modifiées de façon significative et attendue depuis longtemps. Après de nombreuses années de critiques de la part d'universitaires et de praticiens, la pratique du Président de l'Office de la Concurrence et de la Protection des Consommateurs – consistant à examiner des données électroniques copies pendant une perquisition par la suite dans les locaux de l'autorité et en l'absence de représentant de l'entreprise inspectée, a finalement été renversée par la Cour de la Concurrence et de la Protection des Consommateurs. Même si plusieurs améliorations doivent encore être apportées afin de garantir le plein respect des droits fondamentaux des entreprises inspectées dans l'ordre juridique polonais, la décision de la Cour constitue incontestablement une étape importante dans le renforcement de la situation juridique des entreprises inspectées en Pologne.

Key words: inspection powers; dawn raids; electronic evidence; IT data; right to defence; Polkomtel.

JEL: K21

I. Introduction

Last year brought about a significant and long awaited change in the rules applicable to dawn raids in Poland. As an outcome of rulings issued by the Court of Competition and Consumer Protection (hereinafter; **SOKIK** or the **Court**), the President of the Office of Competition and Consumer Protection (hereinafter, **UOKIK**) had to give up its previous, vividly criticized, practice of coping entire digital storage mediums (such as hard drives) for subsequent review in the authority's premises, and in the absence of the inspected undertaking's representatives.

In the decision of 7 March 2017, No. XVII Amz 15/17, (hereinafter: **Decision**) SOKIK clearly limited the investigative powers of UOKIK in this regard by stating that review and selection of electronic data is not a merely technical activity but does constitute one of the core search activities. Therefore, it cannot be conducted at the UOKIK premises and without the participation of the undertaking concerned. SOKIK approach was subsequently repeated in the Court's judgment of 28 April 2017, No. XVII AmA 11/16, in the *Polkomtel* case.

Due to the unquestionable importance of the SOKIK approach (adopted in the above rulings) for the protection of the fundamental rights of undertakings,

in particular their right to defence and right to privacy, last year's developments should be considered a landmark step in strengthening the legal position of inspected undertakings in Poland.

II. Previous UOKIK practice relating to gathering and analyzing electronic evidence

Dawn raids carried out without forewarning by competition authorities clearly constitute an effective instrument of competition law enforcement, given that they often lead to obtaining key evidence of anticompetitive behaviour (Bernatt, 2011a, p. 58; Michałek, 2015, p. 223). Thus, inspections are considered one of the most important activities undertaken by the Polish competition authority – the President of UOKiK – within his investigative powers (Bernatt, 2012, p. 89; Michałek-Gervais, 2016, p. 25). At the same time, dawn raids interfere significantly with the freedom of economic activity as well as fundamental rights of the undertakings concerned, and thus should be used only exceptionally (For instance Bernatt, 2014; Bernatt, 2011b, pp. 208 and 209).

The Polish Act on Competition and Consumer Protection (hereinafter, **Polish Competition Act**) grants UOKIK the power to conduct inspections and obtain evidence of antitrust violations, which in principle are similar to those enjoyed by the European Commission.

Nevertheless, UOKIK used to interpret its investigative powers very broadly as far as the collection and analysis of electronic evidence was concerned. In practice, instead of reviewing the data stored on the IT systems and hardware at the premises of the inspected undertaking, UOKIK officials would indiscriminately copy data carriers and/or contents of e-mail inboxes in their entirety, in order to make the selection of relevant documents and review them later at the UOKIK premises and without the presence of company representatives. Hence, unlike the solutions adopted in the EU[1], in Poland inspected undertakings were not granted the right to be present

[1] If the Commission has not finished the selection of the electronic documents relevant to the investigation on the spot and wants to continue the inspection at its own premises, it invites the undertaking's representatives to be present during the continued inspection process (further selection and subsequent review of the electronic data). Alternatively, the Commission is obliged to return the sealed envelope containing the copied data to the undertaking without opening it or to request the inspected undertaking to store the sealed envelope in a safe place so that the Commission may continue its inspection at the undertaking's premises during a further announced visit.

during the subsequent searches of the electronic data undertaken by the UOKIK officials at the authority's premises. Furthermore, an undertaking's objection to disclose to UOKIK the full content of their hard drives or e-mail inboxes was considered by the authority to form an obstruction of the inspection, and often led to severe financial penalties[2]. For instance, in 2011 UOKIK imposed on Polkomtel, one of the leading Polish mobile telephony operators, an abnormally high procedural fine of EUR 33 million (Kozak, 2011, pp. 283–290)[3].

This practice was criticized by scholars and practitioners as disproportionate, too intrusive and posing a serious threat to the interests and rights of the inspected undertaking (Michałek, 2014, p. 157; See also for instance Turno, 2016a, Skurzyński and Gac, 2017, p. 116). Taking away binary copies of entire hard drives actually equals the unlawful seizure of documents falling outside the scope of the UOKIK investigation, or being covered by the right to privacy or legal professional privilege (hereinafter: **LLP**) (Michałek, 2014, p. 146). It was in particular alleged that coping such a large quantity of data that it contains also information beyond the scope of the inspection, enables UOKIK to actually conduct fishing expeditions.

UOKIK justified its controversial practice by technical problems in coping only data limited to the subject matter of the investigation. It also argued that this measure might also be considered a means to shorten the time frame in which the undertaking's activities are being interrupted by an inspection. According to UOKIK, since the functioning of the undertaking is paralyzed during its inspection, some undertakings may prefer letting the inspectors continue the search at the authority's premises, rather than having their own premises occupied for a longer period of time. Nevertheless, instead of giving the actual choice in this matter to the inspected undertaking, this solution used to be arbitrarily imposed by the UOKIK officials, a fact commonly criticized and considered to be an abuse of its inspection powers (Michałek, 2014, p. 146).

Various undertakings tried to challenge before the courts this controversial UOKIK practice (Materna, 2014)[4], however it was only last year that SOKIK finally declared it unlawful.

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[2] According to the Polish Competition Act, UOKIK may impose by way of a decision a fine of up to the equivalent of EUR 50 million on an undertaking that fails to cooperate during an inspection, even unintentionally. Like in the EU, such fine, imposed for a procedural violation committed in the course of the main proceedings, has an autonomous character and thus each time UOKIK has to institute separate proceedings concerning the imposition of a fine for the obstruction of inspection. (Kozak 2011, p. 288; Michałek, 2014, p. 147).

[3] See part 'The latest SOKIK judgment in Polkomtel case (XVII Ama 11/16)' below.

[4] See the decisions of SOKIK of 16 December 2009, No. XVII Amz 53/09/A, 22 December 2009, No. XVII Amz 54/09/A, 21 June 2011, No. XVII Amz 28/11, XVII Amz 30/11 and XVII Amz 31/11; 14 February 2012, No. XVII Amz 6/12 and XVII Amz 7/12.

III. The SOKIK Decision of 7 March 2017 (No. XVII Amz 15/17)

With reference to the facts, in 2016 UOKIK carried out dawn raids on suspicion of anticompetitive practices of undertakings active in the fitness sector. During the search conducted at the premises of one of those undertakings (hereinafter, the **Company**), UOKIK officials made copies of three hard disks belonging to the Company's CEO, as well as the entire e-mail correspondence of the Company's CFO for the purpose of their subsequent review at the UOKIK premises. The data were copied in their entirety without being pre-selected or reviewed by the officials.

The Company lodged a complaint to SOKIK against the measure undertaken by UOKIK[5]. It argued that making a copy of such a large quantity of data for subsequent review without its previous selection on the spot was unlawful[6] since by doing so UOKIK:

1. exceeded the scope of the inspection by gaining access and coping information not related to the subject matter of the search;
2. conducted a search outside the premises of the Company without its previous consent;
3. obtained access to information covered by LPP;
4. failed to grant the Company the right to actively participate in the proceedings (that is, in the continuation of the search);
5. violated the principle of proportionality as well as the rights of the Company, in particular its right to defence[7] and right to privacy[8]; and
6. conducted a search despite the non-fulfilment of all conditions provided for by the Polish Competition Act.

Due to the action lodged by the Company, the copied data remained sealed and UOKIK refrained from its review until the issuance of the SOKIK ruling.

The approach adopted by the Court in the Decision turned out to constitute a turning point with regard to the rules applicable to UOKIK dawn raids. Even

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[5] In accordance with Article 105p of the Polish Competition Act that entered in force on 18 January 2015, an undertaking being subject to a search and persons whose rights have been breached in the course of a search may file a complaint with SOKIK regarding search-related activities that exceeded the subject matter of the search, or other search-related activities conducted in infringement of the law.

[6] It constituted a breach of several provisions of, *inter alia*: European Convention on the Protection of Human Rights, Polish Constitution, Polish Competition Act, Polish Code of Criminal Administrative Procedure and Polish Code of Administrative Procedure.

[7] By not allowing the Company to participate in the process of verifing the content of copied data at the UOKIK premises.

[8] By seizing information being of a private nature or containing legally protected secrets (LPP).

though the Company's complaint was eventually dismissed[9], SOKIK stressed that the majority of the plaintiff's arguments, concerning the standards which should be met by the UOKIK search, were correct.

SOKIK agreed with UOKIK that searches constitute one of the most effective tools to obtain evidence of competition law infringements committed by undertakings (in particular in cases relating to a suspicion of prohibited agreement[10]). The Court reminded, nevertheless, that at the same time inspections constitute an exception to the right to privacy (granted also to legal persons) and, thus, the UOKIK inspection powers should be interpreted narrowly (On this issue see also Turno, 2016a). In the light of values protected in the constitutional order of a democratic state of law, it is necessary that undertakings subject to dawn raid are provided with appropriate guarantees relating, in particular, to obtaining and using evidence by competition authorities. Therefore, the relevant legal provisions on the conduct of inspections cannot be interpreted to the detriment of the inspected undertakings. Otherwise, the existing guarantees would have a mere 'illusory character'.

SOKIK pointed out the most important safeguards attributed to searched undertakings, namely: (i) limitation of the scope of the search (and of the activities undertaken by the UOKIK officials) solely to the subject matter indicated in the court authorisation; (ii) limitation of the place of the search to the undertaking's premises; (iii) limitation regarding the possibility to use in the proceedings evidence that constitutes legally protected secrets.

With regard to the limitation of the scope of the search, SOKIK noted that the UOKIK right to request information during an inspection (be it control or search), had to be understood as obliging the UOKIK officials to make a strict selection and, thus, request or look for solely the information falling within the scope of the inspection. This restriction applies also to the UOKIK power to make copies of evidence (including printouts and notes). In the Court's opinion, the explicit content of the relevant regulations[11] does not give UOKIK the right to copy and print evidence which is not related to the subject of the search.

[9] Albeit not for reasons stipulated by UOKIK. On this issue see more below at the end of this part.

[10] Such agreements by their very nature have usually a secret nature and due to risk of severe administrative sanctions companies do not voluntarily share with the competition authorities evidence of their inappropriate market behaviour. Therefore, the surprise effect of a search undoubtedly facilitates the gathering of evidence.

[11] Namely Articles 105n, 105 b par. 1 point 2 and 105 o of the Polish Competition Act.

Furthermore, in SOKIK view, there should be no difference in the approach depending on the type of the information carrier. SOKIK noted that with regard to paper documents stored at the undertaking's premises, the UOKIK officials do the selection on the spot and make copies only of those that are related to the subject of the inspection. Nevertheless, in case of electronic evidence, UOKIK claims to see a mainly technical problem impeding the making of a selection on the spot and coping only evidence collected on IT data carriers that relates to the subject of the inspection.

However, according to the Court, in the light of applicable legal regulations, the different character of the information carrier from which copies and printouts are made cannot in any way limit the legitimate rights of undertakings. The competition authority has no right to make notes, copies and printouts (and make use) of information exceeding the scope of the search as indicated in the court authorization. Moreover, contrary to the arguments raised by UOKIK, the authority is always able to make a selection of only the content that may be relevant to the case at hand, irrelevant of the type of information carrier (be it paper or electronic).

Secondly, SOKIK pondered over the limitation of the place of the search to the undertaking's premises. The Court held that in order to ensure that the undertaking's right to defence and right to privacy are appropriately protected, UOKIK is obliged to select the evidence (information to be subsequently copied) in the presence of the undertaking's representative, given that such an action constitutes an integral part of a search[12] and cannot be considered a mere technicality. Otherwise, the UOKIK practice should be regarded as contrary to the provisions of the Polish Competition Act and the Act on the Freedom of Economic Activity. Analysis of hard disks and e-mails conducted in the absence of the inspected undertaking would have significantly undermined its right to defence.

According to the Court, the arguments raised by UOKIK, that due to the length of the process of electronic data analysis conducting it on spot may be disadvantageous for the inspected undertaking, cannot release the authority from being obliged to respect the undertaking's rights to participate in the search (including in the review of the content of IT information carriers).

Lastly, with regard to the third limitation of the possibility to use in the proceedings evidence that constitutes legally protected secrets, SOKIK pointed at Article 225 of the Polish Code of Criminal Procedure[13] as relevant in the case of UOKIK dawn raids. The Court held that the questioned UOKIK practice runs afoul of this provision (excluding the authority from reading

[12] Since UOKIK deals with evidence.

[13] To which refers the Polish Competition Act in the part regarding the UOKIK power of inspection.

the content of documents containing professional secrets and introduces the so-called envelope procedure).

Therefore, in order to prevent the protection of the LPP from being only illusory, UOKIK cannot: firstly, obtain evidence in such a broad scope as expected by the authority (in particular the entire content of disks); and, secondly, make the selection of the information copied from data carriers at its own discretion and in the absence of the undertaking concerned (namely at the UOKIK premises).

SOKIK concluded that the limitations of the inspection powers described above, and the undertaking's rights correlated with them, oppose the interpretation of the inspection rules as adopted by UOKIK, in particular with regard to the practice consisting of the copying of entire data carriers and reviewing (searching) them at the UOKIK premises and in the absence of the undertaking's representatives. Having said that, the Court held, nevertheless, that in the case at hand the Company's claims were premature since the alleged infringement of the provisions indicated in the complaint did not take place. In the Court's opinion, the mere copying of IT data carriers in their entirety did not constitute a search activity. And, as SOKIK noted, the contentious copies of the electronic data were still sealed and hadn't been analysed in any way by UOKIK. This actually meant that (so far) no search activities had been undertaken by UOKIK outside the Company's premises and in the absence of the Company's representatives.

According to SOKIK, the making of binary copies of the IT data carriers (hard drives etc.) in their entirety should be regarded as a particular type of securing evidence and, since the seizure of the original hard drives would have been much more intrusive and onerous for the undertaking inspected, such an action is in accordance with the principle of proportionality. Given that according to the Polish Competition Act secured evidence may be stored at the UOKIK premises, the storage of binary copies in a sealed envelope at the UOKIK premises does not constitute in itself an infringement of the provisions of the act in question.

The Court finally underlined that in order to respect the Company's right to participate in the search activities, and to avoid an infringement of the relevant provisions indicated in the Company's complaint, UOKIK is obliged to undertake the review (search) of the copied IT data in the presence of a representative of the Company and at the Company's premises.

IV. The latest SOKIK judgment in the *Polkomtel* case (No. XVII Ama 11/16)

Soon after the Decision, SOKIK rendered its second judgment in the famous *Polkomtel* case[14].

With brief reference to the facts, in December 2009, UOKIK simultaneously carried out dawn raids at the premises of five undertakings suspected of having concluded an anticompetitive agreement in relation to a mobile television project. Two of the companies inspected – Polkomtel[15] and PTC[16] – were subsequently fined for having obstructed the UOKIK dawn raids. The fine imposed on Polkomtel related to, *inter alia*, the company's refusal to provide a hard drive with the copies of the e-mail inboxes of the selected Polkomtel's employees requested by UOKIK. Further acts of obstruction alleged by UOKIK consisted of delaying the beginning of the dawn ride by preventing the inspectors and police from establishing contact with a person authorised to represent the company[17] and providing only selected documents[18].

In this saga of rulings that appeared in this case, first, the UOKIK decision, imposing a EUR 33 million procedural fine, was challenged before SOKIK which originally reduced the amount of the fine to EUR 1 million[19]. The Court's judgment was appealed to the Warsaw Appellate Court[20] that quashed it and returned the case to the Court for reassessment.

In its second judgment SOKIK upheld its approach as to the unlawfulness of the UOKIK previous practice of subsequent reviews of electronic data. In accordance with the aforementioned Decision SOKIK held here that '*reviewing a copy of electronic data (as well as taking notes and printouts) at the UOKIK office is not just a technical activity*. *The review of the content of copies of hard drives and e-mails undertaken outside the undertaking's premises constitute the essence of the search, because namely at this very moment the authority deals with*

[14] Judgment of SOKIK of 7 April 2017, No. XVII AmA 11/16.

[15] Decision of UOKIK of 24 February 2011, No. DOK-1/2011.

[16] Decision of UOKIK of 4 November 2010, No. DOK-9/2010. See also the subsequent judgments that led to an important reduction of the initial fine imposed by UOKIK, namely judgment of SOKIK of 20 March 2015, No. XVII AmA 136/11 and judgment of the Warsaw Appellate Court of 1 March 2017, No. VI ACa 1076/15.

[17] By preventing the inspectors and police from establishing contact with a person authorised to represent the company.

[18] Instead of all the documents concerning Polkomtel's participation in the contested mobile television project.

[19] Judgment of SOKIK of 18 June 2014, No. XVII AmA 145/11.

[20] Judgment of the Warsaw Appellate Court of 20 October 2015, No. VI ACa 1478/14.

the evidence. This activity is therefore very important for the procedural position of the inspected undertaking and should not be made without its participation'.

Moreover, the Court held that there is no reliable evidence that the analyses of the IT data carriers cannot be made at the premises of the inspected undertakings and in the presence of the undertaking's representatives. Difficulties or inconveniences that UOKIK face cannot release the authority from the obligation to respect the rights of the inspected undertaking, in particular the right to participate in the inspection (that is the search of the information carriers). Furthermore, UOKIK cannot justify its practice by arguing that it would be unfavourable for the inspected undertaking to conduct the search of its IT data on the spot, since it would make the dawn raid last longer. This is so in particular, in the case at hand, where Polkomtel *expresis verbis* asked UOKIK to conduct such activity at its premises.

Thus, SOKIK concluded that although Polkomtel refused to provide access to the hard drive at the UOKIK request, in the light of relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms[21] and the Charter of Fundamental Rights of the European Union[22], this refusal should be considered justified and, thus, could not result in the imposition of a fine on Polkomtel. This conclusion led, *inter alia*, to the significant reduction by SOKIK of the fine initially imposed by UOKIK (EUR 33 million)[23] to EUR 300 thousand[24].

The *Polkomtel* case is one of the examples demonstrating how important full judicial control of decisions taken by the competition authority is, as well as how necessary it is for the appropriate protection of the fundamental rights of undertakings.

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[21] Namely Article 8 (Right to respect for private and family life). For more on the interference of the investigative powers of the competition authorities with Article 8 ECHR see, for instance, K. Kowalik-Bańczyk 2012, pp. 395–402, Bombois, 2012, pp. 137–143, and Michałek 2015, pp. 213–229.

[22] Namely Articles 7 (Respect for private and family life) and 8 (Protection of personal data).

[23] The Court stressed that the fine initially imposed by UOKIK was inadequate to the alleged infringements and violated the principle of proportionality. '*The sanction should be imposed primarily for the retribution and deterrence of the perpetrator and others from similar acts. It has to perform a number of functions, but above all it is a reciprocation of the act. Nevertheless, the fine imposed by the President of the Office has only a repressive dimension*.'

[24] According to SOKIK, Polkomtel should be only fined for unintentional lack of cooperation resulting in the delay of the beginning of the dawn raid.

V. Conclusions

After many years of being criticized by scholars and practitioners, the UOKIK practice consisting of the subsequent review of copied electronic data at the UOKIK premises and without the presence of a representative of the inspected undertaking has been finally overruled by the Court.

The SOKIK Decision incontestably constitutes a significant step in preventing the fundamental rights of undertakings from being undermined during dawn raids. Like the CJEU in the landmark *Hoechst* judgment[25], SOKIK stressed the need to guarantee the protection of the undertaking's right to defence at each stage of any antitrust proceedings, including the preliminary inquiry stage. The ruling also reduces the risk of fishing expeditions being conducted during the subsequent searches of the IT data.

SOKIK noted, however, that the mere coping of the contested electronic data does not constitute in itself an infringement of the undertaking's right. It's only the subsequent analysis of such copied data, conducted outside the undertaking's premises and without the presence of its representatives, that constitutes an unlawful action of UOKIK, and thus may be challenged before the Court.

The fact that SOKIK has finally analysed this controversial issue in detail should be appreciated even more given the avoidance of the CJEU to express its own opinion as to the legality of the measure in question. For instance, in the *Nexans* case, instead of ruling on the legality of the contested practice, the General Court simply declared the undertaking's challenges inadmissible[26].

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[25] See judgment of the European Court of Justice of 21 September 1989 in joint cases 46/87 and 227/89 *Hoechst vs Commission. Para. 15: 'it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.'* See also judgment of the Court of First Instance of 11 December 2003 in the case T-66/99 *Minoan Lines SA*, para. 48.

[26] Judgment of the General Court of 14 November 2012 in the case T-135/09 *Nexans vs Commission*. Nexans contested the inspection measures consisting namely of the taking away of forensic copies of computer hard drives for subsequent review at the Commission premises. According to the undertaking, stored media contained data such as emails, addresses etc., which included those of a personal nature and protected by the right to privacy, the confidentiality of correspondence and legal professional privilege. Nexans argued that measures of this kind should be challengeable since contested acts brought about a significant change in the undertaking's legal position and have seriously and irreversibly affected its fundamental rights – i.e. the right to privacy and the right to defence. Nevertheless, the GC stated that the contested actions do not constitute actionable decisions but are merely measures implementing the inspection decision. Such implementing measures can thus only be challenged in the appeal of the final decision on the infringement, or the decision imposing fines for a failure to cooperate. Such

Unlike SOKIK, the CJEU did not make a distinction between coping electronic data and reviewing such data outside the inspected undertaking's premises.

This ground breaking ruling of SOKIK undoubtedly constitutes a milestone in the process of improving the protection of the rights of undertakings vis-à-vis the UOKIK investigative powers; due to the SOKIK Decision the illegal practice of searching the copied electronic data at the authority's premises and in the absence of a representative of the inspected undertaking has finally come to an end. The course of dawn raids carried out subsequently to the Decision confirmed that in the aftermath of this ruling, UOKIK has changed its practice in accordance with the SOKIK approach[27].

The SOKIK Decision may also be regarded as a spark that will hopefully lead to a legal specification of the question of LPP. The Court clearly stated that the appropriate protection of LPP requires, firstly, selecting the relevant evidence from the data carriers that could potentially contain information covered by LPP at the undertaking's premises, and only subsequently making copies of the selected electronic data. Even though the Court did not rule on the merits of the LPP (leaving for instance the question of its exact scope still open), it has definitely provided grounds for further discussion on the issue[28].

Even thought there are still several improvements that need to be made in order to guarantee the full respect of fundamental rights of inspected undertakings in the Polish legal order (Bernatt, and Turno, 2015, pp. 75–92; Bernatt, and Turno, 2013, pp. 27–29, Turno and Wardęga, 2015, pp. 112–117), the importance of the SOKIK Decision is unquestionable and one may hope that the legal position of the undertakings being subject UOKIK proceedings will continue to improve.

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a stance brings about legal uncertainty for undertakings since it leads to unreasonable delays between the carrying out of inspections and the moment its implementation stands to be reviewed (Michalek, 2015, p. 208. and Michałek, 2014, p. 145).

[27] What understandably has made UOKIK dawn raids last longer than they used to.

[28] By concluding that the relevant provisions of the Polish Code of Criminal Procedure should be considered as the legal basis for the protection of LPP, SOKIK may suggest that the scope of information covered by LPP should be broader under Polish law than under EU law, including not only correspondence exchanged with an external lawyer, but also communication with the company's in-house lawyer). For more on the LPP protection in the EU and Poland see, for instance: Turno and Zawłocka-Turno, 2012, pp. 193–214, Turno, 2016b, Bernatt and Turno, 2013, pp. 17–30, Bernatt, and Turno, 2015, pp. 81–82.

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The Judicial Review of the Standard of Proof in Cartel Cases: Raising the Bar for the Croatian Competition Authority Case comment to the Judgment of the Constitutional Court of the Republic of Croatia No. U-III-2791/2016 of 1 February 2018 (*Sokol Marić d.o.o.*)

by

Alexandr Svetlicinii*

CONTENTS

Abstract

The *Security agencies* case represents another example of the procedural diversity among Member States in applying national competition rules that mirror Articles 101 and 102 TFEU. In its infringement decision the Croatian NCA specified that the presence at the meeting with competitors and participation in the discussion concerning minimum prices was sufficient to impute to the parties participation

* Assistant Professor, University of Macau, Faculty of Law; e-mail: AlexandrS@um.edu.mo. The author acknowledges the support from the University of Macau Multi-Year Research Grant MYRG2015-00210-FLL. Article received: 27 May 2018; accepted: 25 September 2018.

in an anti-competitive agreement prohibited under the national equivalent of Article 101 TFEU. As the Croatian NCA investigated an agreement 'by object', it considered itself relieved of the burden to demonstrate the anti-competitive effects. The Constitutional Court has taken a different approach and held that the fact that the participants of the meeting have not publicly denounced the results of the meeting, cannot serve as evidence of an anti-competitive agreement. The court also found that the Croatian NCA did not manage to provide a reasonable explanation why the 'hourly cost of service' apparently discussed by competitors is the same as 'hourly price of service' that appears in the NCA's decision. As a result, the Constitutional Court's approach deviated from several substantive presumptions developed by the EU Commission and the EU courts when applying competition rules in relation to anti-competitive agreements. This places a heavier burden of proof on the Croatian NCA in cartel cases when compared to its own preceding practice or the enforcement practices of the EU Commission or other European NCAs.

Résumé

L'affaire des agences de sécurité représente un autre exemple de la diversité des procédures entre les États membres dans l'application de règles de concurrence nationales qui reflètent les articles 101 et 102 du TFUE. Dans sa décision d'infraction, l'autorité croate de la concurrence a précisé que la présence à la réunion avec les concurrents et la participation à la discussion sur les prix minimaux étaient suffisantes pour imputer aux parties la participation à un accord anticoncurrentiel interdit par l'équivalent national de l'article 101 du TFUE. L'autorité croate ayant enquêté sur un accord 'par objet' s'estime déchargée du fardeau de démontrer les effets anticoncurrentiels. La Cour constitutionnelle a adopté une approche différente et a jugé que le fait que les participants à la réunion n'ont pas dénoncé publiquement les résultats de la réunion ne peut servir de preuve d'un accord anticoncurrentiel. La Cour a également conclu que l'autorité croate n'avait pas réussi à expliquer de manière raisonnable pourquoi le 'coût horaire du service' apparemment discuté par les concurrents était identique au 'prix horaire du service' figurant dans la décision de l'autorité. En conséquence, l'approche de la Cour constitutionnelle s'écartait de plusieurs présomptions de fond développées par la Commission et les tribunaux de l'Union européenne lorsqu'elle appliquait les règles de concurrence relatives aux accords anticoncurrentiels. Cela alourdit la charge de la preuve incombant à l'autorité croate dans les cas des accords anticoncurrentiels par rapport à sa propre pratique antérieure ou aux pratiques répressives de la Commission de l'UE ou d'autres autorités européennes.

Key words: anti-competitive agreement; burden of proof; Croatia; price-fixing; standard of proof.

JEL: K21

I. Infringement proceedings of the competition authority

In 2013, the Croatian competition authority (hereinafter: AZTN)[1] noted an article published on the media portal *Novi list*, which reported the meeting of security services companies, where the participants have allegedly agreed on the minimum hourly rate for security guard service.[2] The AZTN established that on 23 October 2013, in the office of the professional magazine *Zaštita* [Security][3], the representatives of seven security services agencies have held a meeting. It has been followed by a press release reporting the establishment of the 'minimum hourly cost' of the security guard service in the amount of HRK 32.50 (approx. EUR 4.38) and the agreement of the security companies to apply this standard in their activities.

When replying to the statement of objections composed by the AZTN, the undertakings concerned advanced several arguments, which can be summarized as follows: (1) there was no agreement on prices and the subject discussed concerned 'minimum hourly cost' of the security guard service; (2) one of the purposes of the meeting was the issue of unfair competition observed on the market for security services; (3) after the meeting the participants did not apply the price of HRK 32.50 in their bids, which suggests that there was not agreement on prices; (4) the press release about the meeting has been prepared by the editors of the magazine *Zaštita* without the approval of the attendees. Most of the responses to the statement of objections attempt to distinguish between the 'hourly rate of security guard service', which is a price offered by the service providers when participating in public bids, and 'hourly cost of security guard service'. The responses of the meeting attendees indicate that they were well aware of the illegality of fixing prices, some of them explicitly referring to the association of bakers, previously sanctioned by the AZTN for price fixing. (Svetlicinii, 2012a) In order 'not to end up like the bakers', some of the meeting participants insisted that there should be no discussion about prices, but only about the costs. Furthermore, after the publication of the press release, no participant has disputed or denounced its content, at least not before the AZTN has commenced its investigation into the subject matter.

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[1] *Agencija za zaštitu tržišnog natjecanja*, http://www.aztn.hr/.

[2] Ana Raić Knežević, *Šefovi zaštitarskih tvrtki dogovorili najnižu cijenu rada – da bi je opet kršili?* [The executives of the security companies have agreed minimum hourly rate – to break it again?] (Novi list, 19 November 2013), http://www.novilist.hr/Vijesti/Hrvatska/Sefovi-zastitarskih-tvrtki-dogovorili-najnizu-cijenu-rada-da-bi-je-opet-krsili.

[3] *Zaštita – časopis za zaštitu i sigurnost osoba i imovine*, http://zastita.info/hr/.

In its decision, the AZTN noted that undertakings could not have identical costs and therefore there can be no minimum 'hourly cost of security guard service' as suggested by the representatives of the security agencies. The Croatian NCA emphasized that regardless of the exact terminology used by the undertakings, the nature of their agreement concerned the minimum price of the security guard service. The AZTN specified that the very presence at the above mentioned meeting and participation in the discussion concerning minimum prices was sufficient to impute to the parties participation in an anti-competitive agreement prohibited under the national equivalent of Article 101 TFEU.[4] The fact that no undertaking has later disputed or denounced the contents of the press release published in the magazine *Zaštita* indicates their silent agreement. The AZTN also noted that it was sufficient to establish the existence of an agreement without the need to prove whether the parties have in fact followed it or not. In the present case, the Croatian NCA investigated an agreement 'by object', which relieved the AZTN of the burden to demonstrate its anti-competitive effects. According to the AZTN, the fact that anti-competitive agreement was not implemented, or implemented only partially, could not affect the existence of the infringement. As a result, the Croatian NCA has imposed fines ranging from HRK 171,000 (approx. EUR 23,125) to HRK 1,333,000 (approx. EUR 180,250) (Svetlicinii, 2010a).

The *Security agencies* case resembles earlier AZTN practice in sanctioning members of professional associations for reaching anti-competitive agreements with their competitors. For example, in 2012, the AZTN established that the members of the Craftsmen Association of Osijek have entered into an anti-competitive agreement with the objective to fix the retail price of white bread.[5] During their meeting, the members of the association discussed the costs and potential price modifications in relation to particular bakery products, as well as the designation of the representative who would announce the results of the meeting to the general public. It was stated in the minutes of the meeting obtained by the AZTN that given the increase in the costs of raw materials and energy, as well as the fact that the prices have not been modified for the last two years, the attendees made a decision to fix the recommended price of white bread at 8 HRK (approx. EUR 1.07). It was also stated that no sanctions would be applied to undertakings that would decide not to follow the recommended price. Although the analysis of the subsequent price dynamics indicated that not all of the attendees have modified their retail prices, the AZTN noted that their attendance of the meeting, discussion on prices with their competitors, as well as the absence of an express denouncement of the specified agreement,

[4] *Zakon o zaštiti tržišnog natjecanja* [Law on Protection of Market Competition], *Narodne novine* 79/2009, Article 8.

[5] AZTN Decision No. UP/I 030-02/11-01/039 of 26 July 2012.

constituted sufficient evidence for imputing the participation in the anti-competitive agreement contrary to the national equivalent of Article 101 TFEU. The failure to adhere to the recommended price demonstrated by individual undertakings was considered as an attenuating circumstance for the calculation of the fine. (Svetlicinii, 2012a; Deniz Ata, 2012) The express absence of any sanctioning mechanism did not affect the conclusion reached by the AZTN. It is notable that several witnesses in the *Security agencies* case testified that the attendees of the meeting were aware about the sanctions imposed by the AZTN in the above-mentioned *Bakeries* case. Nevertheless, the parties seemed to believe that by formally disclaiming that their discussion concerned 'costs' and not 'prices' they would be immune from the eventual prosecution under competition law.

II. Judicial review of the High Administrative Court

The undertaking Sokol Marić d.o.o., which was among the security agencies penalized by the AZTN for the participation in the price-fixing cartel,[6] has challenged the decision of the competition authority before the High Administrative Court (hereinafter: HAC).[7] The appellant argued that the AZTN's burden of proof encompassed the establishing of the following elements: (1) the existence of the will of the parties to reach an agreement; (2) the alleged agreement should have as its object and effect the restriction of competition; (3) the relevant market should be defined in order to demonstrate the actual market power of the alleged cartelists. Sokol Marić also disputed the economic logic of the AZTN's conclusion: why would the parties agree on the minimum price, and thus restrict their freedom to set prices at public tenders, where the winning bidder is expected to offer the lowest price?

The HAC concluded that the AZTN has established without doubt that the security agencies have discussed and reached an agreement on the prices of the security guard services. The fact that the agreement was not implemented in practice did not affect its existence. In its review of the AZTN's decision, the HAC has consistently followed its previous practice of distinguishing between anti-competitive object and effect as two alternative criteria for the establishment of anti-competitive agreements. (Akšamović, 2017) For example, in 2011 the AZTN found that members of the Association of office supplies retailers have reached an informal (verbal) agreement concerning coordination

[6] This undertaking has been penalized by the AZTN with the highest fine among all undertakings concerned, which amounted to HRK 1,333,000 (approx. EUR 180,250).

[7] *Visoki upravni sud Republike Hrvatske*, http://www.upravnisudrh.hr/.

of their conduct on the market for office supplies.[8] (Svetlicinii, 2011a) In their appeal before the HAC the undertakings concerned emphasized *inter alia* that they jointly accounted for only 10–20% of the relevant market, while none of the members had a market share exceeding 5%. They argued that due to the insignificant market shares, the alleged agreement could not restrict competition on the relevant market. The HAC concluded that appellants agreed to share the market by refraining from competition for existing clients. The HAC held that such anti-competitive agreements are prohibited under the national equivalent of Article 101 TFEU regardless of the number of undertakings involved or the actual effects on competition.[9] (Svetlicinii, 2012b)

III. Judicial review of the Constitutional Court

Being in disagreement with the conclusions reached by the HAC, Sokol Marić has contested the judgment before the Constitutional Court.[10] The applicant claimed the infringement of its constitutional rights: guarantee of judicial review of administrative decisions, right to fair trial, protection of reputation, right to property, guarantee of entrepreneurial freedom and equal treatment of undertakings on the market.[11] The applicant has framed its challenge of the AZTN's decision as an unjustified reversal of the burden of proof, where the alleged participants in the price fixing agreement had to prove their innocence and were expected to publicly denounce the contents of the press releases and media articles about the alleged anti-competitive agreement. It argued that NCA's conclusions were not based on market realities, as it was commercially unreasonable for competitors to publicly announce that they will not offer their services below a certain price, as they would be losing out to their competitors. It was also illogical for the alleged cartelists to publicly announce the establishment of their 'cartel'. The applicant also saw no reason for denouncing the newspaper article, which mentioned 'the real hourly cost of security guard services' without declaring the existence of any anti-competitive agreement.

The Constitutional Court noted that at the start of the specified meeting the participants acknowledged that it is illegal to discuss minimum prices but the AZTN did not treat this as clear denouncement of the alleged anti-competitive purpose or result of the meeting. According to the Constitutional Court, the

[8] AZTN Decision No. UP/I 030-02/2010-01/018 of 21 July 2011.

[9] High Administrative Court, decision of 19 December 2012, in case Us-9383/2011-4.

[10] *Ustavni sud Republike Hrvatske*, https://www.usud.hr/.

[11] Constitution of the Republic of Croatia, Articles 19, 29(1), 35, 48(1), 49(1)and(2).

fact that the participants of the meeting have not publicly denounced the media articles concerning the results of the meeting, cannot serve as evidence of an anti-competitive agreement. Moreover, the court noted that the AZTN has not investigated whether the security companies have already applied the hourly rate of HRK 32.50 prior or after the specified meeting. The high court noted that the existence of an alleged anti-competitive agreement cannot be based on media statements and concluded that the NCA's assessment was arbitrary. The court found that the AZTN did not manage to provide a reasonable explanation why the 'hourly cost of service' is the same as 'hourly price of service'. The court also found no economic logic for the security companies to fix the minimum prices since in the context of public tenders that would lead to the loss of business to competitors. The Constitutional Court held that both the AZTN and the HAC have not properly addressed the arguments of the applicant in relation to the absence of economic rationale of the alleged price fixing. The court concluded that the arbitrary assessments carried out by the AZTN and HAC have breached the applicant's right to fair trial, quashed the judgment and the infringement decision, and returned the case to the AZTN for repeated investigation.

IV. Case comments

1. Enforcement practice of the competition authority in line with the EU law standards

In another case investigated in 2010, the AZTN noted the public statement of the chairperson of the Association of Newspaper Publishers mentioning the heated debates among the publishing companies concerning the need for price increases due to the substantial increases in costs and the fact that the last price increase occurred in 2001.[12] (Pecotić Kaufman, 2010) The AZTN also noted a simultaneous increase in prices of several major newspaper by 1 HRK (approx. EUR 0.13). Based on the above considerations, the AZTN concluded that the observed conduct of market players could not be viewed as a mere price parallelism but constituted a clandestine agreement or concerted practice of implementing a uniform price increase.[13] (Svetlicinii, 2010b) The HAC in

[12] In another case, concerning price fixing on the market for weekly magazines, the AZTN has managed to obtain direct evidence in the form of text messages exchanged by the chairpersons of the management boards of two newspaper publishers, which were retrieved from the phone used in the criminal investigation.

[13] AZTN Decision No. UP/I 030-02/2008-01/72 of 25 March 2010.

its review has attributed particular weight to the statement of the association's chairperson concerning the discussions on a price increase as well as the fact that the price increase was identical in the amount and simultaneous in time. The court noted that differences in cost structures and cost effectiveness of individual newspaper publishers spoke against the economic logic of an identical and simultaneous price increase. On this point the court has aligned its position with the AZTN by stating that instead of following the price increase of the market leader it would be more 'economically logical' for the competitors to keep their prices lower and gain a competitive advantage. Since price fixing was considered a restriction 'by object', the HAC saw no need for a more detailed economic assessment of the relevant market, market shares of the parties and effects of the price increase on competition.[14] (Svetlicinii, 2011b).

2. Constitutional Court's approach towards burden of proof in cartel cases

The approach of the Constitutional Court, on the other hand, has deviated from its previous practice of accepting EU competition law standards as auxiliary sources of law for interpretation purposes even prior to Croatia's formal accession to the EU.[15] (Svetlicinii, 2008a) It has consistently maintained that Croatian competition law should be applied in the manner that follows EU standards in this field. This was so even at a time when EU competition rules or ECJ case law could not be used as formal sources of law by the Croatian competition authority, but had to be relied upon as auxiliary sources aiding in the interpretation and application of national competition rules.[16] (Pecotić Kaufman, 2011; Butorac Malnar and Pecotić Kaufman, 2016) Addressing the argument that prior to 2013 EU standards were not published in any official Croatian publication, and therefore could not constitute a source of law in Croatia, the Constitutional Court explained that the specified standards were not used as substantive law, but rather as supplementary interpretation tools that assisted the AZTN in the application of the legal provisions of the Croatian competition law.

In the present case, the Constitutional Court has disregarded several substantive presumptions developed by the EU Commission and the EU courts when applying competition rules in relation to anti-competitive agreements. (Bailey, 2010) In the *Plasterboard* cartel case the ECJ has explained that 'even if the burden of proof rests … on the Commission or on the undertaking or

[14] High Administrative Court, decision of 21 December 2011, in case Us-4995/2010-6.

[15] Constitutional Court, decision of 13 February 2007, in case U-III-1410/2007, published in *Narodne novine* 25/08.

[16] Constitutional Court, decision of 17 January 2011, in case U-III-4082/2010.

association concerned, the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied'.[17] (Svetlicinii, 2010c) Another presumption confirmed by ECJ in *Aalborg Portland* is that 'it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel'.[18] Needless to say, like other presumptions formulated by the EU courts in competition cases, such as presumption of effective control in relation to a 100%-owned subsidiary, (Svetlicinii, 2011c) they can be effectively rebutted by the parties concerned. The alternative nature of the 'object' and 'effect' requirements for the establishment of anti-competitive agreements has been clarified by the ECJ in the *Irish beef* case: 'certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[19] The court made it clear that the object and effect of the alleged agreement should be analyzed separately when determining the infringement of Article 101 TFEU. (Svetlicinii, 2008b) Interestingly enough, on 22 December 2017, the Romanian Competition Council has prosecuted a number of Romanian security services companies for designing and displaying on their websites of the methodology for calculation of the 'hourly costs' of various security services.[20] Without applying EU competition rules directly, the Romanian NCA has referred to the above-mentioned ECJ case law concerning the public denunciation of anti-competitive agreements and the distinction between anti-competitive restraints 'by object' and 'by effect'.

3. Applicability of the EU competition rules and ECJ case law in domestic competition cases

In its infringement decision, the AZTN has determined the scope of the relevant geographic market as national, since the undertakings concerned offered their security services throughout the national territory. Since Croatia

[17] Case C-413/08 P *Lafarge SA v European Commission*, judgment of 17 June 2010, para 30.

[18] Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, para 81.

[19] *Competition Authority v Beef Industry Development Society Ltd* (C-209/07) [2009] 4 C.M.L.R. 310, para 17. The presumption that the restrictions by object are harmful to competition has been included in the EU Commission's Guidelines on application of Article 101(3) TFEU. See Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) [2004] OJ C101/97, para 21.

[20] Romanian Competition Council, Decision No. 80 of 22 December 2017.

has become a Member State of the EU in July 2013, and the meeting of the security agencies took place in October 2013, the AZTN was under the obligation to apply EU competition rules to the cases where the anti-competitive practice would have 'effect on trade' between at least two Member States.[21] The AZTN decision does not contain any discussion on the applicability of EU competition rules on the basis of the 'effect on trade' criteria, which effectively shielded it from a notification to the European Competition Network and from an opportunity to present it for a preliminary ruling to the ECJ.[22] (Botta, Svetlicinii and Bernatt, 2015) Thus, unlike the NCAs of other Member States, (Svetlicinii, 2014; Svetlicinii, 2017) the AZTN did not consider that the application of EU competition rules would support its reliance on ECJ case law and strengthen its decision against a possible judicial challenge.

Although the AZTN has used ECJ case law as a reference to explain the distinction between agreements and concerned practices, as well as between intent and negligence, these references do not relate to the key arguments advanced by the appellant. The HAC, which has routinely referred to the ECJ case law when reviewing AZTN decisions in the past, (Botta and Svetlicinii, 2015) has limited its assessment to the arguments advanced by the parties and upheld the AZTN's references to the ECJ case law. Finally, the judgment of the Constitutional Court does not contain any references to EU law or ECJ case law that could aid in the interpretation of the competition rules and support the approach of the AZTN in establishing the existence of the anti-competitive agreements.

The observed disregard of EU competition law standards goes hand in hand with the apparent lack of understanding of the economic significance of the 'hourly costs' discussed at the meeting of the security agencies on 23 October 2013. The judgment of the Constitutional Court suggests that the AZTN was arbitrary in equalizing the terms 'hourly costs' and 'hourly rates'. The high court also stated that the Croatian NCA did not accord sufficient attention to the fact that at the specified meeting the representatives of the security companies have acknowledged that it is illegal to discuss prices of their services and decided, instead, to only discuss the costs of those services. Apparently, the high court considered that such acknowledgment was sufficient for the undertakings concerned to distance themselves from the alleged price-fixing agreement.

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[21] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition lid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1-25, Article 3.

[22] This is common in several 'new' Member States, where NCAs do not conduct a meaningful assessment of the 'effect on trade' criterion, which leads to the situation that the majority of their cases are resolved under national competition laws.

4. Conclusion

The *Security agencies* case also represents another example of the procedural diversity among Member States in applying almost identical national competition rules that mirror Articles 101 and 102 TFEU. The 2014 Pilot field study on the functioning of the national judicial systems for the application of competition law rules published by the DG Justice confirmed that burden of proof and standard of judicial review vary from jurisdiction to jurisdiction.[23] While the harmonization of the procedural rules applied by the NCAs is an ongoing process,[24] the harmonization of the national rules and standards of judicial review remains the subject of an academic and policy debate. (Pecotić Kaufman and Petrović, 2017)

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Daria Kostecka-Jurczyk, *Koncentracja w formie wspólnego przedsiębiorstwa a ryzyko konkurencyjne w świetle prawa antymonopolowego* [*The concentration in the form of a joint venture and the competition risk in the light of antimonopoly law*], C.H. Beck, Warsaw 2017, 304 p.

Joint ventures may create risks for competition. Those risks may be carried by the very structure of the relevant market, or the creation of conditions fostering the coordination of the market conduct of a joint venture and its parent entities or the parent entities themselves. At the end of last year, Dr. Daria Kostecka-Jurczyk, an academic active in the area of EU law, economic law and competition law, published the book *Koncentracja w formie wspólnego przedsiębiorstwa a ryzyko konkurencyjne w świetle prawa antymonopolowego* [*The concentration in the form of a joint venture and the competition risk in the light of antimonopoly law*] (C.H. Beck). She analyses therein various risks that competition is exposed to when joint ventures are established; the author studied them carefully and summarized them in the individual chapters of the book. However, her analysis goes beyond the interpretation of EU and Polish competition laws, jurisprudence and legal literature; she examines all aspects of joint ventures from, primarily, a legal perspective, but also from an economic point of view. This approach draws the attention of the reader to the author's versatility and ability to switch from one discipline to another with ease.

The author believes that the distinction between full-function joint ventures and non-full-function joint ventures is not a sufficient tool to draw a line between joint ventures that are concentrations and those that are anti-competitive agreements, because this distinction does not make it possible to capture the risk for competition. Besides this main hypothesis, she identifies seven sub-hypotheses which the book sets out to test and, I would add, proves. Although deliberately composed of six chapters (as well as, of course, an introduction and the summary), the book focuses on three main research areas.

First, the author explains expressions such as 'risk', 'risk of a restriction of competition' and exemplifies reasons for which joint ventures are created between undertakings. She also defines the term 'joint venture' and offers classifications of joint ventures. Another important issue that is taken up in the book is the question what characterises the particular types of joint ventures. Further on, the author describes when the intention of the creation of a joint venture needs to be notified

to the competent competition authority. The EC Merger Regulation No 139/2004[1] distinguishes a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity; however, it is unclear how to verify whether a joint venture is a 'full-function' one or not. This is due as much to doubts resulting from Regulation No 139/2004 on how to interpret changes in the scope of the activities of the joint venture, as it is to difficulties with the interpretation of the variety of changes regarding its parent entities that, in fact, may take place. To complicate things a little further, it is not clear whether Article 3(4) of Regulation No 139/2004 puts any limits on the application of Article 3(1)(b) and what is the relationship between both provisions.

Second, the author analyses Article 2(3), (4) and (5) of Regulation No 139/2004 and asks further questions connected with her work. She scrutinises the concepts of horizontal coordination, vertical coordination, collective dominant position and parallel behaviours. To a great extent, she employs the theory of oligopoly. There is an important question answered in this part of the book: how to amend Article 2 Regulation No 139/2004 so that the assessment of coordination is comprehensive and coherent? She believes that Article 2(4) and (5) of Regulation No 139/2004 should be repealed and coordination should be assessed in the light of Article 2(3) under the SIEC-test.

Third, the book covers spill-over effects from the joint venture on the remaining independent activities of the parent entities, including coordinated and non-coordinated effects (included in the SIEC-test). The author proves that both Article 2(3) and Article 2(4) of Regulation No 139/2004 include the risk of coordinated effects and, furthermore, that non-coordinated effects cannot be subsumed under coordination. The author also proves that joint venture agreements *ex definitione* result in structural changes, whereas they do not regulate any competitive behaviours of the parent entities. In other words, such behaviours can be agreed upon in separate contractual clauses only as ancillary restraints to the concentration in question.

The author analyses also the respective Polish legal framework. Provisions contained in the 2007 Act on Competition and Consumer Protection[2] are concise; however, there are many uncertainties regarding concentrations in the form of joint ventures, particularly because of the differences between the Polish rules and Regulation No 139/2004. The author asks the right questions here and correctly diagnoses the problems in the Polish legal provisions. Their 'pro-EU type' interpretation applied from time to time does not make it much easier for the Polish competition authority to apply the 2007 Act. Perhaps unsurprisingly given these findings, the author also finds that this means that a legislative initiative to amend the 2007 Act may be needed.

Under Polish competition law, all joint ventures that meet its quantitative criteria need to be notified to the competition authority on the basis of the Article 13 of the

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Text with EEA relevance), OJ L 24, 29.01.2004, p. 1-22.

[2] Act of 16 February 2007 on Competition and Consumer Protection (consolidated text Journal of Laws of the Republic of Poland 2017, item 229 as amended).

2007 Act. This notification duty is based on the literal (linguistic) interpretation of this provision (Article 13 para. 2 p. 3). The author supports the view that the scope of the 2007 Act in this regard is too broad, and only full-function joint ventures should be subject to the merger notification regime provided for in the 2007 Act. However, it remains to be seen whether this proposal will be taken into account on the occasion of future amendments of the 2007 Act. The rationale favouring a merger notification regime without the full functionality test may be that it is more efficient in terms of preventing infringements of competition law. For instance, in the absence of the broad scope of the 2007 Act, Poland would be only capable of an *ex post* intervention via competition law in the case of the joint venture that was to handle the design, financing and construction, as well as meant to operate the Nord Stream 2 gas pipeline, running from the Russian Baltic coast to an exit point near Greifswald (Germany).[3] Furthermore, Poland is not the only European state maintaining this type of a merger notification regime. In continental Europe, also Austrian, German and Lithuanian regimes may be considered perfect examples of the above.[4]

The reviewed book is the first publication in Polish that approaches the issue of joint ventures in such comprehensive and systematic way, offering certain *de lege ferenda* proposals. It highlights many gaps in knowledge on joint ventures that need to be filled and raises many questions. The author managed not only to tackle numerous issues in her book but also to provide guidance for further research by way of references to relevant cases and publications in its extensive footnotes. So, I sincerely recommend the reviewed book to both researchers and practitioners specialising in competition law.

dr hab. Anna Piszcz, prof. UwB
University of Białystok
piszcz@uwb.edu.pl

[3] On that joint venture see *Nord Stream 2 – Application withdrawn*, https://www.uokik.gov.pl/news.php?news_id=12511; *UOKiK against Nord Stream 2*, https://www.uokik.gov.pl/news.php?news_id=14323 (1.07.2018).

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CONFERENCE REPORTS

Security, regulation and competition of the energy market – 2nd National Academic Conference, Łódź, 26 April 2018

On 26 April 2018, the second National Academic Conference 'Security, regulation and competition of the energy market' was held at the Faculty of Law and Administration of the University of Łódź (hereinafter; WPiA UŁ). The Society of Energy Law and Other Infrastructural Sectors of the University of Łódź (hereinafter; NKPEiISI) acted as the main organiser of the Conference. The event was held under the honorary patronage of the Prime Minister Mateusz Morawiecki, the President of the Energy Regulatory Office and the Centre for Antitrust and Regulatory Studies of the University of Warsaw. The co-organisers of the Conference were: the Department of European Economic Law of WPiA UŁ, the Polish Foundation of Competition Law and Sector Regulation Ius Publicum in Warsaw (Ius Publicum Foundation) and the University of Economics in Katowice. Polskie Górnictwo Naftowe i Gazownictwo S.A. (hereinafter; PGNiG) acted as the Strategic Partner of the initiative. The event was a follow-up to the first National Academic Conference 'Security and regulation of the energy market', held on 24 May 2017[1].

The Conference was opened by its organiser – M. Kraśniewski (Chairman of the Board of NKPiISI, Deputy Chairman of the Board of the Ius Publicum Foundation). He welcomed all the guests, especially the co-organisers of the conference – Professor Maria Królikowska-Olczak D. Sc. (Head of the Department of European Economic Law of WPiA UŁ), Professor Mirosław Pawełczyk, D. Sc. (University of Silesia, Chairman of the Board of the Ius Publicum Foundation) Marzena Czarnecka, PhD (Assistant professor, University of Economics in Katowice). Furthermore, he expressed his gratitude to all the moderators and speakers for their involvement in the preparation of the agenda for this year's Conference. A special word of thanks was extended to the Members of the Programme Board of the Conference, who contributed significantly to the substantive framework of the Conference. Next, the co-organisers of the Conference and the Associate Dean of WPiA UŁ Zbigniew Świderski, PhD took the floor. They welcomed the guests and noted individual substantive aspects of the Conference as well as at its meaning for academic discourse.

[1] M. Kraśniewski, W. Modzelewski, M. Sokół 'Security and regulation of the energy market' – first National Academic Conference on the 5th anniversary of the Society of Energy Law and Other Infrastructural Sectors of the University of Łódź, 24 May 2017, YARS 2017, issue 10(16), p. 229–237.

Then, the Łódzkie Province Governor Professor Zbigniew Rau D. Sc. read a letter to the Organisers and Participants of the Conference from the Prime Minister Mateusz Morawiecki. In the introduction, the Prime Minister highlighted the importance of the energy sector, a vital element of State policy. He stressed that the unique specificity of this sector led to the need to create a regulatory regime based on EU legislation, such as the third energy package, as well as the need to ensure the continuity of supply. However, it was also pointed out that changes would have to take place while maintaining a price level that is acceptable for the final customers. Therefore, the State pays significant attention to legislative processes in relation to the energy sector. Prime Minister Morawiecki stressed that such an approach was expressed by the provisions of the Sustainable Development Strategy. The Chairman of the Council of Ministers stated that the provisions of the Strategy were impossible to implement without active involvement of scholars, experts and business people. Later on, he praised the Organisers for the selection of the topics for this year's Conference, which fully coincided with the Government's activity in the energy sector. Prime Minister Morawiecki linked energy security with the active policy of diversifying the sources of natural gas supply to Poland, and the introduction of the capacity market mechanism that ensures the continuity of energy production. Furthermore, he tied the regulation with the Act on Electromobility and Alternative Fuels, which was adopted at the beginning of the year. It was stressed that in duly justified cases, purely market conditions of economic trade had to make room for a higher good, for example, innovation. Prime Minister Morawiecki considered competition to be the most effective mechanism for the provision of goods and services, including energy, to citizens and enterprises.

Next, Konrad Fischer (Director at the Ministry of Innovation and Development) read a letter by the Minister Piotr Naimski (Secretary of State at the Chancellery of the Prime Minister, Government Plenipotentiary for Strategic Energy Infrastructure). Piotr Naimski highlighted the importance of the implemented diversification of gas supply sources to Poland in the context of the upcoming expiration of the multi-year contract with the Russian supplier GAZPROM. In his opinion, the activity related to the expansion of the President Lech Kaczyński Terminal in Świnoujście, and the construction of the *Baltic Pipe* pipeline were vital for State security and would help to ensure actual price competition on the Polish gas market. Minister Naimski also referred to the current activity of the Government in relation to the energy sector. Particular attention was paid to the Capacity Market Act, which will modernise the Polish energy sector based on national resources, which will translate into stable and uninterrupted energy supply.

The opening of the Conference was followed by the first panel – 'Energy market between security and regulation'. The session was moderated by Professor Bartłomiej Nowak D. Sc. (Kozminski University). The speakers were: Maciej Małecki (Chairman of the Sejm's Energy and State Treasury Committee), Professor Andrzej Powałowski D. Sc. (Head of the Department of Public Economic Law and Environmental Protection Law of the Faculty of Law and Administration at the University of Gdańsk), Professor Jan Wojtyła D. Sc. (professor of the Department of Law and

Insurance at the University of Economics in Katowice), Piotr Woźniak (Chairman of the Management Board of PGNiG), Paweł Ostrowski (Deputy Chairman of the Management Board of Towarowa Giełda Energii), Arkadiusz Zieleźny (Chairman of the Management Board of POLENERGIA Obrót S.A.), Anna Żyła (Chief Ecologist in the Bank for Environmental Protection).

Professor Nowak pointed out that principally the energy sector was not subject to competition rules, which resulted from the domination of natural monopolies on the market. The network industry itself has a highly capital intensive nature – investments in energy are very costly, and the return on equity is slow. Moreover, the market has a small number of players. The regulation is seen as a substitute for competition on the market, which is not fully effective. Next, the Moderator asked Professor Powałowski about energy regulation in the context of Article 22 of the Constitution of the Republic of Poland.

Professor Powałowski began his speech by stating that Article 22 of the Constitution of the Republic of Poland provides for boundary conditions of rationing as well as regulation (harmonising regulation). The regulation itself applies to all infrastructural sectors. It can be of a rationing character. The speaker stressed that Article 22 of the Constitution of the Republic of Poland required the adoption of an act in order to introduce certain regulation and to indicate the public interest for each and every legislative activity. Then, he pointed out that the public interest had a broad definition – it covered notions of the axiological sphere as well as long-term and current policy. In Professor Powałowski's opinion, it was reasonable, albeit not always, to combine the public interest with the social interest, provided that the State (State institutions) was the bearer of the interest. The public interest is combined with the need to specify objectives accepted by the State and the society itself. In the energy sector, the legislator should regularly attempt to make the society aware, rather than only the energy industry, of the objectives it pursues.

Next, Professor Bartłomiej Nowak asked Arkadiusz Zieleźny about the importance of legal stability and clarity for the functioning of an energy company. Mr Zieleźny said that regulation should help to determine the relation between 'the energy sector' and the client as well as between the State and private investors. The activity of private investors in the energy sector ensures functioning competition in this sector and external capital, which in turn should lead to a more optimal use of national deposits of energy-producing raw materials and improved national welfare. Therefore, legal predictability is essential for the functioning of energy companies. Instability leads to difficulties in gaining investors' trust. A. Zieleźny gave an example of the consequences of legal instability – the Renewable Energy Sources (hereinafter; RES) sector. The initial drafting stage of the Act on Renewable Energy Sources included preferences with the aim to convince private companies to invest in this industry. During later stages of the work on that Act, negative solutions, which did not encourage investments, started to appear. Instability may cause perturbation in the sector, exemplified by the RES market, which has been restructured on numerous occasions and witnessed several bankruptcies. Such situation does not create appropriate conditions for increased investment. Market standardisation is essential.

Professor Wojtyła drew attention to the dimensions and importance of energy security. It has its own economic, social and legal dimension. All of them should be taken into account – security is a certain result of these three dimensions and it is difficult to say which one is the most important. According to Professor Wojtyła, the methodology of combining these diverse dimensions was the most important aspect here, because security could not be considered without taking into account the whole system. When adopting specific legal solutions, one must remember the constant volatility in the energy market as well as the great game of interests that determines the behaviour of the main players. According to the invited guest, the key issue was the ability to predict changes that might occur on the market. Professor Wojtyła said that the first question that should be asked was of the rationality of legal solutions. He warned against the omnipotential meaning of the law in shaping the behaviour of individual players, because it was impossible in a free market economy. Also, the role of the State is quite limited due to EU regulations on unlawful State aid. Professor Wojtyła also stated that economic solutions were coded in individual legal norms – if an adopted economic solution was defective, the law that contained it was defective as well. When conducting research, it is also important to determine the root cause of an error – whether it lies in the economic system or in the legal system. In general, the error occurs in both systems, but it is necessary to separate them. The weakness of the law is also caused by instability – one rule changes several times a year. This state of affairs results from the lack of an appropriate concept (policy). The speaker stated that a certain reference was the energy policy of the European Union, which was implemented under national conditions. However, the lack of a defined national energy policy leads to significant economic problems (an example is the coal sector). Next, he asked a question about the direction of Polish energy policy. He mentioned diversification of supplies as those directions, but at the same time he pointed out that a stable base of raw materials was important. For these reasons, it is necessary to make political decisions for the development of a hard coal base in Poland, which should be an important component of a larger whole. The speaker also stated that the greater the diversity, the higher the level of energy security. He at the same time underlined that the level of security depended on a stable energy policy. According to Professor Jan Wojtyła, stability in this matter is already noticeable – this confirmed the improvement of the condition of mining in Poland. He also mentioned that solidarity between the power industry and the mining industry gave good results and that there was hope for the stability and effectiveness of that solidarity in the future.

Next, Professor Bartłomiej Nowak asked Anna Żyła about the opinion of the banking sector on the energy industry regarding the financing of energy investments. She described the energy sector as very interesting for banks, but at the same time difficult when it comes to investment. The problem of the sector results from the domination of regulations, which should be stable. She pointed out that energy investments were of long-term nature – in the case of energy investments a standard crediting period was 15 years. Ms Żyła believes that the energy sector could not be treated only as a market. The mechanisms used on the RES market are quasi-market mechanisms and require appropriate conditions in order to function. Legal instability

directly translates into the involvement of banks in the energy sector. A. Żyła claimed that the energy market needed many investments and required legal stability as well as State support. The banking sector itself has noticed not only large investments in energy but also smaller ones, such as investments in distributed renewable energy. Ms Żyła stated that the profitability of energy investments had to be ensured in order to develop new technologies that would be likely to be fully implemented. In her opinion, this state depended largely on the energy mix, which in turn was reliant on State energy policy. Anna Żyła claimed that the energy policy was neither stable nor clear in many aspects. She expressed hope that this situation would change soon and lead to a stabilisation of the regulatory environment for future investments. Moreover, she added that the driving forces, such as the RES and prosumer energy, would not stop, but stable law was required for them to function properly.

According to the TGE Vice-Chairman, legal stability was very important for the functioning of the stock exchange, which is, without a doubt, crucial for the correct functioning of the energy sector. Paweł Ostrowski also said that the stock exchange was one of the elements that ensured energy security because it settled accounts as the Accounting Chamber. In his view, the stock exchange was also a beneficiary of energy policy, which in the longer perspective was very ambitious – in these plans he saw new opportunities for TGE.

The Chairman of PGNiG – Mr Piotr Woźniak – stated that the energy industry could not escape regulation as there was no way back from it. Piotr Woźniak referred to his experience from the work in the Energy Regulators Regional Association, where work was carried out in relation to numerous codifications for the energy industry. As a result of that work, in 2009 seventeen codes were drawn up along with numerous regulatory frameworks. This direction should be continued. However, such an approach suffered a spectacular setback one and a half year ago when, in among the accepted codes and guidelines, an auction for the capacity in the OPAL gas pipeline was decided. In compliance with all provisions, within 24 hours, the entire capacity was booked by one gas company – Gazprom. According to Chairman Woźniak, such a situation resulted from the imperfection of the regulation – this imperfection of the law allowed for the entire capacity of the gas pipeline to be booked up to 2034. Piotr Woźniak also said that the energy market could function in some respect without regulation and could resist current regulation. The best examples of the above were price crumps on the oil market from a few years ago – despite the adverse conditions, it did not come to spectacular bankruptcies, takeovers or mergers.

In a further discussion, Professor Bartłomiej Nowak drew the participants' attention to the issue of energy security. First, he asked Professor Jan Wojtyła to present his definition of energy security. According to the speaker, security is a system that would ensure the implementation of objectives. Professor Wojtyła noted that there was no doubt that the goals of individual countries were variously defined and changed over time. In order to adopt the definition of energy security, the starting point should be to set goals and values, which need to be protected and can be implemented in this context – this is methodologically correct. He also argued that one of the imperfections of Polish legislation was the unlimited formulation of definitions – almost every act

starts with definitions. The speaker recommends caution in formulating definitions because it is difficult to talk about one definition of a given phenomenon. As an example, he mentioned security, which in a very narrow perspective (for example, limited to the provision of a specific energy carrier) is something different than in the broad sense. However, Professor Jan Wojtyła said that special importance should not be given to definitions because the adopted strategy was more important.

According to Professor Powałowski, it was hard to define energy security. However, there are grounds related to the protection of energy security. In his opinion, the social market economy made it imperative to ensure energy security. The energy industry is connected with social needs and, therefore, it will never be a classic market – it is a collision of the market and social needs. According to Professor Andrzej Powałowski, this state of affairs is the reason why the liberalisation and privatisation of the energy industry would never be absolute. The speaker disagreed with the thesis that the law follows the economy. If this assumption was real, the law would refer to privatisation of the energy industry and would be determined by economic factors. However, in order to ensure energy security, economic factors are not essential, unlike State policy and a number of axiological values (for instance diversification or solidarity).

Maciej Małecki began his paper with the definition of energy security from the recipients' point of view – provision of constant and uninterrupted energy supplies for an affordable price. According to Minister Małecki, a regulation that safeguarded the country against the dependence on a single gas supplier, and at the same time allowed for the functioning of this sector in competitive conditions on the global markets, was important for the gas sector. In his opinion, the Yamal contract, valid until 2022, made Poland dependant. Minister Małecki pointed out that the above conditions were the reason for the idea to build the LNG Terminal in Świnoujście, which, alongside the *Baltic Pipe*, was an element of the North Gate. The entire project will allow for the import of gas to Poland in competitive conditions. At the same time, it reduces the risk faced by Poland as a result of the construction of Nord Stream II. At that point, the speaker emphasised that the use of the third energy package for Russian and German investment would stop the construction of this pipeline as it is of political rather than business nature. As the next example of the imperfection of regulation and threats to energy security, Maciej Małecki presented the Decision of the European Commission of 22 October 2016, which in fact granted Russia unrestricted capacity of the OPAL gas pipeline. He also emphasised that pursuant to the Decision, it was possible to import gas to Poland from every direction, and yet the gas would always come from Russia. Therefore, the decision to build the North Gate was made. According to Minister Małecki, Poland's unrestricted connection with supplies of Russian gas would mean that the country was not sovereign on the international arena, but dependent on its neighbour. Reality shows that when business gas contracts are possible, there is no room for solidarity among the EU Member States. Maciej Małecki claimed that the amendments to the Security of Supply Directive, which puts a duty on EU Member States of mutual cooperation in case of an interruption in the supply of gas, which were introduced thanks to Poland's efforts, were a great success. To sum up, the speaker recognised that regulations were essential for the security of gas

supply. In his view, regulation should protect the State against fuel deficiencies, and, at the same time, favour the development of the necessary infrastructure. In his final conclusion, Maciej Małecki paid attention to improved internal energy security in the fuel sector, where a number of regulations limiting the black economy of the fuel trade were introduced in recent times. The benefits from these changes are significant not only for security but also for competition on this market, since they eliminate illegal entities from the market.

Piotr Woźniak stated that the construction of *Baltic Pipe* was a late project. The first attempt to end the monopoly in the imports of gas to Poland took place in 2001, when a contract for the supply of gas was signed with Norway. The contract included the construction of a pipeline between Poland and North Sea fields by the supplier – Norway wanted to directly sell its gas to Poland. Following the change of government, the contract was terminated in 2001. However, there were two attempts to re-build relations with Norway, but Poland had lost its reliability as a partner. Therefore, in 2006 Poland invested in Norwegian beds in order to rebuild its position – currently, PGNiG holds over 21 concessions to exploit gas in the North Sea. The *Baltic Pipe* is a project similar to the idea from 17 years ago. If completed in time, it will help eliminate the monopoly of Russian gas on the Polish market once the Yamal contract expires. Piotr Woźniak pointed out that we paid for gas supply regardless of the market situation, whereas the European market had changed significantly in recent years while Poland was stuck in the previous era (take or pay). He pointed at the margin squeeze and mentioned that it was difficult to engage in sales – pursuant to the Yamal contract Poland bought gas for an excessive price but sold it for the market price. P. Woźniak highlighted that this gap led to price pressure on the company. At this moment, PGNiG is waiting for the judgement of the arbitration court in Stockholm in relation to the clauses of the Yamal contract. A similar dispute between GAZPROM and NAFTOGAZ has already been resolved. However, the judgement in favour of the Ukrainian party has not been respected by GAZPROM. The Chairman of PGNiG said that the example of the Ukrainian and Russian dispute raised concerns that in Poland's case, a legal solution might not be enough and the current state of play would last until the expiration of the contract in 2022. Mr Woźniak clearly concluded that Russian gas had to be replaced with another volume and warned not to sign long-term contracts with GAZPROM in the future. He added that the *Baltic Pipe* would meet the Polish demand for gas and lead to a radical change on the Polish market – PGNiG would be able to purchase gas for the market price from Norway and import gas from the North Sea. In such a scenario, it is safe to say that the Polish market will catch up with other European markets. The new pipeline is good news for PGNiG S.A. as it will improve the company's competitiveness in Europe and increase other countries' interest in cooperation. In Mr Woźniak's opinion, such a state of play might result from guaranteed uninterrupted supply of gas to Poland ensured by the *Baltic Pipe* – disruptions in supplies can be caused only by technical breakdowns. According to P. Woźniak, the most important thing was the fact that the new pipeline would eliminate the risk related to gas supply for domestic purposes, which at the same time was a prerequisite for large-scale use of gas in energy production. Piotr Woźniak

added that PGNiG was intensively preparing for autumn 2022, when the construction of the pipeline was said to be finished. PGNiG is planning large-scale acquisitions on the North Sea. He added that the Norwegian gas portfolio was divided into two sections: own gas exploited based on the company's concession and gas purchased from other partners. Chairman Woźniak pointed out that the Yamal–Europe pipeline would still be used, but the gas would be supplied not based on long- or mid-term contracts as this would be too much of a risk to Polish interests.

The second panel of the Conference was devoted to the relation of energy security to the law and the economy. The session was moderated by Associate Professor Mr Mariusz Golecki (professor at WPiA UŁ). The first paper was given by Professor Mirosław Pawełczyk. He titled his address 'Energy security – opposite values'. The speaker discussed inconsistent and often differently understood relevance of energy security as well as its axiological meaning. In his opinion, energy security is evolutionarily situated on an equivalent level to constitutional principles. Professor Władysław Mielczarski (professor at the Institute of Electrical Power Engineering of the Lodz University of Technology) spoke next on 'The influence of regulation and competition on energy security'. W. Mielczarski pointed out that the market of electric energy had lost the features of a market system and became a 'race' for raising subsidies by its participants. In his opinion, benefits from the introduction of competition to the energy market were very small, however transaction costs related to the maintenance of other subsidies – systems of their allocation and settlement – increased significantly. Professor Mielczarski also referred to the dilemma: was a not particularly efficient system of central management in the energy industry more effective than the market system subjected to manipulations throughout subsidy systems. Zdzisław Muras, PhD gave the third paper (the Head of the Department of Legal Issues and Disputes Settlement of the Energy Regulatory Office) entitled 'Energy security and the control policy in the context of judicial inspection of the decisions made by the market regulator. The role of administration and judicatures'. In the address, he emphasised that the possibility of challenging decisions of regulatory bodies constituted the basic component of the legal democratic State as well as guaranteed the defence of self-interests. Later in his address, the speaker analysed the appeal mode from the decision of the President of Energy Regulatory Office and the role of civil courts in the control of these decisions. He based his speech on broad examples from case law. In the conclusions, Z. Muras emphasised that settlement of cases related to the scope of sectorial regulation should take into consideration the shape and guidelines determined by the national policy, the regulatory policy based on it, as well as the fact that the obligation to take these elements into account did not belong to the area of the jurisdictional activity of civil courts. The last speaker – Professor Michał Domagała (assistant professor at the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin) introduced his paper titled 'Cooperation of electricity undertakings – condition for energy security'. In this paper, the speaker addressed the issues of regulatory implementations of the obligations imposed on non-public entities in the field of energy security. He described the subjective and objective scope of the obligation of economic cooperation between electricity undertakings in the context of the achievement of

energy security. Mr Domagała emphasised that the aforementioned obligation went beyond the duty of contracting only – it also included an active involvement in the realisation of the public interest.

In the afternoon part, two complex sessions were held with three parallel panels. The first session contained panels on 'The Polish capacity market', 'Renewable energy sources', and 'Functioning of electricity undertakings'; the second session contained panels on: 'Electromobility'; 'Environmental protection in the energy sector'; and 'Consumer protection'.

The panel 'The Polish capacity market' was moderated by Professor Mirosław Pawełczyk. Mr Tomasz Dąbrowski (Director of the Department of Energy at the Ministry of the Energy) was the first to speak. In the introduction, he noted one of the main causes that determined the implementation of activities aimed at the adoption of regulation of the Polish capacity market – the constantly growing demand for power in the National Power System, which is connected with economic growth of the country and the development of new technologies. Next, the speaker presented the purpose of the new regulation – ensuring the safety of electricity supplies to final customers in the medium- and long-term perspective through investments in new manufacturing powers and the modernisation of existing power stations as well as combined heat and power stations, so as they would not be withdrawn for rational economic reasons. In his speech, Mr Dąbrowski also referred to the operational principles of the capacity markets in other European countries. An essential part of Mr Dąbrowski's paper was to show the rules for the participation of foreign entities in the Polish capacity market and the certification process. The speaker also pointed out that the Polish capacity market would help guarantee competition on the energy market as well as technological neutrality and would also help avoid excessive support of individual market participants.

The next paper – 'The Polish capacity market as the support instrument for the construction of new power plants. Will it work?' – was delivered by Mr Igor Muszyński (Radzikowski, Szubielska and Partners LLP). He analysed solutions included in the regulation of the capacity market that support the construction of new power plants. He paid attention to the significance of the capacity market, which leads to a change in cash flows in the electricity sector. He also touched upon the themes associated with the execution of tasks faced by an investor reporting its participation in an auction. Mr Muszyński paid attention to the resistance of the power market to external changes, shown by the stiff character of power agreements, and a lack of possibility of amending its provisions, excluding two exceptions to this principle. At the end of his address, he mentioned the legally increased stock exchange duty to sell electric energy set at 30%. He also emphasised the importance of new regulations for the development of the electricity sector, necessary to create a system which supports investments in new manufacturing powers.

The third paper 'The capacity market – general certification and certification for main auctions (practical problems and first conclusions)' was presented by Michał Będkowski-Kozioł PhD LL.M. Eur.Int. (Dresden) (Cardinal Stefan Wyszyński University in Warsaw). In his address, he paid attention to the processes of general

certification, as well as certification for main and additional auctions. Moreover, he highlighted existing problems in the certification process. The speaker analysed the situation of market participants, putting emphasis on their rights and duties in individual phases of certification. He also made a preliminary assessment of the ongoing general certification process, underlining its importance in allowing participants to be involved in the market. Mr Będkowski-Kozioł explained individual stages of the certification process and pointed at the interrelationships between individual kinds of certification. In the end, he described the deadlines and datasets required to submit an application.

Next to speak were Marcin Kraśniewski, MA (WPiA UŁ) and Michał Bałdowski, MA (WPiA UW). They considered the secondary market as the tool providing the effectiveness for the mechanism of the capacity market. In the first part, they described the nature of the secondary market. They showed that the secondary market performs a protecting function for the supply of required capacity, also if an obliged entity fails to deliver the capacity in the appropriate amount. Moreover, they pointed at the existence of a second crucial function – namely making the capacity market mechanism more flexible, because the secondary market allows for the supply of capacity by entities which did not win the auction, but participated in the certification process in relation to the same auction. Later on, the speakers addressed the two types of transaction: secondary trade in the capacity obligation and reallocation of the volume. The next section of the paper was devoted to British legal solutions determining the operational principles of the secondary market for the capacity market in Great Britain. The speakers praised both solutions. To conclude, they compared the regulation of the secondary market in both countries.

The last address presented by Paweł Ura (WPiA UW) concerned the participation of foreign producers in the Polish capacity market. First, the speaker indicated the general legal framework of the European Union, referring to the directive for the electricity sector, pointing at the efforts to achieve a uniform and competitive market, preserving equal chances for its participants. Next, he discussed the obligation to admit foreign producers to participate in the Polish capacity market. In his statement, the speaker also presented the manner of participation of foreign entities in the auction system, emphasising preliminary auctions. In conclusion, Paweł Ura paid attention to the possibility of a discrepancy between EU law and domestic law due to the planned implementation of the Winter Package.

The panel discussion about renewable energy sources was hosted by Professor Maria Królikowska-Olczak. Speaker included: Magdalena Porzeżyńska, PhD (WPiA UW), Mariusz Szyrski, PhD (Cardinal Stefan Wyszyński University in Warsaw), Marcin Trupkiewicz, MA (Adam Mickiewicz University in Poznań), Michał Krzykowski, PhD (University of Warmia and Mazury), Artur Leśniak (Jagiellonian University) and Anna Żyła.

Magdalena Porzeżyńska titled her address 'The analysis of selected support systems for energy production from renewable sources in the light of EU rules on State aid'. The purpose of the paper was to show that domestic energy markets are not able to assure a desirable production level of renewable energy, thus Member States have to use instruments supporting this market. She began the address by discussing

the guidelines of Directive 2009/28/EC, paying special attention to the freedom of EU Member States in its implementation. Furthermore, she stated that correct categorisation of the support system as State aid was essential. She also showed that the decision-making practice of the European Commission and the judicial decisions of the Court of Justice of the European Union in this respect confirm that in the process of designing and implementing of the support systems, the need to ensure their compliance with the rules of State aid is problematic in many Member States.

Mr Mariusz Szyrski spoke next addressing the subject of local power industry as the latest trend in Polish and European law. To begin with, he showed that it was possible to view 2016-2017 as a breakthrough in the development of the concept of the issue he brought up at the level of EU legislation. In the very period, the European Union and its Member States noticed that local energy communities exploiting the energy from renewable sources should play a fundamental role in the development of the new energy policy. The speaker noticed that a possibility of creating and functioning of such structures like energy clusters, energy cooperatives, or other local energy associations had been predicted within the local energy community. In conclusion, he stressed the unexpected growth in the production of energy by natural persons in Poland, which has been hampered in recent times due to a delayed amendment to the Act on RES.

Marcin Trupkiewicz, MA gave a speech on 'New shape of support instruments in the draft amendment to the Act on RES'. To begin with, he stated that the basic goal of the government draft act on the amendment to the Act on RES was to ensure compliance with EU principles on State aid. Poland committed itself to this goal in the notification procedure related to the Polish support system for the development of RES. Next, he showed the recipients of the new regulations, that is, producers of hydro power and biogas, including agricultural biogas. M. Trupkiewicz discussed the provisions of the draft Act on RES which constitute two new sales models of unused energy. These models are a feed-in tariff – the producer signs a contract for sale of unused energy for a fixed purchase price with the obliged seller – and feed-in premium – the purchase price of electric energy available on a competitive market is levelled to a guaranteed fixed price.

In the paper 'The new shape of support instruments in the draft amendment to the Act on RES' Michał Krzykowski, PhD presented a thesis that in order to meet the challenges resulting from growing global population and quick depletion of natural resources, the changing climate and the need to pay more attention to the environment, the European Union will radically change its approach towards productions, consumption, processing and storage of recycled goods and neutralisation of biological waste. Furthermore, he presented proposals for the implementation of the aforementioned thesis – moving towards circular economy, which helps to maintain the resources in the economy as long as possible and to reduce waste production to the minimum. In the paper, he suggested, among others things, to develop ISO standards, quota systems as well as biolabels.

Anna Żyła spoke next of the financing rules for RES projects by the banking industry. Anna Żyła presented a practical look at financing of RES investments and

broadly understood environmental protection. In her paper, she justified why the law, the economy and engineering should be part of a consistent whole for investment projects. She emphasised that the support system for investments was undergoing constant developments and helped to fund complex and innovative projects. However, she added that every investment was approached individually. In the final part of her speech, Anna Żyła discussed the rules for the provision of investments carried out by special purpose vehicles and prosumers.

Artur Leśniak presented a paper concerning legal obstacles for the development of RES in Poland. As the first barrier, he identified ineffective support. A. Leśniak regarded low social awareness as the next barrier which in his opinion influenced the adoption of the so-called anti-wind power plant act. He claimed that the involvement of the social factor in the administrative decision-making process was cumbersome and slowed down the investment process. Excessive bureaucratisation, present in the process of connecting RES installations to the network, was regarded as a next barrier. The speaker emphasised that the five-stage process of connecting was excessively complicated and the documents necessary in the course of its implementation required extensive expertise. This, often combined with little experience of the investor, significantly extends procedures.

The first panel, entitled 'The functioning of energy companies' and led by Professor Mariola Lemonnier (University of Warmia and Mazury), was opened by a speech delivered by Michał Karpiński, MA (University of Silesia in Katowice) on 'Regulation for security – the situation of energy companies on selected examples'. In his speech, he discussed the limitations related to the operation of energy companies in order to protect the legitimate public interest, that is, energy security. He also emphasised that any restrictions on economic freedom should be exceptional. The next speech, entitled 'Investments in wind energy – evaluation of the current state in light of Polish and EU regulations', was given by Dominika Basik (Cardinal Stefan Wyszyński University in Warsaw). She presented the current state of investments in wind energy and discussed the regulatory environment having key impact on the volume of these investments. She also noted that it was necessary to introduce legal changes that would foster investments in wind farms. The third paper, entitled 'Energy market as the addressee of financial regulations', was delivered by attorney Łukasz Jankowski (Kancelaria Wierzbowski Eversheds Sutherland Sp. K.), who presented the impact of financial sector regulation on the energy sector. Among other things, he spoke in detail of the sanctions for a violation of MiFID II provisions in the form of fines. He pointed out that those penalties were to eliminate expected potential benefits for entities and to act as a deterrent. The next speech on interim settlements in cases concerning the operation of energy enterprises in Poland was presented by attorney Konrad Zawodziński (District Bar Council in Warsaw). The speaker discussed here the nature of interim settlements based on the subject-related framework of energy companies, public administration bodies and judicial power. In the further part of his speech, he drew attention to the low popularity of those types of decisions and the disproportion between the competences of the office of competition and consumer protection and the sector regulator in the sphere of interim settlements. The last

paper, titled 'An attempt to evaluate selected commitments proposed by GAZPROM in antitrust proceedings from a market perspective', was delivered by Marcin Kamiński (University of Warsaw). He analysed the anti-trust proceedings against GAZPROM. He paid particular attention to the commitments that were proposed by this company. He also stressed that the current way of conducting antitrust proceedings would not lead to the compensation of damages.

The electromobility panel was chaired by Professor Mirosław Pawełczyk. The first paper, concerning the adoption of the new Act on Electromobility, was delivered by Adam Szafrański, D. Sc. (University of Warsaw). In his speech, he stressed the existence of an irreversible phenomenon of economic progress, to which the implemented regulations were usually the answer. However, he noted that the case of electromobility was slightly different due to a relatively low number of electric vehicles in Poland, pointing at the reasons for this phenomenon, that is, a maximum reach of 500 km and the price on average twice as high as in the case of combustion cars. Professor Szafrański pointed out that despite those conditions, on which the legislators had no influence, there were areas where the State had a chance to show support for the development of the electric vehicle market, by, for instance, introducing appropriate legal instruments allowing for the construction of a generally accessible charging station and defining the rights and responsibilities of individual participants of that market. An important part of the paper was the analysis of the rules for the building of a charging station, including the importance of construction law for this process. Professor Adam Szafrański also talked about privileges for the owners of electric vehicles provided for in the Act (such as clean transport, free parking, tax reliefs).

The next paper addressed the assumptions of the programme for zero-emission public transport (E-mobility) and was given by attorney Nina Zys (the National Centre for Research and Development). The speech began with an indication of the initiating factor to start work on the programme – the implementation of a new financing method of research, based on the problem-driven research model in the area of electromobility, by the National Centre for Research and Development. The new system assumes the creation of comprehensive research programmes from the portfolio of projects contributing to the main purpose of the E-mobility Programme. She pointed out that the new financing rules were aimed at solving existing problems and satisfying the needs of recipients by means of projects involving coherent technological solutions. In the further part of the lecture, N. Zys presented the main assumptions of the E-mobility programme based on American research programmes.

Michał Markiewicz, PhD (the National Centre for Research and Development) was the next speaker in the 'Electromobility' panel. He focused on the potential risk involved in the implementation of the programme of zero-emission public transport in the form of an innovation partnership. He began his considerations by discussing the principles of an innovation partnership. Afterwards, he discussed the implementation of projects under an innovation partnership on the example of the E-mobility project. The aim of the project is to create a new, emission-free public transport vehicle that will be introduced onto the Polish market and the development of charging station infrastructure. The essence of M. Markiewicz's speech was the indication of the risks

associated with the implementation of projects under an innovation partnership (process risk, procedural risk, technological risk).

The last speech, delivered by Patrycja Gliwka (University of Warsaw), addressed the advantages and disadvantages of the solutions adopted in the Act on Electromobility and Alternative Fuels. She started by discussing legislative work and their pace. She pointed at the rush in these changes, related to financial penalties for the failure to implement Directive 2014/94/EU on the deployment of alternative fuels infrastructure. Subsequently, she raised the issues of generally accessible charging points and its concessions for the distribution of electricity. She noted that it was not required to have a license to supply electricity to public charging stations. Such concessions are required to build charging stations which, together with the regulations imposing additional duties related to the creation of charging stations, may lead to the construction of a limited number of such stations.

At the same time, the panel on environmental protection in the energy sector was held with Anna Żyła as its moderator. Maciej Kojro (Cardinal Stefan Wyszyński University in Warsaw) was the first speaker of this session delivering a speech on 'The impact of the MCP Directive on the heating sector'. In the paper, he analysed problematic issues for its application and the implementation process in Poland. In the opinion of the speaker, the system created by the Medium Combustion Plan Directive and the Industrial Emissions Directive (hereinafter; IED) was a coherent whole. He believed that the inclusion of emission standards for small and medium-sized sources was the implementation of the EU programme 'Clean Air for Europe'. As a conclusion of his speech, M. Kojro positively assessed the shape of EU regulation.

Jędrzej Maśnicki, MA (University of Warsaw) presented a paper entitled 'The impact of environmental regulations on ensuring equal conditions of competition in the energy sector'. He put emphasis on the economic aspect of EU environmental regulations in the energy sector. He stated that the harmonisation of environmental protection rules was important from the economic point of view. Among EU regulations which significantly affect the economy, he included standards on industrial emissions, integrated emissions of exhaust gases into the atmosphere and emission control systems. In the paper, J. Maśnicki paid much attention to the IED and the Best Available Technology (hereinafter: BAT) conclusions. Among other things, he mentioned the lack of research on the impact of the BAT and IED conclusions on the activities of the energy sectors of the Member States. He also pointed out that the adaptation of national energy systems to BAT conclusions was an expensive process and, thus, required special attention. He criticised the process of establishing and applying EU law, which justified the failure to include strictly technical aspects of the energy sector in those processes. In the summary, he stated that the main goal of environmental regulations was to ensure a level playing field and also that environmental policy was an important element of the European Union's economic policy.

The issues of the IED and the BAT conclusions were further discussed in the next paper, delivered by attorney Radosław Maruszkin. He characterised the objects subject to regulations of the IED and discussed the divisions of large stationary combustion sources and the types of pollution emitted by those objects. In the summary,

R. Maruszkin considered a four-year period to adapt to the BAT conclusions to be far too short, which justified the existence of an extensive decision-making process in corporate administrative matters.

The following paper – prepared by Karolina Chról (Cardinal Stefan Wyszyński University in Warsaw) – was related to the Directive on the geological storage of CO2 (hereinafter; CCS Directive). The author pointed out that the Directive did not gain popularity among the Member States. In her opinion, the implementation of the provisions of the CCS Directive and, thus, the creation of carbon dioxide storage sites in Poland, created an opportunity for the development of national economies. She stated that such obligations as long-term landfill inspections and examinations of carbon dioxide composition were crucial for environmental safety and environmental protection.

Lastly, Adrian Król (University of Warsaw) presented a paper on new support systems for high-efficiency cogeneration in Poland. In the first part of the speech, he distinguished two perspectives for the development of this system. In his opinion, the first period was of a regulatory nature (the Energy Efficiency Directive), while the second was characterised by State aid for the congregation support system. He paid particular attention to discussing EU guidelines on the application of State support. In his opinion, they primarily promoted systems consisting of a supplement to the market price.

The panel on 'Consumer protection in the energy sector' was led by Rafał Zgorzelski, PhD. The first speech, entitled 'Connection agreements in the heating sector – aspects of competition and consumer law', was given by Jarosław Sroczyński (Kancelaria Markiewicz & Sroczyński Sp. K.). He discussed practical aspects of connection agreements. He said that divergent targets of heating companies and heat consumers often led to disputes. In his opinion, this state of affairs led to the need to pay special attention to consumer protection in the heating sector. Attorney Sroczyński pointed to the need to analyse whether, and to what extent, the investor's obligations could be transferred to entities that own apartments or houses. He further mentioned that case law showed that the 'community' and the 'cooperative' constituted consumer groups within the meaning of the Act on Competition and Consumer Protection. As such, they were therefore protected by the President of the Office of Competition and Consumer Protection. The next paper, titled 'Protection of consumer interests in light of the Winter Package and the new order for consumers', was delivered by the co-organiser of the Conference – Marzena Czarnecka, PhD. In the introduction, she stressed that should protection of consumers be necessary, it had to be provided via the energy market through such measures as solidarity rates or reduction of energy bills. Subsequently, the speaker presented legal perspectives for consumers in the light of changing European Union law – the 'Winter Package' – and the European Union Communication on Delivering a New Deal for Energy Consumers. As emphasised by M. Czarnecka, a fully integrated internal energy market should bring tangible benefits to consumers, and the new order would contribute to the removal of unnecessary burdens for enterprises. The next speech, delivered by Paweł Domagała, MA (Cardinal Stefan Wyszyński University in Warsaw), was entitled

'Threats related to the conclusion of off-premises and distance contracts for the supply of electricity'. At the beginning of his speech, the speaker pointed out that the conclusion of off-premises contracts with consumers caused many abuses by dishonest suppliers, often resulting from the activities of unreliable agents of energy companies. Subsequently, the speaker presented the postulate of the President of the Energy Regulatory Office regarding the introduction of a ban on contracts for the supply of electricity outside the premises of an energy company. In the summary of his speech, M. Domagła presented legal perspectives on the use of off-premises and distance contracts. The last speech, entitled 'The actions of the Office of Competition and Consumer Protection in the field of consumer protection on the electricity market', was delivered by the Director of the Delegation of the Office of Competition and Consumer Protection in Łódź, Tomasz Dec. The paper presented the achievements of the Office of Competition and Consumer Protection in the scope of consumer protection in the electricity sector. The speaker stated that an increase in the market position of energy production and the trade in that energy, as well as the resulting increase in energy prices, had been noticeable in recent years. He also pointed at the upward trend in the process of changing the seller. Mr Dec noted that the authorities were not fully prepared for the ongoing liberalisation of the energy market and agreed with the view of the previous speakers that the allocation of additional competences to authorities could help to improve the legal situation of consumers.

The conference was summed up by Professor Maria Królikowska-Olczak who drew attention to the multifaceted nature of the subject matter and its practical meaning for many entities in the energy sector, including consumers. She claimed that the goals set by the organisers of the Conference were fully accomplished. She expressed hope that the deliberated considerations would be continued during subsequent meetings of the representatives of science, State and local government administration as well as the energy sector. Afterwards, Professor M. Królikowska-Olczak expressed her gratitude to Professor Mirosław Pawełczyk, Marzena Czarnecka, PhD and Marcin Kraśniewski, MA for their joint substantive and organisational work at the Conference. She also sent her thanks to the representatives of the conference partners. Special words of gratitude for the organisational and financial support provided by the Polish gas company PGNiG S.A. were extended to Daniel Wais (Director of the Management Department of the PGNiG Capital Group).

Mateusz Czuba
Faculty of Law and Administration, University of Łódź
matteuszczuba@gmail.com

Marcin Kraśniewski
PhD candidate, Faculty of Law and Administration, University of Łódź
mkrasniewski@wpia.uni.lodz.pl krasniewski@iuspublicum.pl

Michał Pytkowski
Faculty of Law and Administration, University of Łódź
michalpytkowski89@gmail.com

Fifth National Academic Conference 'Consumer in the Rail Passenger Market', Łódź, 9 May 2018

On 9 May 2018, the Fifth National Academic Conference 'Consumer in the Rail Passenger Market' was held at the Faculty of Law and Administration of the University of Łódź (WPiAUŁ)[1]. The event was organised by the Student Society of Energy Law and Other Infrastructural Sectors of the University of Łódź, the Department of European Economic Law of WPiA UŁ and the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum* in Warsaw.

At the conference, representatives of academia, administration and business from across Poland talked about the future of legal regulations of the rail passenger market. The agenda of the fifth edition of the conference included issues that have already been discussed as well as some new subjects. The issue of protecting consumer interests in the railway passenger market as well as the functioning of railway companies were some of the matters discussed. Furthermore, standards, problems and development perspectives of the Polish railway industry were analysed. The meeting helped to better identify as well as understand the processes of the railway market and was a great opportunity to exchange views and experience. Worth mentioning is especially the practical value of the conference – the debate included heads of railway companies as well as relevant offices and ministries. The concept of the conference assumed by the organisers helped to identify the current problems of the market and to attempt to comprehensively address them. The conference consisted of two discussion panels and four lecture panels.

The first discussion panel – moderated by Professor Mirosław Pawełczyk – focused on the current trends in the legal regulation of the railway sector. The panel included: Tomasz Buczyński (Director of the Department of Railways in the Ministry of Infrastructure), Alicja Kozłowska (Director of the Regulation Department in the Office of Rail Transport), Radosław Kwaśnicki, PhD (Partner in Kancelaria RKKW Kwaśnicki, Wróbel & Partnerzy, Deputy Chairman of the Supervisory Board of PKNORLEN S.A.), Piotr Rachwalski (Chairman of the Management Board of Koleje Dolnośląskie Sp. z o.o.) and Włodzimierz Wilkanowicz (Chairman of the Management Board of Koleje Wielkopolskie Sp. z o.o.). The main topic of the debate was the construction of an integrated ticket. The panellists had different opinions and referred to legal solutions in selected EU Member States. Moreover, they also tried to indicate the scope of ticket integration and how the consumers and carriers themselves will benefit from this integration. The speakers also referred to the integration of railway and bus transport. In their opinion the latter should complement the former.

[1] Previous editions: M. Kraśniewski, *Fourth National Academic Conference – Consumer in the Rail Passenger Market, Łódź (Poland), 26 April 2017*, YARS 2017, issue 10(16) p. 238–241; K. Chojecka, M. Kraśniewski, T. Mizioch, A. Sobierajska, *Third National Conference: Consumer in the Rail Passenger Market. Łódź, 25 May 2016*, YARS 2016, issue 9(14) p. 325–334.

In this part of the conference, a number of other topics was discussed also such as the issues of legal titles of PKP S.A. to lands communalised by municipalities as well as unbundling and third party access in the railway sector.

The second plenary discussion, devoted to conditions and development perspectives of passenger railway transport, was opened by its moderator – Rafał Zgorzelski, PhD (Executive Director in the Industrial Development Agency). The panel consisted of: Michał Beim, PhD (Poznań Universityof Life Sciences), Peter Jančovič (Executive Director in LEO Express Sp. z o.o.), Elżbieta Nowak (Director in Łódzka Kolej Aglomeracyjna Sp. z o.o.), Jarosław Oniszczuk (Member of the Management Board of PKP Intercity S.A), Teresa Woźniak (Director of the Department of Infrastructure in the Marshal Office of Lodz). In this part of the conference, panellists indicated measures taken by railway carriers in order to increase the competitiveness of Polish railways and assessed them from the legal point of view by referring to experience from European countries with advanced competitiveness in the railway sector. The representatives of regional bodies also mentioned that priorities imposed on individual types of trains needed to be addressed. In their opinion, this should lead to increased availability of regional services and to a higher number of passengers.

The lecture panel 'The development of railway passenger transport – legal issues' was moderated by Professor Maria Królikowska-Olczak, D.Sc. The panel included Stefan Jarecki, PhD (University of Applied Information Technology and Management), legal adviser Przemysław Ciszak (Polskie Koleje Państwowe S.A.) and Marcin Kraśniewski, M.A. The speech by Mr Jarecki was devoted to measures aimed at ensuring effective and non-discriminative access to rolling stock – he stressed that owning appropriate stock by railway carriers was one of the most crucial obstacles for the development of competition in the railway transport sector. P. Ciszak discussed the principles of functioning of fees for the use of railway stations by railway carriers (station fees). Finally, M. Kraśniewski in his speech titled 'Compliance in the railway sector – codes of ethics in a railway company' pointed at the importance of compliance procedures in external relations, especially with consumers, by referring to American experiences and the possibility to create a brand based on these procedures.

The final part of the conference included the panels titled 'The functioning of railway companies' (moderator: Łukasz Grzejdziak, PhD, University of Lodz) and 'Offers and contracts in passenger railway transport' (moderator: Professor Mirosław Pawełczyk). They covered such issues as liability for damages, consumer access to information, high-speed railways, choice of law for transport contracts, and insurance contracts. The final panel, 'Access to rail infrastructure and service infrastructure' (moderator: Marcin Kraśniewski, M.A.) was attended by students and postgraduates from various academic centres in Poland. The speakers discussed the current issues by refereeing to external experiences.

Marcin Kraśniewski, M.A.
Faculty of Law and Administration of the University of Lodz
Polish Foundation of Competition Law and Sector Regulation *Ius Publicum*
e-mail: mkrasniewski@wpia.uni.lodz.pl krasniewski@iuspublicum.pl

8th International PhD Students' Conference on Competition Law Białystok, 10 October 2018

The 8th International PhD Students' Conference on Competition Law took place on 10 October 2018 in Białystok, Poland. The conference focused on EU State aid law. It was organized by the Department of Public Economic Law at the Law Faculty of the University of Białystok. The international character of the conference provided an excellent opportunity for PhD students to exchange opinions on issues related to EU State aid law.

Professor Anna Piszcz (University of Białystok) opened the conference and welcomed a number of guests including: Dr. Mónika Papp (Hungarian Academy of Sciences & ELTE Eotvos Lorana University), Professor Pieter Van Cleyenbreugel (University of Liege) and Dr. Łukasz Grzejdziak (University of Łódź). Professor Piszcz presented subsequently the assumptions and scope of the conference.

The first session was chaired by Professor Piszcz. Dr. Mónika Papp took the floor first with a presentation entitled 'State Aid Modernisation: An Opportunity or a Straitjacket'. She started her speech by describing the State aid law as an instrument to support national industrial and social policy. Consequently, the speaker discussed the goals of the policy, that is, its derogatory, competition and political integration function. The second part of the presentation was devoted to a historical perspective of State aid policy. Dr. Mónika Papp presented statistics, reports, examples of success and examples of failures of this policy. Furthermore, she discussed the most recent guidelines relating to granting State aid funds.

Professor Pieter Van Cleyenbreugel spoke next presenting a paper entitled 'Tax rulings and the limits of EU State aid law'. In the first part of his presentation, the speaker discussed the general overview of tax rulings in Member States. In particular, he highlighted tailored application of national tax provisions. Moreover, the author deliberated over aims and consequences on national tax law. The second part of the presentation was devoted to tax rulings from the point of view of the EU internal market. In the last part of the speech, Professor Pieter Van Cleyenbreugel presented the limits of EU State aid law resulting from primarily law and the jurisdiction of the Court of Justice of the European Union.

Dr. Łukasz Grzejdziak presented the last paper of the first session entitled 'Polish tax on the retail system: Should selectivity be placed before the bracket'. His speech centred on the decision of the EU Commission dated 30 June 2017 (SA.44351) concerning Polish tax on the retail sector with progressive rates. The

speaker deliberated over the background of the Act on retail sales tax adopted by the Polish Parliament on 6 July 2016. Afterwards, Dr. Łukasz Grzejdziak explained the statement of the European Commission why progressive tax rates based on turnover give companies with low turnover an advantage over their competitors.

The first session ended with a panel discussion where the participants of the conference discussed legislative proposals and the role of national competition authorities. The discussion was followed by PhD students' session. The second part of the conference was moderated by Professor Pieter Van Cleyenbreugel.

Evelin Pärn-Lee (Tallinn Technical University) gave the first presentation entitled 'EU State Aid rules and innovation: A two edged sword?' She discussed economic principles on research and development investments (hereinafter; R&D&I). The author presented typical R&D&I and public funding situations. The speaker raised the issue of the incentive effect (Article 6) rule in Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (hereinafter; GBER). Afterwards, she also presented the Estonian experience with GBER incentive effect.

Maarten Aalbers (Leiden Law School) discussed State aid rules in the sports sector in a presentation entitled 'State aid law applied to the sports sector: Back to the level playing field?' Firstly, he focused on the EU constitutional framework on sports. The speaker described the application of substantive State aid rules in the sports sector. He pointed out the 'social return' of sports in the context of the EC's enforcement policies.

The last presentation entitled 'No more 'Galacticos' aid in sport?' was delivered by Radosław Niwiński (University of Białystok). The speaker presented EU policy towards football clubs. The speaker outlined and analysed the main concerns related to the Dutch and Spanish football club cases connected with State aid. The author pointed out that financing of any privileges for professional sport entities could be classified as illegal State aid. Because of the abovementioned material risk, the speaker recommends clubs and public authorities to review their contractual relationships to ensure transparency in relation with State aid funds.

The second session of the conference concluded with a debate and comments regarding the presentations delivered by PhD students. The conference allowed for the exchange and analysis of international experiences on State aid practices. The conference is one of many to come in a series of international conferences on competition law organised by the Department of Public Economic Law at the Law Faculty of the University of Białystok. The next meeting is announced to take place in October 2019.

Radosław Niwiński
PhD student at the Department of Public Economic Law at the University of Białystok; e-mail: rniwinski@op.pl

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