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International Jean Monnet Module
Conference of EU and
Comparative Competition Law Issues

Competition Law (in Pandemic Times): Challenges and Reforms

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Competition Law (in Pandemic Times): Challenges and Reforms

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RETHINKING UNFAIR TRADING PRACTICES IN AGRICULTURE AND FOOD SUPPLY CHAIN: THE CROATIAN PERSPECTIVE

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ABSTRACT

In recent years, the need for a systematic and harmonised way of preventing unfair trading practices (hereinafter UTPs) in the food supply chain has intensified at the European level due to many diverging national legislative solutions. These efforts resulted in the Directive 2019/633 on unfair trading practices (UTPs) in business-to-business relationships in the agricultural and food supply chain. Croatian UTPs Act, enacted already in 2017, was just amended to conform with the requirements of the named Directive. Generally speaking, the UTPs Act sets out rules and measures to prevent the imposition of UTPs in the food supply chain, establishes the list of such practices and sets up the enforcement structure and sanctions. Comparing the Directive to the UTPs Act, the authors discuss the outcome of the transposition pointing to the incorrect scope of application of the national legislation, its potential consequences and de lege ferenda solutions. Further, the authors anlyse the legal nature of the adopted UTPs system concluding that it does not fit into the traditional systematisation of laws jeopardising the coherency of the intricate and complex relationship between relating legislative frameworks. New rules are diverging and overlapping with both competition and contract law, leading to possible undesirable spill over effects in contract law, and unresolved concurring

competence with competition law. Authors suggest precautionary interpretative measures as a means of solving the identified legal conundrum.

***Keywords**: food supply chain, Directive 2019/633, unfair trading practices, UTPs*

1. INTRODUCTION

The importance of the agricultural sector and the perseverance of the small farmers and farms is one of the EU policy's main goals.[1] Tackling the issue of UTPs that seriously endanger farmers throughout the EU was on the EU legislator's agenda for some time. UTPs can be defined as a practice imposed unilaterally by a buyer concerning the sale of agricultural and food products to a supplier, using its significant bargaining power *vis-à-vis* the supplier, contrary to the principles of good faith and fair dealing, the principle of equality of arms in production and/or trade of agricultural and food products.[2] After more than ten years of discussion between the European Parliament, the European Commission, the Economic and Social Committee and Committee of the Regions, and various stakeholders the European Parliament and the Council on 17 April 2019 adopted Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter UTP Directive)[3] established at European level a common binding legal framework due to be transposed into national legislation by May 2021.

A key factor of UTPs is the existence of significant imbalances in bargaining power between suppliers and buyers of agricultural and food products. The UTP Directive aims at reducing the occurrence of UTPs in the food supply chain by introducing a minimum common standard of protection across the EU. The Directive's minimum harmonisation approach allows Member States to adopt or maintain national rules that go beyond the UTPs regulated by the Directive.

Before adopting the UTP Directive, only four MS had no specific regulation, with some MS that had several types of legislative instruments in place, alongside private regulation. The laws generally came in one or two varieties: amendments of the competition law (e.g., lower market dominance thresholds) or amendments

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1 See Article 39 of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012, p. 47–390 (consolidated version)

2 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Tackling unfair trading practices in the business-to-business food supply chain, COM/2014/0472 final.

3 Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111 (UTP Directive)

of the contract or commercial law (e.g., introducing special rules on B2B transactions or by extending the consumer protection rules to small businesses). The Republic of Croatia is one of the Member States that regulated this issue before adopting the UTP Directive by the Act on the prohibition of unfair trading practices in the B2B food supply chain[4] (hereinafter UTPs Act) which entered into force on 7 December 2017. However, even before adopting the UTPs Act, some of the issues concerning UTPs were regulated by contract law, commercial law and to some extent by competition rules.

The goal of this paper is to analyse the relationship between these related legislative frameworks and identify possible areas of confusion. To that end, the authors first present an overview of the UTPs legislative framework, which is followed by an analysis of its relationship with competition and contract law.

2. OVERVIEW OF THE UTPS LEGISLATIVE FRAMEWORK

2.1. Scope of application

The very name of the UTP Directive suggests that it covers B2B relations in the agricultural and food supply chain. Because B2B relations are usually understood as relations between trades, it might be concluded that its personal scope of application is limited to traders, be it suppliers or buyers, who are involved in the food supply chain. However, the UTP Directive does not determine its personal scope of application in relation to traders, but instead to buyers and sellers. It defines a buyer as any natural or legal person, irrespective of that person's place of establishment, or any public authority in the EU buys agricultural and food products.[5] Also, the term buyer may include a group of such natural and legal persons.[6] Supplier means any agricultural producer or any natural or legal person, irrespective of their establishment, who sells agricultural and food products.[7] The UTP Directive explicitly excludes the application of its provisions to agreements between suppliers and consumers.[8]

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4 The Act on the prohibition of unfair trading practices in the business-to-business food supply chain, Official Gazette No. 117/2017

5 Article 3 (1) of the UTP Directive makes an exception for public entities providing healthcare regarding the prohibition on payment delays; it also makes an exception for payments made in the framework of school schemes described in Article 23 of Regulation 1308/2013.

6 Art. 2 (2) of the UTP Directive

7 Art. 2 (4) of the UTP Directive. Also, the term 'supplier' may include a group of such agricultural producers or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations

8 Art. 1 (2) of the UTP Directive

In order to apply the provisions of the UTP Directive, the buyer must have a significant bargaining power. However, it has to be emphasised that UTP Directive is careful not to equate this power to the power usually addressed by the competition rules. The text does not refer to market power or a position of dominance; rather, it seems to address a different kind of power, namely buyers' relative bargaining power in the agri-food supply chain.[9] The UTP Directive adopts the dynamic approach based on the relative size of the supplier and the buyer in terms of annual turnover.[10] Asymmetry of turnover is conceived as a proxy for asymmetry of power. Therefore, when UTPs are carried by a buyer and supplier with the same level of turnover, they do not fall within the UTP Directive scope.

The UTP Directive covers trading relationships with a non-EU dimension. It applies to buyers established in the EU that trade with non-EU suppliers and buyers established outside the EU that trade with EU suppliers. Thus, the UTP Directive aims to avoid putting EU suppliers at a competitive disadvantage, which would happen if a trade is diverted to suppliers outside the EU. Another reason is to prevent forum shopping by buyers who might otherwise choose to establish themselves outside the EU to avoid compliance with the stricter rules.[11]

With the transposition of the Directive into Croatian legislation, the terms buyer and supplier have been harmonized so that the term buyer now includes the term wholesaler, processor, and retailer that have been defined in UTPs Act 2017. Since these are B2B relations, the question of the interpretation of the term trader in Croatian law arises. It should be noted that in Croatian law the definition of a trader is given in the Companies Act where a trader is defined as a legal or natural person who independently performs a permanent economic activity in order to make a profit by producing, trading goods or providing services on the market.[12] A trader is also defined by the Trade Act as a legal or natural person registered to

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9 Daskalova, V., *Regulating Unfair Trading Practices in the EU Agri-food Supply Chain: a Case of Counterproductive Regulation?*, Yearbook of Antitrust and Regulatory Studies, Vol. 13, No. 21, 2020, pp. 7-53, p. 13

10 Art. 1 (2) the UTP Directive identifies a schedule with five categories. Furthermore, the annual turnover of the suppliers and buyers shall be understood in accordance with the relevant parts of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L 124

11 Daskalova, V., *The New Directive on Unfair Trading Practices and EU Competition Law,* Journal of European Competition Law & Practice, Vol. 10, No. 5, 2019, pp. 281–296, p. 283

12 Art. 3 (1) of the Companies Act, Official Gazette No. 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 125/2011, 152/2011, 111/2012, 68/2013, 110/2015, 40/2019

purchase and sell goods and / or provide services in trade.[13] In the personal scope of application, the CCA took the position that in terms of UTPs Act participants in the food supply chain can be considered traders only with the cumulative fulfilment of the following conditions: - it is a natural or legal person registered to buy and sell goods within the meaning of the Trade Act, - who buys agricultural or food products in the observed relationship, - the purpose of purchasing these products is resale, - this person, together with his affiliated companies, generates the total annual income determined by the UTPs Act.[14] Therefore, the CCA has adopted its own interpretation of the term trader for the purposes of applying the UTPs provisions. Thus, a natural or legal person could have the status of a trader under the Companies Act, but would not be a trader under the UTPs Act.

This raises the further question of whether the contract entered into by the contracting parties in the food supply chain is a commercial contract? According to Art. 14 (2) of the Obligations Act, commercial contracts are contracts concluded by traders among themselves in the performance of activities that are the subject of business activities of at least one of them or are related to the performance of those activities.[15] Authors are of the opinion that in this case the term trader should be interpreted in accordance with the provisions of the Companies Act. So, if, for example, the supplier was an individual farmer, he would not have the status of a trader in accordance with the provisions of the Companies Act and the contract he would conclude with the supplier would not be a commercial contract but a civil contract.[16] Thus, we conclude that the provisions on UTPs apply to both civil and commercial contracts.

We can also put this point of view in correlation with the provisions of the UTPs Act, according to which the bargaining power of the supplier is not determined at all, but only the buyer who is required to exceed the annual turnover of HRK 15 million (approximately EUR 2 million). This could lead to a situation where the

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13 Art. 4 (1) of the Trade Act, Official Gazette No. 87/2008, 96/2008, 116/2008, 114/2011, 68/2013, 30/2014

14 Ministry of Agriculture and Croatian Competition Agency, *Odgovori na pitanja adresata Zakona o zabrani nepoštenih trgovačkih praksi u lancu opskrbe hranom*, 2018, [http://www.aztn.hr/ea/wp-content/uploads/2017/12/Pro%C4%8Di%C5%A1%C4%87eni-tekst-Odgovora-na-pitanja-adresata-Zakona-o-zabrani-nepo%C5%A1tenih-trgova%C4%8Dkih-praksi-u-lancu-opskrbe-hranom-ZNTP-od-5102018..pdf], Accessed 20 March 2021

15 Obligations Act, Official Gazette No. 35/2005, 125/2011, 78/2015, 29/2018

16 See more Petrović, S., *Pravni oblici pravnih osoba za obavljanje djelatnosti - pretpostavke i posljedice*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 56, special issue, 2006, pp. 87-127.; Braut-Filipović, M.; Zubović, A., *Legal status of Croatian family farms,* in: Sander, G.; Poščić, A.; Martinović, A. (eds.), Exploring the Social Dimension of Europe, essays in honour of prof. Nada Bodiroga-Vukobrat, Verlag dr. Kovač, Hamburg, 2021, pp. 473-486.

provisions of the UTPs Act protect a supplier who has the same or even higher bargaining power as a buyer. Such a scenario, which is possible under Croatian law, is not allowed by the provisions of the Directive which adopts five turnover-based categories according to which protection is afforded and each of these categories explicitly requires the buyer and the supplier have different annual turnover.

Further uncertainty in determining whether a particular person is a trader are related to the performance of business activities. In this regard, the position of the CCA until the adoption of the amendments to the UTPs Act was that if the main activity of the buyer is not trade, or purchase of agricultural and food products, for their resale, he will not be considered a trader under the UTPs Act.[17] However, it should be noted that the UTPs Act from 2017 in the definition of a trader required that it is a person "who buys agricultural and food products for resale" while the amendments to the UTPs Act in the definition of a buyer only refers to a person "who buys agricultural and food products". Thus, the CCA took the positions that persons performing catering activities are not considered traders, while amended definition of "supply chain of agricultural and food products" explicitly covers persons performing catering activities. Furthermore, regarding the position of public authorities, the definition of "buyer" now includes those public authorities that are defined as such in accordance with the regulations governing administrative disputes.[18] However, it should be noted that the UTP Directive applies to all sales made to buyers which are public authorities, but provided that the supplier has a turnover not exceeding 350 million euros.[19] This criterion is not adopted in Croatian law, which means that the provisions on UTPs will apply to public authorities as a buyer regardless of the turnover of the supplier.

We can conclude that by lowering the threshold of annual turnover[20] and simplifying the determination of contractual parties, the new regulatory regime has significantly expanded its scope of application that has to be adjusted at the enforcement level. In addition, by retaining a threshold for only one contractual party - the buyer - the new UTPs Act fails to meet the basic principle underlying

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17 Thus, for example, hotels were not subject to the application of the UTPs Act.

18 Art. 2 (2) of the Law on Administrative Disputes, Official Gazette No. 20/2010, 143/2012, 152/2014, 94/2016, 29/2017

19 Art. 1 (2) of the UTP Directive. The concept of public authority covers national, regional or local authorities, but also bodies governed by public law and associations formed by one or more such authorities or bodies, regardless of size. Daskalova, V., *op. cit.,* note 11, p. 282

20 It has to be emphasised that under the UTPs Act from 2017 the threshold was much higher. The legislation applied to re-seller whose turnover in Croatia exceeds approximately EUR 13,3 million (HRK 100 million), and to processor/buyer whose turnover in Croatia exceeds approximately EUR 6,7 million (HRK 50 million). Thus, the assumption of the existence of a strong bargaining power has changed significantly.

the Directive – assuring that it applies to situations of significant imbalances in bargaining power, as unequivocally explained by preamble of the Directive and its par. 1. Authors consider that such a regulatory choice, which may lead to the protection of a supplier with the same or even stronger bargaining power then the buyer, may not be regarded a higher protection granted under the minimum harmonisation standard of the Directive, but instead it amounts to its incorrect transposition. In that sense, *de lege ferenda* suggestion of the authors is the introduction of threshold for the supplier, which should be lower then that of the buyer, i.e. at least below HRK 15 million. In the meantime, in order to ensure the full effectiveness EU law, the potential illogical consequences of the scope of application of the UTPs Act must be avoided. This should be achieved by abiding to the principle of consistent interpretation of EU law, consisting of a duty of national courts and all other state bodies, including the CCA, to interpret national legislation designed to implement EU law, i.e. the UTPs Act, as far as possible, in light of the wording and the purpose of the UTP Directive as a legislation with which it is harmonised.[21]

2.2. Types of prohibited UTPs

Before adopting UTP Directive, UTPs have been often prohibited through the use of general clauses and general principles.[22] The Directive focuses on prohibition of UTPs providing a "minimum list" of UTPs distinguishing between practices unfair *per se* („black list") and practices that should be qualified unfair if not explicitly agreed upon in the supply contract („grey list"). For the latter the default rule prohibits the practice, but parties may overcome this prohibition if they expressly agree upon. Contract terms that allow for UTPs included in the "black list" or that admit "grey list" practices without complying with the requirements imposed by the UTP Directive may not be enforced.[23]

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21 For a detailed account on the EU principle of consistent interpretation see Mišćenić, E., *Europsko privatno prvo: opći dio*, Školska knjiga, Zagreb, 2019, pp. 131 et seq.

22 For an overview of national legal frameworks see Cafaggi F.; Iamiceli, P., *Unfair Trading Practices in the Business-to-Business Retail Supply Chain - An overview on EU Member States legislation and enforcement mechanisms*, 2018, [https://iris.unitn.it/retrieve/handle/11572/204123/224121/JRC%20Report%20(final).pdf], Accessed 10 March 2021, pp. 12-13, 14 pointing out that „in the large majority of systems, general principles and general clauses are always complemented by either examples or more structured lists of prohibited practices falling under the umbrella of the general prohibition."

23 Art. 3 par. 4 of the UTP Directive. Cafaggi, F.; Iamiceli, P., *Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive*, 2019, [https://ssrn.com/abstract=3380355], Accessed 10 March 2021, pp. 10

The UTP Directive enumerates nine practices which are *per se* prohibited ('black list'):[24] (a) payment delay,[25] (b) abrupt order cancellation of perishable agricultural and food product,[26] (c) unilateral changes of contract terms concerning frequency, method, place, timing or volume of the supply or delivery, quality standards, terms of payment or the prices or as regards the provision of services, (d) request for payments that are not related to the sale,[27] (e) requests for payment concerning the deterioration or loss of agricultural and food products - that is not caused by the negligence or fault of the supplier - occurring on the buyer's premises or when ownership has passed to the buyer (f) refusal to confirm in writing the terms of a supply agreement[28] (g) unlawful use or disclosure of supplier's trade secret (h) commercial retaliation against a supplier exercising contractual or legal rights, including filing a complaint or cooperating with enforcement authorities during an investigation[29] (i) request for compensation for the cost of examining customer complaints related to the sale of the supplier's products although there is no negligence or fault on the part of the supplier.

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24 Art. 3 par. 1 of the UTP Directive

25 The Directive imposes a maximum payment term of 30 days for perishable agricultural and food products and 60 days for non-perishable agricultural and food products. The Late Payments Directive requires that businesses pay within 60 days, unless expressly agreed otherwise and unless that is grossly unfair, and that public authorities pay within 30 days or within 60 days (in exceptional circumstances). Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L 48/1

26 A period of less than 30 days is always considered as short notice. Daskalova, V., *op. cit.,* note 11, p. 289 points out „A confusing element of the UTP Directive is the fact that the practice of returning unsold products to the supplier without paying for them or for their disposal is a practice featured on the grey list of practices. Specifically, Article 3(2) of the UTP Directive provides that parties can make agreements regarding returns. Given that returns are less strictly treated than cancellations, one may expect to see a lot more returns instead of order cancellations in the future since the former can be negotiated pursuant to a contract, whereas the latter are *per se* prohibited."

27 This type of UTPs raises the issue of interpretation of payments that are not related to sale. It will be necessary to withdraw the difference with the payments listed in the „grey list" regulated in Art. 3 (2) of the Directive. This raises the question as to where the grey zone ends and where the "prohibition zone" begins.

28 The UTP Directive strengthens the already existing provisions under the common agricultural policy regulations. See Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 [2017] OJ L 350/15.

29 The Preamble of the UTP Directive in par. 25 gives the following examples of reprisal: delisting of products, reducing the quantities of products, or suspending the provision of certain services such as marketing or promotion of supplier products. Daskalova, V., *op. cit.,* note 11, p. 295 points out that this provision addresses the so called 'fear factor', which is deemed to be one of the major reasons why contract law enforcement, private voluntary schemes, and stricter unilateral conduct laws have failed to discipline buyers which systematically breach their contracts or act in bad faith toward their suppliers. Schebesta, H.; Purnhagen, K. P; Keirsbilck, B.; Verdonk, T., *Unfair Trading Practices in the Food Chain: Regulating Right?*, 2018, [https://ssrn.com/abstract=3267118], Accessed 25 March 2021

Within the so called 'grey list', practices allowed if agreed upon in the contract concern the return of unsold products and the imposition to suppliers of certain fees (for stocking, displaying, listing, marketing, advertising, promotional activities, including discount initiatives, or for fitting-out premises for supplier's products).[30] Article 3(2) of the UTP Directive does not take a stance as to whether the requests specified in its subparagraphs are fair or not, exploitative or exclusionary.[31]

With the UTP Directive transposition into Croatian legislation, all UTPs covered by the UTP Directive are included in the list of UTPs in Croatian law, so the application is expanded from the current 33 to 43 practices that are considered UTPs. The new regime regulates the obligations related to the written contract between the buyer and the supplier and the rules and responsibilities regarding the issuance of invoices and the redemption block.

2.3. Enforcement

Since UTPs may result in civil, administrative, and criminal infringements, the key issue is the regulation of enforcement regimes. The UTP Directive explicitly prescribes that MS should designate one or more enforcement authorities to ensure the effective enforcement of the prohibited UTPs.[32] The enforcement triangle, including judicial, administrative and private resolution mechanisms, represents a relatively common feature in MSs.[33] The UTP Directive focuses on administrative enforcement, providing authorities with additional power to investigate and to sanction both domestic and cross-border UTPs. Enforcement authorities may carry on own investigations stimulated by affected parties or initiate *ex officio* proceedings (Art. 6 (1) of the UTP Directive). Furthermore, MS must ensure that enforcement authority has the power to carry out unannounced on-site inspections within the framework of its investigations, in accordance with national rules and procedures as well as the power to impose, or initiate proceedings for the imposition of, fines and other equally effective penalties and interim measures on the author of the infringement. The penalties should be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement. An innovative element of the UTP Directive is the possibility for producer organisations and other organisations representing (or having a legiti-

30 Art. 3 par. 2 of the UTP Directive

31 Daskalova, V., *op. cit.,* note 11, p. 295

32 According to Article 4 (2) of the UTP Directive „If a Member State designates more than one enforcement authority in its territory, it shall designate a single contact point for both cooperation among the enforcement authorities and cooperation with the Commission."

33 For an overview of main enforcing authorities in MS before the adoption of the UTP Directive see Cafaggi F.; Iamiceli, P., *Unfair…, op. cit,* note 21, p. 18

mate interest in representing) suppliers to submit complaints.[34] Since most supply chains expand cross-border in the Art. 8 of the UTP Directive has prescribed the obligation of cooperation among enforcement authorities.

Croatian UTPs Act from 2017 empowered the CCA for the enforcement of its provisions. The CCA carries out the administrative proceeding to establish abuse of superior bargaining power by imposing UTPs and the administrative proceeding for setting and imposing the fines. The CCA may initiate the proceeding *ex officio* or upon the request of the party. From the entry into force of the UTPs Act until the end of 2019, CCA initiated 223 cases, of which 187 had the status of non-administrative cases. During 2019, nine administrative proceedings were completed with the issuance of seven decisions, in which it was established that the parties, using significant bargaining power, imposed UTPs on their suppliers within the meaning of the UTPs Act and imposed administrative penalties in the total amount of HRK 3,499,500.00.[35]

3. BACK TO THE BASICS: LEGAL SYSTEMATIZATION OF THE NEW RULES ON UTPS

Every legal system strives towards a coherent systematization of legal norms.[36] There are plenty of classification criteria, but one of the most important ones is according to the content of legal norms.[37] Such systematization serves multiple functions, including facilitating the applicable legal norm to a concrete legal relationship; the detection and elimination of contradictions and illegalities between different legal norms, and, particularly, the systematic interpretation of legal norms.[38] "In systematic interpretation, one attempts to clarify the meaning of a legal provision by reading it in conjunction with other, related provisions of the same section, or title, of the legal text, or even other texts within or outside the given legal system; thus, this method relies upon the unity, or at least the con-

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34 Art. 5 (2) of the UTP Directive

35 Croatian Parliament, *Explanatory memorandum of the Draft Law on the Amendments to the UTPs Act*, 2021, [https://www.sabor.hr/hr/prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-zabrani-neposstenih-trgovackih-praksi-u-lancu], Accessed 2 April 2021

36 According to Visković „the term system of legal norms (or legal system) denotes primarily two different but also related things: hierarchical arrangement of legal norms and scientific arrangement of legal norms" Visković, N., *Teorija države i prava*, Birotehnika, Zagreb, 2001, p. 267, 286.

37 This is the so-called scientific arrangement of legal norms defined as "the totality of positive and historical legal norms of a society, state and non-state, which are classified into units according to content, i.e. according to the types of social relations that they regulate." *Ibid.*, p. 268.

38 *Loc. cit.*

sistency, of the legal world."[39] The importance of such an interpretation cannot be overstated. It directly influences the achievement of an efficient and coherent enforcement and "in the juridical perspective, the logical coherency of the system becomes the necessary guarantee for non-arbitrary decisions."[40]

In light of these observations, we start off the analysis with the fundamentals - the legal systematization of the new rules on UTPs in B2B relationships in the agricultural and food supply chain. As will be demonstrated below, this is not such an easy task. It is unclear from the theoretical point of view the appropriate legal systematization of these rules and how they interrelate with other complementary rules in the national legal system.

At the EU level, consumer law has already addressed the injustice arising out the unequal bargaining power between the contractual parties,[41] which doES not extend to B2B relations maily because as matter of principle, in commercial relations neither party is considered a weaker party in need of consumer –like legislative protection. On the other hand, general contract law and legislation directly related to B2B commercial relationships, such as the Directive concerning misleading and comparative advertising, only partially addresses the relevant issue.[42] The same holds for the EU competition law which generally provide an excellent legal framework for combating distortions of competition which may as well arise from unequal bargaining power between contractual parties.

Article 101 TFEU, prohibits all agreements between undertakings, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. However, this legal ground has been of a limited importance when it comes to the agricultural sector, as the EU competition rules are subject to a number of deroga-

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39 Brugger, W., *Concretization of Law and Statutory Interpretation*, Tulane European & Civil Law Forum, Vol. 11, 1996, pp. 207-250, pp. 207, 237.

40 Caroccia F., *Rethinking the Juridical System. Systematic Approach, Systemic Approach and Interpretation of Law*, Italian Law Journal, Vol. 2, No. 1, 2016, pp. 65-85

41 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 [2005] 29/1 amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance), [2019] OJ L 327/7

42 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L 376/21

tions and exemptions in that sector on the grounds of Articles 39 and 42 TFEU.[43] On the other side, Article 102 TFEU, protects competition from unilateral market power exercised by a dominant undertakings. However, below the dominance threshold, as understood under Article 102 TFEU, the unilateral conduct in question falls outside the scope of the of EU competition law.[44] This is due to the belief that if not dominant, an undertaking is prevented from abusing its market power, because the competitive market forces assure the competitive equilibrium. As long as there are available alternative business partners, the unsatisfied party may turn to someone else making such business practice unprofitable.

The problem in the food and supply chain is that these market forces are not working properly because the market is highly concentrated, i.e. held in the hands of just a few very large retailers, making it difficult for suppliers to find alternatives.[45] In addition, often SMEs involved in such contracts may find it difficult to exit, due to financial constraints in terms of loans they have to keep replaying.[46] This enables strong retailers to systematically impose UTPs on their business partners, provoking a domino effect along the supply chain, as the latter is "a continuum of vertically inter-related markets."[47] As a result, "the negative effect of a UTPs that occurs downstream, for instance between a retailer and a processor, thus can cascade backward in the chain to ultimately reach farmers."[48]

The existent legal gap, coupled with serious risks posed by these practices in the food supply chain, induced a sequence of EU Commission's recommendations

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43 The underlying reason is the overriding importance of the Common Agricultural Policy (CAP) goals set out in Article 39 TFEU, as approved by the CJEU. The CAP derogations relate to periods of crisis, the general and product specific CAP derogation. In addition, there are exceptions relevant for activities of agricultural producers. These principles are specified in the Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation). For a brief summary of derogations and exceptions see *An overview of European competition rules applying in the agricultural sector*, 2016, [https://ec.europa.eu/competition/sectors/agriculture/overview_european_competition_rules_agricultural_sector.pdf], Accessed 9 April 2021

44 See Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, Brussels, 29.1.2016 COM (2016) 32 final, p. 3

45 Daskalova, V., *Counterproductive Regulation? The EU's (Mis)Adventures in Regulating Unfair Trading Practices in the Food Supply Chain*, 2018, [https://ssrn.com/abstract=3255435], Accessed 20 March 2021

46 *Ibid.*

47 Proposal for a Directive of The European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, Brussels, 12.4.2018, COM (2018) 173 final, 2018/0082(COD).

48 *Ibid*.

on desirable features for national and voluntary governance frameworks.[49] As a result, most of the MS implemented some form of national legislation to tackle the issue. While covering more or less similar practices, legislation instruments between MS varied: some of the MS integrated UTPs rules in the national competition law framework; some extended the consumer protection from unfair commercial practices to cover B2B relations; others enacted special B2B rules, either horizontal or limited to food and supply chain.[50] Needless to say, this process led to numerous divergences between national legislative frameworks, pressuring the Commission to unify the rules at the EU level, which was done in 2019 with the UTP Directive.

So, what are these rules? Are they the extension of contract or competition law? The answer is not as simple as they belong to both and neither. Being somewhere in between, the new rules are diverging and overlapping with both, leading to possible undesirable spillover effects in contract law, and potential overlaps with competition law enforcement.

UTPs arise as in the context of a contractual relationship between the parties, subject to general contract law which is characterized by dispositive norms and parties' autonomy. Before the enactment of the UTPs Act, in Croatia general contract rules covered by the Obligations Act applied to most UTPs situations in B2B relations.[51] Specific protection was granted only against a limited list of UTPs under the Trade Act[52] and a number of UTPs under the Consumer act,[53] which is however not applicable to B2B relations. Beside the notion of the UTPs, common to these rules is their private enforcement before national courts.

During the preparatory stage of the Directive, it has been established that traditional reliance on contract law remedies is faulty in the case of UTPs in food and

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49 As a stricter unilateral conduct rules envisaged under article 3 (2) of the Regulation 1/2003, OJ L [2003] 1/1

50 For an attempt of systematic classification of national legislation on the topic see Fałkowski, J.; Ménard, C.; Sexton, J. R.; Swinnen J.; Vandevelde, S., *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects,* 2017, [file:///D:/Users/Korisnik/Downloads/jrc_report_utps_final%20(1).pdf], pp. 44-45, Accessed 10 March 2021

51 Under these rules, the provisions of the general terms and conditions of the contract which, contrary to the principle of good faith and fairness, cause obvious inequality in the rights and obligations of the parties to the detriment of the co-contractor, or jeopardize the achievement of the purpose of the contract, are null and void. Article 296 of the Obligations Act, Official Gazette No. 35/2005, 125/2011, 78/2015, 29/2018

52 Articles 63 and 64 of the Trade Act, Official Gazette, No. 87/2008, 96/2008, 116/2008, 114/2011, 68/2013, 30/2014

53 Consumer Act, Official Gazette No. 41/2014, 110/2015, 14/2019

supply chain, mostly due to the fear factor of commercial retaliation,[54] such as delisting products or reducing the quantities of products ordered.[55] It is predominantly in this context that the enforcement structure of the UTPs departed from private law mechanism and entered the realm of public, administrative enforcement, very much resembling the enforcement of competition law. The designated enforcement body in Croatia, the CCA is an independent body with public authority and as such it does not fit into the traditional institutional divide between the executive, judicial and legislative branch. Consequently, it is not given the authority to conduct misdemeanour procedures against misdemeanour offences. Therefore, to enable the CCA to impose fines it was necessary to bypass the provisions of the Misdemeanour Act.[56] This has been done by treating UTPs as offences *sui generis*,[57] just like competition law violations. There are no other *sui generis* offences in the Croatian legal system to the best of our knowledge.[58] This fact alone indicates the ambiguous legal nature of UTPs and the institutional enforcement design as well as their similarity with competition law violations.

We may observe that up to the enactment of the UTPs Act, in the Croatian legislative framework any kind of *ex post* administrative intervention in contractual relationship between trading parties[59] was unthinkable outside the context of competition law.[60] Competition law consists of rules to ensure a level playing field for all undertakings competing on the market. It sets clear competition rules and defines limits of undertakings' freedom of action. In other words, competition

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54 UTP Directive, para 8 of the Preamble

55 UTP Directive, para 25 of the Preamble

56 Misdemeanor Act, Official Gazette No. 107/2007, 39/2013, 157/2013, 110/2015, 70/2017, 118/2018

57 Croatian Parliament, *Proposal of the Act on the prohibition of unfair trading practices in the business-to-business food supply chain,* introductory remakrs, May 2017, [https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081259/PZ_144.pdf], Accessed 30 March 2021

58 For an extensive analysis of *sui generis* offences see Butorac Malnar, V.; Pecotić Kaufman, J., *The interaction between EU regulatory implants and the existing Croatian legal order in competition law*, in: Kovač, M.; Vandenberghe, A. (eds.), Economic Evidence in EU Competition Law, Intersentia, Zagreb, 2016, pp. 327-356

59 As opposed to *ex ante* sectoral regulation conducted by different regulatory agencies, such as HAKOM or HERA.

60 For a more protective and interventionist approach in B2B contractual relations see Germany's extension of competition law in relation to unilateral conduct of undertakings with relative or superior market power under § 20 of Act against Restraints of Competition in the version published on 26 June 2013, Federal Law Gazette I, 2013, p. 1750, 3245 as last amended by Article 10 of the Act of 12 July 2018, Federal Law Gazette I, p. 1151. For a short overview, see Glöckner, J., *Unfair trading practices in the supply chain and the co-ordination of European contract, competition and unfair competition law in their reaction to disparities in bargaining power,* Journal of Intellectual Property Law & Practice, Vol. 12, No. 5, 2017, pp 416–434. UTP Directive, para 1 of the Preamble.

law imposes limitations on the contractual freedom for the sake of a higher good - the protection of a competitive process[61] across sectors as the best mechanism for the efficient allocation of resources.[62] However, when it comes to contractual interventions in B2B relations outside competition law context, one may rightfully question the legitimacy of protection of any interest overriding the party autonomy. According to the Directive, the protection against unfair trading practices should be introduced "to reduce the occurrence of such practices that are likely to negatively impact the living standards of the agricultural community."[63] Without undermining the importance of this goal and sector to which it relates, one may not but question whether such a goal could be attributed to some other sectors featuring similar market structures and threats, leading to fragmented, sector specific regulation, eroding the basic principles of general contract law.

The UTPs Act and competition law obviously do not pursue the same goals, nor do they use the same concepts and assessment criteria. Yet, the same activities might represent the violation of both laws. This is because they both sanction the unfairness resulting from strong market power. This becomes obvious when we investigate the wording of Article 102 (a) TFEU, according to which the abuse of dominant position may consist of direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions.[64] The same is included in the national Competition Law Act. In this sense, sometimes the point of divergence will be a question of dominance threshold rather than substance, as both sets of rules are rooted in the concept of fairness.[65] Having said that, it is necessary to identify the relationship between the two legislative frameworks in situations of overlap, i.e., would they both apply, or would one override the other. The answer is not straight forward, as competition law and UTPs Act, despite all the underlying similarities, are complementary to each other, and are not in relation of *lex generali* and *lex specials*. If one of the listed UTPs would be included in the contract within the scope of the UTPs Act and would simultaneously distort competi-

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61 The goals of EU comeptition have always been debated. In a recently conducted emirical study of CJEU case-law, a variety of comeptitiion law goals have been identified: efficiency, welfare, economic freedom and protection of competitors, competition structure, fairness, single market integration, and competition process. See Stylianou, K.; Iacovides, M., *The Goals of EU Competition Law - A Comprehensive Empirical Investigation,* 2020, [https://ssrn.com/abstract=3735795], Accessed 28 March 2021

62 Bailey, D.; John, E. L. (eds.), *Bellamy & Child European Union Law of Competition*, 8th edition, Oxford University Press, Oxford, 2018, para 1.016.

63 *Ibid*.

64 Most exploitative abuses of dominant position fall under this category.

65 For a detailed comparative analysis of the concept of fairness see Abdollah Dehdashti S., *B2B unfair trade practices and EU competition law*, European Competition Journal, Vol. 14, No 2-3, 2018, pp. 305-341

tion within the meaning of Art 101/102 TFEU or the corresponding violations of Croatian Competition Act, all of the rules would be applicable. However, would it run counter to the principle of *ne bis in idem*, to prosecute the same undertaking for the same conduct twice, under different legal grounds? In the context of competition law, the answer to this question is clear as it has been addressed by the CJEU who stated "that principle thus precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged."[66] The reservation here is related to the fact, that UTPs Act and competition law, do not pursue the same goals, thus the infringement, although being done by the same undertaking would be pursued and sanctioned for different purposes. This raises serious concerns of legal certainty. In addition, double proceedings undermine institutional efficiency, as both would be conducted by the same body, under similar but nevertheless different procedures, assessment and sanctions. This point of confusion should be cleared most straightforwardly.

Legal reasoning leads towards the overriding applicability of competition law rules over UTPs Act. This is particularly the case with Articles 101 and 102 TFEU. If for nothing else, then on the account of the hierarchy of EU legal norms. Being prescribed under EU primary law and applicable across sectors,[67] they should take precedence over any implementing national law of the UTP Directive as a secondary EU law source. In that regard, some form of coordination would be necessary, particularly between the Commission and national enforcement bodies of UTPs legislation. The same reasoning should apply in case of simultaneous application of EU and national competition rules by national competition authorities (NCAs) under Article 3 (1) of the Regulation 1/2003. However, when it comes to the overlapping competence of UTPs Act and national competition rules, the answer is not straightforward. Not being in a hierarchical relationship, competition law enforcement's choice is justifiable on different grounds - a more holistic approach and broader intervention. It is plausible that UTPs would represent only one segment of the competition law infringement which often tends to be a complex combination of different anticompetitive strategies. In that sense, remedies and sanctions under the UTPs Act could resolve the problem between the contracting parties, while the competition law issue would not necessarily be resolved. This could potentially lead towards split proceedings. This solution is not satisfactory either. It is well known that competition law infringements may comprise a com-

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66 Case C-17/10 *Toshiba Corporation* [2012], ECLI:EU:C:2012:72, par. 94

67 As already mentioned earlier, there are some derogations and exemptions of EU cometition law in the agrecultural sector, however it does not extend to UTPs.

bination of strategies distorting competition with combined force and are thus often being treated as a single competition law infringement. To the contrary, if competition law would override the applicability of the UTPs Act in cases of overlap, the sanctions and remedies in that proceedings could solve both the unfairness of contractual relation between the parties and the related competition law issue. Such a solution would create more legal certainty for the parties and would lead to a more efficient enforcement.

We have stated initially that UTPs regulation is somewhere in between contract and competition law. While the relationship with contract law is not as blurry, as these rules are in *lex specialis-lex generali* relation, the concerns are arising from the possible undesirable spillover effects from UTPs into general contract law, as analyzed in the following section.

4. POSSIBLE SPILL OVER EFFECTS TO OTHER B2B CONTRACTS

As UTP Directive applies to B2B contracts in the food supply chain, authors consider it worth analyzing the possible effect this Directive could have on all B2B contracts.[68] It would not be the first time a directive with a much narrower scope of application influenced a significantly broader set of legal relations. An example would be the Directive 1999/44,[69] which aimed the consumer contracts but influenced B2B contract law in many EU countries regarding the conformity of the goods in the sale of goods contract.[70] Thus, the authors shall analyze the possible effects of UTP Directive and compare them to existing legal instruments to unify the sale of goods contract. Authors shall consider UNIDROIT Principles of International Commercial Contracts (hereinafter UNIDROIT Principles)[71], Principles of European Contract Law (hereinafter PECL) and United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG)[72] for analyzing the status of unequal bargaining power in the international commercial sale of goods contracts.

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68 See also Daskalova, V., *op. cit.,* note 9, p. 28

69 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171

70 Petrić, S., *Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 27, No. 1, 2006, pp. 87-128, p. 99.

71 International Institute for the Unification of Private Law (UNIDROIT), *Unidroit Principles of International Commercial Contracts,* 2016, [https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016], Accessed 25 March 2021

72 United Nations Commission on International Trade Law, *United Nations Convention on Contracts for the International Sale of Goods, (Vienna, 1980) (CISG)* [https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg], Accessed 20 March 2021

Unequal bargaining power is a standard widely recognized in contract law, and it is relevant to more stages of contracts, from its formation, interpretation and possible contract remedies.[73] Even if the parties or the court do not expressly state the inequality of bargaining skill as the ground for their claim / judgement, this standard can be embedded in other contractual concepts, such as *contra preferentem* rule, reasonable expectations doctrine and others.[74] The challenge is that although the importance of unequal bargaining power is recognized, the concept remains ambiguous.[75] Traditionally, bargaining and negotiating problems between the parties are connected to the precontractual phase, where parties who breach their duties in bargaining/negotiating can be subject to precontractual liability. This liability stems from the good faith and duty of care principles.[76] However, the precontractual liability is mostly recognized in situations when the contract did not occur, while any breach after the contract is concluded shall most likely fall within the contractual liability.[77]

In a B2B sale of goods contract, it can be challenging to prove the inequality of bargaining skill which should trigger certain legal consequences.[78] On the other hand, courts are traditionally more willing to allow certain groups to claim unequal bargaining power, where the most prominent example would be consumers.[79] Protection of consumers is in the focal point of EU legislature with many EU directives and regulation that intervene in Member States' contractual law to ensure the protection of the weaker party-the consumer.[80] However, in B2B transactions there was no such presumption until the UTP Directive came into force.

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73 See also Barnhizer, D. D., *Inequality of Bargaining Power,* University of Colorado Law Review, Vol. 76, No. 1, 2005, pp. 139-242, p. 144.

74 *Ibid*., p. 149.

75 See Helveston, M.; Jacobs, M., *The Incoherent Role of Bargaining Power in Contract Law*, Wake Forest Law Review, Vol. 49, No. 4, 2014, pp. 1017-1058, p. 1021; Schwartz, A., *Seller Unequal Bargaining Power and the Judicial Process*, Indiana Law Journal, Vol. 49, No. 3, 1974, pp. 367-398, p. 392.

76 See Braut Filipović, M.; Tomulić Vehovec, M., *Precontractual Liability in Eu And Croatian Law*, Harmonius Journal of Legal and Social Studies in South East Europe, Vol. 1, No. 1, 2012, pp. 13-32, p. 15.

77 It is rather an exception if the parties can invoke the precontractual liabiliy after the contract is concluded. Different legal standings on this matter can be found throughout the MSs. See Cartwright, J.; Hesselink, M., *Precontractual Liability in European Private Law*, Cambridge University Press, 2008, p. 362 and further.

78 Adler, R. S.; Silverstein, E. M., *When David Meets Goliath: Dealing With Power Differentials in Negotiations,* Harvard Negotiation Law Review, Vol. 5, 2000, pp. 1-112, p. 54. From the American court practice, see for example case *Coursey v. Caterpillar,* Inc., No. 94-1348, 1995, (6th Cir. Aug. 6, 1995), where the court stated: "Unconscionability is rarely found to exist in a commercial setting.". For other examples and views from American theory and practice see Choi, A.; Triantis, G., *The Effect of Bargaining Power on Contract Design*, Virginia Law Review, Vol. 98, No. 8, 2012, pp. 1665-1744, p. 1730.

79 Barnhizer, D. D., *op. cit.,* p. 150.

80 See Mišćenić, E., *Europsko privatno pravo: posebni dio*, Školska knjiga, Zagreb, 2021, pp. 22 et seq.

UTP Directive explicitly correlates the evaluation of bargaining power of the contractual parties to their financial strength. Precisely, it says: "A suitable approximation for relative bargaining power is the annual turnover of the different operators."[81] The EU legislator finds that such an approach offers a distinctive advantage to the contractual parties: "predictability concerning their rights and obligations under this Directive".[82] It must be noted that the existence of bargaining power in any contractual relationship, including those in the vertical relationship in the food supply chain, does not and should not presume the abuse of that power.[83] However, UTP Directive significantly enhances the position of the sellers of the agricultural products, as the very existence of one of the defined UTPs coupled with the existence of the unequal bargaining power due to different financial strength of the parties, presents a breach of the contract by the buyer. Sanctions for such a breach vary depending on the national law,[84] where Croatian legislature opted for a nullity of a particular contractual provision[85] and fines.[86]

In fact, we could argue that UTP Directive and Croatian UTPs Act introduce an irrefutable assumption that a buyer with a defined financial income holds significant bargaining power in the contractual relationship. This is an irrefutable assumption as the law provides no possibility for the buyer to prove otherwise. Further, if one of the parties has significant bargaining power and the sale of goods contract has a provision which represents the UTPs as defined by the UTP Directive and Croatian UTPs Act, this also represents an irrefutable assumption that the UTP occurred,[87] and the buyer suffers sanctions – possible nullity of the contractual provision and fines.[88] Such a result reflects upon contractual liability, where the seller can sue for damages, outside of possible penalties by the competent body. The seller can also rely on the irrefutable assumption that the unequal bargaining power exists and, coupled with the UTPs in the contract, claim damages.

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81 Par. 14 of the Preamble of UTP Directive

82 Par. 14 of the Preamble of UTP Directive

83 See Commission Staff Working Document, Impact Assessment: Initiative to improve the food supply chain (unfair trading practices), SWD(2018) 92 final, p. 21. That is also the standopint taken in the UNIDROIT Principles. See International Institute for the Unification of Private Law (UNIDROIT), Unidroit Principles of International Commercial Contracts, *op. cit.,* p. 110.

84 Cafaggi F.; Iamiceli, P., *op. cit,* note 21, p. 30

85 For nullity of a certain provision see for example article 9 of the Act on the Prohibition of Unfair Trade Practices in the Food Supply Chain. Before the amendment from 2021, it was provided that the entire sale of goods is null if it is not conluded in a written form and if it does not have all the obligatory provisions. See former article 6 of the UTPs Act from 2017.

86 See Article 24 of the UTPs Act

87 See also Brnabić, R.; Ivkošić, M., *Zakonsko uređenje nepoštenih trgovačkih praksi – otvorena pitanja*, Zbornik 56. susreta pravnika, Opatija, 2018, pp. 109-139, p. 128

88 See Articles 9 and 24 of the UTPs Act

Thus, UTP Directive introduces a significant exemption to B2B sale of goods contract. Although its scope of application is relatively narrow – it applies solely to the sale of goods contract concerning the food supply chain, authors shall present the status and significance of unequal bargaining power in existing international instruments for the unification of the sale of goods contracts, especially in B2B transactions.

The most famous and widespread instrument for unification of the commercial sale of goods contract is the CISG.[89] However, it is expressly provided that it does not cover the issue of validity of the contract,[90] while it is highly questionable whether the negotiations and precontractual liability fall within the scope of the CISG.[91] Thus, two most typical claims connected with the unequal bargaining power fall outside of the scope of the CISG. However, that does not mean that the drafters of the CISG were unaware of this particular challenge for the parties, and they have in fact associated it with the presumably weaker bargaining power for the parties coming from transitioning and developing countries. For that reason, in the CISG were embedded a more simple and flexible provisions regarding the non-conformity of the goods and remedies for breach of the contract.[92] For example, the time limit set for giving the notice for lack of conformity can be extended if there was a "reasonable excuse" for failure,[93] and this possibility was introduced by having in mind the parties from the developing countries who might lack the knowledge for the examination of the complex goods in due time.[94] But we can only conclude that although the CISG tackled certain consequences of the parties' unequal position, it did not develop the standard of unequal bargaining powers of the parties and possible influence on the validity of the sale of goods contract. This issue remains within the national law applicable to a certain dispute or if the parties chose some of the available international instruments, such as UNIDROIT Principles or PECL.

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89 There are currently 94 countries which adopted and ratified the CISG, which means that it has potential to cover most of the world international commercial sale of goods contract. See *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)* [https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status], Accessed 3 April 2021

90 See Article 4 of the CISG

91 For an overview see Goderre, D. M., *International Negotiations Gone Sour: Precontractual Liability under the United Nations Sales Convention,* University of Cincinnati Law Review, Vol. 66, No. 1, 1997, pp. 257-282

92 Schwenzer, I., *The CISG – A Fair Balance of the Interests of the Seller and the Buyer,* in: Schwenzer, I.; Pereira, C., Tripodi, L. (eds.), CISG and Latin America, Regional and Global Perspectives, The Hague, 2016, pp. 79-91

93 See Article 44 of the CISG

94 See Cañellas, A. M., *The Scope Of Article 44 CISG*, Journal of Law and Commerce, Vol. 25, 2005, pp. 261-271, p. 262

UNIDROIT Principles provide in article 3.2.7. the parties can avoid the contract (not nullify) if "at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage." For deciding upon such a matter, one of the factors that should be considered is the "inexperience or lack of bargaining skill".[95] Such a standard for possible avoidance of the contract concluded in B2B transactions is criticized,[96] as some authors consider that such provision is not in accordance with the commercial practice where it is very often that one party has a stronger or weaker bargaining position due to various factors, such as the buyer's need for the goods, availability of alternate buyers or sellers and other.[97] Official commentaries of the UNIDROIT Principles point out that the party can void the contract on these grounds if it results in a "gross disparity" between the contractual obligations, which is described to be "[…] so great as to shock the conscience of a reasonable person".[98] In other words, the contract must be "unreasonably disadvantageous for one and unreasonably advantageous for the other party."[99] However, this shall not cover the cases when one of the party has a dominant market position because it sells/buys rare things on the market.[100] Applying this rule to the food supply chain, if the seller is dependent on the buyer to buy his/her products, the contract could be voided only if it provided an unreasonable advantage for the buyer. Otherwise, unequal bargaining power or lack of bargaining skill would not trigger the party's right for the avoidance of the contract. We can easily conclude that such a solution gives a much broader space for arguing from both parties whether the actual abuse of the bargaining powers occurred. The proof of the abuse would be on the seller of the agricultural products, which naturally would provide for an additional challenge.

This approach is followed by the PECL, which were generally drafted under the UNIDROIT Principles' influence, consisting of many identical provisions and reasoning.[101] Article 4:109 resembles article 3.2.7. of the UNIDROIT Principles, as the ground for avoidance is also set to be an excessive benefit or unfair advantage due to, among others, if the party "[…] was […] inexperienced or lacking

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95 Par. 1a of Article 3.2.7. of Unidroit Principles.

96 Bortolotti, F., *Drafting and Negotiating International Commercial Contracts,* International Chamber of Commerce, Paris, 2017, p. 47.

97 Hill, R., *Businessman's view of the Unidroit Principles*, Journal of International Arbitration, Vol. 13, No. 2, 1996, pp. 163-170, p. 166.

98 Unidroit Principles, *op. cit.*, p. 110.

99 Drobnig, U.; Lando, O., *Progressive codification of international trade law*, 1982, [https://www.unidroit.org/english/documents/1982/study50/s-50-20-e.pdf], Accessed 3 April 2021

100 *Loc. cit.*

101 See Lando, O., *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?,* Uniform Law Review, Vol. 8. No. 1-2, 2003, pp. 122 – 123

in bargaining skill". The party who seeks the avoidance must prove that "[…] the other party took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit."[102] Thus, the conclusion is the same as for the possible application of the UNIDROIT Principles on the food supply chain.

To conclude, UTP Directive introduces a significant exemption to B2B sale of goods contract. First of all, it brings a very strict definition of unequal bargaining power. It ties the existence of unequal bargaining power to total annual profit of both contractual parties. For comparison, Croatian legislature defines criteria only for the buyers, irrespective of the fact if the actual seller (supplier) has the same, lower or higher income then the buyer, which can lead to the absurd situations that the bargaining power rests with the party who has lower financial incomes! Regardless, it seems that the UTP Directive strives to determine bargaining power in a very definite and predictable way, leaving no room for proving otherwise. Comparing such a solution to existing concepts of unequal bargaining power in contractual law, we find such a solution worrisome. The greatest concern is if such a definition and understanding of unequal bargaining power spills over B2B transaction outside the food supply chain. If the courts are already more willing to treat consumers as a weaker bargaining party, will they be now more willing to view traders with lower financial income in the same way? We strongly oppose to such a standpoint. Party autonomy, coupled with the liability concept where culpa levis might be presumed, but it is a refutable assumption, is in the heart of modern commercial contractual relationships. UTP Directive and national legislations, such as Croatian, significantly alter those understandings. Although there might be justified reasons to take such measures in the food supply chain, authors strongly oppose applying such understanding in other B2B sale of goods contract and other B2B transactions.

5. CONCLUSION

There is no doubt that food and supply chain in Europe is one of the most sensitive markets worthy of protection because of its crucial importance for the well being of EU citizens. The UTP Directive thus provides for a hybrid model of sectoral protection of B2B relations against UTPs, subjecting them to public enforcement. Having analysed the Croatian national legislation, the authors identified its scope of application as an incorrect transposition of the Directive, and offer *de lege ferenda* solutions in that regard. In addition, authors argue that it is very

[102] See Von Rossum, M.M., *Validity*, in: Busch, D.; Hondious, E. H.; Kooten, H. J.; Schelhaas, H. N.; Schrama, W. M., The Principles of European Contract Law and Dutch Law: A Commentary, Kluwer Law International, 2002, pp. 191-214, p. 213

unclear from the theoretical point of view, what is the appropriate legal systematization of these rules in the national legal system. The injustice in contractual relationship arising out of an unequal bargaining power has already been addressed by general contract law and consumer law. On the other hand, the competitive market distortions arising out the abuse of dominant market power is addressed by competition law. Being somewhere in between, UTPs regulation seems to fall out of the classical systematization of legal norms jeopardizing the coherency and the efficiency of enforcement. This transpires particularly in relation to competition law in overlapping scenarios, which remains very unclear and void of any normative guidance. Authors offer a variety of legal arguments in favour of the overriding applicability of competition rules in these situations. In addition, the UTP Directive introduces significant exemptions to B2B sale of goods contract. It determines bargaining power in a very definite and predictable way, tying it to the financial strength of the parties. The authors call for a pressing interpretative caution in order to avoid the detrimental impact of possible spillover effect of the standard of unequal bargaining power, as defined by the Directive 2019/633, to the sale of goods contract in other B2B transactions.

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THE PRESUMPTION OF HARM IN EU PRIVATE ENFORCEMENT OF COMPETITION LAW – EFFECTIVENESS VS OVERCOMPENSATION

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ABSTRACT

The main issue that is still disrupting private enforcement of competition law is the calculation of damages. The 2014 Damages Directive contains some alleviations. Particularly Article 17(2) Damages Directive foresees a rebuttable presumption that cartels cause harm. Despite the clear statement in Recital 47 Damages Directive that this presumption should not cover the concrete amount of harm and studies that vary significantly regarding the typical overcharge, some Member States have created presumptions related to the amount of harm. Other Member States want to expand the presumption to non-cartel violations. This article takes a comparative analysis of the different Member States approaches and attempts to test the Damages Directive and EU competition law boundaries more generally. The article takes a sceptical perspective on some of the Member States' approaches and proposes other solutions to ease the predicaments of damage quantifications: (i) a focus on illicit gains, (ii) amending the calculation guidelines and create a EU-wide competition damages database, (iii) create further procedural measures, such as collective redress instruments, special legal venues for private enforcement of competition law and expert judges, and (iv) foster further party-led solutions.

Keywords: *Competition Law, Private Enforcement, Damages Directive, Overcharge, Harm, Presumption of Harm, Quantification*

1. INTRODUCTION

Competition experts agree: the quantification of harm is *the* challenge in EU private enforcement of competition law.[1] The 2014 EU Damages Directive[2] gives claimants who have suffered harm caused by an infringement of competition law a right to full compensation while avoiding overcompensation. A person who has suffered harm must be placed in the position in which that person would have been had the infringement of competition law not been committed.[3] The necessary counterfactual analysis relies on a hypothetical and, thus, speculative scenario: what would the competitive situation have been but for the infringement? Finding the true counterfactual is impossible because it is impossible to know what would have happened but for the infringement.[4] Hence, the obtainable damages always only represent the second-best optimum.

While the hypothetical but for analysis is typical for any damages claims, competition cases are more complex as the analysis often entails reconstructing entire market structures and "prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated"[5]. This puts limits on the expected certainty and precision of damages calculation. Therefore, the Damages Directive states in recital 45: "Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation." Accordingly, the Directive itself contains several alleviating measures and is accompanied by a Practical Guide on quantifying harm[6] that contains details on the usage of said economic models.

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1 See, inter alia, Isikay O., *Schadensschätzung bei Kartellverstößen — was kann das Kartellrecht vom Zivilrecht lernen?: Die Analyse zweier zivilrechtlicher Schadensphänomene,* Duncker & Humblot, Berlin, 2020, *passim*.

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 (Damages Directive).

3 Article 3(2) Damages Directive.

4 See Howard A., *Too little, too late?: The European Commission's Legislative Proposals on Anti-Trust Damages Actions*, JECLAP, Vol. 4, No. 6, 2013, pp. 455, 459.

5 European Commission, *Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU*, (SWD(2013) 205), par 16 [https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf], Accessed 20 April 2021.

6 Ibid.

The rebuttable presumption that cartel infringements cause harm in Article 17(2) Damages Directive is one of the core elements intended to facilitate damages actions because it reverses the burden of proof in favour of the claimant. Yet, it is not without critique. However, some even have called to follow those Member States, who, in the transposition of the Directive, gold plated the presumption and extended it to a concrete amount of harm or beyond cartel infringements.[7]

This article elucidates the Damages Directives and Member States approaches to the presumption of harm and discusses whether they are based on sound (economic) reasoning. The principle of effectiveness always has to be balanced against other principles and interests, particularly the principle of no-overcompensation, as demonstrated by Articles 3 and 4 Damages Directive itself.[8] The goal of the Damages Directive is to aid claimants and guarantee the effective enforcement of competition law. Nevertheless, effective enforcement cannot trump everything, cannot set aside the general burden of proof and allow presumptions without any empirical foundation or substantial experience. The article takes a sceptical perspective on some of the Member States' approaches and proposes other solutions to ease the predicaments of damage quantifications.

2. THE PRESUMPTION OF HARM *DE LEGE LATA*

2.1. The Presumption That Cartels Cause Harm in Article 17(2) Damages Directive

The presumption in Article 17(2) Damages Directive has manifold origins and rationales. Studies and contributions that the Commission had gathered during the drafting period underlined that proving and quantifying antitrust harm is generally very fact-intensive and costly.[9] It may require the application of complex economic models and constitutes one of the main obstacles in competition damages proceedings. Furthermore, the Commission heavily relied on findings from the famous *Oxera Study*[10]. The study contains an empirical analysis of a data set on cartel overcharges provided by *Connor and Lande*[11] that Oxera adjusted based on

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7 See below section 3.

8 See also Mikelenas, V.; Zaščiurinskaitė, R., *Quantification of Harm and the Damages Directive: Implementation in CEE Countries*, YARS, Vol. 10, No. 15, 2017, pp. 111, 115.

9 Studies, contributions and other accompanying documents for the Damages Directive are available at: [https://ec.europa.eu/competition/antitrust/actionsdamages/legislative_process_en.html], Accessed 7 April 2021.

10 Oxera, *Quantifying antitrust damages: Towards non-binding guidance for courts*, 2009, [https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf], Accessed 20 April 2021.

11 Connor, J.;Lande R., *Cartel Overcharges and Optimal Cartel Fines* in: Collins W,; Angland, J. (eds.), Issues in competition law and policy (ABA Section of Antitrust Law 2008). *Connor and Lande* provided

their own criteria involving, for example, more recent cartels and estimates from peer-reviewed works.[12] The study found that in 93 % of the sample cases, cartels result in overcharge[13], more than 9 out of 10 cartels. Moreover, several Member States already had adopted *prima facie* evidence or a *de facto* presumption of harm for cartel cases, mostly based on experience rules.[14]

Article 17(2) Damages Directive introduces a general rebuttable presumption that cartel infringements cause harm. The presumption only covers cartels as defined in Article 2(14) Damages Directive, even though the wording of Article 17(2) Damages Directive is unclear, as the provision uses the term' cartel infringements' and not 'cartels' itself[15]. However, taking into account the Commission Proposal, including the Impact Assessment Report[16] and recital 47 Damages Directive, the Directive apparently uses both terms as synonyms in the context of the presumption and the addendum 'infringements' seems to be a purely linguistical choice.

Harm in the sense of Article 17(2) Damages Directive includes both the actual loss and the loss of profit as set out in Article 3(2) Damages Directive. The wording 'cause' in Article 17(2) Damages Directive also ensures that the presumption includes the causal relationship between that harm and the cartel infringement, which is itself determined by Member State law subject to the principles of effectiveness and equivalence[17]. Typically, the presumption on the existence of harm applies regardless of the market level on which the claimant is active. For indirect purchasers, the presumption in Article 17(2) Damages Directive has important implications for and must be seen together with the presumption that pass-on has occurred laid down in Article 14(2) Damages Directive[18]. The presumption of harm in Article 17(2) Damages Directive in the case of indirect purchasers

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additional 350 observations for the *Oxera Study*.

12 See in detail Oxera, *op. cit.,* note 8, p. 90.

13 ibid, p. 91.

14 ibid, pp. 92–94. See for an overview Filippelli M., *Presumption of harm in cartel damages cases*, ECLR, Vol. 41, No. 3, 2020, pp. 137, 138. However, some of these *prima facie* cases were later reassessed by higher instance courts, see, for example, for the German *Rails* cases Rengier L., *The German Federal Court of Justice's judgment in Rails II: Shifting the focus from liability to quantum in cartel damages?*, GCLR, Vol. 13, No. 3, 2020, p. 97.

15 Critical Filippelli, *op. cit.,* note 12, p. 140.

16 European Commission, *Impact Assessment Report Damages actions for the breach of the EU antitrust rules* (SWD(2013) 203 final), par 87, 88 [https://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf], Accessed 20 April 2021.

17 Recital 11 Damages Directive, see Case C-298/04 *Manfredi* [2004] ECLI:EU:C:2006:461, par 64.

18 See hereto Botta M., *The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive*, Eur Rev Priv Law, Vol. 25, No. 5, 2017, p. 881.

includes the occurrence of harm on the first market level and, thus, helps to demonstrate part of the presumption requirements of Article 14(2)(b) Damages Directive.[19]

In turn, it is questionable whether the presumption of harm also covers umbrella pricing[20], *i.e.* harm occurred to customers of cartel outsiders. The wording of Article 17(2) Damages Directive would be sufficiently open.[21] However, even if umbrella effects occur in several instances, the decision of the Court of Justice in *Kone*[22] has shown that a case-by-case assessment is necessary. The fact that cartel outsiders could set prices above normal competitive conditions may depend on various factors. This complexity contradicts a presumption. Furthermore, the legislators were aware of the umbrella-pricing phenomenon and would have been able to include an explicit reference to include umbrella pricing in the presumption.

In earlier stages of the drafting procedure, the Commission also considered that "average overcharges in price-fixing cases could serve as guidance for courts in determining the quantum of damages."[23] However, in the final Directive, the presumption only covers the existence of harm. Recital 47 Damages Directive underlines that the presumption should not include the amount of harm.[24] Nevertheless, a presumption that states that harm has occurred entails that damages must be greater than zero.[25] Still, claimants have to prove the concrete amount of harm. Here the interplay with Article 17(1) Damages Directive will be crucial, which allows courts to estimate the amount of harm.

The presumption is rebuttable. This means that the presumption in Article 17(2) Damages Directive ultimately leads to a reversal of the burden of proof for the occurrence of harm. The infringer itself has the necessary evidence to meet the burden of proof that no harm has occurred in its possession.

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19 See Kersting C., *Kartellschadensersatzrecht nach der 9. GWB-Novelle*, VersR, Vol. 1, No. 10, 2017, pp. 581, 583.

20 See hereto Franck J.-U., *Umbrella pricing and cartel damages under EU competition law*, Eur Compet J, Vol. 11, No. 1, 2015, p. 135.

21 Fritzsche A., *Die Schadensvermutung: Auslegungsfragen zum Kartellzivilrecht nach der 9. GWB-Novelle*, NZKart, Vol. 5, No. 11, 2017, pp. 581, 582.

22 Case C-557/12 *Kone* [2014] ECLI:EU:C:2014:1317.

23 European Commission, *Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of EC antitrust rules* (SEC(2008) 404), par 200 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008SC0404&from=EN], Accessed 20 April 2021.

24 See also European Commission, *Impact Assessment Report Damages actions for the breach of the EU antitrust rules*, *op. cit.,* note 14, par 89.

25 Filippelli, *op. cit.,* note 12, p. 139; Iacovides M., *The Presumption and Quantification of Harm in the Directive and the Practical Guide* in: Bergström M.; Iacovides M.; Strand M. (eds.), Harmonising EU competition litigation: The new directive and beyond, Hart Publishing, Oxford, 2015, p. 300.

2.2. Member States' Approaches

Many Member States have literally transposed the presumption of harm of Article 17(2) Damages Directive into Member State law, such as Ireland[26], Luxembourg[27] or the Netherlands[28], without regulating, to the authors' knowledge, any other national peculiarities. On the other hand, in line with the minimum harmonisation technique of the Directive, several Member States have taken different approaches for the presumption of harm. These can be divided into four groups.

First, some Member States have altered the relatively narrow definition of 'cartels' in Article 2(14) Damages Directive to which the presumption of harm relates. Article 14(2) Damages Directive only covers horizontal cartel infringements between competitors and excludes decisions by undertakings or vertical restraints.[29] Italy and Portugal included the national definitions of 'cartel', which go further than Article 2(14) Damages Directive and include every cartel infringement.[30] The Spanish presumption also covers all cartel infringements since Spain did not transpose any definition of cartels.[31] In Belgium, the definition of 'cartel' literally includes also decisions by undertakings or vertical restraints.[32]

Second, in Poland, the presumption extends beyond cartels to any violation of competition law.[33] This includes non-cartel violations of Article 101 TFEU, such as information exchanges and vertical restraints and Article 102 TFEU violations.[34] The aim is to facilitate and increase the popularity of private enforcement in Poland.[35]

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26 Regulation 15 European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017.

27 Article 2 Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence.

28 Artikel 193l Burgerlijk Wetboek.

29 Filippelli, *op. cit.,* note 12, p. 140.

30 Art. 2(1)(l) Decreto Legislativo 19 gennaio 2017, n. 3; Artigo 2(e) Lei n.º 23/2018.

31 Artículo 76(3) Ley de Defensa de la Competencia, en materia de ejercicio de las acciones de daños y perjuicios por infracciones del Derecho de la competencia.

32 Chapitre 13 Art. I.22 § 12 Code de droit économique; see Cauffman C., *Belgium,* in: Rodger B.; Sousa Ferro M.; Marcos F. (eds.), The EU Antitrust Damages Directive: Transposition in the Member States, Oxford University Press, Oxford, 2018, pp. 64, 77.

33 Art. 7 Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji.

34 Piszcz A.; Wolski D., *Poland* in: Piszcz A. (ed.), Implementation of the EU Damages Directive in Central and Eastern European countries, University of Warsaw Faculty of Management Press, Warsaw, 2017.

35 Bernatt M.; Gac M., *Poland* in: Rodger B.; Sousa Ferro M.; Marcos F. (eds.), The EU Antitrust Damages Directive: Transposition in the Member States, Oxford University Press, Oxford, 2018, p. 298.

Third, the case of Germany is quite peculiar for two reasons. When first transposing the Directive, Germany had literally implemented Article 17(2) Damages Directive into national law.[36] With a recent amendment of its national competition law, the legislator wanted to address the *Rails I* and *Rails II* jurisprudence[37], which, *inter alia*, dealt with a causality assessment concerning affected persons and products, the so-called cartel affectedness (*Kartellbefangenheit*). In *Rails I* and *II*, the German Federal Court of Justice stated that there is, in fact, no *prima facie* evidence that cartels affect all transactions in the scope of a cartel.[38] The German legislator was initially of the same opinion.[39] This recently changed. The presumption in the new German law now explicitly extends to the cartel affectedness by stating: "It shall be rebuttably presumed that transactions concerning goods or services with undertakings participating in a cartel, which fall within the scope of a cartel in terms of object, time and place, were affected by that cartel."[40]

Moreover, recently, a German Regional Court exhausted the possibility to estimate damages by using its own free estimation method instead of relying on economic experts.[41] In the course of this free estimation, the court took the facts of the case, a contractual lump sum damage clause, as well as economic studies and comparisons to other Member States' courts into account and arrived at a 15% overcharge.[42] Hence, this method effectively led to a presumption of 15% overcharge through the back door.[43]

Lastly, despite recital 45 Damages Directive, three Member States have introduced presumptions relating to the amount of harm in their legal frameworks. Already before the Damages Directive, the Hungarian competition law included a rebuttable presumption stating that cartels cause an overcharge of 10%.[44] In the trans-

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36 §33a(2) Gesetz gegen Wettbewerbsbeschränkungen.

37 Federal Court of Justice, 11.12.2018, KZR 26/17 – *Rails I*; Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*.

38 Federal Court of Justice, 11.12.2018, KZR 26/17 – *Rails I*, par 59; Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, paras 27, 31.

39 BT-Drucksache 18/10207, 56.

40 See §33a(2) Gesetz gegen Wettbewerbsbeschränkungen.

41 Regional Court Dortmund, 30.09.2020, 8 O 115/14 (Kart).

42 See in detail Makatsch T.; Kacholdt B., *Estimation of cartel damages in competition litigation in Germany: 15 per cent as the new standard?*, GCLR, Vol. 14, No. 1, 2021, p. 12.

43 Hornkohl L., *Freie Schätzung der Kartellschadenshöhe nach § 287 ZPO: Eine Reaktion auf jüngste Entwicklungen*, NZKart, Vol. 8, No. 12, 2020, p. 661.

44 Art. 88/G(6) évi LVII 1996, see Nagy C., *Schadensersatzklagen im Falle kartellrechtlicher Rechtsverletzungen in Ungarn*, WUW,Vol. 59, No. 09, 2010, p. 902; Noble R.; Pilsbury S., *Is 10 per cent the answer?: The role of legal presumptions in private competition litigation*, GCLR, Vol. 1, No. 3, 2008, p. 124.

position of the Directive, Latvia followed the Hungarian approach and also introduced a rebuttable presumption of 10% overcharge for cartels.[45] Romania went even beyond and introduced a rebuttable presumption that cartels cause an overcharge of 20%.[46] The former Member State UK also envisaged a 20% rebuttable presumption of overcharge but abandoned the idea after a wave of criticism.[47] In the United States, cartels have long been assumed to have overcharged consumers by 10% when it comes to calculating fines, not in private damages litigation.[48] The rationale for the three Member States who implemented presumptions related to the amount of harm is similar to Poland's: they want to aid claimants and create an attractive forum for private enforcement of competition law.

3. THE PRESUMPTION OF HARM *DE LEGE FERENDA*: ROOM FOR MANEUVER?

The previous section has demonstrated that several Member States have taken different approaches than the Damages Directives for their presumptions of harm. Some have called to equally extend the presumption of harm in a possible revision of the Damages Directive or on Member State level. These proposals require a critical assessment.

3.1. The Presumption That Cartels Cause Harm Itself

First, the presumption that cartels cause harm itself demands a critical evaluation. The presumption has been criticised for its reliance on the *Oxera Study*, primarily because the study itself heavily depends on, as mentioned above, the equally questionable *Connor and Lande* study.[49] In general, several empirical studies on cartel overcharge exist that almost all use a data set provided by *Connor*[50]. Some studies

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45 21(3) Konkurences likums.

46 Art. 16(2) RDONANȚĂ DE URGENȚĂ nr. 170 din 14 octombrie 2020.

47 See Campbell S.; Feunteun T., *Designing a Balanced System: Damages, Deterrence, Leniency and Litigants' Rights – A Claimant's Perspective* in: Lowe P.; Marquis M. (eds.), European Competition Law Annual 2011: Integrating public and private enforcement, implications for courts and agencies, Hart Publishing, Oxford, 2014, p. 33; Hüschelrath K.; Müller K.; Veith T., *Concrete Shoes for Competition: The Effect of the German Cement cartel on market price*, J Competition Law Econ, Vol. 9, No. 1, 2014, pp. 97, 122.

48 2007 United States Sentencing Commission Guidelines Manual Chapter Two Part R §2R.1.1, Commentary 3.

49 Weidt C., *The Directive on actions for antitrust damages after passing the European Parliament*, ECLR, Vol. 35, No. 9, 2014, pp. 438, 442; Coppik J.; Heimeshoff U., *Praxis der Kartellschadensermittlung: Empirische Evidenz zur Effektivität von Kartellen*, WUW, Vol. 69, No. 11, 2020, pp. 584, 590.

50 Originally see Connor J., *Price-Fixing Overcharges: Legal and Economic Evidence*, 2005, [https://ssrn.com/abstract=787924], accessed 20 April 2021; for the follow-up studies see Connor J., *Price Fixing*

are indeed methodological questionable, particularly because the available data is too diverse or outdated.[51] However, the Commission itself critically assessed the *Oxera* as well as the *Connor and Lande* study and referred[52] to an earlier version of a meta-study by *Boyer and Kotchoni*[53]. In this meta-study, *Boyer and Kotchoni* try to correct some comparability deficits and other problems of the data set provided by *Connor*.

Without going into detail about the validity of *Boyer and Kotchoni's* findings at this point, the study indicates that while the majority of cartel-induced overcharges are in the low percentage range, in a majority of cartel cases, some form of harm has occurred.[54] This generally supports the presumption in Article 17(2) Damages Directive. Nevertheless, also *Boyer and Kotchoni* cannot find the existence of harm in 100% of cases. In fact, no study exists that establishes that harm occurs in every cartel case.[55] Even in textbook cartel cases, no damage can occur, particularly if cartelists do not implement the cartel agreement[56] or in the case of cartels that lead to a restriction of the innovation competition[57]. Thus, the general presumption that cartels cause harm is not in its entirety economically justified, even though the probability that damages occurred is very high. At least there is substantial room for a rebuttal.

Rather than economically, the presumption is procedurally justified.[58] Next to the studies, the aim to facilitate damages actions was one of the rationales for the Article 17(2) Damages Directive presumption.[59] However, it is questionable

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Overcharges: Revised 2nd Edition,2008, [https://ssrn.com/abstract=1610262], Accessed 20 April 2021 Connor, J.,*Price-Fixing Overcharges: Revised 3rd Edition*, 2014, [https://ssrn.com/abstract=2400780], Accessed 20 April 2021.

51 See in detail below at 3.d.

52 European Commission, *Impact Assessment Report Damages actions for the breach of the EU antitrust rules*, note 14, par 88.

53 See for the latest version Boyer M.; Kotchoni R., *How Much Do Cartel Overcharge?*, Rev Ind Organ, Vol. 47, No. 2, 2015, p. 119.

54 See figure at ibid, p. 123.

55 Coppik; Heimeshoff, *op. cit.,* note 48.

56 Maier-Rigaud F.; Milde C.; Helm M., *Textbook Cartels versus the Real Deal: Should We Be Surprised if Some Cartels Do Not Lead to Damage?*, 2015, [https://ssrn.com/abstract=2578317], Accessed 20 April 2021.

57 Fritzsche, *op. cit.,* note 19, p. 582.

58 See also in this vein Maier-Rigaud, Milde and Helm, note 55.

59 European Commission, *Explanatory Memorandum: Proposal for a Directive of the European Parliament and the Council 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* (COM(2013) 404 final), par 4.5 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0404&-from=EN], Accessed 20 April 2021.

whether the presumption of harm alone can, according to recital 45, remedy the information asymmetry and other difficulties associated with *quantifying* harm, as it only relates to the existence and not the amount of harm.[60] The presumption is nevertheless helpful for claimants because it reverses the burden of proof for the occurrence of harm and can work together with the possibility to estimate the amount of harm according to Article 17(1) Damages Directive.[61]

First, it can already create an evidentiary burden for claimants to prove the occurrence of harm due to an inherent information asymmetry. The so-called binding force of competition decisions does not include potential damage, published decisions do not necessarily contain helpful information, and access to the file is also limited.[62] Even if such information asymmetries could be remedied with recourse to the disclosure provisions of the Damages Directive, disclosure is undoubtedly costly and may prolong proceedings at this early stage of a claim.[63] The Article 17(2)-presumption is more appropriate and less intrusive. Now, the defendant, who is most likely in possession of the necessary evidence, must prove that the cartel did not cause any harm.[64] Due to the inherent information asymmetry, this will not create an immoderate burden on the defendant.

Furthermore, the presumption works together with the possibility to estimate harm and creates further procedural efficiencies. Even in a situation where the defendants cannot rebut the presumption, but the claimants equally cannot prove a concrete amount of harm, the possibility for courts to estimate the amount of harm according to Article 17(1) Damages Directive exists. In that sense, the presumption facilitates damages actions and makes them more effective.

3.2. Presumptions Beyond Cartels

Some have called to extend the presumption of harm to competition infringement beyond cartels as defined by Article 2(14) Damages Directive.[65] Such an extension could include decisions by associations, vertical restraints, or even the abuse of dominance. Information asymmetries also exist for claimants in these situations.[66] Contrary to recital 47 Damages Directive, they are not exclusive to cartels due to

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60 Iacovides, *op. cit.,* note 23, p. 299.

61 See also Filippelli, *op. cit.,* note 12, pp. 139, 140; Iacovides, *op. cit.,* note 23.

62 Hornkohl L., *The protection of confidential information during the disclosure of evidence according to the Damages Directive*, ECLR , Vol. 41, No. 2, 2020, pp. 107, 108.

63 European Commission, *Explanatory Memorandum*, *op. cit.,* note 58, par 4.5.

64 Howard, *op. cit.,* note 3, p. 458.

65 Filippelli, *op. cit.,* note 12, pp. 141, 142; Mikelenas and Zaščiurinskaitė, *op. cit.,* note 6.

66 Mikelenas and Zaščiurinskaitė, *op. cit.,* note 6, p. 121.

their secretive nature. The secrecy of a cartel affects the proof of the violation of competition law itself, not the harm.[67]

Nevertheless, relying on experience rules and empirical studies is already questionable when it comes to cartels. As mentioned above, not even all the cartels as defined by Article 2(14) Damages Directive necessarily result in damages. Studies do not even exist for other competition law violations. In fact, the question if other competition law violations, such as information exchanges, cause harm, depends on various factors and a case-by-case assessment and cannot simply be presumed.[68] Naturally, the Directive wants to help claimants and guarantee the effective enforcement of competition law in accordance with Article 4 Damages Directive. However, as initially mentioned, the principle of effectiveness does not trump everything. It cannot set aside the general burden of proof and allow presumptions without any substantial experience. The presumption that cartels cause harm itself is already quite a stretch in that regard. If cartels, the most severe competition law violations, do not even result in harm across the board, there is no room to include other competition law violations in a presumption of harm.

3.3. A Presumption Concerning Affected Persons and Products

As mentioned-above, new changes in German law include a rebuttable presumption of cartel affectedness. While the author is unaware of a German-style presumption in other Member States, generally, the courts of other Member States also have to determine whether certain transactions fall into the scope of those affected by a cartel.[69] Other Member States could follow Germany and introduce a presumption that cartels affect all transactions in the scope of a cartel, which fits their system.

One has to distinguish here the questions of liability in principle and cartel affectedness.[70] On the one hand, the liability in principle relates to the question of

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67 Filippelli, *op. cit.,* note 12, p. 139.

68 See, in detail, Deselaers W., *Anscheinsbeweis für das Entstehen eines Schadens bei bloßem Informationsaustausch?* in: Kokott J.; Pohlmann P.; Polley R.; (eds.), Festschrift für Dirk Schroeder: Europäisches, deutsches und internationales Kartellrecht, Otto Schmidt, Köln, 2018.

69 See, for example, District Court of Amsterdam, 12.05.2021, C/13/639718 / HA ZA 17-1255 et al., paras 3.21 – 3.32.

70 This distinction is very prominent in German law, as the jurisprudence of the Federal Court of Justice distinguishes clearly between the establishment of liability in principle (*Kartellbetroffenheit*) and the cartell affectedness (*Kartellbefangenheit*). In the competition context see Otto J., *(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle*, ZWeR, Vol. 17, No. 4, 2019, p. 354; Soyez V., *Germany "Rail Cartel II": German Federal Supreme Court further strengthens private enforcement in Germany*, GCLR, Vol. 13, No. 4, 2020, pp. R31-R32. However, other Member States also distinguish

"whether the defendant is guilty of an anti-competitive conduct which — through the conclusion of sales transactions or otherwise — is capable of directly or indirectly justifying that the claimant suffered a damage."[71] Following the case-law of the European Court of Justice,[72] the claimant just need to show that the cartel was "liable to cause damage", which does not include any proof that the claimant has purchased cartelised products.[73] Ergo, the liability in principle is part of the question if cartels cause any harm at all and, thus, the presumption of Article 17(2) Damages Directive. As mentioned-above, the presumption in Article 17 (2) Damages Directive includes the causal relationship between the cartel infringement and the occurrence of harm. Therefore, the presumption of liability in principle as part of the presumption of occurrence of harm can be based on the same above-mentioned justification for the Article 17 (2) Damages Directive presumption.

On the other hand, cartel affectedness needs to be seperated from this question. Cartel affectedness deals with the question of wether the claimant has purchased a cartelised good. Cartel affectedness determines the causal connection between the cartel agreement and the existence of individual damages in a specific amount.[74] It is, therefore, also in the understanding of Union law,[75] part of the assessment that deals with the quantification or the amount of harm, which falls outside of Article 17(2) Damages Directive.

As we will see in the following section, presumptions relating to the amount of harm are problematic in themselves. A general presumption covering cartel affectedness is not free of doubt in itself. Member States are, in principle, free to determine the causality. Recital 11 Damages Directive clarifies that "the notion of causal relationship" is "not dealt with in this Directive" but remains governed by national law, subject to the principles of equivalence and effectiveness.[76] As mentioned above, the probability is very high that cartels actually influence many legal transactions that fall within their scope regarding object, time and place. However, no empirical evidence or experience rules exist that undermine a presumption that *all* legal transactions with cartelists falling within the scope of a cartel were actually

between both levels, see the proceedings in the case of District Court of Amsterdam, 12.05.2021, C/13/639718 / HA ZA 17-1255 et al.

71 See Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, par 25.

72 *Kone, op. cit.,* note 20; Case C-435/18 Otis [2019] ECLI:EU:C:2019:1069.

73 Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, par 26.

74 Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, par 27.

75 Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, par 27.

76 See hereto Strand M., *Labours of harmony: Unresolved issues in competition damages*, ECLR, Vol. 38, No. 5, 2017, pp. 205, 206.

affected by that cartel.[77] As the German Federal Court of Justice held in *Rails I*: "the implementation of the cartel agreements may encounter practical difficulties, especially in the initial phase. In this context, the fact that the exchange of information necessary for the implementation of restrictive cartel agreements is subject to restrictions resulting from the fact that the parties concerned particular exercise caution due to the risk of discovery may become important."[78] The critique mentioned above relating to the presumption of harm in Article 17(2) Damages Directive itself can be extended to the cartel affectedness, which equally does not exist across the board.

Again, just like with the presumption of harm itself, one has to take recourse to the principle of effectiveness.[79] To avoid making cartel damages claims practically impossible or excessively difficult for claimants[80], a presumption that transactions within the scope of a cartel actually affected the claimant will be helpful due to the reversal of the burden of proof. In many cases, claimants faced considerable difficulties because they were unable to prove that a concrete transaction was affected by a cartel due to a lack of relevant information.[81] At the same time, such a presumption does not limit the defendant's rights in a detrimental amount. The defendant, who, as already mentioned above, has better access to information, can more easily prove that the cartel did not affect a concrete transaction.[82] Furthermore, the presumption does not affect the actual quantification of harm, which the claimant still must prove. In that sense, a presumption of cartel affectedness in the German sense creates a balance between the principle of effectiveness and non-overenforcement, takes account of defendants' rights and is, therefore, procedurally justified.

3.4. Presumptions Relating to The Amount and Quantification of Harm

To further promote and simplify quantification and damages actions in general, some have called to extend the presumption of harm to the amount and the quantification of harm. These proposals have different dimensions. Some want to follow Hungary, Latvia and Romania and call for a rebuttable presumption that

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77 See Federal Court of Justice, 11.12.2018, KZR 26/17 – *Rails I*, par 59; Federal Court of Justice, 28.01.2020, KZR 24/17 – *Rails II*, par 27, 31.

78 Federal Court of Justice, 11.12.2018, KZR 26/17 – *Rails I*, par 62.

79 BT-Drucksache 19/23492, 89.

80 Higher Regional Court Düsseldorf, 23.01.2019, U (Kart) 17/17, par 95.

81 See examples provided for by Rengier, *op. cit.,* note 12, pp. 98, 99.

82 BT-Drucksache 19/23492, 89.

cartels cause a specific amount of overcharge, primarily of 10%.[83] Others call for a presumption for an approximate or minimal overcharge that could be used as prima facie evidence.[84] In turn, others support the above-mentioned free estimation method of the German Regional Court that lead to a *de facto* presumption of 15% overcharge.[85]

These proposals should be dismissed. In so far as a presumption should only cover overcharge, this might already not be very helpful, for example, for direct customers, to which the volume effect is just as significant or even more critical than overcharge.[86] Beyond that, just like the presumption that cartels cause harm in Article 17(2) Damages Directive itself, supporters of presumptions relating to the amount of harm heavily rely on the studies mentioned above on cartel overcharge. Already for the presumption that cartels cause harm, this article questions the economic validity of the studies concerning the occurrence of harm in *every* cartel case.

However, the studies, *a fortiori*, lack typicality with regard to the amount of harm. Even if one takes into account the studies as a basis for a presumption relating to the amount of harm, the studies do not give rise to a typical overcharge.[87] As demonstrated in Table 1, the means of the overcharge in the studies range from 20 – 49 % and the medians from 11 – 28 %. The deviations are too large to determine a typical overcharge that could be used as a basis for a presumption. Furthermore, the distribution of the overcharge within a study is very broad. Looking at the *Ox-*

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83 Isikay O., *Schadensschätzung bei Kartellverstößen — was kann das Kartellrecht vom Zivilrecht lernen?: Die Analyse zweier zivilrechtlicher Schadensphänomene*, Duncker & Humblot, Berlin, 2020, pp. 187–200; Malinauskaite J.; Cauffman C., *The Transposition of the Antitrust Damages Directive in the Small Member States of the EU: A Comparative Perspective*, JECLAP, Vol. 9, No. 8, 2018, pp. 496, 509; Rauh J.; Zuchandke A.; Reddemann S., *Die Ermittlung der Schadenshöhe im Kartelldeliktsrecht*, WRP, Vol. 9, No. 2, 2012, pp. 173, 183; Klumpe G.; Thiede T., *Regierungsentwurf zur 9. GWB-Novelle: Änderungsbedarf aus Sicht der Praxis*, BB, 2016, pp. 3011, 3017.

84 Kersting C.; Preuß N., *Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU): Ein Gesetzgebungsvorschlag aus der Wissenschaft*, Nomos, Baden-Baden, 2015, par. 58 – 66.

85 Thiede T., *Zur Schätzung des Kartellschadens*, NZKart, Vol. 8, No. 12, 2020, p. 657; Kersting C., *15 % Preisaufschlag: Freie Schätzung des Kartellschadens beim Schienenkartell*, WUW, Vol. 69, No. 11, 2020, p. 619; Makatsch; Kacholdt, *op. cit.,* note 41.

86 Noble; Pilsbury, *op. cit.,* note 43, p. 126.

87 See also Coppik; Heimeshoff, *op. cit.,* note 48, p. 590; Brömmelmeyer C., *Die Ermittlung des Kartellschadens nach der Richtlinie 2014/104/EU*, NZKart, Vol. 4, No. 1, 2016, pp. 2, 8; Inderst R.; Thomas S., *Schadensersatz bei Kartellverstößen: Juristische und ökonomische Grundlagen und Methoden*, 2nd Edition, Handelsblatt Fachmedien, Düsseldorf, 2018, p. 98; Noble; Pilsbury, *op. cit.,* note 43, p. 129; Rinnen F.; Wandschneider F., Ökonomische Überlegungen zur freien Schätzung des Kartellschadens durch das LG Dortmund, NZKart, Vol. 9, No. 1, 2021, pp. 11, 14, 15. See also recently Federal Court of Justice, 10.02.2021, KZR 63/18 – Rails VI, paras 38, 43.

era Study alone, as demonstrated by Figure 1, the distribution of cartel overcharges range from 0 – 70 % of the cartel price.

Table 1: Studies on cartel overcharges

Study	Number of Cartels	Overcharge (% of the cartel price)[88]	
		Mean	Median
Posner (1975)[89]	12	49	28
OECD (2002)[90]	12	16	11
Connor (2005)[91]	674	49	25
Connor and Lande (2005)[92]	674	49	25
Connor and Bolotova (2006)[93]	395	29	16
Connor and Lande (2008)[94]	674	49	20
Bolotova (2009)[95]	406	22	20
Oxera (2009)[96]	114	ca. 20	18
Connor (2010)[97]	1.089	46	19
Smuda (2014)[98]	191	21	18
Connor (2014)[99]	2.044	49	23
Boyer and Kotchoni (2015)[100]	1.119	15	16

88 In the studies, the overcharge is calculated as the actual cartelized price (Pa) minus the counterfactual price but for the infringment (Pb) in relation to the cartelised price: Overcharge= (Pa-Pb)/Pa.

89 Posner R., *The Social Costs of Monopoly and Regulation*, J Polit Econ, Vol. 83, No. 4, 1975, p. 807.

90 OECD, *Report on the Nature and Implications of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, 2002, [https://www.oecd.org/daf/competition/cartels/2081831.pdf], Accessed 20 April 2021.

91 Connor, *Price-Fixing Overcharges, op. cit.*, note 49.

92 Connor J.; Lande R., *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, Tul L Rev, Vol. 80, 2005, p. 513.

93 Connor J.; Bolotova Y., *Cartel Overcharges: Survey and Meta-Analysis*, Int J Ind Organ, Vol. 24, No. 6, 2006, p. 1109.

94 Connor; Lande, *op. cit.*, note 9.

95 Bolotova Y., *Cartel overcharges: An empirical analysis*, J Econ Behav Organ, Vol. 70, No. 1-2, 2009, p. 321.

96 Oxera, *op. cit.*, note 8.

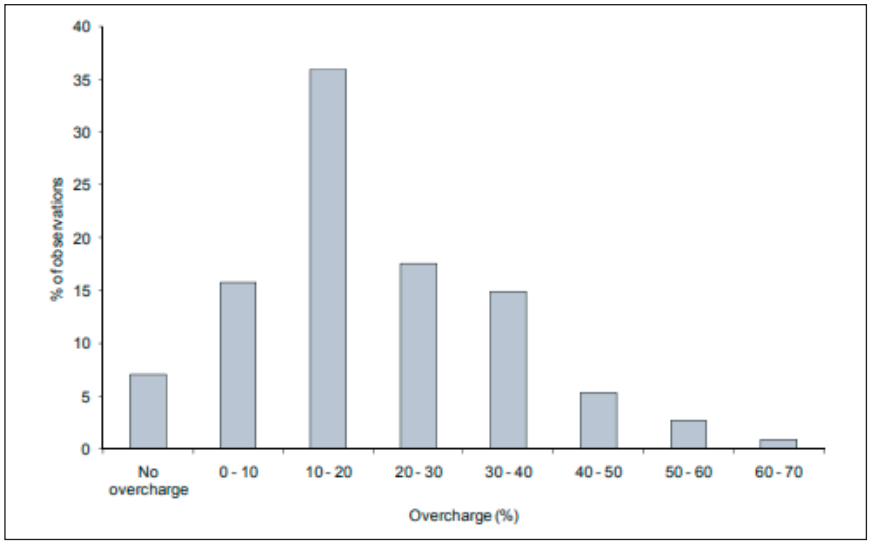
97 Connor, *Price Fixing Overcharges, op. cit.*, note 49.

98 Smuda F., *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, J Competition Law Econ, Vol. 10, No. 1, 2014, p. 63.

99 Connor, *Price-Fixing Overcharges, op. cit.*, note 49.

100 Boyer; Kotchoni, *op. cit.*, note 52.

Figure 1: Distribution of cartel overcharges (Source: Oxera, 2008).



Furthermore, as indicated above, the studies are methodologically problematic.[101] Early studies, such as *Posner* or the *OECD*, only analysed 12 cartels, a quantity too small to be statistically significant[102] or representative[103]. The other following studies largely rely on the very heterogeneous *Connor* database, even though the selection criteria vary. Already timing-wise, the *Connor* database is questionable because it contains data on cartels from the last 250 years. The competition regimes have changed significantly in the last years.[104] While mainly the leniency policy has led to increased cartel detection after its introduction in the EU, the latest developments, especially the current decline of leniency applications[105] and the increase of private damages actions, have not been factored in. Even developments that date back 20 years are no longer necessarily relevant for today's analyses. In any case, 250-year-old cartels should not be taken into account. Moreover, the

[101] See Filippelli, *op. cit.,* note 12, p. 138; Weidt, *op. cit.,* note 48, p. 442.

[102] Similar Rengier L., *Cartel Damages Actions in German Courts: What the Statistics Tell Us*, JECLAP, Vol. 11, No. 1-2, 2020, pp. 72, 79, who compares statistical data on overcharges in German courts and states that the data is too diverse to come to any meaningful conclusion on typical quantification of damages.

[103] See Cohen M.; Scheffman D., *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs*, Am Crim L Rev, Vol. 27, No. 2, 1989, p. 331.

[104] Bechtold R., *Kartell ist nicht gleich Kartell: Zur Indizwirkung von Bußgeldentscheidungen für den Schaden der Marktgegenseite und zur Bindungswirkung für den Schadensrichter* in: Kokott J.; Pohlmann P.; Polley R. (eds.), Festschrift für Dirk Schroeder: Europäisches, deutsches und internationales Kartellrecht, Otto Schmidt, Köln, 2018.

[105] Ysewyn J.; Kahmann S., *The decine and fall of the leniency programme in Europe*, 2018, Concurrences Art. N° 86060.

studies cover a broad range of cartels that are not automatically comparable.[106] As the studies rely on estimations themselves, different methods but also estimation biases and mistakes are possible, such as sample selection or publication biases.[107]

Even the meta-study of *Boyer and Kotchoni*, which tries to correct some of these deficits, is not necessarily applicable in a European context.[108] The underlying data primarily covers multinational or non-European cartels.[109] Studies that focus on Europe, such as *Smuda*, are subject to the just-mentioned biases and errors and, in any case, show that overcharges vary across periods or European regions. In fact, there are no reliable studies and no empirical evidence at all across different cartel offences and markets those cartels typically lead to a certain (minimum) harm (in Europe). The studies are so diverse that not even a high probability of a specific (minimum) amount could be established. On the contrary, many different factors have to be considered in the calculation of damages, such as the number and heterogeneity of cartelists, degree of organisation, barriers to entry, type of market, market coverage, geographical scope and duration of the cartel or possibility of tacit collusion in the counterfactual scenario,[110] which argue for a case-specific assessment and an overall approach of these factors[111].

Legal reasons also argue against any presumption related to the amount of harm, first of all, recital 47 Damages Directive.[112] While the wording 'should' does not indicate an obligation and Member States are anyway not bound by recitals *per se*[113], recital 47 stipulates the clear will of the European legislator not to introduce presumptions relating to the amount of harm. Second of all, presumptions of a specific amount of harm could also easily lead to overcompensation. In that case, the injured party could obtain an advantage from the damaging event, which runs contrary to most European damages law traditions and which the Damages Directive does not allow according to Article 3(3).[114] Moreover, the studies have

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106 Coppik; Heimeshoff, *op. cit.,* note 48, p. 586.

107 ibid, pp. 590, 591.

108 Inderst; Thomas, *op. cit.,* note 92, p. 94.

109 See Boyer; Kotchoni, *op. cit.,* note 52, p. 120; see also to the difference between national and international cartels Noble; Pilsbury, *op. cit.,* note 43, p. 129; critical with regard to the European dimension Rinnen; Wandschneider *op. cit.,* note 92.

110 Inderst; Thomas, *op. cit.,* note 92, pp. 94–99; Inderst R.; Schwalbe U., *Das kontrafaktische Szenario bei der Berechnung von Kartellschäden*, WUW, Vol. 61, No. 2, 2012, pp. 122, 131, 132.

111 Rinnen; Wandschneider, *op. cit.,* note 92, p. 13.

112 Mikelenas; Zaščiurinskaitė, *op. cit.,* note 6, p. 120; Bodnár Miskolczi P., *Hungary* in: Piszcz A. (ed), Implementation of the EU Damages Directive in Central and Eastern European countries, University of Warsaw Faculty of Management Press, Warsaw, 2017, pp. 143, 144.

113 Hess B., *Europäisches Zivilprozessrecht*, 2nd Edition, De Gruyter, Berlin, 2020, par 4.58.

114 See Brömmelmeyer, *op. cit.,* note 92, p. 8.

shown a wide range of overcharge. In some cases, the overcharge goes far beyond a 10%-, 15%- or even 20%. A presumption could, therefore, also lead to an under enforcement. Even though a presumption would indeed be rebuttable, courts might be reluctant to deviate from such a 'save haven'.[115] Even if that is not the case, the battle will just take place on the rebuttal stage,[116] where defendants will provide evidence that the true damage is below the presumed amount, and claimants would still suffer from information asymmetry.

In that respect, reasons of effectiveness and efficiency cannot dispel these concerns. Promoters of presumptions relating to the amount of harm want to create incentives to sue and improve claimants' situation. However, as stated above, the principle of effectiveness is no means to an end, especially when empirically unfounded.[117] Again, the presumptions that cartels cause harm is already a compromise. A presumption relating to the amount of harm goes far beyond that and places effective private enforcement above anything else.

Even if one would want to justify a presumption relating to the amount of harm as a policy choice, the presumption actually needs to be beneficial for claimants and encourage private enforcement. Yet, *Noble and Pilsbury* have shown that this is not necessarily true.[118] In case the actual amount of damage is more significant than the presumed amount, the chance of winning must rise sufficiently to offset the reduced presumed amount of damages.[119] In general, situations for smaller and larger claims differ considerably. In smaller claims, legal fees play a great role and could even come close to the amount of harm suffered. In these cases, only when the true overcharge is lower than the presumed overcharge, a presumption relating to the amount of harm actually encourages claims.[120] This illustrates the small scope of application where a presumption relating to the amount of harm would make sense. In other situations, the presumption will, in fact, reduce the incen-

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115 Noble; Pilsbury, *op. cit.,* note 43, pp. 124, 125.

116 See Mikelenas; Zaščiurinskaitė, *op. cit.,* note 6, p. 121.

117 See also Brömmelmeyer, *op. cit.,* note 85, p. 8; Thole C., *Freie Mindestschadensschätzung nach § 287 ZPO durch das Gericht?: Das Urteil des LG Dortmund vom 30.9.2020 auf dem Prüfstand des Prozessrechts*, NZKart, Vol. 9, No. 1, 2021, pp. 5, 7.

118 Noble; Pilsbury, *op. cit.,* note 43, pp. 129–132, who also came to the conclusion that the incentive for cartelists to enter into cartels with a very high overcharge will be even enhanced through a 10% persumption of overcharge, while there will be a reduction to engage in cartels with a small effect on prices.

119 In the model of *Noble and Pilsbury*, the chance that the claimant will win the case if the presumption of a 10 % overcharge is in place must be at least two-and-a-half times larger than the chance that the claimant wins a cartel damages case without a presumption to increase the incentive to litigate, see ibid, p. 130.

120 ibid.

tive to bring claims unless the chance of winning in the absence of the presumption is meagre because relying on the presumption would not be profit-increasing for claimants.[121] For larger claims, incentives are considerably reduced, especially when the actual harm is more significant than the presumed.[122] Furthermore, such a presumption will not even likely reduce litigation costs. A resource-intensive battle will instead take place on the rebuttal stage.[123] Considering this, a presumption relating to the amount or quantification of harm does not increase the effective private enforcement of competition law.

4. OVERCOMING THE QUANTIFICATION DIFFICULTIES AND MAKING DAMAGES ACTIONS MORE EFFECTIVE

This article has demonstrated that substantially extending the presumption of harm is not appropriate. Nevertheless, damages quantification remains the main hurdle in private enforcement of competition law, even after the alleviations brought by the Damages Directive. Yet, one has to distance oneself from the obsession that an extended presumption of harm will be the only solution for the calculation problem. Other options are available to help with the quantification dilemma or ease and incentivise private actions for damages. This section includes first proposals that could give rise to further research.

4.1. Illicit Gains and Damages Estimation, Unjust Enrichment and Restitution

One option for claimants, particularly direct purchasers, could be a stronger focus on the illicit gains of the infringers. Illicit gains are the difference between cartel profits and the cartelists counterfactual profits but for the cartel.[124] When there is no cost increase for the cartelists and the cartel involves most of the market actors, the illicit profits equal the additional payments of the cartelists customers', *i.e.* their actual loss.[125] Even though cost increases or large numbers of firms outside the cartel could lead to a different outcome, illicit gains could be used to facilitate the estimation of damages itself.

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121 ibid.

122 ibid, pp. 130, 131.

123 Hüschelrath; Müller; Veith, *op. cit.,* note 46, p. 122; Makatsch; Kacholdt, *op. cit.,* note 41.

124 Ellger R., *Kartellschaden und Verletzergewinn* in: Bechtold S.; Jickeli J.; Rohe M. (eds.), Recht, Ordnung und Wettbewerb: Festschrift zum 70. Geburtstag von Wernhard Möschel, Nomos, Baden-Baden, 2011, pp. 216, 217.

125 See Oxera, *op. cit.,* note 8, p. 97; Hempel R., *Privater Rechtsschutz im deutschen Kartellrecht nach der 7 GWB-Novelle*, WUW, Vol. 53, No. 4, 2004, pp. 362, 370.

They could, for example, be used as a minimum estimate of actual loss.[126] Similar provisions or case law already exists in Germany[127] or Denmark, and Sweden[128]. Special features of a case, such as the costs or the market coverage of the cartel, could be taken into account on a case-by-case basis, for which the cartelists hold the burden of proof. Even though, as explained above, there is always the risk that judges do not want to deviate from a presumption, the risk of overcompensation is low. Since illicit gains represent a direct transfer from the customer to the infringer, they will not be larger than the overcharge harm.[129] The reversal of the burden of proof, on the other hand, could lead to substantial facilitation, at least for the actual loss. Claimants still hold the burden of proof for their loss of profits. Furthermore, claimants still hold the burden of proof for the existence of the illicit gains themselves, the foundation for estimating the minimum amount of harm. To calculate the illicit gains, the claimant needs a substantial amount of information that uniquely lies in the defendants' hands.[130] To remedy such an information asymmetry,[131] claimants must take recourse to the disclosure rules. Disclosure, in general, could substantially facilitate damages actions for claimants and eliminate information asymmetries, particularly for damages calculation.[132]

A similar approach could entail recourse to unjust enrichment and restitution instead of damages.[133] Such a claim focuses on the illicit gain instead of the claim-

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126 See in general Oxera, *op. cit.,* note 8, 99; in favor of a legal presumption Alexander C., *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht: Privatrechtliche Sanktionsinstrumente zum Schutz individueller und überindividueller Interessen im Wettbewerb*, Mohr Siebeck, Tübingen, 2010, p. 402; Meeßen G., *Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht: Konturen eines Europäischen Kartelldeliktsrechts?*, Mohr Siebeck, Tübingen, 2011, p. 425; in favor of prima facie evidence: Rauh J., *Vom Kartellantengewinn zum ersatzfähigen Schaden: Neue Lösungsansätze für die private Rechtsdurchsetzung*, NZKart, Vol. 1, No. 6, 2013, p. 227.

127 See § 33a(3) Gesetz gegen Wettbewerbsbeschränkungen.

128 Möllers T.; Heinemann A., *The enforcement of competition law in Europe*, Cambridge University Press, Cambridge, 2007, pp. 502, 529.

129 Oxera, *op. cit.,* note 8, p. 99.

130 ibid, p. 98.

131 See Rauh, *op. cit.,* note 131, p. 227.

132 Recital 15 Damages Directive, see in detail Hornkohl L., *Geschäftsgeheimnisschutz im Kartellschadensersatzrecht: Die Offenlegung von Beweismitteln und der Schutz von Geschäftsgeheimnissen im Kartellschadensersatzrecht nach Umsetzung der Kartellschadensersatzrichtlinie*, Mohr Siebeck, Tübingen, 2021 forthcoming, Chapter 1.

133 See Bernhard K., *Making victims whole: A restitution approach to cartel damages*, 2012, Concurrences Art. N° 41907; Dreher M., *Die Anfechtung und Abwicklung kartellbefangener Verträge nach §§ 123, 812 ff. BGB: Bereicherungsrecht als Alternative zum kartellrechtlichen Schadenersatz* in: Studienvereinigung Kartellrecht (ed), Kartellrecht in Theorie und Praxis: Festschrift für Cornelis Canenbley zum 70. Geburtstag, C.H. Beck, München, 2012; Westermann K., § 11 Zivilrechtliche Nichtigkeit kartellrechtswidriger Verträge und einseitiger Rechtsgeschäfte, bereicherungsrechtliche

ant's loss.[134] In most jurisdictions, unjust enrichment and restitution coincide with a reversal of the burden of proof and an improved situation for claimants. The claimant can simply demand repayment of the entire price paid.[135] The claimant must, in turn, return the acquired cartelised good. Since the cartelised good usually has been resold or processed, the infringer can demand compensation. However, the infringer holds the burden of proof for the compensation, which is, principle, determined according to the market price.[136] The information asymmetry can, thus, be further corrected, which gives claimants incentives to sue. A downside remains: restitution claims usually do not entail an award for the loss of profit.[137] This makes restitution particularly interesting for indirect purchasers, who cannot claim a loss of profits. On the other hand, for intermediary suppliers or in abuse cases, the loss of profit often represents the 'lion's share' of the claim.[138] Those claimants must additionally sue for loss of profits as damages.

4.2. Amending the Calculation Guidelines: EU Competition Damages Database

The Commission already provided guidelines for damages calculation, but those only contain various methods of calculation. They could further be amended to help claimants, who currently are dependant on complex economic calculations provided by costly economic experts. As stated above, many factors determine the amount of harm. These factors could be used to refine the guidelines and introduce a database of cases including a list of typical criteria relevant to determine cartel damages calculation based on a collection of Europe-wide precedents.[139] Such collections of typical criteria should not be binding on courts but could help estimate damages in other, similar cases.[140] German civil law already knows such an approach for the estimation of non-material damages.[141] In that regard, the

Rückabwicklung kartellrechtswidriger Verträge in: Fuchs A.; Weitbrecht A. (eds), Handbuch Private Kartellrechtsdurchsetzung, C.H. Beck, München, 2019.

134 Oxera *op. cit.,* note 8, p. 99.

135 Woeste K., *Bereicherungsrecht als Alternative zum Kartellschadensersatz: Passing-on defense im Bereicherungsausgleich?*, ZWeR, No. 4, 2018, pp. 392, 397.

136 Kahle C., *Die Leistungskondiktion als Alternative zum Kartellschadensersatzanspruch: Zur Anfechtbarkeit und Rückabwicklung von Kartellfolgeverträgen*, Nomos, Baden-Baden, 2013, p. 42; Mankowski P.; Schreier M., *Zum Begriff des Wertes und des üblichen Preises, insbesondere in § 818 Abs 2 BGB: Zugleich zur Verzahnung von Zivil- und Kartellrecht*, AcP, Vol. 208, No. 6, 2008, pp. 725, 745.

137 Woeste, *op. cit.,* note 140, p. 400.

138 Howard, *op. cit.,* note 3, p. 458.

139 See in detail Isikay, note 88, pp. 177, 178.

140 ibid.

141 Maslow C., *Der Schutz des immateriellen Erfüllungsinteresses bei Vertragsverletzung durch Schadensersatz: Eine rechtsvergleichende Untersuchung auf der Grundlage des deutschen und englischen Rechts*, Mohr Siebeck, Tübingen, 2015, p. 200.

yearly reports of *Laborde*[142] already contain helpful insights on damages calculation in the EU Member States. However, as *Laborde* repeatedly states himself, the reports are not complete and lack methodological uniformity and precision. The Commission, which could use the European Competition Network as a reporting system, would be better positioned to create such a database.

4.3. Procedural Tools: Collective Redress, Concentrations and Expert Judges

Several procedural instruments are missing in the Damages Directive and the Member States implementing laws, which could facilitate damages calculations and damages actions in general. Significantly, the possibility to join forces in different capacities could help claimants in bringing damages actions. An apparent first solution would be collective competition redress, which could save time and costs, particularly for small claimants.[143] The complex damages calculation could be bundled together in such cases. Unfortunately, the recent Collective Consumer Redress Directive[144] does not include competition law in its scope. Thus, collective competition redress remains in the hands of Member States, which could give rise to forum shopping. Here, at least the recent *Trucks* case of the Amsterdam District Court, which did not entail collective redress but where many individual claims were joined together, could serve as a good first step into the right direction.[145]

Notably, the possibility of a concentration of procedures on a national and international level could also be beneficial. The Damages Directive does not entail jurisdictional rules, and existing instruments are not always helpful.[146] Even on a national level, rules on the concentration of proceedings are often missing.[147] In Germany, for example, only on the state level, concentrations at one Regional Court for competition law claims are possible.[148] Contrary, the mentioned Dutch *Trucks* case was bundled at the District Court of Amsterdam.[149] The concentra-

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142 See for the newest version Laborde J.-F., *Cartel damages actions in Europe: How courts have assessed cartel overcharges: 2019 edition*, 2019, Concurrences Art. N° 92227.

143 See in general, inter alia, Şahin E., *Collective Redress and EU Competition Law*, Routledge, London, 2018.

144 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

145 See the proceedings in District Court of Amsterdam, 12.05.2021, C/13/639718 / HA ZA 17-1255 et al.

146 Idot L., *The international aspects of private enforcement after the Directive 2014/104/EU: Gaps in the EU system and competition between national laws*, 2017, Concurrences Art. N° 83833.

147 Wurmnest W., *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie,* NZKart, Vol. 5, No. 1, 2017, pp. 2, 10.

148 § 89 Gesetz gegen Wettbewerbsbeschränkungen.

149 See the proceedings in District Court of Amsterdam, 12.05.2021, C/13/639718 / HA ZA 17-1255 et al.

tion of proceedings in one Member State or at least the concentration within the different Member States on national level, could bring further procedural efficiencies. The court could serve as a hub or collection point for damages actions against one defendant.[150] For damages calculation, several aspects, such as the question of how the market would have evolved but for the infringement, are relevant in more than one claim. Furthermore, documents and other evidence relevant for damages calculation could be stored at this court.

Similarly, such a concentration could be combined with an extended specialisation of judges. In most Member States, cartel damages actions end up before ordinary civil courts. While the respective chambers often have a competition focus, the emphasis on competition expertise could be stressed even further. Nowadays, particularly the costs incurred for the engagement of economic experts could exceed the actual damages in case of small claims and is, therefore, prohibitive.[151] Instead of or complementary to those expert witnesses, competition expert judges practising at these special competition venues could further facilitate damages calculation. For example, in Germany, Austria or Belgium, the commercial divisions of civil courts nowadays have commercial lay judges. These commercial judges come from the commercial community and sit on a panel together with ordinary judges. They are expected to assess a case based on their particular professional qualifications and business experience, which allows for a practical and appropriate judgment in commercial disputes that correctly assesses general business practices.[152] In a similar vein, competition expert judges could use their own competition expertise, particularly when it comes to damages calculation.

4.4. Party Involvement: Lump-Sum Damages Clauses and Settlements

Lastly, further party involvement will be needed. One instrument that parties can already take recourse to is lump-sum damages clauses, for example, in supply contracts. According to such clauses, an undertaking that violates competition law is obliged to pay a lump-sum amount of damages to their contracting partner.[153] In contrast to the above-mentioned legal presumptions of a specific amount of overcharge, lump-sum damages clauses, even included in general terms and conditions, would be agreed upon between the parties, which have a better insight into

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150 See hereto also Hornkohl L.;Melzer E., *Prozessualer Geheimnisschutz im Kartellschadensersatzrecht nach der 10. GWB-Novelle: Eine Novelle ohne Novellierung*, NZKart, Vol. 9, No. 4, 2021, pp. 214, 219, 220.

151 Makatsch; Kacholdt, *op. cit.,* note 41, p. 15.

152 See Lindloh K., *Der Handelsrichter und sein Amt: ein Leitfaden*, 6th Edition, Franz Vahlen, München, 2012.

153 See in detail Sirakova K., *Pauschalierter Kartellschadensersatz in Einkaufs- und Lieferbedingungen als Alternative zur Schadensschätzung*, Nomos, Baden-Baden, 2020.

the respective market and transaction conditions and, thus, amount of possible damages. Recently, the German Federal Court of Justice has backed such an approach in *Rails VI.*[154]

Lastly, in- or out-of-court settlements between parties where precise damages calculation would not be needed should further be promoted. One possibility to promote settlements could be staggered proceedings, which are quite prominent in Dutch law[155] and have been common in Germany before the *Rails II* case law limited the current practice[156]. First, courts could give interlocutory or declaratory judgments in which the courts established the liability of the defendants, now with the help of the Article 17(2)-presumption, without quantifying the exact amount of damages.[157] The damages calculation is, in theory, left to a second stage. Often, the interlocutory decisions are followed by settlements.[158]

5. CONCLUSION

Quantification of harm remains a significant difficulty for parties and courts in cartel damages actions. Solutions need to balance the principle of effectiveness against other legal principles and interests. Both the presumption that cartels cause harm or a presumption concerning affected persons and products remain within the boundaries set by the Union legal framework. They incentivise and facilitate damages actions while balancing the principle of effectiveness against, particularly, the principle of non-overenforcement. Presumptions relating to the amount of harm or presumptions for other competition law infringements than cartels as defined by the Damages Directive go beyond what is necessary and would not be based on empirical findings or economic sound reasoning. The calculation of a concrete amount of damages remains subject to various different factors, which demand a case-by-case assessment. Nevertheless, damages calculation and damages actions, in general, should be further facilitated. This article proposed several strategic and legal solutions. Some of which, such as restitution or lump sum damages clauses, are already available today and satisfy claimants need for compensation, at least in part, without the need for complex, lengthy cost calculations by expensive experts. For the other proposals, such as amended calculation guidelines

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154 Federal Court of Justice, 10.02.2021, KZR 63/18 – Rails VI.

155 See the proceedings in District Court of Amsterdam, 12.05.2021, C/13/639718 / HA ZA 17-1255 et al.

156 Rengier, *op. cit.,* note 12, p. 100.

157 Rengier, *op. cit.,* note 107, p. 75.

158 Laborde J.-F., *Cartel damages actions in Europe: How courts have assessed cartel overcharges: 2018 edition*, 2019, Concurrences Art. N° 88877.

or additional procedural tools, the European Commission or the Member States need to take action.

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THE CONCEPT OF LENIENCY IN REPUBLIC OF NORTH MACEDONIA

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ABSTRACT

The concept of "leniency" in competition law, or better known as the "leniency programme", has proven to be an extremely important instrument in fighting unfair competition. In the Republic of Northern Macedonia (hereinafter RNM), this concept of suppressing or reducing unfair competition, more or less, exists solely as a law conception. Nowadays, when the EU discusses the impact of the global crisis and the Coronavirus pandemic on the level of utilization of "leniency programme", this concept is still unknown or not a well-known concept for business sector in RNM.

The main focus of this article is "leniency programme" in RNM. The key questions that we aim to answer here, are: whether and to what extent this instrument is predicted in Macedonian competition law? Is it predicted only as a law category, or it has practical implications too? Although this research refers to RNM, we strongly believe that a thorough study of "leniency" requires exploration of European conception of "leniency" too. For that purpose, we use relevant EU legislation, as well as practice. Thus, our main goal is to consider the position of RNM towards "leniency" and bring into relation to the Macedonian competition law.

We base our hypothetical framework on the assumption that the applicability of "leniency programme" in RNM is at the lowest level. Furthermore, that the undertakings are not interested in applying "leniency". This situation is partly due to the lack of information, the complexity of the application procedure, as well as other factors that are related not only to the attitude of the executive of undertakings, but more to the general economic circumstances, economic development, the market size of goods and services, etc.

Using the analytical-descriptive method, the comparative method, and the method of analysis and synthesis, we'll elaborate the situation in RNM regarding this issue, and we will present our views considering the questions: whether certain measures should be taken regarding „leniency program", and what should be done to boost the use of this program in the Macedonian business sector.

Keywords: *business, competition, fine, cartel, damage, marker.*

1. INTRODUCTORY ASPECTS OF LENIENCY PROGRAMME IN COMPETITION LAW

1.1. The importance of competition law and protection from cartel behavior in the market of goods and services

Competition law is vital in ensuring a free and fair market for goods and services. The protection of competition law is at the top of the agenda of almost every country. This also refers to the EU. The need to provide protection of competition is strongly related to the development of two segments with economic dimension, such as: protection of business, as well as protection of the consumer sector.

Influenced by the immense and speedy turnover of goods and services and the enormous growth of e-commerce, the protection of competition is set as one of the most essential factor for ensuring smooth and real economic growth.[1] Among the most common types of violations of competition rules, the practice emphasizes cartel activities. These activities generally include fixing purchase or sale prices or other trading conditions, limiting production or establishing sales quotas, dividing markets, negotiating tenders, restricting import or export and / or anti-competitive behavior directed at other companies, competitors of the cartel participants.[2]

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1 See: OECD, *The role of competition policy in promoting economic recovery*, 2020, [www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economicrecovery-2020.pdf], Accessed 11 April 2021.

2 This definition of "cartel activities" is typical for almost all legal systems, including the Macedonian legal system. According to Macedonian Law on Protection of Competition ("Official Gazette of the Republic of Macedonia" nos. 145/2010, 136/2011, 41/2014, 53/2016 and 83/2018., hereinafter LPC), Article 5, point 11., "Cartels" means all agreements and decisions and / or concerted conduct between two or more undertakings whose purpose is to coordinate their conduct as competitors in the market and / or to influence relevant competition parameters, in particular by fixing purchasing or selling

In the last decades of the 20th and the beginning of the 21st century, the EU began to pay special attention on creation of an enforcement strategy that deters cartels activities. Taking into account the European statistics regarding the penalties imposed on cartels, its tendency to reduce cartel activities is evident.[3]

Table 1. Fines imposed (not adjusted for Court judgments) - period 2016 - 2020

Year	Amount In E
2016	3 726 976 000
2017	1 945 656 000
2018	800 748 000
2019	1 484 877 000
++2020++	288 080 000
Total	**246 337 000**

Table 2. Fines imposed (not adjusted for Court judgments) - period 1990 - 2020

Year	Amount in €*)
1990 – 1994	537 491 550
1995 – 1999	292 838 000
2000 – 2004	3 458 421 100
2005 – 2009	9 355 867 500
2010 – 2014	7 917 218 674
2015 – 2019	8 307 828 000
++2020++	288 080 000
Total	**57 744 824**

prices or other trading conditions, restriction of production or establishment of sales quotas, division of markets, negotiation of tenders, restriction of import or export and / or anti-competitive behavior directed at other companies - competitors of the cartel participants, in accordance with Article 4 of the Law on Protection of Competition, provides that "cartels".

[3] Data taken from the official website of the EU, the section on competition, sub-sector statistics, [https: //ec.europa.eu/competition/cartels/statistics/statistics.pdf], Accessed 25 March 2021.

Table 3. Ten highest cartel fines per undertaking (since 1969)

Year	Undertaking	Case name	Amount in €*
2016	Daimler	Trucks	1 008 766 000
++2017++	Scania	Trucks	880 523 000
2016	DAF	Trucks	752 679 000
2008	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 of which 391 940 000 jointly and severally with LG Electronics
2012	LG Electronics	TV and computer monitor tubes	687 537 000 of which 391 940 000 jointly and severally with Philips
2016	Volvo/Renault Trucks	Trucks	670 448 000
2016	Iveco	Trucks	494 606 000
2013	Deutsche Bank	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche	Vitamins	462 000 000

Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.[4] As we mentioned above, this definition is valid for cartels in almost all legal systems. Each of these systems provides for separate decision-making authorities, in the event of an injury of competition.

Within the EU frame, the competent authority for dealing with competition violations is the Directorate-General for Competition (hereinafter DGC). In the national legal systems, in addition to the courts, the competent authorities for dealing with cartels are national commissions, agencies, etc. Experiences from the practice has shown that detecting cartel behavior of business entities or other undertakings in a broader context, is extremely difficult. The inevitable consequences from the global recession, increased the pressure on the management of the companies and other undertakings broadly, to reach to cartel activities. On the other hand, proving existence of a cartel is not easy. This is commonly due to the management skills and experience in fixing

[4] According to Commission Notice on Immunity from fines and reduction of fines in cartel cases, Available from: [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52006XC1208(04)#ntc1-C_2006298EN.01001701-E0001], Accessed 31 March 2021.

prices, or sales quotas, or dividing markets etc. Practice shows that cartels are habitually negotiated in strictly discreet spaces and under strictly defined conditions, with the splitting up information between the narrowest circles of managers.[5]

The statistics regarding fines, presented above, clearly show the huge EU ambition to oppose to the cartels. In this regard, there are highly imposed penalties that aim to create a clear perception in the business sector of the mandatory compliance with the competitive legal regime. However, experience shows that the high fines *per se,* does not present the best model for preventing cartels. The EU is constantly working to modernize its consumer protection strategy / policy and business sector. Because of this ambition, EC implemented many up-to-date instruments, such as: eLeniency online, Anonymous Whistleblower Tool, as well as Management Plan 2020 DG Competition.[6] All of these activities are part of the EU's overall cartel strategy. In addition, the EU continuously develops its competition legislation too. However, the established EU practices and legal framework for protection of competition, proved to be insufficient for combating cartels. Hence, back in 1996, the EU took concrete steps in the field and created the "leniency programme", as a separate instrument for dealing with cartels. The origins of this concept of cartel protection have been known to the United States since 1978.[7] Namely, the Division first implemented a leniency program in 1978, which was substantially revised in 1993.[8] The Corporate Leniency Policy in USA, was first introduced in 1978 and revised in 1993, and as a model for protection against cartel activities was implemented in the EU.

According to experts, the leniency programme has been successfully practiced in the EU for more than two decades.[9] Currently, affected by different circumstances, the EU is facing the challenge of effectiveness of leniency programme, focusing on the need of new and additional intervention in the competition legislation. An argument in support of this view, is the fact that the EU invests maximum in the process of facilitating the application procedure, and is working diligently to increase the number of leniency applications. EC constantly bear in mind the new

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5 See more for the model of cartels arrangement: [https://ec.europa.eu/competition/cartels/leniency/leniency.html#video], Accessed 1 April 2021.

6 See more: [https://ec.europa.eu/competition/cartels/whistleblower/index.html], Accessed 1 April 2021.

7 See more about the genesis, development and status of the leniency programme in the United States: Buffier B.W., Kafele, H.L., Fishbien S., Shearman & Sterling LLP., *Cartel leniency in United States: overview:* Available from: [https://uk.practicallaw.thomsonreuters.com/4-501-2185?transitionType=-Default&contextData=(sc.Default)], Accessed 1 April 2021.

8 See: [http://www.oecd.org/corporate/ca/1890449.pdf], Accessed 11 April 2021.

9 Dominte, O., & Şerban, D., & Dima, A.M., *Cartels in EU: study on the effectiveness of leniency policy,*" Management & Marketing, Economic Publishing House, vol. 8(3), 2013, pp.1-24.

circumstances, including the COVID -19 Pandemic, and notifies the potential participants with required rules referring to the procedure for leniency application.

However, lately, key question is brought to the table among the experts circles: whether the "leniency program" is still the most appropriate model for the prevention, reduction of distortions of competition?! Furthermore, it is a priority to EU to answer the following questions:

- what are the advantages and disadvantages of the application of the "leniency program";
- whether and what measures should be taken in order to improve the efficiency of the implementation of the "leniency program";
- what is the attitude of the European versus the national law of the member states regarding the application of the "leniency program"
- is there effective cooperation between the national bodies for protection against competition competition and the European Commission as a competent body for protection of competition on the European market;
- found the EU border between public and private antitrust enforcement, and what is the contribution of The 2014 EU Directive on damage actions;[10]
- What is the impact of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

All these questions have raised the need to re-actualize the subject-matter of the "leniency".[11] Their elaboration from the perspective of the EU legal framework and its impact on the Macedonian competition law will be analyzed below.

2. LENIENCY PROGRAMME IN EUROPEAN LAW AND POLITICS

2.1. Leniency programme in European Competition policy

The conception and implementation of European competition policy is a complex issue for the EC. In the last decade of the 21st century, the EU faces many challenges in the field of competition law and makes tremendous effort to improve

[10] 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, available from: [https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32014L0104], Accessed 5 April 2021.

[11] Snyder, B., *Chief Executive Officer, Competition Commission of Hong Kong*, China, OECD Competition Division, [https://www.youtube.com/watch?v=dJSNoWD0vb8], Accessed on 1 February 2020.

the quality of equal treatment of undertakings. The presence of the Coronavirus worldwide, has a huge impact on this process. Namely, under the influence of the COVID -19 pandemic, the conditions for realization of the "leniency programme" become easier said than done. As an aggravating circumstance, financial crisis affected the companies, to come to a decision for participating in cartel more easily.

Nevertheless, the EU's position is that competition law must be protected.[12] According to Margrethe Vestager, "fighting cartels is a very high priority for the European Commission 'owing to the' serious harm cartels cause to consumers and businesses [and to] the economy as a whole in terms of removing incentives to compete on prices or to innovate ". . There will be no exception to this positioning of competition policy, regardless of the new circumstances of business operations in the internal market. It is enough to superficially analyze the work of the EC and to see the decisions on which the solutions are based in certain cases".[13] Based on this position, the proper legislative intervention has been done.[14]

2.2. Leniency programme from European legislation perspective

Studying "leniency programme" vie legislative perspective require profound analysis. In EU frame, many relevant provisions should be explored in order to reach to a considerable understanding of this topic. Bearing in mind that our focus is "leniency "in RNM, we are solely going to address those aspects of EU legislation, which we consider relevant for Macedonia issues too. The EU corpus of leniency provisions encompasses regulations, directives, notices etc.[15] First and foremost,

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12 See more about EC activities on protection of competition: [https://ec.europa.eu/competition/antitrust/coronavirus.html], Accessed 10 April 2021.

13 EU Commissioner for Competition: 'Press release Statement 15/5260', 24 June 2015, Available from: [https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/european-union], Accessed 1 April 20201.

14 Palmigiano, P., Penny, L., *Competition law and coronavirus: what's the connection,* 2020, available form: [https://www.taylorwessing.com/en/insights-and-events/insights/2020/04/competition-law-and-coronavirus-whats-the-connection], Accessed 28 March 2021.

15 It is not possible to analyze the entire EU legal sources which are relevant for "leniency". So, in this article we only will mention them, solely for the purposes of our main research. Such as: 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; 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; Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market; Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commis-

article 101 TFEU (formerly Article 81 of the TEC) is applicable in case of establishing a cartel or applying the leniency programme.[16] According to this article, the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

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sion pursuant to Articles 81 and 82 of the EC Treaty; Directive (EU) 2019/1937 of 23 October 2019 of the European Parliament and of the Council on the protection of persons who report breaches of Union law; Commission's Notice on co-operation within the network of competition authorities (OJ 2004 C101/43) (ECN Notice).

16 Consolidated version of the treaty on the functioning of the European Union - part three: union policies and internal actions - title vii: common rules on competition, taxation and approximation of laws - chapter 1: rules on competition - section 1: rules applying to undertakings - article 101 (ex article 81 tec).

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The early development of the "leniency program" in the EU is formally linked to the adoption of the Commission Notice on the non-imposition or reduction of fines in cartel cases, which is a consequence of the previously established need to prevent or reduce cartel behavior.[17] This need has been identified as one of the core objectives of the EC, recorded in the 1993 White Paper on Growth, Competitiveness and Employment.[18]

Fully aware of the role of the consumer sector and the value of the free market for goods and services, in the introduction of 1996 Commission Notice on non-imposition or reduction of fines in cartel cases, EC emphasized that consumer protection and the provision of a free market for goods and services, exceeds the interest in punishing the participants in the cartel. 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, contributes to the establishment of the basic concepts of application of the "leniency program" in a large extent. Well acquainted with the need for amendments to this document, it announces the readiness for constant interventions in accordance with the new trends in the field. In point 3 from 1996 Commission Notice, it announces that "The Commission will examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it."

The essential value of the 1996 Commission Notice is the criterias that it predict, according to which a certain entity can be exempted from a fine, or to have a reduced value of the fine to be paid in the name of a misdemeanor.[19] A part from this, section E of the 1996 Commission Notice provides the procedure for implementing the leniency application, step by step, until the final completion. It is noteworthy that in this version of the EC Notice, the protection of applicants is not taken into account, in terms of the statements they make before the DGC. In this regard, 1996 Commission Notice emphasized: "The fact that leniency in

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17 Original text is available from: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX-%3A31996Y0718%2801%29], Accessed 31 March 2021.

18 White paper, European Commission., *Growth, competitiveness, and employment.,* The *challenges and ways forward into the 21st century,* COM (93) 700 final. Brussels: 05.12.1993. [https://www.cvce.eu/content/publication/1997/10/13/b0633a76-4cd7-497f-9da1-4db3dbbb56e8/publishable_en.pdf], Accessed 1 April 2021.

19 When determining the conditions under which the subject may be exempted or request a reduction of the fine, the document qualifies into three categories: non-imposition of a fine or a very substantial reduction in its amount, substantial reduction in a fine, significant reduction in a fine. This qualification is just another confirmation of the EU's commitment to include as many entities as possible, which through their participation in the leniency program, will contribute to reducing cartel behavior.

respect of fines is granted cannot, however, protect an enterprise from the civil law consequences of its participation in an illegal agreement. In this respect, if the information provided by the enterprise leads the Commission to take a decision pursuant to Article 85 (1) of the EC Treaty, the enterprise benefiting from the leniency in respect of the fine will also be named in that decision as having infringed the Treaty and will have the part it played described in full therein. The fact that the enterprise cooperated with the Commission will also be indicated in the decision, so as to explain the reason for the non-imposition or reduction of the fine". Practice has shown that this solution is not the most appropriate, given the fact that exactly this moment (the position in the civil litigation) is perceived by experts as one of the main reasons why undertakings are in a dilemma whether to report the existence of a cartel or participate in it.

The EC desire to enriched the effectiveness of the "leniency programme", contributed to the implementation of the concept of the Anonymous Whistleblower Tool.[20] According to this concept, since 2017, the possibility has been established for every individual who has knowledge of practicing cartel behavior by certain entities, to report it. This also serves to relieve national courts from resolving cases. In 2002, citing point 3 of the introduction of 1996 Commission notice, EC adopted the Commission notice on immunity from fines and reduction of fines in cartel cases Official Journal C 045 , 19/02/2002 P. 0003 – 0005.[21] Totally aware of the need for constant changes of the legal framework, the 2002 Commission Notice anticipates: the Commission announced that it would examine whether it was necessary to modify the notice once it had acquired sufficient experience in applying it. After five years of implementation, the Commission has the experience necessary to modify its policy in this matter. Whilst the validity of the principles governing the notice has been confirmed, experience has shown that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted. A closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement could also increase this effectiveness.

Today's procedure for leniency is conducting under Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C298/17) (2006

[20] When determining the conditions under which the subject may be exempted or request a reduction of the fine, the document qualifies into three categories: non-imposition of a fine or a very substantial reduction in its amount, substantial reduction in a fine, significant reduction in a fine. This qualification is just another confirmation of the EU's commitment to include as many entities as possible, which through their participation in the leniency program, will contribute to reducing cartel behaviour.

[21] See: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002XC0219%2802%29], Accessed 11 April 2021.

Leniency Notice).[22] This Notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. According to 2006 Leniency Notice, point (8(a)), the Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel, or;

(b) find an infringement of Article 81 EC in connection with the alleged cartel.

Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection. As well, Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC. Yet, these conditions are not the only requirements that should be fulfilled.[23]

2006 Leniency Notice also predict the possibility of using reduction of fine under certain conditions.[24] Finally, the 2006 Commission Notice gives an answer to one of the most essential questions that has a strong impact on companies in deciding whether to use the leniency program, and that is the position of these companies in civil proceedings. Namely, according to point 39, from 2006 Commission Notice, in line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC. All these issues that we only opened in this part of the article, are crucial for the maintenance and development "leniency" under

[22] Published on 8 December 2006 and subsequently amended on 5 August 2015.

[23] In order not to burden too much this part of elaboration, see more about the additional condition for getting leniency in the 2006 Commission Notice.

[24] 2006 Commission Notice, Part III, point 23, Requirements to qualify for reduction of a fine.

the new circumstances. So, in the part dedicated to Macedonia, we are going to take them in mind, as a most suitable way to understand the situation in RNM, regarding "leniency".

3. LENIENCY IN MACEDONIAN COMPETITION LAW

3.1. Legal framework for leniency in Macedonian competition law

Comparative study of "leniency programme", points out that European experts for cartels, still perceive leniency as the most effective tool for detecting and combating cartels.[25] Theoretically, numerous debates, conferences and roundtables related to "leniency" have been focused on the question: how to motivate participants in cartel to report and to take advantage of the leniency?! This is strongly related to the efforts, achievements and success of this programme.[26] Via leniency programme, EC exempt many companies from fines. For example, in cases, EU Canned Vegetables (Case COMP/AT.40127); Forex (Case COMP/AT.40135); Occupant Safety Systems (Case COMP/AT.40481), DGC exonerate these companies from a huge amount of fines.[27]

As we have seen from the theoretical elaboration above in the text, the EC continuously takes numerous actions to increase leniency applications. The best proof for this standpoint is the fact that right away after the declaration of the pandemic, many changes were made on the official website of the EC in the field of applications, such as: notifying the possibility of submitting oral notifications, elaborating the stages of the procedure, news required documents were attached etc.[28]

"Leniency programme", is not an unknown concept in the Macedonian law. Namely, Article 65 of the LPC of RNM explicitly provides for the concept of exemption or reduction of the fine (leniency). More precisely, in Article 64 of the LPC, in the part titled as "fine assessment", the Commission for deciding on

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25 Ysewyn, J., Boudet, J., Leniency and competition law: *An overview of EU and national case law Procedures, agreement, all business sectors, sanctions / fines / penal ties, leniency, foreword*, Art. N° 72355, 2018, [https://www.covcompetition.com/wp-content/uploads/sites/21/2018/08/here-1.pdf], Accessed 29 March 2021.

26 For cartel infringements, the largest fine imposed on a single company is over €896 million; the largest fine imposed on all members of a single cartel is over €1,3 billion. Available from: [https://ec.europa.eu/competition/cartels/leniency/leniency.html], Accessed 1 March 2021.

27 The original text of the decisions of the European Commission is available from: [https://uk.practicallaw.thomsonreuters.com/0-517-4976?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a774715], Accessed 11 April 2021.

28 A special document is available on the official website, which contains data on the exact stages of the procedure in case of submitting an application, which now can not be in oral form: [https://Ec.Europa.Eu/Competition/Cartels/Leniency/Oral_Statements_Procedure_En.Pdf], Accessed, 1 April 2021.

misdemeanors (hereinafter CDM) within the Commission for protection of competition (hereinafter CPC), treats leniency as a mitigating circumstance in the assessment of the fine. Additionally, the essential concept of the leniency program is contained in Article 65 of the LPC. The Leniency program refers only to detection and suppression of cartels, and not in any other forms of distortion of competition. In Article 7 of the LPC, the legislator explicitly stated what a cartel is, and in what forms it occurs. Compared to defining a cartel in other relevant legal sources, difference are not encountered.[29]

According to Macedonian law, any direct or indirect fixation of the purchase or sale price or some other trading conditions is a cartel; further, any activity that restricts or controls production, market, technical development or investment, any activity that means market sharing or sources of supply is a cartel; further, any conduct which implies the application of different conditions for the same or similar legal matters with other trading partners, which puts them in a less favorable competitive position or any activity which conditioned the conclusion of the contracts by accepting from the other contracting parties additional obligations, which after their nature or in accordance with commercial customs are not related to the subject of the contract. All these behaviors present cartels activities and are prohibited within the meaning of Article 7 (paragraph 1) of the LPC. Any agreement, decision, or individual provision of the agreements, which are guaranteed in this sense, do not produce legal effect, i.e., are null and void.[30]

In order to reduce the scope and dynamics of cartel activities, the LPC, among other things, provides for "leniency programme". According to the legal wording of Article 65, in order to detect cartels that constitute violations of Article 59 paragraph (1) item 1) of the LPC, the Commission for deciding on a misdemeanor at the request of a company that has recognized its participation in a cartel will de-

[29] In this context the definition from the Commission Notice on Immunity from fines and reduction of fines in cartel cases: Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF], Accessed 15 March 2021.

[30] Following the example of EU solutions and comparative solutions of other systems, an exception to the application of this prohibition is in contracts, decisions of associations of undertakings and concerted conduct that contribute to improving the production or distribution of goods or services or promoting technical or economic development, provided that consumers also benefit from it proportionately. See Article 7 paragraph 3 of the LPC.

termine full exemption from fine , which as a rule should have been pronounced to that company if the same:

1) first submit evidence that enables the Commission for deciding on a misdemeanor to initiate a misdemeanor procedure or
2) first submit evidence that enables the Commission for deciding on a misdemeanor to complete the already initiated misdemeanor procedure with a decision that determines the existence of a misdemeanor, if without such evidence the existence of the misdemeanor could not be determined.

Article 65 from LPC lay down the conditions that must be fulfilled for "leniency". The LPC also envisages the concept of reduction from fines, and the conditions that must be accomplished to apply for it. In this regard, if the company that has admitted its participation in a cartel which is a misdemeanor under Article 59 paragraph (1) item 1) of the LPC, does not meet the conditions for full exemption from the fine from paragraph (1) of the LPC, the fine A rule that should have been imposed on him may be reduced if he submits to the CDM relevant evidence of decisive importance for making a decision that determines the existence of a misdemeanor.

The immunity, that is, the reduction of the fine referred to in paragraphs (1) and (2) of the article 65, shall apply if the undertaking requesting immunity, that is, reduction of the fine cumulatively meets the following requirements:

1) terminates its participation in the cartel immediately after the submission of the request for immunity from a fine;
2) cooperates with the Misdemeanor Commission fully, on a continuous basis, and submits the necessary data in the shortest possible time period;
3) does not notify the other participants in the cartel about the submission of the request for immunity from a fine;
4) prior to the submission of the request for immunity from a fine, does not disclose the existence or content of the request, except to bodies responsible for sanctioning the cartel outside the Republic of Macedonia, and
5) does not destroy, conceal or falsify relevant evidence used to establish facts being of importance for making a decision by the Misdemeanor Commission.

(4) The Misdemeanor Commission shall not grant full immunity from a fine to the undertaking referred to in paragraph (1) of this Article which throughout the duration of the cartel has taken measures by which it has forced the other undertakings to participate or remain therein, but may determine reduction of the fine if such undertaking meets the requirements referred to in paragraph (3) of this Article.

The Government of the Republic of Macedonia, on the proposal of the Commission for Protection of Competition, shall prescribe in more detail the conditions and the procedure under which the Commission for deciding on misdemeanors decides on exemption or reduction of the fine. In this regard, the Decree on closer conditions for exemption or reduction of the fine and the procedure under which the CDM decides is applied.[31] A government decree is an act transposing Commission Notice on Immunity from fines and reduction of fines in cartel cases (52006XC1208(04).

This Decree does not exclude the application of Article 58 of the LPC, according to which if damage is caused by any action that constitutes a misdemeanor, the person who will suffer damage may seek compensation in accordance with the Law on Competition.

The Government Decree of 2012 envisages all phases of the implementation of the leniency procedure, as follows:

- Request for exemption from fine
- Conditions for exemption from fine
- Other conditions for exemption from fine
- The action of the CDM upon the request for exemption from fine, and
- Notification of compliance with the conditions for exemption from fine.

According to the Decree of 2012, the company requesting exemption from fine in accordance with Article 65 paragraph (1) item 1) or 2) of the LPC, should submit a request for exemption from fine to the CDM. The company must submit the following evidence to the request for exemption from fine:

a) A statement by the undertaking referred to in Article 3 of the Regulation acknowledging its participation in the cartel; and

(b) Other evidence, cartel related, held or available to the company seeking exemption from the fine at the time of filing, including in particular evidence dating to the time of the cartel.

Article 5 of the Decree explicitly provides for the conditions for exemption from fines. In this sense, the CPC shall determine a fine exemption in accordance with Article 65 paragraph (1) item 1) of the LCP, provided that at the time of filing the request for a fine exemption, the CPC did not have sufficient evidence to initiate a misdemeanor procedure or no misdemeanor was initiated procedure related to the

[31] The whole text of the Decree RNM., бр:41/2012 from 26.03.2012, is available from: [https://dejure.mk/zakon/uredba-za-pobliskite-uslovi-za-osloboduvanje-ili-namaluvanje-na-globata-i-postapka-ta-pod-koja-komisijata-za-odluchuvanje-po-prekrshok-odluchuva-za-osl], Accessed 25 March 2021.

cartel in question. CDM will determine exemption from fine, in accordance with Article 65 paragraph (1) item 2) of the LPC, in favor of the company requesting exemption from fine if the following conditions are met: a) at the time of submitting the request for exemption from fine KOP did not have sufficient evidence to make a decision establishing the existence of the cartel for which the request is submitted;

b) no other undertaking which first submitted evidence which enabled the KOP to initiate a misdemeanor procedure for a cartel was not granted a conditional exemption from the fine referred to in Article 9 paragraph (1) of this Regulation; and

c) the undertaking requesting exemption from the fine is the first to provide evidence dating back to the time of the cartel and prove its existence and submit a statement to the company referred to in Article 3 of this Regulation, which will enable the COP to complete the procedure by adopting of a decision determining the existence of a misdemeanor.

Apart from this conditions, laid down in article 65 LPC, and articles 2 and 5 from the Decree 2012, the undertaking requesting exemption from the fine must also meet the following conditions:

a) to submit to the CDM continuously and in the shortest possible time accurate, unambiguous and complete information from the moment of submitting the request for exemption from fine and during the entire procedure, i.e:
   1) to submit to CDM all relevant information and evidence about the cartel that it owns or that are available to it as soon as possible;
   2) be fully available to the CDM to respond to any requests that may contribute to the establishment of the facts as soon as possible; - to ensure the availability of existing, and if possible former, employees and directors for giving statements and explanations on the minutes before the CDM;
   3) not to destroy, falsify or conceal relevant information or evidence relating to the cartel, and
   4) not to disclose the fact that he has submitted a request for exemption from fine to the COP, nor to disclose the content or part of its content until the COP submits a preliminary report on the established factual situation in accordance with Article 42 paragraph (1) of the LPC, except unless otherwise agreed between the CDM and the company seeking exemption from the fine;[32]

[32] In order to give the participants in the procedure the opportunity to state the facts and circumstances of importance for determining the factual situation, the Commission for deciding on a misdemeanour,

b) terminate his participation in the cartel immediately after submitting the request for exemption from fine, unless the continuation of his participation in the cartel, in the opinion of the COP, is necessary for the successful completion of the procedure; and

c) during the preparation of the request for exemption from fine has not destroyed, falsified or concealed evidence of the cartel, nor has it revealed the fact, or any part of the content of the request that it intends to submit, except to other bodies responsible for sanctioning the cartel outside the Republic of Macedonia.

CDM may reject the request for exemption from a fine submitted in accordance with Article 65 paragraph (1) item (1) or (2) of the LPC if it is submitted after the CDM has submitted a preliminary notification on the established factual situation.[33]

Regarding the treatment of CDM in relation to the leniency application, the predicted solutions express the implementation of a marker system.[34] This system enables the preservation of the applicant's place in terms of obtaining exemption.[35] In this sense, the decision of the Decree according to which the company requesting exemption from fine in accordance with Article 65 paragraph (1) item 1) or 2) of the LPC, may submit a notice of intention to file a request for exemption before submitting the request for exemption from fine.

For the submitted notification, CDM issues a certificate which keeps the place of the submitter of the waiting list for exemption from fine, for a period determined individually from case to case, in order to enable the submitter of the notification to obtain the necessary data and evidence (marker). In the confirmation, CDM determines the deadline within which the submitter of the notification is obliged to submit a request for exemption from the fine referred to in Article 2 of this Regulation. If the submitter of the notification has submitted the request for exemption from the fine within the deadline determined by the CDM, the request for exemption from the fine shall be considered submitted on the date of issuance of the certificate. If the submitter of the notification has not submitted a request for exemption from the fine within the determined deadline, the CDM may freely

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before scheduling an oral hearing, submits to the participants a preliminary notification on the established factual situation.

33 See article 6 from the LPC.

34 Lacerda, Aranha, J. F., *The Leniency Programs and the Creation of a One-Stop Shop for Markers*, RDC, Vol. 2, nº 2, November, 2014, pp. 64-75.

35 See more: [http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm#:~:text=Marker%20systems%20allow%20a%20prospective,period%20of%20time%2C%20while%20the], Accessed 28 March 2021.

dispose of the data and evidence submitted with the notification, for which he/she shall notify the submitter of the notification in writing.

The Decree envisages the whole procedure of CDM (Article 8). According to this, at the request of the undertaking seeking for exemption from fine, CDM issues a receipt which confirms the date and, if possible, the time of receipt of the request for exemption from the fine. CDM will not decide on a request for release from a fine before deciding on a previously submitted request for release from a fine related to the same cartel, whether it is a request or notification of intent to file a request for release.

CDM is obliged to inform the applicant about the results after the submitted application. Hence, in accordance with Article 9, when the CDM determines that the undertaking seeking exemption from the fine meets the requirements of Article 65 paragraph (1) item 1) or 2) of the LPC and Articles 2 and 5 of this Regulation, it shall notify it in writing. In case when the conditions are not met, CDM will notify the applicant in writing. In this case, the company seeking exemption from the fine may withdraw the evidence submitted in support of the request for exemption, or to request from CDM to treat the documentations as a request for reduction of the fine. This does not prevent the CDM from taking action ex officio in order to gather the necessary evidence.

The CPC's action on the request for exemption or reduction of a fine, including the definition of specific activities, terms and criteria useful for the procedure, is also provided in the CPC guidelines for exemption or reduction of the fine, which are adopted by the CPC alongside with 14 other Guidelines and Guide for Detecting Illegal Contracting in Public Procurement Procedures.[36] In 29 points of the guidelines, the CPC provides for the procedure and includes the definition of certain aspects that can not be found in the JCC and the Decree. Hence, the importance of the same in terms of successful practical implementation of leniency.

The analysis of the LPC in the part of the leniency programme, as well as the analysis of the Decree and the Guidelines, indicates the fact that in a normative sense the concept of the "leniency programme" is fully implemented in RNM. In the practice of business operations and in the practice of the CPC, the picture is quite different. Namely, from the research we conducted in the business sector,

[36] In this regard, for example, is the definition of a key criterion for determining the amount of the fine reduction. Namely, according to the guidelines, that will be the total added value of the evidence provided by the applicant for reduction of the fine. This is particularly important in terms of whether the evidence submitted by the company constitutes evidence of significant added value in relation to the evidence already available to the CDM. CDM will also take into account the overall level of cooperation provided.

and from the research of the work of the CPC in the area of leniency, we found a large discrepancy between the use of this programme and its law anticipation.

To get more information about the usefulness and effectiveness of the leniency, we approach to the CPC with several relevant questions, as follows:

In how many cases, in the last 10 years (2010-2020) the commission for deciding on a misdemeanor within the CPC, has made a decision to exempt companies from fines, based on the leniency program in terms of Article 65 (exemption or reduction of the fine) leniency) of the Law on Protection of Competition („Official Gazette of the Republic of Macedonia" No. 145/2010; 136/2011; 41/2014; 53/2016 and 83/2018).	The Commission for deciding on misdemeanors at the CPC, in the last 10 years, has not made a decision on exemption from fines under Article 65 of the CPC.
In how many cases, in the last 10 years (2010-2020) the commission for deciding on misdemeanors within the CPC, has made a decision to reduce the fine of companies, based on the leniency program in terms of Article 65 (exemption or reduction of the fine) leniency) of the Law on Protection of Competition ("Official Gazette of the Republic Macedonia" No. 145/2010; 136/2011; 41/2014; 53/2016; 83/2018).	The Commission for deciding on misdemeanors at the CPC, in the last 10 years, has not made a decision to reduce the fine under Article 65 of the CPC.
How many companies in RNM in the last 10 years (2010-2020) have requested reduction or exemption from fine in terms of Article 65 of the LPC, based on the leniency program.	So far, the CPC has not submitted requests for exemption or reduction of the fine on the basis of cartel detection, i.e., in terms of Article 65 of the CPC, i.e., application for leniency program.
How many companies in RNM in the last 5 years submitted a request for exemption or reduction of the fine in terms of Article 65 of the LPC, however, did not cooperate with the CPC completely, continuously, i.e., provided the necessary data with a delay.	No such requests have been submitted to the CPC so far.

Taking into account the answers from the authorities in the CPC, we conclude that in the RNM this programme has no practical dimension. This is not surprising. From the interview with an employee of the CPC, we received information that only one company in 2018 ask if it can use leniency, but never started a procedure. Accordint to the data from the CPC, the potential applicant found this appication as very complex.

For the needs of the leniency research, we conducted research in over 120 companies registered in the territory of RNM. The research was mainly based on gathering information about:

- have they heard of the leniency program;
- are they familiar with the possibilities that leniency provides for its users;
- do they consider it a useful tool in the fight against cartelism;
- do they consider to use this programme.

We contacted 120 companies registered in the territory of RNM. Twenty seven (27) companies showed willingness to answer the questions. From these, eighteen (18) had never heard of leniency, and nine (9) companies said they knew the program, but had little knowledge of the benefits of using it.

The low level of interest in participating in this programme is clearly stated in the EC report from 2020. Namely, among other shortcomings and indications, the EC noted that "leniency" is has not been implemented in RNM in practice. According to the report, North Macedonia's legislative framework is broadly aligned with the EU acquis in the area of antitrust and mergers, though some remaining pieces of implementing legislation have yet to be aligned. On antitrust, there is no leniency policy towards whistle-blowers. On implementation, the number of merger decisions decreased from 61 in 2018 to 49 in 2019 and the number of decisions adopted on cartels and abuse of dominant position dropped from 5 in 2018 to 3 in 2019. The CPC should improve its enforcement record by increasing on-site inspections and by using the leniency instrument more often. It should also continue to make full and transparent use of the possibility of fining, if applicable. The lack of capacity of the CPC and of courts dealing with anti-trust cases hinders proper enforcement.

Taking into account the data obtained by the CPC, and the situation in the business sector, the main questions is imposed: why leniency is not use in RNM? Given the specificity of leniency, and in general the competition law for each national economy, we can't ignore the question of the justification of the application of "leniency" in the economies with different scope and scale. Namely, in our opinion, the legal regime of a large number of issues in the field of competition law that are regulated in the EU and worldwide, must not be automatically applied in economies of different type and scope, including RNM. More precisely, there is no efficiency in the bare implementation of EU legislation, in circumstances when the conditions for EU solutions are not matured, and there is still no business climate for them.[37] However, in terms of leniency, we made a more

[37] More about the need of different legal regime in competition law in the small economy countries see: Gal. M. S., *Competition policy for small Market Economies, Institute of Developing, Economies,* Japan External Trade organization, Vol.42, n.1, 2004, pp.113–118. Available from: [file:///C:/Users/User/AppData/Local/Packages/Microsoft.MicrosoftEdge.8wekyb3d8bbwe/TempState/Downloads/ZDE200403-006%20(1)pdf], Accessed 1 March 2021.

thorough analysis and quite easily and with great certainty we can say that the state of RNM in terms of the degree of implementation of leniency, negatively affects the economic situation, and seriously endangers consumer rights.[38] Hence, there is no reason for not using this program, arguing that it is an unsuitable tool for countries with low economic turnover.

Analyzing the CPC reports, in the part of violation of Article 7 and ascertainment of cartel behavior, there are many cases which according to the Macedonian economy show serious distortion of competition. The data from the annual reports of the CPC show that there are forms of cartel behavior and that the CPC continuously acts on such cases and imposes fines. For example, only in 2018, the CPC imposes a total amount of 11,036,936.00 denars, imposing a fine on Makedonski Telekom, Prilepska Pivarnica, Institute of Accountants and Certified Accountants for RSM, etc.[39]

Cartels have been detected in the pharmacy industry too. Commission imposed fine in total amount of 5570.146,00 Euros on two crucial wholesalers. One of cases is known as Alkaloid Cons and Dr. Panovski case. In this case the CPC declared fine for concerted practices, during the submission of bids for the generic drug Etoposide. The concerted practice was ascertained in the tender procedure announced by the PHI University Radiotherapy and Oncology Clinic Skopje, PHI University Clinic of Pediatric Diseases, Skopje, PHI University Clinic. Trifun Panovski "Bitolain" 2011. Namely, in the purchase made by hospitals, Alkaloid Cons and Dr.Panovski provided identical prices for the generic drug Etoposide (injections / vials of 100 mg, 100 ml, 100 mg / 5 ml and 20 mg / ml). The bids submitted with the said drugs coincided completely up to 2 decimals. Such matching of the offered prices exists only in the case of concerted practice. Pursuant to Article 59 (1) and in conjunction with article 7 (1) of the Law on Protection of Competition, concerted practice is forbidden.[40] In 2012, on the same grounds, with a fine of € 770,000,00 these two participants were penalized for concerted practice in public procurement bid for Docetaxel.[41]The practice revealed that these two CPC solutions have influenced other pharmaceutical companies, as prevention for further potential bargaining and concerted practice. Alkaloid is one

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38 Tusevska Gavrilovikj, B., *Competition law in Republic of North Macedonia*, Faculty of Law, Osjek, 2020.

39 In order not to burden the text, in this section we do not enter the data from the reports for the last 10 years. They are available at: [http://kzk.gov.mk/category/konkurencija-obrasci-informacii-resursi/], Accessed 28 March 2021.

40 The case was downloaded from the official website of the Commission for protection of competition. See: [http://kzk.gov.mk/wp-content/uploads/2019/03/Globa-za-lekot-etoposide.pdf], Accessed 1April 2021.

41 See the full text of the case at the official website of the CPC: [http://kzk.gov.mk] Accessed 8 April 2021.

of the biggest pharmaceutical companies in RNM; hence this decision cannot be ignored in the pharmaceutical industry.

Bearing in mind this situation, our opinion is that the RNM should seriously pay attention on the implementation and effectiveness of leniency programme. In this context, some suggestions will be given in the conclusions.

4. CONCLUSION

Analyzing "leniency programme" in RNM, from theoretical and practical point of view, we came to the conclusion that this world-accepted programme for combating cartels, does not apply in the territory of RNM. Collected data from the work of CPC, the analyzed data collected from the companies registered in the territory of RNM, the CPC reports in the last 10 years, the reports of EC from 2020 for the development of the competition law in RNM etc., shows that "leniency" in RNM exists only as a law category. More preciously, leniency programme doesn't have practical dimension in fighting cartels.

Taking into account positive comparative experiences, the views of many experts concerning the advantageous of "leniency" and the need for its widespread use, at the same time, based on the fact that the implementation of this programme has great advantages in both large and small economy countries, we are of the opinion RNM, i.e the competent authorities must deal more seriously with this issue. Namely, when a certain concept or programme exists in the legislation and bylaws of a state, its success is determined by the capacity and will of the competent bodies to implement it.

RNM via CPC, should take concrete measures for promoting leniency, which according to our opinion should include organization of seminars, workshops, round tables and other educational events that will highlight the benefits of using this programme. They should focus on the business sector and other undertakings too, and explain the whole procedure, stages that encompass the same procedure, and finally, take all the necessary steps to make this program whit in reach of the undertakings.

In addition, the CPC should work on transmission of clear and comprehensive information and highlight the high fines that the CPC may impose, which should be the main incentive for undertakings to report a cartel. The mere interpretation of the provisions of the LPC and the Decree from 2012, does not provide with solutions and improvement of the situation regarding cartels. Despite the commission's claims that it has a small budget that limits its ability to exercise its legal powers, we hold the view that CPC may act on a better way to improve this situation.

The analysis of the solutions contained in the LPC, the Decree, the guidelines, etc., creates the perception that the RNM thoroughly and comprehensively regulates the "leniency programme". Yet, this perception is relevant, only if the solutions are analyzed separately. However, analyzing this concepts comparatively and in relation to EU solutions, it is easy to see that the provisions, especially of the bylaws, should be clearer, more precise, and the most important to regulate more questions regarding the implementation of leniency. What is worth to be mentioned, for example, the Decree from 2012 speaks about marker system, in extremely deficient language, explaining it without giving a clear idea of the procedure, the position of the applicant since he will apply marker and etc. To achieve level of understanding, CPC may just take into consideration the point 15 of the 2006 Leniency Notice, and to implement it in the Decree.

This way Macedonian law predicts the notion, conditions and procedure for leniency, creates the impression that the Decree from 2012, and in general LPC in the part of leniency, are pro forma adopted provisions, established in the absence of real will to motivate companies to use leniency. Hence, the very low level of knowledge for leniency in RNM is not surprising. We can not expect effectiveness of this programme, given the fact that companies are not familiar with the basic concepts of it. For example, business sector, the concept of "added value", or "quality of evidence and accurate time frame" etc is unknown category. The undefining or inaccurate definition of these essential concepts contributes to the creation of "abuse" position, imposing the question: whether or not the conditions for using the benefits of the program are met.

Finally, in addition, companies have no idea about one of the most serious questions imposed in EU and worldwide competition law, such as the position of applicants in civil proceedings. How protected they are, whether they are in a discriminatory position in relation to the other participants in the cartel, given the fact that they have already given statements to the relevant body, etc. In circumstances when the EU and the world are discussing and working on taking concrete measures to increase the use of this programme, RNM treats the issue only as a legal conception. So, changes in this area must be done, and the CPC must take concrete measure to improve the situation regarding "leniency."

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FTC V. FACEBOOK OR BREAKING UP DOMINANT DIGITAL PLATFORMS IN THE TIME OF COVID-19: MOTIVES, RATIONALE, AND POSSIBLE ALTERNATIVES FROM A COMPETITION LAW PERSPECTIVE[1]

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ABSTRACT

The Federal Trade Commission of the United States (FTC) filed a Complaint against Facebook on 9th December 2020, in the midst of the COVID-19 crisis. While facing one of the biggest social and economic crises in American history, FTC has enough time and resources to (re) investigate Facebook's acquisitions of Instagram and WhatsApp. This paper analyses motives and rationale behind the FTC's Complaint requesting Facebook's break-up and what could be possible alternatives from a competition law perspective. All the findings suggest that the FTC's Complaint is politically motivated, and the competition authorities should enable digital platforms to expand. However, the expansion should be controlled, to ensure that the benefits for consumers are not undermined by relatively slower (not diversified) technological development.

Keywords: *Competition Law, Digital Platforms, COVID-19, Facebook, Federal Trade Commission, Mergers and Acquisitions, Relevant Market.*

[1] The article originated within the University of Belgrade School of Law research project – *Epidemic, Law, Society*, 2021.

"'Forward, the Light Brigade'
Was there a man dismayed?
Not though the soldier knew
Someone had blundered.
Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die.
Into the valley of Death
Rode the six hundred."

The Charge of the Light Brigade by Alfred Tennyson, 1854

1. INTRODUCTION

The Federal Trade Commission (FTC) Complaint against Facebook is undoubtedly a hallmark case and a new stage in competition law enforcement pertaining to digital platforms, due to, among other reasons, the introduction of the *ex-post* merger control. This is relevant not only for the US for several good reasons. First, the US competition law, as competition law with the longest enforcement tradition, is a role model for many jurisdictions around the world. Thus, developments in the US competition law could be relevant for many other jurisdictions. Second, Facebook, as well as other digital platforms, is global, and the outcome of this case could affect not only the users in the US but the users worldwide. Finally, the outcome of this case could have a significant impact on the business conduct of similar digital platforms, also affecting consumer welfare. These insights illustrate the motivation for this paper.

This paper aims to explore the FTC Complaint against Facebook filed during the COVID-19 crisis, to assess its merits and to investigate whether some alternative courses of action could have been available to the FTC. The structure of the paper is consistent with its aim. In the first section, the FTC Complaint is described and analysed, and the motives for such a move are explored. The rationale for the FTC Complaint is then analysed within the framework of an ostensible competition law violation. As the FTC Complaint requests the divestiture or break-up of Facebook, the effects of such a request are investigated, as well as possible alternatives to such divestiture are reviewed and evaluated. The conclusion follows.

2. The FTC Complaint

The FTC submitted its Complaint against Facebook under Section 13(b) FTC Act, 15 U.S.C. § 53(b), requesting a permanent injunction and other equitable

relief against Facebook, to undo and prevent Facebook's anticompetitive conduct and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).[2]

The Complaint consists of seven main parts, excluding three parts concerning jurisdictional issues.[3] In the first two parts, the Plaintiff explains the nature of the case and the industry background. The third part refers to the definition of the relevant market and monopoly power, while the fourth and fifth part describe anticompetitive conduct and harm to competition in the case at hand. Finally, in the sixth part, the Plaintiff attempts to qualify Facebook's conduct as a violation of the law, and in the seventh, he asks the court to render in his favour and order the breakup.

2.1. Nature of the case

In the Plaintiff's words, Facebook is the world's dominant online social network with more than 3 billion users. The Plaintiff states that people regularly use Facebook's services to connect with friends and family and enrich their social lives, but he does not specify the relevant market and services that Facebook provides.[4] Instead of specifying the services and defining relevant market, the Plaintiff jumps to the conclusion that Facebook maintains its monopoly position by buying up companies that present competitive threats and by imposing restrictive policies to actual and potential rivals that it has not acquired and cannot acquire.

Allegedly, the violation started when Facebook "toppled" its early competitor Myspace and gained monopoly power. Since then, in the Plaintiff's words, Facebook has enjoyed a quiet life through anticompetitive means. However, it is not explained in the Complaint how Facebook toppled Myspace or how, and where, it gained monopoly power (once again, the Plaintiff failed to define the relevant market and Facebook's services). Instead of providing an explanation, the Plaintiff further developed his argument by claiming that subsequently, Facebook identified Instagram and WhatsApp as the two significant competitive threats to its

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2 The Complaint was filed with the United States District Court for the District of Columbia, on 9 December 2020, and revised on 21 January 2021. The FTC's Complaint is available at: [https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_Complaint.pdf], Accessed 4 April 2021.

3 Jurisdictional issues in the case at hand are not relevant for this paper, and hence they will be entirely disregarded. The working assumption is that the court has jurisdiction to handle the case.

4 The services that Facebook provides are named in the compliant as "personal social networking services" (§2), while it is stated that Facebook "monetizes its personal social networking monopoly principally by selling advertising, which exploits a rich set of data about users' activities, interests, and affiliations […]" (§4).

dominant position. As support for this argument, the Plaintiff quoted Facebook CEO's (Mark Zuckerberg's) email from 2008: "it is better to buy than compete". Additionally, the Plaintiff claims that Facebook imposed anticompetitive conditions by restricting access to its digital platform and that Facebook's market position is protected by high barriers to entry and strong network effects.

Competition law specialists would expect more facts and details when describing the nature of the case. In this way, this part of the Complaint seems more like the Plaintiff's wishful thinking than a ground for better understanding of the nature of the case. However, the Plaintiff could have at least mentioned that both acquisitions were previously analysed in detail at approved by the Plaintiff itself.[5]

2.2. Industry background

The Plaintiff describes in general how social networks function and what are their advantages in comparison with e-mail and messaging. Social network users can share content (exchange information) and interact with their friends and family in various ways, including posting texts, photos and videos online, commenting, reacting, etc. Nevertheless, it seems that the Plaintiff almost entirely neglected one of the main advantages of social networks in comparison to other means of communication – they are free of charge for the users. In this part of the Complaint, instead of describing the industry and costs and benefits for the users and broader society,[6] the Plaintiff attempts to present Facebook's business model. In short, as stated in the Complaint, Facebook's business model is mirrored in "selling advertising based on detailed user data".[7] In the Plaintiff's words, Facebook entirely relies on that business model and a substantial portion of its overall revenue comes from selling advertising placements to marketers.[8]

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5 See: FTC Press Releases, *FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program*, 2012, [https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition], Accessed 16 March 2021; FTC Press Releases, *FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition*, 2014, [https://www.ftc.gov/news/events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed], Accessed 16 March 2021.

6 In short, Facebook (as a two-sided platform) connects the two distinct customer groups – users of the network and marketers. In this way, Facebook reduces transaction costs, enables exchanges, and increases consumer welfare. See: Evans, D. *et al.*, *Platform Economics: Essays on Multi-Sided Businesses*, Competition Policy International, 2011, pp. 2 – 5; Jean-Charles, R.; Jean, T., *Two-Sided Markets: An Overview*, Institut d'Economie Industrielle, 2004, pp. 13 – 16.

7 Compliant, §43.

8 *Ibid*., §50.

2.3. Relevant market and monopoly power

Even though the Plaintiff identified advertising as the major source of Facebook's revenue, in the very next paragraph of the Complaint, he states "personal social networking services in the United States is a relevant market".[9]

Furthermore, personal social network services are a relevant product market, and these services consist of "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space".[10] The Plaintiff defines the United Stated as the relevant geographic market.

There are at least two highly controversial issues concerning the definition of the relevant market. First, if a relevant market, in general, is considered as a grouping of sales for which an unjustified price increase is profitable,[11] Facebook has no monopoly power over personal network services because these services (as defined by the Plaintiff) are free of charge. Secondly, even if Facebook's services would include advertising, Facebook would not have a significant market power due to many other participants providing the same services, in an entirely different relevant market.[12]

Second, it is a bit strange that the Plaintiff describes Facebook in the Complaint as a global social network, with more than 3 billion users worldwide but specifies only the United States as the relevant geographic market.[13]

Finally, Facebook is a two-sided platform that connects two distinct groups of customers – users (using the network free of charge) and marketers (paying for the advertising services). Both groups create cross-side network effects or indirect network effects,[14] which should be taken into account when defining the relevant product market.[15] Qualifying "personal social networking services" as a relevant

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9 *Ibid*., §51.

10 *Ibid*., §52.

11 Hovenkamp, H., *Antitrust and Platform Monopoly*, ILE Institute for Law and Economics, Research Paper No. 20 – 43, 2020, p. 10.

12 In addition to specialized websites, television, radio, and other media, an advertiser in the US currently may use many social networking applications such as Twitter, Pinterest, Reddit, Snapchat, Messenger by Google, Tumblr, Discord, GroupMe, TikTok, and many others.

13 Compare, for example, Complaint §1 and §56.

14 See Rochet, J.; Tirole, J., *Platform Competition in Two-Sided Markets*, Journal of the European Economic Association, 4/2003, pp. 990 – 1029.

15 Evans *et al.*, 2011, pp. 169–171; Odorović, A., *Određivanje relevantnog tržišta kod dvostranih platformi: problemi i nagoveštaji rešenja*, Pravo i privreda, 7-9/2019, pp. 270 – 286.

market just oversimplifies the case and leads to biased conclusions. Obviously, "something is rotten" in this relevant market definition.

2.4. Anticompetitive conduct

Following the definition of a relevant market in the Complaint, Plaintiff attempts to describe "Facebook's efforts to deter, suppress, and neutralize personal social networking competition". In essence, all these efforts may be summed in the acquisition of Instagram and WhatsApp and the imposition of new conditions to access the application programming interfaces (API). The two acquisitions are described in detail in the Complaint (excluding the procedure when they were *ex ante* assessed by the FTC as not harming competition), while the Plaintiff describes the cutting off API access in examples. Facebook deprived potential competitors of its application programming interfaces in several cases, ultimately causing their business failure (Path, Circle, etc.). However, the Plaintiff does not provide any convincing evidence that would support the causal link between cutting off API access and the failures of these (potential) competitors. Moreover, if they were truly innovative and efficient start-ups, they would succeed in any case, as Facebook succeeded at the time when MySpace was the most developed social network.[16]

2.5. Harm to competition

In the Plaintiff's opinion, the two acquisitions and the imposition of new conditions on access Facebook's programming interface constitute harm to competition. However, if one would consider that claim in the context of the definition of a relevant market formulated by the Plaintiff ("personal social networking services"), it is unclear how users have been "deprived of the benefits of additional competition for personal social networking."[17] Due to the positive network effects, it is in the users' greater interest to have one dominant social network than a vast number of smaller networks. Also, as mentioned above, Facebook's services are free for end users. Thus, it is unclear how Facebook could reduce consumer welfare by acquiring new companies and offering more diversified and better services and ultimately a more developed social network. Even if one would alternatively define the relevant market as "advertising services" or "digital advertising services",

[16] Also, Plaintiff mentioned none of the many successful social networking applications currently in existence in the US (see *supra note* 10); All these applications and platforms are developing and making a profit regardless of the API.

[17] *Ibid*., §162.

it would be equally difficult to qualify Facebook's conduct as significant harm to competition due to the large number of other participants in that market.[18]

2.6. Violation of law

In the Plaintiff's opinion, "Facebook's anticompetitive acts violate Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus constitute unfair methods of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a)".[19] On one hand, since this part of the Sherman Act refers to the monopolization of trade or commerce,[20] it is not possible for Facebook to provide free services in the relevant market and to violate the law at the same time. On the other hand, if one were to consider (digital) advertising as the relevant market, there would be no monopoly power and attempt to monopolize on Facebook's side and no violation of the law. Similarly, the FTC Act implies trade or commerce, which does not exist between Facebook and its users in the defined relevant market.

2.7. Prayer for relief

Based on the allegations in the Complaint, the Plaintiff asked the court for the following reliefs, among others:

i) breaking-up Facebook, including but not limited to Instagram and WhatsApp,[21]

ii) prior notice and prior approval obligation for future mergers and acquisitions,[22]

iii) permanent enjoinment from imposing anticompetitive conditions on APIs and data.[23]

Regardless of the court's final decision in this case, it should be consider what are the true motives behind the breakup request and what could be the effects and possible alternatives to the petition in terms of competition law. These issues could be highly relevant for Facebook and many other digital platforms, and their users, in the US (and Europe). In that sense, the first request will be analysed in detail,

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18 See *supra note* 10.

19 *Ibid*., §174.

20 Section 2 of the Sherman Act, 15 U.S.C. § 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize *any part of the trade or commerce* [emphasis added] among the several States, or with foreign nations, shall be deemed guilty […]."

21 §176 (B) of the Complaint states: "Divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp), and such other relief sufficient to restore the competition […]."

22 *Ibid*., §176 (D).

23 *Ibid*., §176 (F).

while the other two will be considered in the light of possible alternatives to breaking up a dominant digital platform.[24]

3. The motives for the Complaint

The motives of the FTC to file the Complaint against Facebook, focusing to its breakup, should be considered by analysing the context of such a decision – primarily the origins of the public pressure supporting such a move.

The first origin is the academic community and its recent contributions to the debate about the US competition law and its enforcement. There are two highly visible and influential recent contributions,[25] whose main points are that the level of competition in the US has plummeted and that the competition law enforcement in the country is too lax.[26] In both contributions, digital giants, including Facebook, are considered as flagship examples of the main insights related to the decline of competition and the ineffective US competition law.

There is widespread academic concern about the increased industrial concentration in the US economy. This undisputed development has been analysed from various standpoints, both in terms of its origin and consequences and the debate is far from settled. It has been pointed out by prominent IO specialists that industrial concentration is not relevant market concentration,[27] and is hence irrelevant for measuring competition, and that even (relevant) market concentration is not an indicator of the competition condition in a given market.[28] Nonetheless, substantial segments of the academic community, both in law and economics, consider that increased industrial concentration, followed with ostensible increase in

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[24] All the other Plaintiff's prayers for relief, such as declaring that Facebook's course of conduct described in the Complaint violates the Sherman Act, will not be further discussed. The reason for this lies with the defined goal of this paper. Namely, the authors are not interested in the outcome of this particular case but rather in the motives, rationale, and possible alternatives to breaking up a dominant digital platform.

[25] Baker, J. B., *The Antitrust Paradigm: Restoring a Competitive Economy*, Harvard University Press, Cambridge, Mass, 2019; Philippon, T., *The Great Reversal: How America Gave Up on Free Markets*, Belknap Press of Harvard University Press, Cambridge, Mass, 2019.

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[27] Shapiro, C., *Antitrust in the Time of Populism*, Journal of Industrial Organization, Vol. 62(2), 2018, pp. 714 – 748.

[28] Bryan, K. A.; Hovenkamp, E., *Startup Acquisition, Error Costs and Antitrust Policy*, University of Chicago Law Review, Vol. 87(2). 2020, p. 336.

profit margins[29] and the share of capital in the distribution of national income[30] is a sign of market power and declining competition in the US markets. Accordingly, more vigorous competition law enforcement and even new methods of competition policy are advocated.[31]

The other source of public pressure is the advent of the Neo-Brandeisian movement, a half breed between academic and stakeholders' movement whose main point is that competition law enforcement should accomplish many goals other than competition in the relevant market in terms of preventing price increase and output decline and enabling price decease due to both static and dynamic efficiency.[32] Hence, the movement advocates a competition law reform that would transform the US antitrust into "antimonopoly", aimed especially at curbing the political power of big business, with technological giants as the prime suspects. According to this view, big companies should be broken up, not predominantly because of the competition harm that they produce effects as such, but rather because of their political power, which enables them to influence decision making processes and to create, among other things, legal barriers to entry to the market. The theoretical underpinning for this move is based on the political theory of firm.[33] It is rather telling that Lina Kahn, one of the already (though she is 31 years old) well established stars of the Neo-Brandeisian movement, has recently been nominated by US President Biden for FTC commissioner.[34] It seems that the antitrust populism has penetrated the core of the US antitrust legislation enforcement and it seems that the COVID-19 pandemic, which made digital communication between people much more important in daily life than it had been previously, has increased the pressure for the FTC to "do something".

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29 Basu, S., *Are Price-Cost Markups Rising in the United States: A Discussion of the Evidence*, Journal of Economic Perspectives, Vol. 33(3), 2019, pp. 3 – 22. The increase of profit margins with increasing share of fixed costs does not necessary imply an increase in profit rates. De Locker, J., Eeckhour, G. U., *The Rise of Market Power and Macroeconomic Implications*, *Quarterly Journal of Economics*, Vol. 135(2), 2020, pp. 561 – 644.

30 Autor, D. *et al.*, *Concentration and the Fall of the Labor Share*, American Economic Review, Vol. 107(5), 2017, pp. 180 – 185.

31 Even a Pigouvian tax on the size of the firm has been proposed. See: Nobel Laureate Paul Romer on How to Curb Big Tech's Power, 2021, [https://www.chicagobooth.edu/why-booth/stories/stigler-center-antitrust-conference-paul-romer], Accessed 4 April 2021.

32 Khan, L., *The Amazon Antitrust Paradox*, Yale Law Journal, Vol. 126(3), 2017, pp. 710 – 805.

33 Zingales, L., *Towards a Political Theory of the Firm*, Journal of Economic Perspectives, Vol. 31(3), 2017, pp. 113 – 130.

34 See: White House Statements and Releases, *President Biden Announces his Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission*, 2021, [https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/22/president-biden-announces-his-intent-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission/], Accessed 4 April 2021.

Hence, taking all this public pressure into account, and especially allegations about Facebook's political involvement or at least the political consequences of its operations, it is not surprising that the FTC, which does not operate in a political vacuum, has stepped forward with the Complaint. Whether the Complaint has competition law merit does not depend on the FTC's motives, but understanding the broader context may explain the possible lack of merit of the Complaint if that is the finding of the analysis.

4. THE RATIONALE FOR THE COMPLAINT

It is a challenging task to find a rationale for any competition law Complaint in a case when (free) personal social networking services constitute the relevant product market. With that as the starting point, new acquisitions and enlargement of the social network could hardly harm consumers. Quite the opposite, due to economy of scale and scope, improvement of services, and increased network effects, consumer welfare would increase through such acquisitions. Furthermore, even if the relevant product market includes (digital) advertising services, almost the same conclusions are valid due for a considerable number of other service providers in that market. That is demonstrated by analysing and closer exploring the Instagram and WhatsApp acquisitions.

4.1. Acquisition of Instagram

As described in the Complaint, during the first decade of the 21st century, social network customers significantly changed their behaviour. They started to shift from computers to smartphones and other mobile devices.[35] It is true that Instagram, as a more suitable social networking app for mobile devices, used that change in customer behaviour to gain more users and increase its popularity, which threatened Facebook's apps for taking, sharing, and commenting photographs. Facebook wanted to keep its users and, if possible, to offer the same or similar services as Instagram. However, that does not mean Facebook's conduct can be automatically qualified as significant harm to competition and violation of the law.[36] To conclude whether the acquisition is significant harm to competition a counterfactual analysis is needed – something that the Plaintiff missed to do. It

[35] Complaint, §78.

[36] In that sense, it is unclear what is the Plaintiff is trying to prove when quoting Facebook's internal correspondence in the Complaint, identifying Instagram as a superior social networking application at the time, and revealing Facebook's intention to improve its services and take over Instagram (Complaint, §82 – §104). This is neither *mala fidei* nor illegal conduct *per se*. On the contrary, a desire to improve its services and be more efficient is the main driving force in market economy.

should be analysed and explained what the consequences would be if the acquisition did not take place and compare these with the existing consequences.

Had Facebook not acquired Instagram, consumers would have continued to use (at least) two different social networking apps instead of one. In other words, if a consumer had wanted to share their photos online, they would have had to share them via both apps to ensure that all of their friends and family could see the post. Moreover, one would have had to use two different sets of tools to modify and prepare photos for sharing (the greater the difference between these tools, the greater the difference would be between the two versions of photos, and it would become harder to send the same photo, i.e. the same message, to all friends and family). Besides difficulties in communication between customers using different tools and apps, the customer's opportunity costs of time would have been much higher. Namely, customers would have spent more time allocated to sending and sharing photos online, and on the top of that the quality of communication would be lower. Therefore, the acquisition significantly reduced costs and increased consumer welfare.

Furthermore, the counterfactual analysis should include advertising, even though the Plaintiff excluded advertising services from the relevant product market.[37] In this sense, had Facebook not acquired Instagram, marketers would have had one additional social networking app as a potential advertising service provider. However, that does not mean the marketers would have been in a relatively better position. Namely, without the Instagram acquisition, it would have been even more demanding and more costly for marketers to reach their target groups. When some of their (potential) customers are using one network and some the other, and these networks are not compatible, marketers would have to pay for both networks' services. On one hand, the individual price for each of the two networks probably would have not be lower because neither of the two providers could achieve economy of scale. On the other hand, the quality of services would be lower due to the lower functionality and visibility of individual networks.[38] Accordingly, the increased number of advertising services providers does not necessary imply that consumer welfare would increase.

Finally, instead of conducting a counterfactual analysis, the Plaintiff claims in the Complaint that "Facebook cannot substantiate merger-specific efficiencies or

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37 The Complaint, §51 and §52; As stated before, Facebook is a two-sided platform, and both sides are and should be equally relevant when analysing the effects of acquisitions on consumer welfare.

38 Due to the acquisition, Facebook was able to make the two networks compatible, achieve economies of scope, improve the quality and functionality of both applications functioning within the same network.

other procompetitive benefits sufficient to justify the Instagram acquisition".[39] Nevertheless, the burden of proof lies with the Plaintiff, which should prove that the (already approved) acquisition constitutes significant harm to competition, not with the Defendant.

4.2. Acquisition of WhatsApp

As a result of the change in consumer behaviour, besides the increase in popularity of the apps for sending and sharing photos, mobile messaging has also been transformed dramatically. Instead of traditional text messaging via short message service (SMS) or multimedia message service (MMS) protocols, consumers abruptly switched to text messaging via internet-based, over-the-top mobile messaging apps (OTT messaging).[40] In that sense, Facebook has been trying to improve its messaging app (Messenger) and follow the new trends in social networking. However, in that aspect of networking, i.e. mobile messaging, WhatsApp was one of the most successful apps, gaining several thousand new users per day and striving to connect 400,000 people worldwide in 2014. Facebook wanted to keep its users and to offer the same or similar messaging services. Once again, Facebook's sole intention to improve its services and possibly acquire WhatsApp is not *per se* a violation of the law nor has resulted in significant harm to competition.[41] The only relevant issue is what the economic consequences would be if the acquisition did not take place, i.e. what would be the result of the counterfactual analysis?

Had Facebook not acquired WhatsApp, consumers would have continued to use (at least) two different mobile messaging apps instead of one. In other words, if a user would have wanted to send a message to their friends or family, they would have had to check which app they are using and then communicate using the same app. Moreover, since the two apps (Messenger and WhatsApp) were not compatible prior to the acquisition, one had to have and use two different sets of contacts. In addition to these difficulties in establishing and maintaining communication, users would have to constantly switch from one app to the other, which could further increase opportunity costs of time and reduce consumer welfare. Namely, users would spend more time on messaging, and the quality of messaging services

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39 The Compliant, §106.

40 Over-the-top (OTT) messaging services implies services directly provided to consumers via the Internet. OTT bypasses telecommunication companies that traditionally provide such services. Due to the lower fixed and variable costs, OTT messaging services providers are much more efficient than traditional providers.

41 This should be taken into account when reading the Complaint (§115-§127). Namely, the Plaintiff quotes Facebook's internal correspondence revealing Facebook's intention to acquire WhatsApp without ever analysing what could be the economic consequences of the acquisition.

would be lower because neither of the two networks would achieve economy of scale and substantially improve their functionality. Therefore, WhatsApp acquisition reduced costs and increased consumer welfare.

On the other side of the digital platform, marketers too could benefit from the acquisition. Before 2014, WhatsApp had only 300,000 users worldwide,[42] while, after the acquisition, due to the increased network effects and economy of scope, it gained the trust of more than a billion users. In that sense, marketers may reach their target groups within one network, and the advertising price would not change significantly (if at all) due to the large number of advertisement service providers in the market.[43]

Accordingly, the conclusion on the counterfactual analysis is that the acquisition is beneficial for all relevant stakeholders: the acquisition is beneficial for Facebook because it enables it to gain more users worldwide and materialise economies of scope, while, at the same time, it is beneficial for the customers (users and marketers) due to the increase in efficiency, network functionality, and network effects. In other words, if one observes from the relevant market participants' point of view, it seems there is no rationale for any complaint related to the acquisition.[44] However, this does not mean this type of acquisition (a dominant platform acquiring start-ups) should not be notified at all. Possible alternatives to breaking up dominant digital platforms, from a perspective of competition law, will be analysed separately.

5. THE EFFECTS OF BREAKING UP FACEBOOK

There is a long and troublesome history of break-ups in the history of the US competition law, starting with the controversial Standard Oil case in 1911. It was demonstrated that most of the break-ups were failures.[45] Perhaps the only one that

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42 Statista, [https://www.statista.com/statistics/260819/number-of-monthly-active-whatsapp-users/], Accessed 26 March 2021.

43 One of the Plaintiff's argument is that the two acquisitions eliminate potential competition that could threaten Facebook's market position in the future. However, the Plaintiff mentioned none of many other relatively large companies and start-ups currently participating in the US (digital) advertising market.

44 Possible complaints related to private data protection are not closely related to competition law and thus are not discussed in this paper. Nonetheless, it is reasonable that the general rule should apply – the acquirer is bound by all of the acquired's firm contractual obligations related to data protection.

45 Kovacic, W. E., *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, Iowa Law Review, Vol. 74(4), 1989, pp. 1105 – 1150; Crandall, R. W., *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, AEI-Brookings Joint Center for Regulatory Attitudes, Working Paper 01.05., 2001; Sullivan, E. T., *The Jurisprudence of Antitrust Divestiture: The Path Less Travelled*, University of Minnesota Law School, Vol. 86(2), 2002, pp. 565 – 613.

produced a desirable outcome, the only success story, is the consensual break-up of AT&T and the creation of the Baby Bells, followed by vertical separation and introduction of competition into long-distance telephony.

It is intuitive that the probability of an unsuccessful break up is substantial. It is difficult even impossible to unscramble the eggs, as the assets of the company are fully integrated and used for the operation of a single entity. Nonetheless, the specific difficulties in the case of the proposed Facebook break-up should be identified. The best way to start it would be to consider the business motives/aims of Facebook in both mergers, i.e. acquisitions of both Instagram and WhatsApp. There is no doubt that one of the motives was elimination of potential competitors, i.e. they were killer acquisitions.[46] In that way, it is very convincing that the acquisitions have harmed the competition – a reasonable theory of harm. Nonetheless, Facebook profited from these mergers in other ways.

The first one is economy of scope, which enabled it to diversify its supply portfolio and to allocate overhead costs to more output units, decreasing average costs, i.e. increasing production efficiency. It is economy of scope, not scale that was achieved, as these mergers were conglomerate mergers, because the acquired companies (especially WhatsApp) operated in different relevant markets. Breaking up Facebook along the merger lines would not only undermine economy of scope but would fail to re-establish competition in the relevant market, as the new/old undertakings would operate in their separate relevant markets. WhatsApp would, for example, compete with other messenger services, as it does today as a Facebook brand.

The other reason for the increase in Facebook's efficiency is the gathering of various assets of the acquired companies. Some of them are IP related: patents and trademarks. For example, it is much cheaper to acquire the WhatsApp trademark than to invest in a new brand in the messaging services market. So, it was a reasonable, cost-reducing business decision to diversify the supply portfolio by acquiring WhatsApp compared to investing in Facebook's own new entry operator. Breaking-up Facebook along the merger lines would not prevent the company from entering the messenger services market, only this time with a substantially higher costs – evident inefficiency.

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[46] For example, Kevin, A. B.; Erik, H., *Startup Acquisitions, Error Costs, and Antitrust Policy*, The University of Chicago Law Review, Vol. 87, p. 345, defines killer acquisitions as follows: "In these acquisitions, the acquirer does not utilize or further develop the target's innovation, but instead merely prevents such innovation from entering into competition with the incumbent's own product".

It is not only IP related assets that are gathered is acquisitions: there is also specific software industry know-how that cannot be protected as IP. Different production teams in different companies, developing specific software, create distinctive know-how that can be obtained only by acquiring the firm. Although specific human capital is not an asset (strictly speaking in accounting terminology), it is also acquired through such mergers. It is feasible to acquire that capital on the labour market, negotiating individual contracts with all the people. The transaction costs of such a way of obtaining human capital are extremely high, so acquisition of a firm for such a reason is perfectly reasonable,[47] not only for the acquiring firm, but also for the consumer welfare perspective, because the transaction costs are minimised.[48] Since there is a constant and substantial flow of human capital within a firm, the eggs have been scrambled, it is highly uncertain how the break-up would be done, i.e. along which lines the labour force (human capital) would be divided. It could be expected, though, that further adjustments, i.e. transfer of labour, would occur in the market, with related transaction costs. Furthermore, the human capital of a firm is not only the sum of the human capital of its employees, since there is a substantial premium to it embodied in the "team spirit" that further increases production efficiency, especial in research and development activities, boosting innovations. The break-up would inevitably completely destroy the team spirit, or at least substantially undermine it.

Finally, breaking-up Facebook, "including but not limited to Instagram and WhatsApp" would effectively introduce *ex post* merger control in the US competition law. Like almost every other jurisdiction in the world, there is *ex ante* merger control in the US, introduced by the Hart-Scot-Rodino Act of 1976. Accordingly, either the FTC or the DoJ must be notified of every merger that complies with the merger notification rule, i.e. above the threshold set by these rules, and these authorities decide whether they will challenged the merger before the courts. If the merger is not challenged, then it is cleared.[49] Facebook notified the FTC of the mergers/acquisitions. The FTC formally cleared the merger with Instagram in 2012, and informed, although between the lines, that it would not challenge the merger with WhatsApp in the court. That means that in the legally stipulated process of *ex ante* merger control Facebook received feedback from the authority

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47 Polsky, G. D.; John F. C., *Acqui-hiring*, Duke Law Journal, Vol. 63(2), 2013, pp. 281 – 346.

48 That is not to say that there are no transaction costs of the capital transaction, i.e. of the merger itself. Nonetheless, these transaction costs are fixed costs for all the transfers of assets and human capital, so substantial economy of scale exists.

49 Basically, the US pattern of merger control is very similar to the European one, only the courts are not involved in the first instance of deliberation, though the right of appeal does exist. On the EU level, the EC is notified of the merger decision, and it is the EC that decides whether to clear the merger, to clear it conditionally, or to prohibit it.

in change that these mergers have been cleared and that they do not, on balance, harm competition.

A few years later the very same competition law authority (the FTC) claims that those mergers harmed competition and asked the courts to effectively annul them. This does not fall short of the *ex post* merger control, introduced after *ex ante* merger control has already been exercised. This precedent creates substantial legal uncertainty for undertakings that are considering mergers. Such uncertainty will be biased, as it will deter from the merger those merging parties whose mergers would be beneficial for economic efficiency and which would increase consumer welfare. This is perhaps the most devastating effect of such a move by the FTC – if it is supported by a court decision.

6. POSSIBLE ALTERNATIVES

As demonstrated, the acquisition of start-ups by a dominant digital platform could be beneficial for relevant stakeholders due to the increase in efficiency, network functionality, and network effects. However, there is widespread concern that these types of acquisitions may (pre)determine the future direction and pace of technological development. Namely, it would not harm competition if one were to invent a superior digital platform on their own but could be disputable, from a competition law perspective, if one were to create a superior digital platform through contracts. In this sense, a clear distinction should be made between these two cases.[50] Furthermore, concerning creating a superior network through contracts, the two sub-cases may be distinguished: a dominant platform planning and executing acquisitions of technologically advanced (start-up) companies, and a dominant platform's behaviour constituting significant harm to competition. The first sub-case does not necessarily imply the second sub-case. Nevertheless, there are reasonable indications that competition authorities should closely monitor and regulate the first sub-case in any event.

One of the main concerns related to establishing or enlarging a dominant platform through contracts is that future technological development will have a strictly predetermined path. Namely, when a digital platform is large enough and enjoys significant market power, new start-ups do not have strong incentives to invent or develop alternative technological solutions. The most profitable strategy for relatively small start-up companies would be to focus on R&D activities that

[50] For the similar distinction see Bryan A. K.; Hovenkamp, E., *Antitrust Limits on Startup Acquisition*, Review of Industrial Organization, Vol. 56(4), 2020, pp. 632–633; Of course, when there is significant harm to competition, the acquisition should not be approved.

could improve the existing technology, so it can licence the improved technological solutions to a dominant network or be acquired. In that way, the technological development pace would be slower and consumer welfare would be lower even though a dominant platform did not harm competition in the market.[51] To put it simply, economies of scale and powerful network effects are like a magnetic force, not only for users of a dominant digital platform but also for all competitors in the market, attracting them to invest in the same technology. The crucial question is whether the competition authorities (in the US and Europe) should ban these technology transfers through contracts and acquisitions or not?

It seems that the dissolution or break-up of a dominant platform is not an appropriate solution for the described problem for at least two reasons. First, as already mentioned, this would imply *ex post* annulment of the already approved acquisitions and generate significant legal uncertainty. Second, breaking up the company does not solve the problem of the magnetic force of the dominant platform and the relatively slow pace of technological development. On the contrary, by breaking up a dominant platform, competition law authorities could further slowdown the technological development. Namely, technology has already been developing in one direction, and authorities would effectively ban its fusion by breaking up a dominant platform, depriving all customers of the benefits derived from economies of scope and network effects. Furthermore, one platform will eventually become dominant again, based on its technology with substantial economy of scale, and competition authorities will once again constrain the platform in order to attract smaller companies to contribute to further technological development and materialisation of economies of scope and network effects. In that sense, breaking up a dominant platform when there is no significant harm to competition (the acquisitions were approved) only slows down technological development and reduces consumer welfare.

The alternative solution could imply enabling technology fusion and increasing competition in the market at the same time. The authorities could implement this solution in practice instead of the break-up, and the key to its implementation is non-exclusive licensing. Namely, on one hand, when approving the formation or enlargement of a dominant platform based on contracts (sub-case when there is no significant harm to competition), competition authorities may impose the non-exclusive licencing condition on the technology transfer. On the other hand,

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[51] Radulović B., *Reassessing the Costs of Patents*, in: Vasić R.; Ivana K. (eds.), Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU, University of Belgrade Faculty of Law, 2006, pp. 171–172. "The desire of acquiring the monopoly power that patents confer encourages too many innovators to pursue the same research projects entering a 'race to patent' which needlessly absorbs a portion of the available resources."

when approving a merger that will establish or enlarge the formation or enlargement of a dominant platform based on acquisitions, competition authorities may impose the patent pledge or non-exclusive licencing condition.[52] In that way, a dominant platform could acquire new technologies and companies, while all other companies could use the same technology and develop it further in different directions. In that sense, competition authorities would not deprive consumers of the benefits derived from the materialisation of economies of both scale and scope and network effects, or of endless possibilities related to further (diversified) technological development.

Applied to the Facebook case, it seems that the dissolution or break-up would not resolve the issue. On the contrary, as previously explained, it could slow down further technological development and deprive consumers of benefits deriving from the economies of scope and network effects. Furthermore, this approach would not solve the problem of the directional technological development, i.e. the magnetic attraction of the dominant platform's technology. Instead of breaking up Facebook, the authorities could condition all technology transfers (*pro futuro*) to be conducted under non-exclusive or open licencing terms. In that way, Facebook could achieve economies of scope and increase network effects, while potential competitors could develop alternative and possibly more efficient technological solutions.

Furthermore, the competition concern regarding Facebook as the dominant platform can be overcome by introducing compulsory interoperability with pooling of all digital platforms/networks as a competition remedy.[53] Interoperability occurs when the technology systems of multiple firms are compatible, so that users can process instructions for all of them. Polling includes sharing of information, especially on the customer base. In the competitive markets, two-sided platforms have strong incentives to share information because in that way both direct and indirect network effects are achieved, new customers can be attracted, and economy of scale can be achieved. In the case of Facebook and other social networking sites technical data pooling would produce a much larger group of customers – users and marketers. All the participant firms would have the advantage that accrue

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[52] A patent pledge is a pledge of a patent owner that all its (potential) competitors can use and further develop the same technology free of charge. See, for example: Contreras L. J., *The Evolving Patent Pledge Landscape*, Centre for International Governance Innovation, CIGI Papers No. 166, 2018.

[53] Kades, M.; Morton F. C., *Interoperability as a Competition Remedy for Digital Networks*, Washington Center for Equitable Growth, Working Paper, 2020; Hovenkamp, H., *op. cit.*, p. 6; Stigler Centre for the Study of the Economy and the State, *Stigler Committee on Digital Platforms - Final Report*, 2019, [https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf], Accessed, 09 April 2019.

from a larger joint database and they would have to compete with the quality of their individual services, not on the size of the database. It is users that will ultimately select with social network platform they will use, and they could switch from one to the other without losing any it their contacts. Technical data pooling in the service of interoperability (list of users and their contact details) should be distinguished from the private data pooling (e.g. behaviour of users, their search history).[54]

This is basically what is known as interconnection in the telephony. Customers of one operator can dial all customers using all other operators and can be dialled by all customers of all operators, hence the network effects are maximised. Although there are many telephone companies, it still remains a unitary network. It enjoys all of the network externalities that result from having a single, very large network.[55] With compulsory interoperability and technical data pooling, there would be a single social network platform – a unitary network – with many firms, including Facebook, operating that network and competing with each other in the quality of the service they provide.

The EU has a somewhat similar approach, as it recognises the immense economic and social effects of digital platforms and is currently working on further improvement of its legislative framework.[56] Among other formal proposals, in December 2020, the European Commission unveiled the Digital Services Act, which introduces a series of new, harmonised EU-wide obligations for digital service providers.[57] Moreover, the Commission proposed the Digital Markets Act, which should ensure fair and open digital markets by regulating dominant digital platforms or the gatekeepers.[58] As stated in this proposal, the gatekeepers should be regulated *ex ante*, i.e. they should abide by a set of obligations enabling the better functioning of digital platforms, interoperability, data protection and transparency. Even though this is still a draft regulation, it seems that Europe is exploring new solutions that would enable digital platforms to achieve economies of scale and scope and increase network effects, while their technology and technical users' data would become more accessible to competitors and thus, the pace of further

54 *Supra note* 44.

55 Hovenkamp, H., *op. cit*., p. 100.

56 European Parliament, *Online Platforms: Economic and Societal Effects*, EPRS study, March 2021.

57 See: European Parliament, *Digital Services Act: EU Legislation in Progress*, EPRS study, March 2021.

58 Caffarra C.; Morton F. C., *The European Commission Digital Markets Act: A translation*, Vox EU, 5 January 2021, [https://voxeu.org/article/european-commission-digital-markets-act-translation], Accessed 2 April 2021; European Commission, *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, 2021, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en], Accessed 02 April 2021.

technological development could still be blistering. At the same time, on the other side of the pond, it seems that there is no understanding nor tolerance for dominant digital platforms, except when it comes to their political (ab)use. Ironically, even though Europe has developed its competition law predominantly under the influence of the US law, when it comes to digital platforms, the US is now the one who should look up to other legal systems in search of better ideas and new legal solutions.

Apart from the alternatives to the break-up, based on the non-exclusive (or open) licensing, interoperability, data pooling and other similar behavioural remedies, the question is whether there are some other non-behavioural alternatives to the break-up of Facebook and other digital giants.

The obvious one, which would not affect their economy of scale and scope, would be economic regulation of Facebook. The rationale for that regulation must be the natural monopoly argument. If the industry is a natural monopoly, then due to subadditivity of the costs function, competition is neither sustainable nor desirable. It is not sustainable because of the decreasing average costs each competitor tries to crowd out competition in order to get a bigger share of the market, as the increased output would make that competitor more competitive. The dynamic equilibrium of entries and exits is a corner solution: only one firm on the supply side. Competition is not desirable, because the exogenous average costs of one firm, due to subadditivity, are inevitably lower than the average costs of two or more firms.[59]

The question is whether Facebook is a natural monopoly. As to being "natural", there are no reliable information on the firm's cost function, save only that the firm is a multi-product one; there is no information whether there is subadditivity of the cost function or not.[60] Furthermore, the cost function depends on technology and in the IT industry technology is changing daily, so even if there is subadditivity at one moment, that information is not relevant even for the near future. That was exactly the case in the telecommunication industry when natural monopoly was abolished because of the introduction of new technology, which changed the cost function. The technological progress in the IT industry is much more intensive.

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[59] Endogenous average costs could be higher due to X-inefficiency, i.e. the production inefficiency of a monopolist.

[60] Baumol J. W.; Panzar, C. J.; Willig D. R., *Contestable Markets and the Theory of Industry Structure,* Harcourt Brace Jovanovich Publishers, San Diego, 1982; Hovenkamp. H., op. cit., 17–28.

Not only is Facebook not a "natural" monopoly, but it is also not a monopoly at all. There are many substitutes even in the relevant market of "personal social networking services", as specified by the FTC. The point is that social networking services are a highly differentiated product. Some of them are general, some of them are more or less specialised. So, this market is definitely a monopolistic competition market, i.e. a market with competition of imperfect substitutes. Furthermore, as already pointed out in this paper. Facebook is a two-sided platform, i.e. a two-sided market, and even if there is a monopoly on one side, that does not necessary mean that the firm is a monopolist.

For the sake of the argument, let us suppose that Facebook is a natural monopoly and that there is a rationale for economic regulation. The long history of economic regulation of natural monopolies, especially in the US, has demonstrated that it hardly provides efficient outcomes. There are two main reasons for this. The first one is asymmetric information – a situation where regulated companies are much better informed about relevant issues (the costs function, level of effort to minimize the costs etc.) than the regulator. The other one is that regulators are biased towards the regulated firms, as it has been demonstrated by the economic theory of regulation.[61]

The other *pro futuro* alternative is reformed and more stringent merger control, which would prevent killer acquisitions and therefore protect (potential) competition. One solution for that would be to lower the notification threshold, i.e., to include those still small potential competitors in the merger screening process, as their acquisitions would then be notified.[62] The problem with this solution is that the notification threshold then must be rather low and that would substantially increase the administrative burden to both the competition authorities and undertakings. Many mergers that are harmless for competition would then be notified and reviewed. Furthermore, in the case of both Instagram and WhatsApp acquisitions, both were notified and then cleared by the FTC. So, in this specific case, it is not the low notification threshold that matters.

The other idea is to use the acquisition price as the indicator of the threshold for the merger notification, rather than turnover.[63] It is true that this price releases true economic value of the capital transaction and provides the hint of acquired forms, i.e. economic value of preventing (future) competition. Although economically sound, there are at least two practical problems. One is that this criterion cannot

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61 Stigler, J., *The Theory of Economic Regulation*, Bell Journal of Economics and Management, Vol. 2(1), 1971, pp. 3 – 21.

62 Philippon, T., *op. cit*., p. 274.

63 *Ibid*., 275.

be used in the case of proper mergers (fusions), so dual notification systems would have to exist. The other one is that the acquisition price can be quite manipulated legally. In some cases, it would not be public information at all. Nonetheless, this could be promising line of thinking with some suggestions already made on how to overcome practical obstacles.[64]

Introduction of *ex post* merger control is hardly an alternative solution, as this is effectively the bottom line of the FTC Complaint. The only difference is that in this very case the FTC already cleared both acquisitions.

7. CONCLUSION

It is evident that there has been a substantial political pressure on the FTC to file the Complaint against Facebook, pressures based not only on the competition law viewpoint. "Do something (in the midst of the COVID-19 crisis)" was the main message, and the FTC decided to do something big – that is why there is a petition to the court to break up Facebook. A sad echo of the Standard Oil case from more than a century ago.

It has been demonstrated in the paper that the case has not been prepared well and that the argumentation for the break-up is rather poor. Furthermore, alternatives to the break-up – more promising from the consumer welfare perspective – have been identified.

These alternatives should be further explored, and among them the priority should be the details needed for the enforcement non-exclusive licensing, compulsory interoperability and technical data pooling, as well as the details for the reform of the *ex ante* merger control procedure that would minimise the probability of killer acquisitions of potential competitors.

It was not the aim of the paper to analyse the probabilities regarding the outcome of the case, i.e. to explore what the ruling of the court might be. It remains to been seen whether the US courts will be a match for the FTC Complaint in the way the Russian artillery was to the Charge of the (British) Light Brigade.

[64] Bryan, K. A.; Hovenkamp, E., *Startup Acquisition, Error Costs and Antitrust Policy*, University of Chicago Law Review, Vol. 87(2). 2020, pp. 331 – 356; Bryan, K. A.; Hovenkamp, E., *Antitrust Limits on Startup Acquisition*, Review of Industrial Organization, Vol. 56(4), pp. 615 – 636.

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COMMERCIAL AGENTS AND ONLINE PLATFORMS RISKS RELATED TO MARKET SPECIFIC INVESTMENTS

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ABSTRACT

Certain suppliers choose to distribute their products through commercial agents. Due to special features of this particular commercial relationship, for the purpose of EU competition law the agent is considered to form an integral part of supplier's undertaking and as a consequence, the agreement between the two falls out of the scope of competition rules. The aim of this article is to demonstrate the importance of the EU competition law criteria for agency qualification and the existent ambiguities in that regard, with a view of providing a much-needed clarification in the context of online platforms. To this end, the authors first provide a brief overview of CJEU and EU Commission development related to agency agreements, followed by a comparative NCA's analysis of the market-specific investments as the most critical agency criteria when it comes to online platforms business models. Finally, authors analyze the revisions of Vertical Guidelines proposed during the EU Commission's evaluation of VBER. The authors argue that Vertical Guidelines should make a clear distinction between online platform's investments that are specifically related to the relevant market and investments which could also be used in other product markets. This would improve legal certainty for undertakings by allowing them to assess what types of risks or costs would bring their agreements within the scope of competition rules.

Keywords*: commercial agents, EU competition law, market specific investment, online platforms, VBER.*

1. INTRODUCTION

When appointing a commercial agent or a distributor (or a reseller), the supplier effectively chooses to outsource the sale function of its business in order to benefit from the agent's or distributor's knowledge and established trade connections, to save costs and to ensure compliance with local law.[1] Certain suppliers choose to distribute their products through commercial agents instead of distributors. Under the Commercial Agents Directive,[2] the agent is a person having the authority to negotiate the sale or purchase of goods on behalf of the principal, or to negotiate and conclude such transactions on behalf and in the name of the principal.[3] There are a number of advantages and disadvantages of this business model for the contracting parties.

Advantages of agency (in comparison to the use of an independent distributor) include a greater degree of principal's control, more freedom in setting the price of goods in the downstream market, supplier's freedom to choose customers and maintain closer contact with customers and greater control over marketing.[4] Since the principal is the party to the contract with end customer, the principal will be free to lawfully fix the prices at which the products are sold. This is certainly an advantage for the principal, as this practice would qualify as a hardcore restriction of competition under EU and Croatian competition law (so called resale price maintenance) if imposed on an independent distributor. Furthermore, the principal (supplier) which uses an agent to distribute the products will retain control of the terms of supply of products to end customers and will be able to choose its customers. In addition, the commission paid to the agent is typically lower than the margin which the distributor earns (considering that the distributor assumes a greater risk), which will probably result in the agency structure being more cost-effective for the principal.[5]

However, using commercial agents to distribute the products or services also has its disadvantages, including the agent's post-termination compensation/indem-

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1 Practical Law UK Practice Note Overview, *Commercial Agents*, Thomson Reuters, 2021, p. 10. [https://uk.practicallaw.thomsonreuters.com/], Accessed 30 March 2021.

2 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L 382/17.

3 Article 1 (2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ [1986] L 382/17.

4 Practical Law UK Practice Note Overview, *Commercial Agents*, Thomson Reuters, p. 13. [https://uk.practicallaw.thomsonreuters.com/], Accessed 30 March 2021.

5 *Ibid.,* p. 10.

nity and potential tax implications[6] (for example, the application of rules on permanent establishment of the territory in which the agent is operating). Commercial Agents Directive contains rules protecting the commercial agent in cases of termination of agency agreement, unless the agreement is terminated because of default attributable to the commercial agent, or unless the agent has terminated the agreement unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot be required to continue his activities.[7] The risk of application of rules on post-termination compensation/indemnity to independent distributors, on the other hand, is significantly lower.

In this context, a commercial agent is often considered to economically form a part of the principal's undertaking, i.e. the commercial agent and the principal are qualified as a single undertaking for the purpose of applying competition law rules. When this is the case, the property of the goods does not pass to the agent and the agent bears no commercial risk in relation to transactions between the principal and the customer and is consequently excluded from the application of Article 101(1) of the Treaty on Functioning of European Union ('**TFEU**'),[8] as well Article 8(1) of the Croatian Competition Act[9] (essentially corresponding to Article 101(1) TFEU) in a purely domestic context.

Developing on the CJEU case law on agency agreements in the context of EU competition rules, the European Commission Guidelines on Vertical Restraints (2010/C 130/01) ('**Vertical Guidelines**') list agency agreements as vertical agreements which generally fall outside the scope of Article 101(1) TFEU.[10] Vertical Guidelines are a soft law instrument that sets out the principles for assessment of vertical agreements under Article 101 TFEU.[11] They are not legally binding but may be used to interpret and clarify the rules of TFEU and the Regulation

6 *Ibid*., p. 13.

7 Articles 17 and 18 of the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ [1986] L 382/17; Articles 830 and 831 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima),Official gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18.

8 Whish, R.; Bailey, D., *Competition Law*, Oxford University Press, 9th edition, Oxford, 2018, p. 634.

9 Croatian Competition Act (Zakon o zaštiti tržišnog natjecanja), Official gazette, No. 79/09, 80/13, 41/21.

10 European Commission Guidelines on Vertical Restraints, OJ [2010] C 130/1, para. 18.

11 *Ibid.*, para. 1.

330/2010 in vertical agreements ('**VBER**').[12] [13] In order to benefit from the exemption, the agency relationship must be genuine. In other words, the agreement must satisfy the conditions provided in Vertical Guidelines regarding commercial or financial risk borne by the agent in relation to the activities for which the agent was appointed to act on behalf of the principal.[14] One of the risks which is material for determining whether an agency agreements is exempted from application of competition law is the risk related to market specific investments, which are defined in Vertical Guidelines as investments specifically required for the type of activity for which the agent has been appointed.[15]

In a roundtable discussion related to agency agreements within the evaluation of VBER conducted by the European Commission, the participants pointed out that a particular problem in the application of currently effective VBER and Vertical Guidelines is the lack of clarity of the notion of a market-specific investment, including in the context of online platforms acting as agents for their suppliers.[16] The question whether specific costs incurred by agents are considered market-specific investments is important to assess whether agents are independent actors on the relevant market on which the supplier's products/services are sold.

The consequence of agency qualification is that specific provisions of agency agreements dealing with contracts negotiated on behalf of the principal will fall outside the scope of Article 101(1) TFEU or Article 8(1) of the Croatian Competition Act. These provisions would include limitations on territory into which the agent may sell products/services; limitations on customers to whom the agent may sell products/services; and prices and conditions at which the agent may sell products/services.[17] With regard to online platforms, this question is relevant for assessment of legality of contractual provisions restricting the platform from selling products to certain customers or setting the prices and conditions under which the platform may offer supplier's products/services. In addition, although it may appear that agency qualification is not relevant for assessment of most favored nation clauses (MFN) since they are primarily concerned with the relationship between the prin-

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12 Regulation (EU) 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 102/1.

13 Tuytschaever, F.; Wijckmans, F., *Vertical Agreements in EU Competition Law*, Oxford University Press, Third Edition, Oxford, 2018, p. 29.

14 *Ibid.,* p. 5.

15 *Ibid.*

16 European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 172 final, p. 136.

17 Tuytschaever, Wijckmans, *op. cit.*, note 13, p. 305.

cipal and the agent (agency market) which is always subject to Article 101 TFEU, such clauses may nevertheless have an effect on the relevant product market.[18]

The aim of this article is to demonstrate the importance of the criteria for EU agency qualification and the existent ambiguities in that regard with a view of providing a much-needed clarification, particularly in the context of online platforms acting as agents for their suppliers. To this end, the authors first provide a brief overview of CJEU and EU Commission development related to agency agreements, followed by a comparative NCA's analysis of the market-specific investments as the most critical agency criteria. The final section of this article deals with revisions of Vertical Guidelines proposed during the EU Commission's evaluation of VBER with the view of contributing to the upcoming legal clarifications.

2. DEFINING COMMERCIAL AGENCY0

Already in 1962, the EU Commission published a Notice on Exclusive Dealing Contracts with commercial agents that remains relevant to date. Under this Notice, the main factor for distinguishing a genuine commercial agent from an independent distributor was the risk resulting from the transaction with the customer.[19] It provided that "a commercial agent must not by the nature of his functions assume any risk resulting from the transaction."[20] Following the publication of the Notice, the subsequent EU Commission practice and court decisions were focused on the factor of agent's integration with the principal, instead of the risk assumption by the agent.[21]

In the VVR case[22] from 1987, the CJEU had the opportunity to rule on nature of the relationship between a tour operator and a travel agent. The judgment was rendered in the preliminary reference procedure initiated by the Belgium commercial court in the course of proceedings by Vereniging van Vlamsee Reisbureaus against the Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten ('Sociale Dienst') for an order prohibiting Sociale Dienst from continuing to grant rebates to its clients, contrary to the Belgian national rules on commercial practices for

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18 *Ibid.*

19 EU Commission Notice on exclusive dealing contracts with commercial agents of 24 December 1962, OJ [1962] 139, p. 1. Huyue Zhang, A., *Toward an Economic Approach to Agency Agreements*, Journal of Competition Law & Economics, Vol. 9, No. 3, 2013, p. 565.

20 European Commission Notice on Exclusive Dealing Contracts with Commercial Agents of 24 December 1962, p. 1.

21 Huyue Zhang, *op. cit.,* note 19, p. 565.

22 Judgment of 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, C-311/85, EU:C:1987:418.

travel agents.[23] Sociale Dienst was established by the Special Family Allowance Fund and had the task of acting as the travel agent for local and regional public service employees.[24] In that capacity the Sociale Dienst granted those persons rebates on the price of tours organized by tour operators, passing on to them all or part of commission normally paid to travel agents.[25] In the course of an action for a restraining order the Belgian court referred to the CJEU for a preliminary ruling questions on whether the provisions of Belgian national law which provide that it is contrary to fair commercial practice for an approved travel agency to (i) offer prices and tariffs other than those agreed or imposed by law and (ii) to share commissions, give rebates, or offer advantages in any form whatsoever, on conditions which are contrary to customary practice, are compatible with Article 101(1) (former Article 85(1)) EEC Treaty).[26] In the course of proceedings for preliminary ruling, CJEU established that the documents disclosed by the parties suggested that there were agreements at various levels intended to oblige travel agents to observe prices of tours fixed by tour operators.[27] According to the CJEU, such agreements had the object and effect of restricting competition between travel agents by preventing travel agents from competing on prices by freely deciding to pass on consumers some portion of commission they receive.[28] The Belgian government argued that Article 101(1) TFEU (former Article 85(1) EEC Treaty) cannot apply to a relationship between a tour operator and a travel agent, since such relationship was one of principal and agent, and that a travel agent must be regarded as an auxiliary organ of the tour operator.[29] However, the CJEU held that a travel agent which sells travel organized by a large number of different tour operators should be regarded as an independent agent that provides services on an independent basis, and cannot be treated as an auxiliary organ of the tour operator.[30]

Similar reasoning was applied in Suiker Unie[31] where the EU Commission was of the opinion that the agency agreement between sugar supplier and its trade representatives did not fall outside the scope of Article 101(1) TFEU because the

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23 *Ibid.*, para. 2.

24 *Ibid.,* para. 4.

25 *Ibid.*

26 *Ibid.,* para. 8.

27 *Ibid.,* para. 12.

28 *Ibid.,* para. 17.

29 *Ibid.,* para. 19.

30 *Ibid.*

31 Judgment of 16 December 1975, *Suiker Unie*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174.

agents did not work exclusively for the sugar supplier and were not integrated into the supplier (which was also confirmed by the CJEU).[32]

The change of approach by European courts occurred first in 1995.[33] In a preliminary ruling procedure in Volkswagen AG case,[34] the CJEU provided responses to questions raised in proceedings between Bundeskartellamt and Volkswagen AG ('VAG') and VAG Leasing GmbH ('VAG Leasing'), after an order by the Bundeskartellamt requiring from VAG and VAG Leasing to desist from practice contrary to German competition law. The relationship between VAG and its dealers was governed by a distribution agreement by which VAG granted the dealers the right to resell to the public new motor vehicles and spare parts of Volkswagen and Audi marks and obliged the dealers to provide certain other services, including leasing transactions.[35] The dealers were required to negotiate leasing contracts on behalf of VAG Leasing. They would need to buy the vehicles from VAG in their own name and then transfer the ownership of vehicles to VAG Leasing at the same price at which they had bought them.[36] For each leasing transaction completed by VAG Leasing (with the customer), the dealers received a commission which would correspond to their profit which would have been made on a similar transaction, while following the expiry of the lease, the vehicles needed to be returned to dealers and dealers needed to sell the vehicles. For the purpose of their sale, dealers were required to repurchase the vehicles from VAG Leasing (after expiry of leasing contracts).[37] In the course of its investigation, Bundeskartellamt held that exclusive arrangements between VAG Leasing and dealers unfairly impeded the business activity of those dealers and the independent leasing companies and it prohibited VAG and VAG Leasing from requiring the dealers to negotiate leasing contracts exclusively for VAG Leasing.[38] Once the case ended up in proceedings before the German supreme court (Bundesgerichtshof), Bundesgerichtshof stayed the proceedings and referred several questions for a preliminary ruling to the CJEU, the first two of which were essentially whether Article 101(1) (former Article 85(1) EEC Treaty) prohibits an obligation imposed by the manufacturer on all its dealers established in that member state to develop activities as agents for

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32 Huyue Zhang, *op. cit.,* note 19, p. 566. EU Commission Notice on Exclusive Dealing Contracts with Commercial Agents of 24 December 1962.

33 Huyue Zhang, *op. cit.,* note 19, p. 566.

34 Judgment of 24 October 1995, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH*, C-266/93, EU:C:1995:345, para. 4.

35 *Ibid.,* para. 4.

36 *Ibid.,* para. 6.

37 *Ibid.*

38 *Ibid.,* para. 10.

leasing transactions exclusively for the manufacturer's leasing company.[39] VAG and VAG Leasing claimed that their German dealers, as intermediaries of VAG Leasing, form one economic unit with VAG and VAG Leasing, so that in the absence of more of one undertaking, the exclusive agency agreement between the above undertakings and their dealers falls outside the scope of Article 101(1) TFEU.[40] This argument was rejected by the CJEU on the grounds that agents can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking.[41] The CJEU further held that this was not the case in proceedings at hand, considering that German Volkswagen dealers assumed, at least partially, the risk of transactions concluded on behalf of VAG Leasing, in so far as they repurchased the vehicles from it upon expiry of the leasing contracts, and their busines of sales and after-sales services was carried on largely in their own name and for their own account.[42]

Several years later, in DaimlerChrysler case,[43] the CJEU decided on appeal against the decision of EU Commission,[44] where the EU Commission rejected the argument that agreements entered into with German dealers were agency agreements and therefore exempt from application of Article 101 TFEU.[45] In DaimlerChrysler, the EU Commission argued that commercial agents were required to devote a considerable part of their financial resources to sales promotion and bore the risk of sales for a large number of vehicles, since the agents were required to purchase demonstration cars which is directly relevant for marketing to the final customer and constitutes a market-specific investment.[46] The Commission also argued that the financial commitment the principal required from its agents could not be considered separately from their activities as intermediaries, as demonstration cars

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39 *Ibid.,* para. 16.

40 *Ibid.*, para. 18.

41 *Ibid.,* para. 19.

42 *Ibid.* Specifically, the dealers were required to purchase vehicles from Volkswagen AG and sell them to Volkswagen AG Leasing. Further, the dealers negotiated leasing contracts on behalf of Volkswagen AG Leasing and were remunerated by a commission based on the profits the dealers would make by selling vehicles in the open market for each transaction. Following the expiry of relevant leasing contracts, the dealers were required to repurchase the vehicles back from Volkswagen AG Leasing.

43 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322.

44 European Commission decision of 10 October 2001 COMP/36.264 – *Mercedes Benz*.

45 Ezrachi, A., *EU Competition Law – An Analytical Guide to the Leading Cases*, Hart Publishing, Sixth edition, Oxford, 2018, p. 208.

46 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 76.

were a market-specific investment required by the principal.[47] Although the CJEU accepted in this case that the commercial agent runs a certain risk by purchasing demonstration vehicles from the principal, it nevertheless stressed that such demonstration vehicles were purchased on preferential terms and could have been resold three to six months later if they accumulated a minimum of 3000 kilometers, which significantly undermined the importance of the risk identified by the Commission.[48] The CJEU held that even if the agent has a separate legal personality, but does not freely determine its conduct on the market and carries out the instructions of the principal, the restrictions from Article 101 TFEU do not apply to the relationship between the agent and the principal.[49] In DaimlerChrysler it was the principal that determined the conditions of sale of vehicles to customers and that bore the risks associated with sale of vehicles.[50] Furthermore, the terms of individual agency agreements prevented the agents from purchasing and holding stocks of vehicles.[51] For the above reasons, the agents were supposed to be treated the same as employees, integrated into the principal's undertaking and forming the same economic unit.[52] In these proceedings the existence of an agreement between undertakings within the meaning of Article 101 TFEU (former Article 81(1) TEC (Nice)) has not been established to the requisite standard.[53]

The facts in Volkswagen AG case were in part similar to the facts in above mentioned DaimlerChrysler decision, in which the CJEU concluded that the relationship between the supplier (principal) and the dealers was one of genuine agency which fell outside the scope of Article 101(1) TFEU. However, the important difference between Volkswagen AG and DaimlerChrysler facts is related to the arrangement between principals and dealers for (re-) purchase of demonstration vehicles.[54] Specifically, in Volkswagen AG (where the agency agreement was qualified as independent distributor agreement) the dealers had an obligation to repurchase the vehicles following the termination of leasing contracts and further resell those vehicles at their own risk.[55] On the other hand, in DaimlerChrysler, the dealers were required to purchase demonstration vehicles from the supplier, however the manufacturer (supplier) also had the obligation to repurchase the vehicles

47 *Ibid.*

48 *Ibid.,* para. 108.

49 *Ibid.*, para. 88. Ezrachi, *op. cit.*, note 45, p. 208.

50 Ezrachi, *op. cit.,* note 45, p. 209.

51 *Ibid.*

52 *Ibid.*

53 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322*,* para. 119.

54 Huyue Zhang, *op. cit.,* note 19, p. 568.

55 *Ibid.*

from dealers once they reach certain mileage.[56] Therefore the difference in facts which led CJEU to reach opposite conclusions in the two cases, related to the risk born by dealers, which thus appears to be the most important element of what is considered to be a genuine agency agreement.

In CEPSA case[57] the Spanish supreme court (Tribunal Supremo) referred the question for preliminary ruling to the CJEU regarding exclusive fuel distribution agreements. In its judgment, the CJEU assessed whether the referred agreements constituted agreements between undertakings for the purpose of applying Article 101 TFEU, i.e. whether the parties' relationship is qualified as an agency agreement.[58] The CJEU held that the decisive factor for determining whether a service station operator is an independent economic operator (resulting in the concerned agreement being qualified as an agreement between undertakings) should be found in the clauses of the relevant agreement relating to the assumption of financial and commercial risks linked to the sale of goods to third parties.[59] CJEU further stated that the question of risk is to be assessed on case-by-case basis taking into account the real economic situation.[60] With respect to the risks linked to market-specific investments (i.e. investments required to enable the service-station operator to negotiate or conclude contracts with third parties), CJEU held that it was necessary to establish whether that operator makes investments into the premises or equipment, such as a fuel tank or in advertising campaigns.[61]

Adoption of Commission Notice on Guidelines on Vertical Restraints in 2000 and its replacement with Vertical Guidelines in 2010 eliminated doubt as to whether an agent must be integrated with the principal in order to be exempt from application of EU (or national) competition law altogether, since the Vertical Guidelines clearly specify the risks which cannot be borne by a genuine agent.

Vertical Guidelines define agents as legal or physical persons vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal for the purchase of goods/services by the principal or for sale of goods/services supplied by

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56 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 108.

57 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485.

58 Ezrachi, *op. cit.*, note 45, p. 210.

59 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485, para. 36.

60 *Ibid.*

61 *Ibid.,* para. 39.

the principal.[62] Despite the similarities or differences in the definition of an agent under national legislation and the Vertical Guidelines, only the criteria developed in EU competition law, including CJEU's practice and Vertical Guidelines as a soft law instrument developed on the basis of CJEU's decisions, are relevant to determine whether an agency agreement may be indeed qualified as genuine agency and therefore be exempt from the application of Article 101(1) TFEU.[63] Vertical Guidelines expressly provide that the only determining factor in assessing an agency agreement in the context of Article 101(1) TFEU is the financial or commercial risk borne by the agent, irrespective of the qualification of such agreement by the terms stipulated in the contract or national legislation.[64] Three types of financial or commercial risk are identified which are relevant for assessment whether the agency agreement is genuine and falls outside the scope of Article 101(1), specifically (i) contract-specific risks, (ii) risks related to market-specific investments, namely those that are specifically required for the type of activity for which the agent is appointed and (iii) risks related to other activities undertaken on the same product market (at the risk of agent).[65]

Vertical Guidelines further state that an agreement will fall under the definition of agency only if the agent does not bear any or bears only insignificant risk in relation to the contracts negotiated and/or entered into on behalf of the principal, while the agreement is considered to constitute genuine agency where the agent does not take title in the goods supplied and (a) does not contribute to costs relating to supply or purchase of the contract products; (b) does not maintain stocks at its own costs or risk; (c) does not undertake responsibility for product liability; (d) does not take the risk for customer's non-performance of the contract; (e) is not under an obligation to invest in sales promotion; (f) does not make market-specific investments in equipment, premises or training of personnel and (g) does not undertake other activities within the same product market required by the principal.[66]

In Croatia, the definition of agency is similar to the one provided in Vertical Guidelines. Croatian Civil Obligations Act qualifies the commercial agent as person authorized to negotiate agreements with third parties on behalf of the principal and, if so agreed with the principal, enter into agreements with third parties on principal's behalf. In performing its activities a commercial agent must look after

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62 European Commission Guidelines on Vertical Restraints, para. 12.

63 *Ibid.*, para. 13.

64 *Ibid.*

65 *Ibid.,* para. 14.

66 *Ibid.,* paras. 15 and 16.

the principal's interests and act dutifully and in good faith.[67] Commercial agent must in particular make proper efforts to negotiate and conclude transactions it is authorized to enter into on behalf of the principal, communicate to the principal all necessary information regarding the market conditions available to him, and to comply with the instructions given by the principal.[68] Although not expressly provided under the provisions of Croatian law, the agent does not take title or become owner of the goods sold on behalf of the principal to the customers. Transfer of title to goods from the principal to the commercial agent will usually result in the agreement being considered as a sales or distribution contract since the fact that the agent negotiates and/or concludes transactions on behalf of the principal is an essential element of commercial agency which would not exist in case of a transfer of title.

Despite similarities, the risks and liabilities of the agent described in Vertical Guidelines are not relevant for finding of commercial agency in the context of Croatian national contract law, and the other way around, qualification of agency under national contract law does not affect the finding of agency under competition law. The only relevant criteria for establishing agency relationship under Croatian contract law are related to agent's authorization to negotiate and enter into contracts on behalf of the principal.[69] Consequently, even if the intermediary would qualify as commercial agent within the meaning of Croatian contract law, this would not automatically result in satisfying requirements for agency qualification for the purpose of competition rules.

Given the fact that the two approaches may yield different results, it is of outmost importance to make a clear distinction between the two at the enforcement stage. The separate line of interpretation of competition law concepts is meant to satisfy the specificities of commercial relationships with a view of addressing systematical distortions of competition. Thus, when such interpretation is coupled with the complex relationship between EU and national competition law rules, specific interpretative obligations arise for the national enforcer. When interpreting legal norms or filling in legal gaps in relation to articles 101 and 102 TFEU or the corresponding harmonized national legislation, the national enforcer, be it the Croatian Competition Agency or a national court should make recourse to EU competition law understanding of a given concept or term rather than to a na-

67 Article 811 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

68 Articles 811 – 813 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

69 Article 804 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

tional, civil law-based jurisprudence.[70] This is supported by the express provision of Croatian Competition Act.[71]

3. MARKET – SPECIFIC INVESTMENTS MADE BY THE AGENT

Vertical Guidelines expressly provide that, if the analysis of agency agreement in question shows that there are no contract-specific investments made by the agent, the existence of market-specific investments must be analyzed and, if such investments exist, the agency will not be considered as genuine[72] and will fall under the prohibition of Article 101(1) TFEU or corresponding national rules (in Croatia, Article 8(1) of the Croatian Competition Act). Market-specific investments are usually understood as investments that are required for activity for which the agent has been appointed by the principal, and which enable the agent to negotiate this type of contract.[73] These investments are different than those made to enhance the provision of agency services, such as investments in personnel or services, which only improve the agent's competitive position in the agency market.[74] If the agent decides to work for another principal, or if it decides to distribute the products or offer services as an independent dealer, investments made in personnel or services will not be sunk costs as they may very well be used for such other activities.[75] On the other hand, market-specific investments will typically be considered as sunk costs if the agent stops offering products or services on behalf of the principal, i.e. if the agent leaves this field of activity a market-specific investment cannot be used for other activities or sold other than at significant loss.[76]

It has been pointed out during the roundtable discussions in the course of VBER evaluation that the notion of market-specific investments is unclear in practice, in particular when determining which activities could constitute market-specific investments in the context of online platforms acting as agents for their suppliers.[77] In its earlier case law, CJEU held that market-specific investments are those

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70 For a detailed discussion see Pecotić Kaufman J.; Butorac Malnar V., *The interaction between EU regulatory implants and the existing Croatian legal order in competition law*, in: Kovač, M.; Vandenberghe, A. (eds.), Economic evidence in EU competition law, Intersentia, 2016, pp. 327- 356.

71 Article 74(1) of the Croatian Competition Act (Zakon o zaštiti tržišnog natjecanja).

72 European Commission Guidelines on Vertical Restraints, para. 17.

73 Lianos, I., Commercial Agency Agreements, *Vertical Restraints, and the Limits of Article 81(1) EC: Between Hierarchies and Networks*, Journal of Competition Law and Economics, Vol. 3, No. 4, p. 638.

74 *Ibid.,* p. 639.

75 *Ibid.*

76 European Commission Guidelines on Vertical Restraints, para. 14.

77 European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation, *p.* 148.

required to enable the agent to negotiate or conclude contracts with third parties, such as investments in premises or equipment (e.g. fuel tank) (investments specifically linked to the transactions concluded on behalf of principal)[78], or in advertising campaigns (investments linked to sales promotion).[79] An example of market-specific investments related to sales promotion in earlier case law of CJEU would be the agent's obligation to purchase demonstration products sold on behalf of the principal.[80]

Even though the agent's investments related to sales promotion are considered as market-specific investments which run the risk of agency agreement being considered as an independent distributor contract, it has been recognized by the European Parliament in the course of drafting the Vertical Guidelines that there always has to be a certain financial or economic risk borne by the agent in order to implement the agency agreement properly, i.e. the agent must always bear a certain level of risk which should not necessarily result in the agreement automatically being considered as non-genuine agency.[81] This question whether sales promotion risks constitute market-specific investments has also been discussed in relation to e-commerce providers (for example, platforms advertising accommodation services).

Legal commentators have argued that maintenance of specialized websites entails risks which cannot be borne by the principals (suppliers) and therefore that such platforms cannot be qualified as agents.[82] Other authors have disagreed with the above approach and held that since investments in specialized websites are not made in the relevant market but in the agency market (i.e. in relation to platform's own business), those investments would not preclude the application of agency exemption to platforms.[83]

Recent decisions of national competition authorities ('NCAs') across EU Member States have shown that NCAs have adopted different approaches towards online

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78 Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

79 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485, para. 39; Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, para. 59.

80 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 76. Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

81 Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

82 Akman, P., *Online Platforms, Agency and Competition Law: Mind the Gap*, Fordham International Law Journal, Vol. 43, No. 2, p. 280, citing an excerpt from Gurin, A., Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A. (eds.), The EU Law of Competition, Oxford University Press, Third Edition, Oxford, 2014, para. 9.58.

83 Akman, *op. cit.,* note 83, p. 280.

platforms and application of agency rules. In the decision of 15 April 2015 no. 596/2013 adopted by Swedish competition authority (Konkurrensverket*)* ('Booking.com decision'), Konkurrensverket was dealing with a question whether horizontal and vertical parity clauses would appreciably restrict competition within the meaning of the Swedish and EU competition law. When dealing specifically with vertical price parity, Konkurrensverket concluded that the business model utilized by Booking.com "also means that hotels only pay for the online travel agency's services when a booking is actually completed, which means that they do not need to invest in or bear any risk for marketing that does not lead to a reservation."[84] However, in its Booking.com decision, Konkurrensverket does not deal with the question of whether the online travel agent (i.e. Booking.com) bears any risk on the relevant market (different from the agency market) and whether the vertical arrangement between Booking.com and suppliers would be qualified as genuine agency and therefore benefit from the exemption of application of competition rules altogether. Still, the wording of the Booking.com decision and the fact that Konkurrensverket conducted at least a preliminary assessment of possible effects of vertical price parity on the relevant market (not the agency market) may serve as an indication that Konkurrensverket did not consider the vertical relationship in question as agency within the meaning of Vertical Guidelines. Otherwise, if Konkurrensverket considered that the agreement in question qualified as agency, its assessment would likely not include the examination of effects on the relevant market, considering that in cases of genuine agency the supplier is in principle free to fix prices and conditions under which the products/services are sold on the relevant market.

Furthermore, Bundeskartellamt decided a similar case against the undertaking Hotel Reservation Service GmbH (HRS) where Bundeskartellamt held that HRS was not a genuine, dependent agent "since it bears its own financial and economic risk."[85] This decision was subsequently confirmed by the Higher Regional Court of Düsseldorf. In the summary of its decision, Bundeskartellamt expressly stresses that the agreements in question between HRS and its suppliers fall within the scope of both German and European bans on anti-competitive agreements, which is not contradicted by the status of HRS (since it is not a genuine agent, as HRS claimed in those proceedings).[86] Among other investments which, in the competition authority's view, pointed to a conclusion that HRS is not a genuine agent was HRS' investment into its specialized website and cooperation with major Internet

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84 Decision of 15 April 2015 no. 596/2013 of the Swedish Competition Authority, para. 27.

85 Decision of 20 December 2013 no. B 9 - 66/10 of the German competition authority (Bundeskartellamt), para. 148.

86 *Ibid.*, para. 6.

providers.[87] The Bundeskartellamt further found that HRS was not a dependent agent due to its investments in "advertising the HRS brand, establishment of a contractual network with a large number of hotels and cooperation partners (e.g. major travel companies, such as DB AG, AirBerlin, Germanwings and public clients such as the Bundeswehr), as well as the establishment and ongoing technical refinement and development of the content of the HRS website, and cooperation with major Internet providers, such as Amadeus, Google, Facebook, Twitter and TravelTainment."[88] Based on some of the legal commentaries, such "investments to create, maintain, and update specialized website to be active on the particular market are market-specific investments that entail risks of the type which cannot be borne by the principal (i.e. supplier) and thus lead to the conclusion that platforms are not agents."[89] On the other hand, there are authors disagreeing with the above qualification, and finding that the described investments are related to the agency market instead of the relevant market for products/services provided to third parties since they are not made in relation to a particular product/service of a supplier, but in relation to platform's business (which requires maintenance of a website).[90] The latter author also suggests that impossibility to transfer the relevant risks to the supplier demonstrates that these risks/investments are related to the agency market, and not the relevant market.[91]

Based on paragraph 15 of Vertical Guidelines, the agreement should be qualified as a (genuine) agency agreement if the agent does not bear any, or bears only insignificant risks in relation to market-specific investments. Since the market-specific investments are defined as investments that are specifically required for the type of activity for which the agent has been appointed by the principal (i.e. which are required to enable the agent to conclude and/or negotiate this type of contract) and which are usually sunk[92], it would be required to analyze (i) whether the investments into the platform's website are required to enter into or negotiate contracts with end customers and (ii) whether they entail such sunk costs.

When using an online intermediary, typically the contracts between the platform's supplier (e.g. hospitality service provider) and the end customer are entered into through the agent's platform and not through direct interaction between the supplier and the end customer. This was also the case in proceedings against HRS,

87 *Ibid.*

88 *Ibid.,* para. 148.

89 Akman, *op. cit.,* note 83, p. 280, citing an excerpt from Gurin, A., Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A., *op. cit.,* note 83, para. 9.58.

90 *Ibid.*

91 *Ibid.*

92 European Commission Guidelines on Vertical Restraints, para. 14.

where the hotel customers were able to make direct bookings at the hotel displayed on HRS' website and based on the prices displayed on the site.[93] In cases where an online intermediary is used by the supplier to enter into contracts with end customers, there is usually no option for the end customer to enter into the contract for accommodation service in any way other than by using the intermediary's website. In such cases, any developments made by the intermediary to its website/platform should be considered as necessary to enter into contracts with end customers. If such investments are necessary to enter into contracts with the supplier's end customers, then they would in principle be regarded as investments in the relevant market, and not the agency market.

Based on the EU Commission Notice on the definition of the relevant market for the purposes of Community competition law ('**Relevant Market Notice**'), a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of products' characteristics, their prices and their intended use.[94] In HRS case, Bundeskartellamt considered that the relevant product market constitutes the market for sale of hotel rooms via hotel portals (which was defined as national in its geographic dimension).[95] In this regard, if the specialized website operated by a platform service provider in HRS was necessary to sell hotel rooms to end customers via hotel portals (online platforms), then a strong argument may be made that the investment into such website is an investment into the relevant market. However, even though the costs are related to entry into contracts with customers on the relevant market, such costs are not sunk if they can also be used in other product markets, such as the agency market.

In case website development would be considered as an investment in the relevant market, the important question for assessing whether the risk/investment related to such website development is borne by intermediary or the supplier is who bears the costs of such website maintenance/development. Here it should be noted that online intermediaries do not only offer the products or services of a single supplier, but are engaged by a number of suppliers who enter into contracts with their customers via intermediaries' platforms. Some authors suggest that particularly this fact, i.e. that products/services of multiple suppliers are sold through intermediary's platform resulting in impossibility to transfer website development costs to

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93 Decision of the German Competition Authority (Bundeskartellamt) no. B 9 - 66/10 of 20 December 2013, para. 3.

94 EU Commission Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ 372/05, para. 7.

95 Decision of the German Competition Authority (Bundeskartellamt) no. B 9 - 66/10 of 20 December 2013, para. 68.

the supplier, demonstrates that these costs are market-specific investments borne by the intermediary which consequently cannot be qualified as (genuine) agent.[96] Considering that the structure of agent's commission is not relevant for the assessment whether the agency agreement is exempt from Article 101 TFEU, it appears that the costs related to specialized websites of platforms cannot be transferred to suppliers by changing the structure of agent's commission.

Vertical Guidelines expressly provide that costs which are considered as market-specific investments are usually sunk, i.e. upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at significant loss.[97] Generally, costs of website development may be considered as irrecoverable costs. Once the company leaves a specific field of activity (for example, sale of suppliers' products or services through its specialized website), the company's website cannot be used any longer for other activities or sold at a profit. In this regard, competition authorities are likely to consider investments into website development as market-specific investments which prevent the agent (e.g. an online platform provider) from being considered as a genuine agent whose agreements or practices would be (at least partially) exempt from application of Article 101(1) TFEU and national competition law rules. Nevertheless, it appears that he above conclusion also depends on the purposes for which the online platform is used, specifically whether the platform is a two-sided transactional platform.

Online intermediaries such as HRS are usually considered as two-sided transactional platforms.[98] Such two-sided transaction platforms are characterized by transactions being carried out between two groups of platform users (including, for example, suppliers and end customers/users).[99] Therefore, a specialized website maintained by the online platform may be used both by the suppliers and by the end customers. In this regard, a contrary argument may be made that investment into such website could not be characterized solely as an investment into the market for sale of products/services marketed by the platform, since these investments are also used in the market in which the platform as the intermediary provides services to suppliers, i.e. the agency market. In this context, it appears that based on the current practice of CJEU it cannot be stated with certainty whether the development of a specialized website is related to the agency market or the relevant market since the online platform is used by the intermediary both for conclusion

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96 Akman, *op. cit.*, note 83, p. 280, citing an excerpt from Gurin, A.; Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A., *op. cit.,* note 83, para. 9.58.

97 European Commission Guidelines on Vertical Restraints, para. 14.

98 Niels, G., *Transaction versus Non-Transaction Platforms: A false dichotomy in two-sided market definition*, Journal of Competition Law & Economics, Vol. 15, No. 2-3, p. 328.

99 *Ibid.*

of contracts with end customers (e.g. in case where the contracts are concluded directly between the supplier and the end customer through the platform or where the intermediary is a merchant of record and enters into the contract directly with the customer) and for provision of agency services to the suppliers. In this context, it seems that agent's investments into the website are linked not only to the transactions negotiated or concluded on behalf of the principal, but also to provision of agency services. This means that such investments may be used in other product markets, and that costs of website development are not necessarily sunk costs.

Significance of online intermediary's investment in developing a specialized website must be assessed in comparison to the overall risk related to sale of products / provision of services to end customers. Even if the online intermediary meets the first criterion of agency definition (that is, if it indeed has the role of an agent), but bears more than insignificant financial or commercial risk related to the activity for which it was appointed by principal, the agreement will not be qualified as agency.[100] In this regard, in addition to being considered as a market-specific investment, investment into a specialized website of the online intermediary must also be assessed in comparison to the overall risk related to the conclusion of contracts for sale of products/services to end customers. The agreement will still be qualified as an agency agreement if the agent bears only insignificant risk in relation to market-specific investment for that field of activity.[101] The case law of the CJEU suggests that a level of risk which is higher than merely negligible or insignificant share of risk may be found acceptable for the agreement to be qualified as agency.[102] Therefore, investment into the intermediary's specialized website should be compared to other costs borne in connection with the sale of products/services for which the agent is appointed by the principal.

If the sales of accommodation services are taken as an example, this means that online travel agent's costs of website development should be compared to the total costs associated with the sale of accommodation to end customers through that platform. These costs would include, for example, acquisition of accommodation units and related equipment, personnel costs, maintenance costs, and any other costs related to the property. It appears likely that the cost of advertising such property through the online travel agent's website may seem negligible when compared to the costs of maintaining accommodation units, the risks arising from cancellation of booked accommodation and other risks borne by the principal. In this regard, even if such costs are to be considered as risks related to market-spe-

100 Tuytschaever, Wijckmans, *op. cit.,* note 13, p. 305.

101 European Commission Guidelines on Vertical Restraints, para. 15.

102 Tuytschaever, Wijckmans, *op. cit.,* note 13, p. 305.

cific investments, it is likely that the cost of developing the website would appear negligible or insignificant when compared to all other market-specific investments related to sales of accommodation to end customers and that the degree of risk borne by the agent would not justify the classification of agreement as a sham agency. On the other hand, if an online travel agent would incur significant costs, for example, for pay-per-click advertisements for specific products of the supplier, irrespective of whether the bookings are actually made, it is more likely that those costs would actually be a non-negligible risk that could qualify the platform as an independent reseller.[103]

It appears that the sole fact that an online intermediary makes an investment into the two-sided platform through which the supplier's products/services are sold to end customers, is not sufficient for a conclusion that such online intermediary cannot qualify as agent for the following reasons: (i) a two-sided transactional platform is used both for conclusion of contracts with end customers who purchase supplier's products/services, and for provision of agency services to suppliers by the online intermediary, and in this regard, the investment is not linked specifically to sale of supplier's products/services and (ii) it is possible that the amounts of investments related to maintenance of a website used for promotion of supplier's products/services would be considered insignificant in comparison to the costs related to acquisition and development of products/services (such as accommodation), equipment, personnel etc. by the suppliers. This said, while costs of website development are general and not directly related to the sale of specific products/services on the relevant market, specific costs that are aimed at selling the product to end customers, such as pay-per-click advertisements which are not recovered by suppliers to agents, are more likely to be viewed as market – specific investments because they are related exclusively to the field of activity for which the agent was appointed by the supplier.

Vertical Guidelines also state that they should not be applied mechanically, and that due consideration must be made to the specific circumstances of each case.[104] In DaimlerChrysler case, even though the EU Commission found and qualified specific obligations imposed under the agency agreement between Mercedes-Benz and its agents as provisions indicating that the agents in fact bore significant risk in relation to the sales of vehicles, it seems that CJEU primarily assessed the overall economic relationship between the parties (instead of finding whether each

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[103] Jung, N., *European Union – Restrictions of Online Sales, including Geo-blocking and Geo-filtering*, 2019, [https://www.lexology.com/library/detail.aspx?g=0218b01f-cd9f-4c16-a52f-adbde5e07a13], Accessed 30 March 2021.

[104] European Commission Guidelines on Vertical Restraints, para. 5.

individual obligation from the relevant agency agreement constituted a prohibited type of risk). CJEU stated that the EU Commission merely listed the obligations imposed under the agency agreement which were linked to sale of vehicles and mentioned the alleged significance of revenue obtained by the agent from those activities which were contractually linked to the sale of vehicles compared with the revenue the agent obtained from sale of cars without showing how those obligations represented material risks for which the agent was responsible.[105] CJEU held that even if it must be recognized that the relevant obligations exposed the agent to certain limited risks, they did not on their own operate to affect the relationship between the supplier and its agents (although it should be noted that these obligations were not related to the relevant market for retail sale of Mercedes Benz vehicles, but to another market).[106]

Considering that investments made by two-sided transactional platforms have a more general nature and have the aim of improving the platform itself[107] instead of being contract or market-specific, those investments of themselves should not have as a consequence that an online platform is understood as an independent distributor/reseller.

4. REVISION OF THE VERTICAL GUIDELINES

Considering the above arguments brought forward by legal scholars, the past practice of CJEU and the difficulties with the interpretation of the term market-specific investments in practice, it seems reasonable to expect that the revision of Vertical Guidelines could include changes to the definition of agency agreements, including a clarification on whether online platforms could in any case qualify as agents, and if so, whether the costs related to maintenance of the specialized website / online platform would constitute market-specific investments which should not be borne by the agent. Since online platforms are often multi-sided, in such cases it is difficult to discern whether a cost or risk related to their development or maintenance is related to the agency market, or the relevant market where the products or services marketed by the platform are sold. The past decisions of national competition authorities and courts also show that in practice it is more likely that the investments into website development would be considered as be-

[105] Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, *para.* 112.

[106] *Ibid.,* para. 113.

[107] Colangelo, M., *Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking*, Journal of Competition Law and Practice, 2017, Vol. 8, No. 1, p. 11.

ing specifically linked to the relevant market and prevent the online platform from qualifying as agent.

However, in cases where an online platform acts agent for multiple suppliers, it effectively cannot transfer the costs of maintaining the website to those suppliers. This is because the structure of the agent's commission does not influence its qualification under the Vertical Guidelines. Furthermore, the costs of website development are not related entirely to the relevant market, but they are also related to the agency market. As the EU Commission recognized in its Working Paper on Distributors that also act as agents for certain products of the same supplier, market-specific investments are understood as covering all investments necessary to enable the agent to negotiate or conclude contracts in the relevant market, including for example investments in furnishing shops or in training sales staff that are specifically required for selling products in the relevant market and that cannot be used for activities in other product markets.[108] In this context, investments that are related not only specifically to the sale of products in the relevant market, but also to another market, such as website development costs which are also related to the agency market, should not be viewed as market-specific investments.

A different interpretation of Vertical Guidelines which would automatically exclude the possibility of agency qualification merely because an undertaking invests in the online platform without assessing whether the investment is related specifically to relevant market and cannot be used also in another product market would mean that an online intermediary cannot be qualified as an agent because it operates online. This is because any online platform necessarily incurs costs related to development of its website. In this regard, in order to precisely determine whether such costs are market-specific investments, it must be established in each case whether the investment in question is used specifically for sale of products/services in the relevant market, and whether it can be used in other product markets. Costs which are specifically related to marketing of suppliers' products, such as advertisement costs aimed at promoting the sale of products, or the costs related to software development that is used for communication with end customers, are clearly related to the relevant market, and not the agency market. If the latter costs would be incurred by online intermediary instead of the supplier, the agreement should not be qualified as agency because the only purpose of those costs would be to improve the sale of supplier's products, which cannot be transferred to an agent.

[108] European Commission Working Paper: Distributors that also act as agents for certain products of the same supplier, para. 19, [https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf], Accessed 30 March 2021.

An online intermediary which provides services both to its suppliers and end customers through its website should therefore not be considered as an independent reseller merely because it makes an investment into its specialized website. This is because the website is used not only for sale of products in the relevant market, but also for management of relationships between the agent and suppliers. Online travel agents (OTAs) are an example of typical online intermediaries whose activity consists in supplying of hotel rooms, airline tickets, tours to tourists, while also providing separate services to suppliers and offering them the possibility to contact a large number of consumers.[109] On the other hand, where an e-commerce platform is acting as a selling agent for suppliers and invests into development of its platform solely for the purpose of selling products to end customers on the relevant market (comparable to an investment of a brick-and-mortar shop into its store and training of staff specifically for the purpose of selling the products), the costs of website development are specifically related to activities for which the agent was appointed by the principal and should be understood as market-specific investments. Denying the status of agency to an online intermediary (such as an OTA) for the reason that it invests into development of its website would also mean that the supplier (for example, an accommodation service provider or an airline) cannot freely determine the prices at which its products will be sold (since this would constitute a price fixing agreement). There are also price comparison websites which do not usually act as traditional agents. In contrast to transactional platforms, comparison websites do not offer products/services on behalf of suppliers, but merely provide information to customers. The primary aim of such websites is to increase transparency and decrease search costs for consumers, instead of engaging in negotiating or concluding contracts on behalf of suppliers.[110] Based on the wording of Vertical Guidelines, price comparison websites should not be considered as agents, unless they would be authorized to negotiate contracts with suppliers' end customers. In addition, there are also sharing economy platforms which have as a common feature that they establish a marketplace which connects the buyer and sellers, typically individuals or small undertakings, with a fee charged for these connecting services.[111] In cases where the contracts between buyers and sellers are not directly negotiated/concluded by the use of such platforms, agency qualification would not be relevant for them. However, to the extent that they provide the possibility to enter into contracts directly through the platform, and where the platform is acting on behalf of either party, such platforms could

[109] Colangelo, *op. cit.,* note 107, p. 7.

[110] European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation of 8 September 2020, p. 148.

[111] Nowag, J., *When Sharing Platforms Fix Sellers' Prices*, Journal of Antitrust Enforcement, 2018, No. 6, p. 3.

also benefit from agency qualification. Even in case of sharing economy platforms it seems unfair not to allow those platforms to qualify as agents because they invest in their marketplace, and thereby prevent the suppliers from setting the prices at which their products will be sold on the marketplace.

Although the majority of respondents to the public consultations related to the Evaluation of VBER responded that relevant paragraphs of Vertical Guidelines dealing with agency provide an adequate level of legal certainty, national competition authorities and a significant number of respondents considered that the criteria for defining agency are difficult to apply to online platforms.[112] Clarification of the meaning of market-specific investments in Vertical Guidelines would be useful for harmonizing approach of national competition authorities towards agency qualification when it comes to online platforms acting as intermediaries between suppliers and end customers. This clarification would also be helpful for businesses in evaluating whether their agreements and practices are covered by competition rules or not, and therefore improve legal certainty. The revision of Vertical Guidelines could provide, for example, that in the context of two-sided transactional platforms there are certain costs or investments which will not prevent the qualification of agency, such as general investments into the platform's website, where costs are not sunk because they may also be used for platform's activities in the agency market, and not only in the relevant market (similar to investments in personnel of brick-and-mortar agents that may be used for provision of services in a different product market). By expressly differentiating between investments which are specifically related to the relevant market, and to other markets, Vertical Guidelines would likely help undertakings in assessment of their vertical agreements, as well as national competition authorities which are currently facing difficulties in establishing which investments should be considered market-specific in the context of online platforms. Furthermore, revised Vertical Guidelines could also expressly exclude price comparison websites from the definition of agency since they do not seem to satisfy the general criteria of agency qualification. This is because such platforms are not authorized to negotiate and/or enter into contracts on behalf of suppliers in the sense in which traditional agents or other platforms (such as OTAs) are authorized to do.

5. CONCLUSION

Based on the established practice of the European Commission and CJEU which is reflected in the Vertical Guidelines, the agreement between the commercial agent and the supplier must meet a number of requirements to be exempted from

112 *Ibid.*

application of competition rules, including the requirement that the agent does not make any market-specific investments.[113] In the course of evaluation of VBER it has been pointed by national competition authorities that the notion of market-specific investments is unclear in practice and difficult to apply to online platforms.[114] Decisions of some national competition authorities show that even general investments in development of websites were considered as market-specific investments which prevent the agreement from being qualified as agency for the purpose of competition rules. However, specialized websites used by online platforms are not always developed exclusively for sale of products to end-customers on the relevant market, but are also used for provision of services in the agency market. This dual role of two-sided transactional platforms and their websites means that costs for development of online platform's website are not always sunk costs, but may also be used for provision of services in other markets. Therefore, a clarification in the Vertical Guidelines expressly making a distinction between online platform's investments that are specifically related to the relevant market and investments which could also be used in other product markets could improve legal certainty by allowing undertakings to assess what types of risks or costs would bring their agreements within the scope of competition rules. This clarification in the Vertical Guidelines could also provide clear criteria for national competition authorities to interpret the meaning of market-specific investments when assessing agreements and practices of online platforms.

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Preliminary communication

PRICE INCREASES DURING THE PANDEMIA AND EU COMPETITION LAW

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ABSTRACT

The debate about the "just price" has ancient origin and returns forcefully to the scene when, in the event of crises of various kinds, there is a rapid and significant increase in prices of given goods or services. In this article it is examined the problem of whether price increases of such a nature could, or should, be considered illicit under EU competition law. The central part of the article reviews different theories on what a "just price" should be and focuses on the idea that a price is "just" when it functions as index of relative scarcity in free markets. It is claimed that such a function deserves protection by EU law. Therefore, price adjustments in response to shocks cannot and should not be considered illegal: it is unacceptable to sanction private firms by attributing them the wrong of not having substituted, at their own expense, for the exercise of a public function (that of making sure that price increases do not put at risk solidarity and other constitutional principles).

Keywords*: Just price; Competition Law; Collusion; Abuse; Dominant Position; Price Gouging*

1. INTRODUCTORY REMARKS ON THE PROBLEM OF THE "JUST PRICE". THE SPECIAL CONCERN SHOWN BY THE EU COMMISSION ON THE ISSUE OF PRICE INCREASES.

The debate about the "just price" of goods and services has ancient origins and its traces may be found already in ancient Babylonian inscriptions.[1] It is, however,

[1] Baldwin, J.W., *The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries*, American Philosophical Society, Philadelphia, 1959, p. 8.

always actual[2] and returns forcefully to the scene when, in the event of crises of various kinds, there is a rapid and significant increase in prices of given goods or services. This is currently (at the moment this article is being written) happening with respect to the crisis induced by the coronavirus pandemic.

As far as prices and competition law are concerned, it is noteworthy that the European Commission committed itself not to show any tolerance to attempts to exploit the crisis as a cover for anti-competitive collusion or abuses of dominant position "*by, for example, exploiting customers and consumers (e.g. by charging prices above normal competitive levels)*".[3] The European Competition Network, in its *Joint Statement*, equally identified excessive pricing as a particular area of concern: "*it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices*".[4]

These concerns on price increases are certainly understandable, since they may bring influence not only on economic efficiency but also on public health and eventually on human lives. There is also a somehow emotional disappointment following any price increase during a crisis. The point, however, is not if price increases are abstractly desirable (as such they *are not*, of course) but whether contrasting price increases is the best path of action or not. Such a question may be answered only after a reflection of what prices are and how they work in capitalistic markets.

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2 Although with less interest in the legal literature. Among others, reference can be made to Perrone, A., *Doctrine of the right price and contemporary contract law. Some preliminary reflections*, in: Campobasso, M.; Cariello, V.; Di cataldo, V.; Guerrera, F.; Sciarrone Alibrandi, A. (eds.), Companies, banks and business crises. Liber amicorum Pietro Abbadessa, Utet, Torino, 2014, pp. 81 ff.; Mccall, J., *Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice*, *South Car. Law Rev.*, 2009, pp. 707 ff.; Di Matteo, L.A., *Equitables Law of Contracts: Standards and Principles*, Transnational Publishers, Ardsley (NY), 2001, 259 ff..

3 Communication from the EU Commission of 8 April 2020, *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, C(2020) 3200 final, § 20, in https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf, hereinafter the EU Commission Firms Cooperation Temporary Framework. On these issues, especially as regards excessive pricing and price gouging, see: Cary, G.S. *et all.*, *Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities*, 30 April 2020, *e-Competitions Competition Law & Covid-19*, Art. N° 94392; Lazda, A.R.B. *et all.*, *The World's Authorities present steps to minimise the impact of COVID-19 on antitrust related issues that businesses may confront in the coming days of the outbreak*, 9 March 2020, *e-Competitions Preview*, Art. N° 93889.

4 European Competition Network, *Join Statement*, 23 March 2020, in https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

The subject matter is very wide and rich in articulations. For the sake of simplicity, I propose to delimit the field of investigation to competition law[5], excluding, among others, consumer protection legislation and legislation against price gouging – which will be referred to anyway in a few instances.

I further propose, for the purpose of this article, to limit attention to the markets not subject to any special sector discipline. The following are therefore excluded, by way of example: markets where the nature of the goods or services exchanged prevent "general" competition law from applying (military defense, police services *etc.*); where determination of prices is subject to administrative measures to protect constitutionally interests prevailing over competition ("essential" goods and services *etc.*); where demand and/or supply of goods or services is subject to public incentives through grants, tax measures or the like; where containment criteria are imposed on prices (cap on interests under usury law *etc.*).

2. PRICE INCREASES AND COMPETITION LAW.

The inquiry on what prices are and how they work in capitalistic markets, in order to assess whether contrasting price increases during crises is the best path of action in EU competition law or not, needs be anticipated by a brief recalling of

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[5] The role of competition law in times of crisis is interpreted in very different ways. On the one hand, some Authors believe that enforcement of competition law should not adapt to crisis in any way: Lowe, P., *Keeping Markets Working Effectively: Europe's Challenge in Recessionary Times*, *European Competition Day*, Brno, 14.5.2009; Kroes N., *Competitiveness – The Common Goal of Competition and Industrial Policies*, Address at the Aspen Institute (Apr. 18, 2008); Shapiro, C., *Competition Policy in Distressed Industries*, speech delivered at the ABA Antitrust Symposium: Competition as Public Policy, 13.5.2009. Other Authors, adopting the same approach, believe that, at least, no relevant adaptation should be pursued; see, e.g.: Drauz, G. *et all.*, *Recent Developments in E.C. Merger Control*, *Journal of Eur. Comp. Law & Pract.*, 2010, 1, p. 19. Other Authors, on the other hand, believe that competition law should take into account the problems caused by economic crisis: see, on this issue, Kokkoris, I. *et al.*, *Antitrust Law amidst Financial Crises*, C.U.P., Cambridge, 2010.
In general, on the role of competition law in times of crisis, among many, see: Derenne, J.; Merola, M.; Rivas, J. (eds.), *Competition law in times of economic crisis : in need of adjustment?*, GCLC Annual Conference Series, Bruylant / LGDJ, 2013; Brenner, Y.S., *Capitalism, Competition and Economic Crisis: Structural Changes in Advanced Industrialized Countries*, Wheatsheaf Books, 1984; Padilla, J. *et al.*, *Competition policy and the Covid-19 opportunity*, 20 April 2020, *Concurrences N° 2-2020, Art. N° 94317.*
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the conditions under which it is possible to sanction, under EU competition law, price increases.

2.1. Price increases up to an "excessive" level as an exploitative abuse under art. 102 TFEU.

The first hypothesis of interest under EU competition law relates to an increase in price amounting to an exploitative abuse consisting in excessive pricing. This may amount to a violation of competition law, under art. 102 TFEU, only insofar as the firm charging "excessive" prices has within the relevant market a dominant position. It ought to be noted that, given the interventionist attitude shown above with respect to the COVID-19 pandemic, it is likely that the EU Commission might adjust the definition of "dominance" in order to reach an higher number of firms, e.g.: defining the relevant markets more narrowly, in order to allow an easier finding of dominance therein; recognizing relevance also to temporary dominance([6]); finding a *collective dominant position* in order to ascribe dominance to more competing firms([7]); admitting excessive pricing as an indicator of dominance([8]), even if this clearly represents a logical contradiction (in fact, only after dominance is assessed *excessive pricing* assumes relevance for competition law).[9]

The EU Commission has charged "excessive pricing" very rarely in the past and Advocate General Wahl suggested that EU Commission should be "*extremely reluctant*" to pursue exploitative abuse cases.[10] However, the crisis induced by the COVID-19 pandemic, along with the interventionist attitude already recalled, is

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6 An example of such an approach, see: Commission Decision n. 77/327/EEC of 19 April 1977 relating to a proceeding under art. 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands), in *OJ L 117, 9.5.1977, p. 1.*

7 It ought to be noted that the concept of "collective dominance" appears to be somehow abused in competition law reasoning since its applications, aimed at fighting anticompetitive outcomes of oligopolistic markets, are sometimes contradictory and not solidly grounded. The issue cannot be appropriately deepened here; with respect to such problem reference may be made to Marchisio, E., *Critical Remarks on Collective Dominant Position in EU and Italian Antitrust Law*, in *ECLR*, 2013, 11, pp. 559 ff..

8 In fact, "*the Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant*", as stated in the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), § 11.

9 Cary, G.S. *et all.*, *op. cit.*, note 3.

10 As noted by AG Wahl, "*the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct*": Opinion of AG Wahl

likely to allow the "excessive price" doctrine a wider recognition in EU competition law, as one may desume after reading the EU Commission's *Temporary Framework* and the European Competition Network's *Joint Statement*, mentioned above.

One of the problems in application of this prohibition lies in its very definition: since reaching a dominant position by endogenous growth (i.e.: not through a merger) is not prohibited under EU competition law and dominance *implies* application of prices above the competitive level by definition[11], prohibition of prices above the competitive level by dominant firms amounts, *as such*, to an irrational and anti-economic imposition in patent contradiction with competition law – which cannot prescind, in its application, from economic theory.

In order to (try to) solve such problem, EU competition law developed a test of "excessive" pricing rooted in the idea that a price is exploitative if "*it has no reasonable relation to economic value of the product supplied*" and based on two variables: whether the price is excessive when compared to the costs the firm actually incurs *and* whether it is "unfair in itself" or when compared to competing products.[12]

Such a definition appears, in itself, ill-grounded, since it is not clear what the "*economic value*" of a product should be *apart from its price* and what "unfair in itself" should mean. Application of these standards (price much higher than cost of production and "unfairness" thereof) would imply, among others, that almost *all* prices charged within luxury markets could be easily found "excessive". Besides these considerations, the above recalled test was developed in *United Brands*, which related to the distribution sector, where comparison between purchase and resell price is rather simple; this would not be the case in many other instances.

This is why EU competition law has been showing an attempt to develop further elements in order to charge "excessive pricing", e.g.: whether the price increase is drastic and sudden long after the product was originally launched; the increase is not caused by an increase of production costs *or other market development*; the demand is elastic or anelastic and to what extent; whether there are barriers to entry preventing potential competitors from entering the relevant market.[13]

These criteria show that, under EU competition law, a charge for exploitative abuse could be grounded only insofar as, among others, it may refer to a clear

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in Case C177/16, Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' *v* Konkurences padome, ECLI:EU:C:2017:286, § 3.

11 Case C-27/76 United Brands v Commission, ECLI:EU:C:1978:22, § 65.

12 *United Brands* (see footnote n. 11), § 250; see also Case C-26/75 General Motors v Commission, ECLI:EU:C:1975:150, § 12.

13 Cary, G.S. *et all.*, *op. cit.*, note 3.

benchmark consisting in the prices charged by the same dominant firm either in the past or in other geographical markets (e.g.: in other countries).[14]

2.2. Price increase due to collusion falling within art. 101(1) TFEU.

A price increase may be considered prohibited under EU competition law also when it is carried on by more firms and such an increase is a consequence of collusion between them, either in the form of an agreement or as a concerted practice. In this respect one should note that any collusion on prices (not only aimed at charging higher prices) would fall within the prohibition set forth in art. 101(1) TFEU. It should also noted that even with respect to application of art. 101(1) TFEU it is required that the relevant firms hold some market power, even if not amounting to dominance.[15]

Under EU competition law, moreover, any *agreement* on price increases would be prohibited as such, even if it did not determine any increase in fact, since art. 101(1) TFEU contains a prohibition of all agreements between undertakings, decisions by associations of undertakings and concerted practices which have "*as their object or effect*" the prevention, restriction or distortion of competition within the internal market, so that an anticompetitive object is enough to fall within art. 101(1) TFUE even if no effect follows.[16]

In absence of an agreement, however, a *parallel* increase of prices would not be sufficient in order to charge competing firms with a concerted practice. It is true, on the one hand, that such concept lies on the principles under which any firm must determine its commercial conduct independently[17] and competing firms must not knowingly substitute for the risks of competition practical cooperation between them.[18]

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[14] Libertini, M., *Diritto della concorrenza dell'Unione Europea*, Milano, Giuffrè, 2014, p. 313. E.g., with respect to prices charged in other member States, see: Joined Cases 110/88, 241/88 and 242/88, François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others, ECLI:EU:C:1989:326.

[15] See European Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union* (*De Minimis* Notice) (2014/C 291/01). Even if price fixing are considered hardcore restrictions not benefiting from the *De minimis* notice, nevertheless art. 101(1) TFEU requires that agreements, decisions and concerted practices *may affect* trade between member States – which would not be the case if the overall market share of the concerned competitors was irrelevant.

[16] On the issue see the Opinion of AG Bobek in Case C228/18, Gazdasági Versenyhivatal *v* Budapest Bank Nyrt. and others, ECLI:EU:C:2019:678, § 25.

[17] Joined cases C-40-48, 50, 54-56, 111, 113-114/73, Suiker Unie et all. v Commission, ECLI:EU:C:1975:174, § 173.

[18] *Suiker Unie* (see footnote n. 17), *§ 26; C*ase C-49/92 P, Commission v Anic Partecipazioni, ECLI:EU:C:1999:356, § 115.

However, on the other hand, competition law cannot undermine the "*right … to react intelligently to the known or foreseeable behaviour of competitors*".[19] Article 101(1) TFUE, in fact, recognizes the right of enterprises to adapt intelligently to the conduct of their competitors in the relevant market and this is so with respect to both past and foreseeable behaviour.[20] As an example, price adaptation following a price increase carried on by a *price maker* firm would not be considered, alone, as falling within art. 101(1) TFEU; likewise, a price increase within an oligopolistic market could be just the result of oligopolistic dependence, insofar as price competition may not exist as a natural consequence of oligopolistic markets.[21] This is so true that price increases are considered as a signal of collusion only insofar as they are accompanied by other elements, especially signalling strategies aimed at reciprocal coordination.[22]

Said in other words: *parallelism* is a mere fact; it can amount to a violation of competition law only insofar as it is characterised by *collusion* – which could result from endogenous or exogenous elements of proof and even in the mere exchange or unilateral communication of commercially relevant information, in this case even irrespective of parallelism under the so-called *Anic* presumption as interpreted by the ECJ.[23]

This means that a price increase brought about by competing firms could be considered falling within art. 101(1) TFEU only insofar as it is proven that such increase is a consequence of collusion. It is clear, in this respect, that under art. 2 of Council Regulation (EC) No 1/2003 of 16 December 2002, "*the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement*". Such a conclusion is strongly underpinned by the presumption of innocence([24]), which indubitably applies to competition law procedures.[25]

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19 *Suiker Unie* (see footnote n. 17), **§** 173.

20 See Case C-199/92 P, Hüls AG v Commission (Polypropylene), ECLI:EU:C:1999:358; Case C48/69, Imperial Chemical Industries Ltd. v Commission (Dyestuff), ECLI:EU:C:1972:70; *Suiker Unie*, *cit.*; Case 172/80, Züchner v Bayerische Vereinsbank, ECLI:EU:C:1981:178**.**

21 Whish, R.; Bailey, D., *Competition Law*, VIII ed., Oxford University Press, 2015, p. 603.

22 *Dyestuff*, *cit.*, §§ 66 and 100-103.

23 Marchisio, E., *From concerted practices to "invitations to collude"*, in *ECLR*, 2017, p. 555.

24 On this issue see Opinion of AG Wahl, *cit.*, § 94. It ought to be noted that the principle of the presumption of innocence is laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union.

25 *Polypropylene*, *cit.*, §§ 149 f.; Case C-235/92 P, Montecatini v Commission, ECLI:EU:C:1999:362, §§ 175 f..

2.3. Price increase in its own and the (assumed) problem of the "just" price.

Both the cases recalled above, under artt. 101(1) and 102 TFEU, consider it relevant the concept of "just" price. Art. 102 TFEU is explicit in this sense insofar as its application requires, in order for a price increase to be considered as an abuse, that such increase represents a departure from a benchmark of "just" price which need be created with respect to prices applied in the past, by competitors, in foreign markets *etc*.

Such a condition is not expressly postulated in the application of art. 101(1) TFEU but it would be considered as a relevant feature thereto, insofar as parallel behaviour may amount to strong evidence of a concerted practice "*if it leads to conditions of competition which do not correspond to the normal conditions of the market*", in particular when prices result charged "*at a level different from that to which competition would have led*".(26) Therefore, a sound definition of what "just" price should (or *might*) mean is undoubtedly relevant also to art. 101(1) TFEU enforcement.

The opportunity appears favourable, therefore, to reflect on what meaning should be given to the concept of "just price" within EU competition law. In fact, only after such definition is clearly stated it seems possible to interpret, in functionally correct terms, the existing disciplines intended to prevent those prices move away from their "right" level.

3. THE "JUST" PRICE AND THE CRITERIA FOR DEFINING IT IN ECONOMIC THEORY (AND NOT ONLY).

The different ideas of "just" price elaborated over time, and conflicting at any given time, may be summarily grouped, for the purposes of this research, into three groups, the last of which presents, in turn, an internal articulation into two sub- groups.

3.1. "Justice" on the demand side. Reference to this concept in "exploitative pricing" doctrine and "price gouging" legislation.

The first conceptual reference to price "justice", historically more antique, places the emphasis on the buyer and his purchasing possibilities; on the "demand" side, one might say.

26 *Dyestuff, cit.*, §§ 66-67.

It is not surprising to find references thereto in the Bible and in the Talmudic literature.[27] Within the Holy Scriptures the expression "just price" never appears (as far as I know). However, the need of a "fair" correspondence between what is paid and what is obtained in exchange is immanent in the text when "*right weight*", the "*right measure*" and the "*right proportion*" are referred to.[28] This is consistent with the numerous biblical references to "justice" in human action, requiring the right man to do what is "*legitimate and just*"[29], to correspond to the servants what is "*just and fair*"[30] and, in generally, to follow what is "*overall just*".[31]

Historically, such an idea of justice has been accompanied by the ancient suspicion against traders and merchants - which has declined over the centuries as a real contempt for profit, commerce and trade. This vision has been well represented since Aristotle, author of one among the first elaborations of fair value in commercial exchange, widely used "*as a philosophical justification for the medieval doctrine of the just price*".[32] In fact, many of the early church fathers, like Aristotle (with reference, in particular, to the *Nicomachean Ethics*), have considered trade as an activity to be viewed with suspicion, as it is moved by greed. This opinion was further supported by the idea that the profit of a party must necessarily correspond to the loss of the other. "*He who buys cheaply to sell dearly, seeks a shameful profit*", in short, and "*it is difficult for buyers and sellers not to fall into sin*".[33]

It is useless to even try a summary review of the literature which, up to the present day, continues to indulge in this ancient and always lively condemnation of profit. The basic *theoretical* idea of this approach is that one is able to define the "just value" of anything and that an exchange for any price not corresponding to such a "just value" should be considered immoral and illegal.[34] Of course, notwithstanding the assumption, one cannot find any definition of what such a "just" value should be if not, tautologically, with reference to the current market price ("*secundum commune forum*"[35]).

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27 Kleiman E., *Just Price in talmudic Literature*, in *Hist. Polit. Econ.* 1987, pp. 23 ff..

28 See Leviticus 19:36; Deuteronomy 25:15; Proverbs 11: 1, 16:11; Ezekiel 45:10.

29 Ezekiel 18:5.

30 Colossians 4:1.

31 Deuteronomy 16:20.

32 Baldwin, J.W., *op. cit.*, note 1, p. 10.

33 Baldwin, J.W., *op. cit.*, note 1, p. 47.

34 St. Thomas, *Summa Theologiae*, 1273. II-II, q. 77, a.1 co. 1.

35 St. Thomas, *op. cit.*, note 34, II-II, q. 77, a.4c. On St. Thomas's reflection on prices see, for example: de Roover, R., *The Concept of the Just Price: Theory and Economic Policy*, in *Journ. Econ. Hist.*, 1958, pp. 422 f.; Noonan jr, J.T., *The Scholastic Analysis of Usury*, Harvard University Press, Cambridge (MA), 1957, pp. 82 ff.; Ambrosetti, G., *La seconda scolastica nella formazione del diritto privato moderno*, in

If one wants to summarize in a few words the above-examined approach, the idea of "just price" on the demand side represents a concept aimed at solving problems of distributive nature. In other words: it serves to allow fair access to goods and services by the largest number of buyers. The concept is far from obsolete, if one thinks, among others, of the use of so-called "political" or "administrated" prices, defined sometimes at a lower level even of production costs and supplemented with proceeds of taxation (or other form of subsidization), still in recent times used to support access to goods or services deemed "essential" for the population.[36]

The idea that a price is "just" insofar as it is and remains affordable for buyers lies behind the prohibition, imposed on dominant firms under EU competition law, to charge high prices which are exploitative, as noted above, under § 2.1. This principle also underpins the so-called price gouging regulations which one may find, e.g., in the USA, where competition law does not deal with excessive pricing at the federal level[37] and price increases are sanctioned by state legislation, instead, which prohibits price increases, beyond what is considered "reasonable" or "fair"[38], in certain situations, such as a declared state of emergency.[39]

However, such an approach to "just prices" plays a role only within the tiny limits of regulated markets and is unsuitable for providing any criterion for understanding the matter in general terms.

Grossi, P. (ed.), *Quaderni fiorentini per la storia del pensiero giuridico moderno*, Milano, Giuffrè, 1973, p. 28.

36 Think of the so-called "enhanced protection service" which, in the Italian energy market, represents the option that allows the consumer to purchase electricity and gas under the economic and contractual conditions established by the Regulatory Authority for Energy, Networks and Environment (ARERA, established by l. 14 November 1995, n. 481), instead of at the free market rates. On this subject see, among others: Smerchinich, F., *Il mercato dell'energia elettrica: descrizione, funzionamento e dinamiche*, in *Riv. it. dir. pubbl. comunitario*, 2017, pp. 1269 ff.; Palmieri, A., *Somministrazione di energia elettrica e servizio di maggior tutela per l'utente*, Nota a ord. Trib. Nola 15 novembre 2010, in *Foro it.*, 2011, I, pp. 246 ss..

37 In fact, the US competition law approach to the issue is inspired by *laisser faire*, under which action against high prices is not antitrust but regulatory action, instead. In this respect, the Supreme Court stated that high, or even monopoly, prices are compatible with the competitive process and foster innovation and entry of potential competitors into the relevant market, in Trinko: US Supreme Court, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), 13.1.2004.

38 A useful short review of such pieces of legislation may be found at https://www.clearygottlieb.com/news-and-insights/publication-listing/exploitative-abuse-of-dominance-and-price-gouging-in-times-of-crisis, where it is noted that there is no uniform threshold for what constitutes an "unreasonable" price, since some states fix the threshold at a 10% increase from previous prices; other states make reference to vague criteria such as prices that "grossly" exceed the average.

39 Lazda, A.R.B. *et all.*, *op. cit.*, note 3.

3.2. "Justice" on the supply side. Reference to this concept in the "essential facility" doctrine.

The second conceptual reference on "just price" represents, in some ways, the reciprocal version of the first one. Moving from the "demand" side to the "supply" side, in effect, it is believed that a price could be defined "just" insofar as it sufficiently remunerates the production factors along with the entrepreneur's organizational activity and business risk.

According to this view, the price is interpreted as a sum of the costs borne by the entrepreneur for the production and distribution of goods or for the provision of services, increased of a surplus intended to remunerate the "entrepreneurial factor".

This reconstruction had the best known formulation in the anchorage of the price of goods or services to the amount of work necessary for their production. David Ricardo, for example, in his work *On the Principles of Political Economy and Taxation* (1817), believed that the exchange value of any good depended on the difficulties of producing it and, in particular, on the amount of work necessary to obtain it. It ought to be noted that Ricardo expressly defined this principle as an approximation, sufficient to describe the economic phenomena covered by his inquiry (for example: to justify the observation that the extension of the cultivation of wheat to relatively less fertile lands determined a relative increase of the price of wheat).

Again, this reconstruction is still alive and in use in modern thought. It suffices to note that the absolutisation of the Ricardian above-mentioned "approximation" represents the cornerstone on which the the theory of the exploitation of the proletariat by the capitalist classes, developed by Karl Marx in *Das Kapital. Kritik der politischen Ökonomie* (1867-1894), is based. Likewise, it ought to be noted that definition of prices based on the sum of production costs *plus* a markup is sometimes used in regulation for the determination of "administered" prices.[40]

In a very few cases such a criterion is referred to in EU competition law in order to define "fair" prices, as it happens, e.g., with reference to the essential facility doctrine (under which fair access price are required).[41] In these cases, one should note,

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[40] See, e.g.: Bassi G., *Prezzi e tariffe nei servizi di pubblica utilità: cenni sull'evoluzione ordinamentale*, in *App. e contr.*, 2016, pp. 74 ff.; Ziliotti, M., *I prezzi di accesso alle reti dei servizi di pubblica utilità: una sintesi teorica*, in *Econ. e pol. Ind.*, 2007, pp. 147 ff..

[41] An essential facility is a facility or infrastructure which is necessary for competitors in order to carry on their business. A facility is essential if its duplication is impossible or extremely difficult because of physical, geographical, legal or economic constraints. Denying access to an essential facility may be

the concept of fairness is construed not only on price levels as such but also relates to (the need to prevent) discrimination between buyers and cross-subsidising.[42]

This definition, however, bears, like its mutual formulation on the demand side, the total arbitrariness in the definition of the reference parameter; in this case, of what the "just" remuneration of the organizational factor should be. In fact, a survey of profit margins practiced by firms may represent, at most, an empirical support for verifying if prices charged at a given moment fall within the market average; it would not provide any useful contribution to define what the "just" level of prices should be on the market, though.

3.3. "Justice" as the encounter of supply and demand curves.

The third conceptual reference on "just price" represents, compared to the first two examined above, a conceptually more sophisticated idea, in a twofold sense. First of all, the definition of the "just" price level is, from an axiological point of view, detached from the "unilateral" perspective that characterizes the first two constructions mentioned above and becomes a function of their interrelation. In other words, this theory is not aimed at patronising a class of economic operators *vis-à-vis* the other but at interpreting their reciprocal interplay, instead.

Secondly, in this theory of "just" prices the "individualistic" perspective, focused on the needs and preferences of *individual* buyers and sellers, is dismissed in favour of a systemic approach. The dominant criterion, in fact, becomes the overlap between the aggregate functions of supply and demand. Such interplay of supply and demand curves makes them recessive both the desire of the individual consumer to purchase and the remuneration of the individual entrepreneur. In this perspective, the inability to buy or sell with profit, far from representing an element in support of the need to fix a different ("more just") price, on the contrary, indicates the inadequacy of the market players suffering from such an inability

considered an abuse of a dominant position by the firm controlling it, in particular where such a denial prevents competition in a downstream market. On this issue under EU law see: Glasl D., *Essential Facilities Doctrine in EC antitrust Law; a contribution to the current debate*, in *ECLR*, 1994, p. 306; Furse M., *The essential Facilities Doctrine in Community Law*, in *ECLR*, 1995, p. 469; Flynn L., *The Essential Facilities Doctrine in the Community Courts*, in *Commercial Law Practitioner*, 1999, p. 245. On this issue see also: OECD, *The essential facilities concept*, GD(96)113, Paris, 1996, in http://www.oecd.org/competition/abuse/1920021.pdf; Valletti, T.M.; Estache, A., *The theory of access pricing: an overview for infrastructure regulators*, The World Bank, 1999.

[42] With reference to one rather known case see Case C-179/90, Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA, ECLI:EU:C:1991:464.

to operate on that market - inadequacy that can lead to support policies[43], for example, but also to note their inefficiency and to propitiate their exit from the market (which is the principle on which insolvency legislation is built[44]).

It may be appropriate to highlight that such a systemic approach is the only one appropriate in order to ground the theory of the "just" price on economic efficiency, which is the main (if not the only) goal of competition law.[45]

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43 By way of example, with reference to Italian law, the support in question may concern: measures to support the income of individuals and families [Cazzola, G., *Il Reddito di cittadinanza. Commento a dec. legge 28 gennaio 2019 n. 4; legge 28 marzo 2019 n. 26*, in *Lavoro nella giur.*, 2019, pp. 446 ff.; Gambaro, L., *Le misure di sostegno al reddito delle famiglie con minori*, in *Minorigiustizia*, 2018, pp. 36 ff.; Valente, L., *Contrasto alla povertà e promozione del lavoro tra buoni propositi e vecchi vizi*, in *Dir. rel. ind.*, 2018, pp. 1081 ff.] business support measures [Averardi, A., *Incentivi alle imprese e "industria 4.0". Il ritorno delle politiche industriali?*, in *Giorn. dir. amm.*, 2017, pp. 625 ff.] also through the use of the tax lever [Saponaro, F., *La leva fiscale come strumento di "governance" economica dell'eurozona*, in *Rass. trib.*, 2019, pp. 353 ff.] or to companies with particular characteristics, as regards their object [Zaffanella, A., *Il sostegno finanziario dello Stato al cinema e la disattesa attuazione della "Costituzione culturale"*, in *Riv. dir. dei media*, 2018, pp. 29 ff.] or because of the subjective qualities of its owner [Golino, C., *Strumenti giuridici ed incentivi economici a favore dell'imprenditoria giovanile e femminile nel "framework" legislativo nazionale*, in *Percorsi cost.*, 2017, pp. 317 ff.].

44 On similar arguments see, limiting reference to a selection among the most recent writings under Italian law: Bassi, A., *I presupposti delle procedure concorsuali nel codice della crisi e dell'insolvenza*, in *Giur. it.*, 2019, pp. 1948 ff.; Boggio L.,, *L'accesso alle procedure di regolazione della crisi o dell'insolvenza*, in *Giur. it.*, 2019, pp. 1952 ff.; Bonfante, G., *Il nuovo diritto della crisi e dell'insolvenza*, in *Giur. it.*, 2019, pp. 1943 ff.; Cardarelli, M.C., *Insolvenza e stato di crisi tra scienza giuridica e aziendalistica*, in *Dir. fall.*, 2019, pp. 11 ff.; Carratta, A., *Il procedimento di apertura delle procedure concorsuali: dalla legge delega al Codice della crisi e dell'insolvenza*, in *Dir. fall.*, 2019, pp. 1057 ff.; Fabiani, M., *Il codice della crisi di impresa e dell'insolvenza tra definizioni, principi generali e qualche omissione*, Nota a Cass. civ. 19 novembre 2018 n. 29742, in *Foro it.*, 2019, I, pp. 162 ff.; Di Cataldo, V.; Rossi, S., *Nuove regole generali per l impresa nel nuovo Codice della crisi e dell'insolvenza*, in *Riv. dir. soc.*, 2018, I, pp. 745 ff.; Scognamiglio, G., *Osservazioni sul disegno di legge delega "per la riforma delle discipline della crisi d'impresa e dell'insolvenza"*, in *Giur. comm.*, 2016, II, pp. 918 ff.; Ferri jr., G., *Lo stato d'insolvenza*, in *Riv. notariato*, 2015, I, pp. 1149 ff..

45 In fact, it was noted that "*the dominant paradigm today is that the only goal of the existing antitrust laws is to increase economic efficiency*": Lande, R.H., *Commentary: Implications of Professor Sherer's Research for the Future of Antitrust,* in *Washburn L. J.* 29, 1990, p. 258. Similarly see: Bork, R., *Legislative Intent and the Policy of the Sherman Act,* in *J.L. & Econ.,* 1966, 9, pp. 7 ff.; Posner, R.A., *Antitrust Law,* II ed., Chicago, 2001; Skitol, R.A., *The Shifting Sands of Antitrust Policy: Where it Has Been, Where It is Now, Where it Will Be in its Third Century,* in *Cornell J.L.Pub. Pol'y*, 1999, 9, p. 239; Easterbrook, F., *Workable Antitrust Policy,* in *Mich. L. Rev*. 84, 1986, p. 1689; Brodley, J.F., *The Economic Goals of Antitrust Efficiency: Consumer Welfare, and Technological Progress,* in *N.Y.U. L. Rev.*, 1987, 62, pp. 1020 ff.; Sullivan, L.A., *Post Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a less determinate theoretical World,* in *Antitrust L.J.* 63, 1996, p. 669; Devlin, A., *Antitrust in an Era of Market Failure,* in *Harv. J. L. Pub. Pol'y,* 33, 2010, pp. 8 ff..
For the sake of completeness one should note that also other goals are sometimes considered relevant, even in the USA: Lande, R.H., *Proving the Obvious: The Antitrust Law were Passed to Protect Consumers (not just to increase Efficiency),* in *Hastings L.J.*, 1999, pp. 963 ff.; Salop, S.C., *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The true Consumer Welfare Standard,* Statement before

This approach is not as late as it might be considered on a first impression. The idea that prices should, in principle, be exclusive function of the interaction between buyer and seller was already present in Roman law[46] - with the only exception, if I am not wrong, of the so-called *laesio enormis* provided for in C.4.44.2.[47] The awareness that the price of a good represents a function of its supply and demand, in an aggregate perspective, may be observed already in Bernardo Davanzati, in his *Lezione delle monete e notizia de' cambi* (1588) and is found, again, in Antonio Serra, in his *Breve trattato delle cause che possono far abbondare li regni d'oro e d'argento dove non sono miniere* (1613).

For the sake of ideological equidistance, it must be noted that adherence to any given religious belief is not determinant as to adherence to one or another theory on the "just" price. In fact, the same idea that there is no valid *a priori* criterion for defining what the "just" price should be may be also found in the reflections of the Spanish Thomists of the sixteenth century. The jurist Francisco de Vitoria, of the so-called Salamanca school, is among those who have argued the idea that the price fixing mechanism consists in the interaction between supply and demand, without regard to other factors such as costs incurred for remunerating the factors of production.[48]

The intuition that "*the just price does not exist before the agreement*"[49] and cannot be considered an "intrinsic" quality of things[50], therefore, spans for centuries. The conscious formulation of the rule of the encounter between the demand and supply curves, however, conceptually required the awareness of the possibility that the two curves meet; therefore: the complete elaboration of a theory of the demand curve inclined in the opposite direction to that of the supply (inverse relationship between quantity demanded and prices). Among the first conscious observers of

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the Antitrust Modernization Commission, Nov. 4, 2005, § 2A; Pitofsky, R., *The Political Content of Antitrust,* in *U. Pa. L. Rev*. 127, 1979, p. 1051; Pitofsky, R. (ed.), *The Effect of Conservative Economic Analysis on U.S. Antitrust*, O.U.P., Oxford, 2008.

46 As one may read in D.35.2.63: "*pretia rerum non ex affectione nec utilitate singolorum, sed communiter funguntur*". This remark is in de Roover, R., *op. cit.*, note 35, p. 424.

47 Sometimes *laesio enormis* was understood, however, as evidence that the principle of "justice" of prices was immanent in Roman contract law. On this issue see: Zimmermann, R.. *The Roman Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, Oxford University Press, 1996, pp. 255 ff.; Westbrook, R., *The origin of Laesio Enormis*, in *Rev. Int. Droits de l'Ant.*, 2008, p. 39.

48 The observation is taken from Arthur Nussbaum, who believed that Francisco de Vitoria was the first thinker to expose (conceptually and not literally) the notions of freedom of trade and freedom of the seas: Nussbaum, A., *A concise history of the law of nations*, New York, Macmillan, 1947, p. 62.

49 Thomasius, Ch., *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione*, 1706, cap. II, § 26.

50 For one of the best known and most authoritative exposition on the point see: von Mises, L., *Human Action: A Treatise on Economics*, New Haven, Yale University Press, 1949, p. 204.

the law of "decreasing returns" (at the very foundation of a aware theory of price fixing by the market, in its anonymous functioning[51]) one may mention Robert Torrens, who mentioned it in his *An Essay on the Production of Wealth* (1821)[52], while the rule of "decreasing marginal utility" is attributed, in the history of economic doctrines, to Hermann-Heinrich Gossen, who dealt with it in his *Die Entwickelung der Gesetze des menschlichen Verkehrs, und der daraus fließenden Regeln für menschliches Handeln*, of 1854.

3.3.1. *The "static" aspects of the interrelation of demand and supply curves: the theory of equilibrium.*

The desire to free the definition of the "just" price from the arbitrariness of individual needs and preferences and the reference to *aggregate* supply and demand functions determined the entry into economics of mathematical methods.[53] One may mention, to this respect, the re-elaboration of the rule of decreasing marginal productivity accompanied by the use of differential calculus and mathematical methods, carried out by Johann Heinrich von Thünen in his *Der isolirte Staat in Beziehung auf Landwirtschaft und Nationalökonomie* (1826).

The evolution of mathematical theories of price soon approached the scientist assumption, born in the Enlightenment era, under which social systems could be represented as complex and measurable "organisms" which, like the human "organism", would naturally tend towards equilibrium and regular (and predictable) functioning. The problem of the "just price" was progressively restated as the problem of "equilibrium" of the price system; in other words: the problem of defining the conditions under which all existing resources can be said to be invested or used in such a way as to maximise marginal utility.[54]

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[51] Among the further theoretical improvements that have occurred over time, one can mention the formalisation of the concept of "elasticity" of demand or supply of a good (geometrically: its inclination), due to Marshall, A., *Principles of Economics*, London, Macmillan, 1890.

[52] The information is taken from Quadrio Curzio, A.; Scazzieri, R., *Rivoluzione industriale ed economia politica, 1817-1848*, Bologna, Il Mulino, 1982, pp. 163 f.

[53] It is worth noting that "mathematisation" represented the natural outcome of marginalistic theories but not an inevitable choice: these theories were also presented according to a "de-mathematised" model, the most authoritative of which is in Wicksteed, P.H., *The Common Sense of Political Economy: Including a Study of the Human Basis of Economic Law*, London, Macmillian, 1910.

[54] The idea of spontaneous equilibrium of the economic system (albeit in the awareness of its eventuality and not absoluteness) is found, for example, in Hume, D., *Political Discourses*, 1752 and in Say, J.-B., *Traité d'économie politique, ou simple exposition de la manière dont se forment les richesses*, 1803. The first "scientist" formulation is that of Petty, W., *Political Arithmetick*, 1690, who introduced in economic analysis quantitative and statistical investigation tools. On the measurability of economic phenomena cf. also Bentham, J., *An Introduction to the Principles of Morals and Legislation*, 1780, who proposed the orientation of public choices on the basis of the arithmetic calculation of individual utilities.

Particularly eloquent of such investigation method is *Tableau* économique (1758), by François Quesnay; he was a court doctor and used the blood circulation scheme of the human body as a model to represent the circularity of the economic system. Consistently with the methodological assumptions, economy is examined, in this work, as a stationary system,i.e.: the production of wealth, for hypotheses coming from agriculture alone, is fixed as constant over the years.[55]

All these concepts were further elaborated within the neoclassical school of economics, whose founders are considered Carl Menger (*Grundsätze der Volkswirthschaftslehre*, 1871), William Stanley Jevons (*The Theory of Political Economy*, 1871) and Léon Walras (*Éléments d'économie politique pure*, 1874).

The first one, in truth, abandoned mathematical analysis and further developed the philosophical implications of method - from which the theory of "methodological individualism" originated. The last two, on the contrary, remained faithful to the trend of progressive mathematisation of the economy. Indeed, Walras extracted from economic reality "ideal types" ("perfect competition", "ideal demand" *etc.*, as in the physical sciences "ideal gases" and "ideal fluids" were defined) to reach, eventually, a measurable content to the notion of "just price": that which results in a situation of general economic equilibrium, where the marginal utility of the last good purchased for each species is equivalent.

3.3.2. *The "dynamic" aspects of the interrelation of demand and supply curves: the price as an index of "relative scarcity". From the problem of "justice" of the price to the investigation of its "function" within the market economy.*

The use of the "organism" metaphor for understanding and describing economic systems and markets has undoubtedly contributed to a better understanding of reality. It has also imposed an high cost in terms of misunderstanding, which is due whenever rhetorical figures that involve semantic translations (as metaphors) are used in scientific discourse[56]: that of relying on formalisations based on assumptions which are, by definition, unachievable in the real world and, sometimes, of making uncritical reliance on them. This entails, among others, the methodological risk, highlighted by Milton Friedman in his Nobel lecture of 13 December

[55] See Cournot, A.A., *Recherches sur les principes mathématiques de la théorie des richesses*, 1838, whose research can be considered the first example of mathematical economics, as noted by Ricossa, S., *Cento trame di classici dell'economia*, Milano, Rizzoli, 1991, p. 93. One should note that Cournot used mathematical functions exclusively symbolically, to represent correlations between data elements, and not as tools for measuring real data; in other words, Cournot's reasoning has no econometric implications.

[56] Marchisio, E., *"Spaccare il capello in quattro". Interpretazione del diritto (commerciale) e figure retoriche*, in *Giur. comm.*, 2018, pp. 404 ff..

1976[57]: even if one makes many attempts "*to patch up the hypothesis by allowing for special factors*", it is inevitable that "*experience stubbornly [refuses] to conform to the patched up version*".[58]

This observation is of elemental importance for the purposes of this research: in fact, the "static" profile, which concerns the study of the elements determining a given level of prices as an interplay between the functions of supply and demand, does not seem to have particular relevance in itself herein - if not as a conceptual reference of principle, with relevance mostly in the long run.

Instead, what appears to be most relevant for the purposes of the present reasoning is the "dynamic" profile thereof, that is: the investigation of price changes, their reasons and the consequences of these changes onto the system. In this sense, by limiting attention not to the absolute value of a price but to its variation over time, one may note that prices act (or, at least, can act) as an "index of scarcity".[59] This means that changes in (relative) prices allow individuals to make accurate and efficient economic choices based on the actual conditions in place.

Two examples can clarify the above-made statement. Let's imagine that the fruit offer is composed, in a given period, of oranges and grapefruits. Let's imagine that both are offered on the market at the same price, but consumers prefer oranges, which tend to run out quickly, and do not like grapefruits, which instead rot on the shelves. The increase in the price of oranges compared to that of grapefruits represents, in this system, the fastest, most efficient and most practical way of communicating to producers the need to produce more oranges and less grapefruits.

Assume, under a different perspective, that a flooding destroys half of the orange plants. The increase in the price of oranges compared to that of grapefruits represents, in this system, the quickest, most efficient and most practical way of communicating to the market the reduced availability of oranges compared to grapefruits and, downstream, to get this "information" on supermarket shelves without any express disclosure from orange producers.

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57 It may be read at: http://www.nobelprize.org.

58 Friedman, M.,. *Nobel lecture*, 1976, in http://www.nobelprize.org, p. 283.

59 Schumpeter, J., *History of Economic Analysis*, New York, Oxford University Press, 1954, claimed that the first conscious theory under which the value of an asset depends on its relative scarcity was formulated by Galiani, F., *Della moneta, libri cinque,* Napoli, Giuseppe Raimondi, 1750. See, on this issue: von Hayek, F.A., *The use of knowledge in society*, in *Amer. Econ. Rev.*, 1945, pp. 519 ff.

4. THE JURIST'S PERSPECTIVE: THE NEED TO "PROTECT" THE FUNCTIONING OF THE PRICE MECHANISM AS AN INDEX OF RELATIVE SCARCITY.

The function of prices as "messengers" of the relative scarcity of goods and services, just mentioned, represents an elemental component for the functioning of competitive markets. Such a function, instrumental to the correct operation of the economic system, must be protected by the legal system, as it is clear after an even summary overview of the relevant normative context.

The current EU "constitutional" framework disciplines the economy pursuant to the "social market economy" model([60]), namely: a competitive economy tempered by social considerations.[61] Such a "social" connotation of the market economy causes that the free-competitive model does not have an absolute nature and admits intervention of public authorities in the economy, both in order to improve the functioning of the market with respect to endogenous anticompetitive dynamics[62] and as an alternative to the market when derogation is deemed necessary

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60 By social market economy one means the economic theory under which the discipline of economic activities should be oriented in order to pursue both market freedom and social justice. It originates from the Ordoliberalism of the School of Freiburg, by Walter Eucken (founder, in 1940, of the magazine Ordo, from which the movement took its name), and found its first theoretical arrangement with Wilhelm Röpke and legal deepening with Hans Grossman- Dörth and Franz Böhm. The basis for this economic doctrine is the idea that economic freedoms are a necessary condition for the full realization of the individual but not yet a sufficient condition. In this sense, it is believed that the State (or similar public bodies with regulatory power) must intervene in order to correct imbalances suitable for limiting the free individual realisation. This doctrine clearly identifies market freedom as a general discipline and limits public corrective actions to correction of market dysfunctions, when the market itself is not suitable for guaranteeing results consistent with the reference social model. On this issue, among the infinite, see: Felice, F., *L'economia sociale di mercato*, Soveria Mannelli, Rubbettino, 2009; Somma, A., *La Germania e l'economia sociale di mercato*, Torino, Centro Einaudi, 2014; Prodi, R., *Il capitalismo ben temperato,* Vol. IV, Bologna, Il Mulino, 1995.

61 The literature on the subject is practically endless. Among the infinite see: Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, Princeton, Princeton University Press, 1990; European Commission, *White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025*, COM (2017) 2025, 1 March 2017; European Commission, *Reflection Paper on the Social Dimension of Europe*, COM (2017) 206, 26 April 2017; Gerber, D., *Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the "New" Europe"*, in *American Journal of Competition Law*, 1994, 42, pp. 25 ff.; Joerges, C.; Rödl, F., *"Social Market Economy" as Europe's Social Model?*, EUI Working Paper LAW No. 2004/8, 2004; Sangiovanni, A., *Solidarity in the European Union*, in *Oxford J. Legal St.*, 2013, 33, pp. 213 ff..

62 What has been defined as the defense of the market by itself, which can come to "replicate" competitive conditions otherwise absent or insufficient in a given market: Selznick, P.. *Focusing Organizational Research on Regulation. Comments on some Aspects of Public and Private Bureaucracy as They Bear on Regulation*, in Noll, R.G. (ed.), Berkeley, University of California Press, 1985, pp. 363 f.. As noted by Giani, L., *Attività amministrativa e regolazione di sistema*, Torino, Giappichelli, 2002, p. 16: "*in this perspective ... the market (rectius the economic system) comes to condition the activities that pertain to the law which, in a certain sense, adapt to it. And so, for example, the same legislative activity, and also the regulatory activity*

to give satisfaction to social and political needs which may not find sufficient satisfaction by the functioning of the "invisible hand"[63] of anonymous exchanges.[64] In other words, the legal system allows public authorities the possibility of intervening in order to reduce negative externalities[65] or confront politically undesirable outcomes[66] that could derive from the functioning of a pure *laissez-faire* system.

These, however, are *exceptions* to the general rule governing economic activities, according to the model of free competition.[67] In fact, legitimacy of any public intervention in derogation to the said general rule (either for pro-competitive or "social" purposes) is conditioned, under European law[68], to respect the principle of proportionality in the broad sense (*Verhältnismäßigkeitsprinzip*). This was devel-

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carried out by public administrations, from "standard training" activities, in a certain sense are transformed into training activities of rules for adaptation to market dynamics, or if you want freedom".

63 According to the well-known metaphor of Smith, A., *The Theory of Moral Sentiments*, 1759; Smith, A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, who, however, used it to represent Providence for which the selfish search for one's interest leads, in the free market, to satisfy the interest of the whole society, thus transforming "private vices" into "public virtues". Subsequently, after Léon Walras and Vilfredo Pareto, the metaphor of the "invisible hand" was commonly used to refer to the economic mechanisms that regulate the market economy in such a way as to ensure that the search for maximum individual satisfaction by individuals produces, at the aggregate level, the well-being of society.

64 According to a parameter of "sufficiency" defined with reference to political, social and cultural benchmarks in force in a given system in a given historical moment. In this second hypothesis, the public intervention is justified by extra-economic intents deemed prevalent or at least equivalent to the principles of the market economy, with which, therefore, it is necessary to carry out a balancing judgment: on the subject see: Celano, B., *Diritti, principi e valori nello Stato costituzionale di diritto: tre ipotesi di ricostruzione*, 2004, http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2004/06celano.pdf.

65 Volokh, A., *Externalities*, in Hamowy, R. (ed.), *The Encyclopedia of Libertarianism*, Thousand Oaks (CA), SAGE, Cato Institute, 2008, pp. 162 ff.; Laffont, J.-J., *Externalities*, in *The New Palgrave Dictionary of Economics*, London, Palgrave Macmillan, 2008; Papandreou, A., *Externality and Institutions*, Oxford, Oxford University Press, 1998.

66 Koslowski, P., *Principles of Ethical Economy*, Dordrecht, Kluwer Academic Publishers, 2001, pp. 6 ff.; Weber, M., *Wirtschaft und Gesellschaft*, Tűbingen, Mohr, 1922.

67 The "style" of the regulatory activity currently in force in Italy represents the "*expression of a different framework of relations*" between legal norm and economic facts, legitimised, at the top, by a very precise paradigm, under which the objectives and operating rules of a given market cannot be defined in heteroreferential terms with respect to the market in question: Giani, L., *op. cit.*, note 62, p. 16, where the observation that in this perspective of regulatory intervention "*the market (rectius the economic system) affects the activities that pertain to the law which, in a certain sense, adapt to it*".

68 Case 182/84 Miro EU:C:1985:470; Case C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health *("Fedesa")*, EU:C:1990:391; Case C-180/96 United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities EU:C:1998:192; Cases C-96/03 and C-97/03 A. Tempelman (C-96/03) and Mr and Mrs T.H.J.M. van Schaijk (C-97/03) v Directeur van de Rijksdienst voor de keuring van Vee en Vlees EU:C:2005:145. See also the observations of the AG Tesauro (EU:C:1991:69) in Case C-68/89 Commission of the European Communities v Kingdom of the Netherlands EU:C:1991:226. On a regulatory level, see, for the systematic scope of the provision, art. 52 of the Charter of Fundamental Rights of the European Union.

oped in German law[69] as a criterion for limiting individual freedoms by public authorities and requires coexistence of a *Legitimer Zweck* (i.e. justification) with the requirements of *Geeignetheit* (suitability), *Erforderlichkeit* (necessity) and *Angemessenheit* (adequacy).

From this regulatory, but also axiological, context it follows the principle that regulation of economic activities cannot be defined in hetero-referential terms with respect to the markets on which it brings effects.[70] As far as this research is concerned, this means that, unless the conditions required by the system exist in order to derogate from the functioning of the price-system (only for the temporary pursuit of legitimate purposes), it does not appear possible to produce rules, or interpret the current rules, conflicting with the function of index of relative scarcity of prices.

Paraphrasing the wording used by Ludwig Raiser, it is necessary to take note of how freedom of contract (*Vertragsfreiheit*) should be recognized, in the economic system, a function (*Vertragsfunktion*)[71] within the dynamics of the competitive market – an essential function in a meta-individual and systemic perspective. Consequently, it is necessary that the "justice" of prices is appreciated not as concerns its amount but "*as regards the legality of its formation*"[72], in a procedural and dynamic perspective.

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69 For implementation of the principles indicated above, in Italy see: Casucci, F., *Il sistema giuridico "proporzionale" nel diritto privato comunitario*, ESI, Napoli, 2001; Galetta, D.U., *Principio di proporzionalità sindacato giurisdizionale nel diritto amministrativo*, Milano, Giuffrè, 1988, pp. 11 ff.; Sandulli, A., *Proporzionalità*, in S. Cassese (ed.), *Dizionario di Diritto Pubblico*, Vol. V, Milano, Giuffrè, 2006, pp. 4643 ff.; Scaccia, G., *Il principio di proporzionalità*, in S. Mangiameli (ed.), *L'ordinamento europeo*, Vol. II, *L'esercizio delle competenze*, Milano, Giuffrè, 2006, pp. 225 ff..

70 Cfr. Giani, L., *op. cit.*, note 62, p. 16, where the observation that in this perspective of regulatory intervention "*the market (rectius the economic system) affects the activities that pertain to the law which, in a certain sense, adapt to it*".

71 Raiser, L., *Vertragsfunktion und Vertragsfreiheit*, in Id., *Die Aufgabe des Privatrechts*, Regensburg, Athenäum-Verlag, 1977, pp. 65 ff.. On the apparent incompatibility between any attempt to impose by law a "just price" and the functioning of competitive markets see, in Italy: Lanzillo, R., *Regole del mercato e congruità dello scambio contrattuale*, in *Contr. impr.,* 1985, pp. 309 f.; Albanese, A., *Contratto mercato responsabilità*, Milano, Giuffrè, 2008, pp. 98 f. and footnote n. 122.

72 Irti, N., *Persona e mercato*, in *Riv. dir. civ.*, I, 1995, p. 292; similarly Navarretta, E., *Causa e giustizia contrattuale a confronto: prospettive di riforma*, in *Ric. Dir. civ.*, I, 2006, pp. 416 ff..

5. BRING PREMISES TO THEIR CONSEQUENCES. THE DISCIPLINE OF PRICE INCREASES "IN TIMES OF CRISIS".

If one shares the above-exposed ideas, it seems necessary to devote some further reflection on price increases in times of crisis, examining separately the hypotheses in which these increases result from shifts in either the supply or demand curve.

5.1. Price increases resulting from shifting of the supply curve. The paradigm of seasonal vegetables in case of adverse weather events.

The first group of price increases during "crisis" refers to the scenarios where the increase in question results from a reduction of the quantities available for sale. Here the price increase acts as a message to the market of a scarcity of the good or service compared to the other ones available within the market. This is the case, for example, of price increases of seasonal vegetables when adverse weather events destroy a significant part of the crops.

In this instance, the effects (let me underline: beneficial under a systemic perspective) resulting from the price increase are evident and must be kept in mind for the purposes of this research. Imagine an oversimplified market where Titius produces twenty artichokes a year and is able to sell its products at a price of € 10 each, which allows him to cover the fixed costs (in hypothesis: overall € 160) and collect a satisfactory profit (in hypothesis: € 40). Let's imagine that the products are purchased by only two consumers, Caius and Sempronius, who, at the unit price of € 10, are willing to buy ten artichokes each. Regardless of who gets to the market first, the other finds enough artichokes on the shelf for himself. The market is in balance.

Let us suppose that a flood destroys half of Titius's production. An increase in the unit price of artichokes, hypothetically, to € 20, would have two consequences. The first, more evident, would be that of allowing Titius to continue to cover his fixed costs (which, having already been borne, have remained € 160) and to collect his own profit. The second, quite often underestimated, would be that of sharing the available artichokes equally between Caius and Sempronius. In fact, if the unit price remained € 10, the first to arrive at the shop would be willing to buy ten, with the consequence that the second would remain without any. Let us suppose, for simplicity of example, that the elasticity of demand[73] is such that in

[73] The elasticity of demand with respect to the price indicates, in microeconomics (other conditions being equal), the relationship between the percentage change in the quantity demanded and the percentage change in the price. Hypersimplifying: when a 1% price change generates a demand quantity variation greater than 1%, the demand is defined elastic with respect to the price. When the opposite occurs, that is: a 1% price change generates a demand quantity variation of less than 1%, the demand

the face of the doubling of price each of the two buyers is willing to buy half of the artichokes they would have purchased at the previously applied price. Under this condition, when confronted with a unitary price increase to € 20, both Caius and Sempronius would be willing to buy (only) five artichokes each. Following the price increase (and *only* following the price increase), regardless of who gets to the market first, the other could continue to find a sufficient amount of artichokes on the shelf even for himself.

Obviously the reality is much more complicated than the example recalled above: the relevant parameters are infinitely greater and have a much wider variability. In addition, attribution of the cost of the flood could be distributed in a proportionally different way between producer and consumers, for example by imagining that the price increase is such as to partially reduce the entrepreneur's profit. However, the logic of the example is that, in the hypothesis under consideration, in the absence of an increase in the unitary price of artichokes of at least up to € 16, the producer Titius would not be able to cover its fixed costs and the distribution of available goods between Caius and Sempronius would, to a greater or lesser extent, depend on who reaches the shelf first.

This means, obviously, that any economic support measure for Titius to keep the unitary price of artichokes at € 10 would be justified only on condition that the demand for Caius and Sempronius was totally inelastic (i.e. in the face of any price increase either of them would prefer not to buy anything) or that the allocation of artichokes between them was regulated in some way (but it is rather likely that any such a regulation would be less efficient than the price increase, this is noted incidentally). Otherwise, imposing or allowing Titius to maintain the prices previously applied would only result in an incentive to hoard: in other words, an invitation to run and buy all the available artichokes before the other does.

5.2. Price increases resulting from shifting of the demand curve. The paradigm of respiratory protection masks during the coronavirus crisis.

The hypothesis of price increase reported in the previous § 5.1, although very often the object of public bewilderment, is however commonly understood and accepted, even by the general public, in light of the fact that Titius, the producer, does not derive any "advantage" from such an increase. On the contrary: at best, he is in the same position it would have been in the absence of the flood; in the worst case, he is forced to renounce (almost) all his profit.

is defined as rigid compared to the price. If a 1% change in price generates a 1% change in demand, demand is of unitary elasticity.

What is commonly presumed unacceptable, however, although often not explicitly, is that the price increase may lead to an increase in the entrepreneur's profit, when it occurs not as a consequence of a decrease in the quantity of goods or services offered onto the market but following a change in consumer preferences - that is: following a shift of the demand curve. This is exactly the case of the increase in the price of respiratory protection masks that occurred on the occasion of the diffusion of COVID-19.

The perceived disapproval of these price increases seems a consequence of a pre-understanding (in the sense, proposed by Gadamer, of *Vorverständnis*).[74] Regardless of the origin of such a prejudice (ethical, under which "profit" is seen as a manifestation of selfishness[75]; cognitive, under which, in presence of a threat to self-esteem, people tend to show hostility towards external groups[76]; *etc.*), the stereotype that any increase in profits amounts to a socially reprehensible event seems to play a relevant role in supporting the conclusion that such increase could, or even should, be considered unlawful.

This is a sociological and cultural issue, of course, not a legal one. However, it is not insignificant for the purposes of legal reflection, given that cognitive sciences confirm[77] what Piero Calamandrei (an eminent Italian jurist) had already observed in the first half of the twentieth century: "*although it continues to be repeated that the sentence can be schematically reduced to a syllogism , in which, from given premises, the judge draws the conclusion for the sole virtue of logic, it sometimes happens that the judge, in forming the sentence, overturns the normal order of the syllogism: that is, it finds first the device and then the premises that serve to justify it ... it means ... that, in judging, intuition and sentiment often have a larger part of what does not seem from the outside*".[78]

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74 In the sense of pre-understanding (*Vorverständnis*) which projects on the object of the research the meaning attributed to this object by the subject who interprets it and by the community to which he or she belongs: Gadamer, H.G., *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, Tübingen, J.C.B. Mohr (Paul Siebeck) Verlag, 1960.

75 On this point, see the references made to the previous § 3.1.

76 One for all: Hewstone, M.; Rubin, M.; Willis, H., *Intergroup bias*, in *Ann. Rev. Psych.*, 2002, pp. 575 ff..

77 Kahneman, D., *Thinking, Fast and slow*, New York, Farrar, Straus and Giroux, 2011; Mortellini, M.; Guala, F., *Mente mercati decisioni*, Milano, Università Bocconi Editore, 2011; Bona, C., *Sentenze Imperfette*, Bologna, Il Mulino, 2010; Bona, C.; Bazzanella, B., *L'assegno di mantenimento nella separazione. Un saggio tra diritto e scienze cognitive*, Trento, Università degli Studi di Trento, 2008; Guthrie, C.; Rachlinski, J.J.; Wistrich, A.J., *Inside the judicial mind*, in *Cornell Law Rev.*, 2001, pp. 777 ff.; Kahneman, D.; Slovie, R.; Tversky, A., *Judgment under uncertainly. Heuristics and biases*, Cambridge, Cambridge University Press, 1982.

78 Calamandrei, P., *Elogio dei giudici scritto da un avvocato*, 1935.

However, even if common feeling condemns profit, it should be noted that the event of price increase in question appears, in theoretical terms, absolutely equivalent to that examined under § 5.1 above, from various points of view. In the first place, at a closer review, price increase of masks from one moment to the other represents, nothing but a variation consequent to a different consumer preference, equivalent to that shown between oranges and grapefruits in the example given in the previous § 4. The difference is chronological: in the previous case, prices vary because at the same time consumers prefer the good "orange" to the good "grapefruit"; in the present case, prices vary because, at chronologically different times, consumers show a different preference for the same good "mask".

Secondly, in both cases (perhaps: especially in the case in question) price increase represents the appropriate tool to produce an efficient rationing of the goods available for sale. If, in a time of crisis, masks continue to be sold at the normal price, it is highly probable that the first to arrive at the store buys up high quality thereof, leaving others unprotected - exactly what happened in reality. Conversely, a timely increase in prices would determine, if demand is presumed elastic, purchase of a smaller quantity of masks by individual consumers, thus allowing a greater diffusion thereof.

Even under an ethical point of view, efficient rationing following price increases at stake cannot, and should not, be underestimated. It is common feeling, driven by the above-said prejudice, that price increases due to a shift of the demand curve favour the wealthier and leave the poorer worse off. It should also be taken into account that failure to let prices increase would favour alarmists, allowing them to fill up their drawers with masks, leaving the others unprotected. It is maybe easier for public authorities to resolve the first problem, lack of resources to purchase masks by someone, than the second, the scarcity of existing masks.

5.3. Irrelevance of any entrepreneur's profit increase and of the objections that prices could raise "too much". Legislation against price gouging as a "storm after the storm".

The arguments upheld under this § 5 allow to conclude that price increases following a situation of crisis, either due to retrocession of the supply curve (reduction of the available quantities) or to advancement of the demand curve (increase in preference for purchase), are both perfectly rational and, above all, both lead to more efficient allocation outcomes than the alternative consisting in maintaining previous prices.

In this perspective, the possible increase in profit for the entrepreneur, apparently relevant in an "ethical" perspective, seems instead to be the result of an irrational and *dangerous* stereotype[79] - the danger consisting, of course, in a *concrete* less just allocation of resources as a consequence of adherence to an *abstract* and only asserted "more just" criterion. Thus, it seems totally irrational and senseless to hold the assumption that the market price is right *until proven otherwise*[80] and to deem that *any increase* in costs in times of crisis represent evidence valid to this scope: this would mean allowing the price system to report changes in scarcity when it is not needed (in a condition of equilibrium, it is allowed to say with a certain approximation) and, incomprehensibly, to prevent it just when it would be necessary.

It would be irrelevant also to object that, in times of crisis, prices could raise "too much". The "correct" price is the price at which all available goods are purchased. If the purchase is made at a price higher than before, it means that the previous price was too low. If, on the other hand, the price actually becomes too high and reaches a measure to which consumers do not want (or are not able) to buy the product, then it will be rational, for the manufacturer or distributor, to lower the price to the point where no unsold goods remain. This is how market rules work.

In this respect, it ought to be noted that "price gouging" legislation in force in several states within USA showed extremely dangerous to consumers for the reasons evidenced above, since price increases are a rational response to product shortages and their control hinders efficient market functioning, including drawing resources to the affected market. The unwanted effect of prohibition of price gouging, in fact, is that of making market recovery longer and more difficult, since price gouging laws prevent the flow of goods in from other states and, therefore, may harm the people whom they are meant to protect, instead.[81]

6. A NOTE: SOLIDARITY AND "CORRECTIVE" INTERVENTIONS ARE NEEDED BY PUBLIC AUTHORITIES, NOT PRODUCERS, WHOLESALERS OR RESELLERS.

At this point it is necessary to dispel a myth. It is often believed that leave price mechanisms operate would amount to disavowing solidarity – which is certainly recognised under EU law, deriving from artt. 8, 9 and 10 TFEU, along with art.

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79 For a discussion of similar topics in the legal perspective see: Oppo, G., *Diritto dell'impresa e morale sociale*, in *Riv. dir. civ.*, I, 1992, pp. 15 ff..

80 Koslowski, P., *op. cit.*, note 66, p. 188.

81 Culpepper, D.; Block, W.E., *Price gouging in the Katrina aftermath: Free markets at work*, in *International Journal of Social Economics*, 35, 2008, pp. 512 ff..

12, specifically aimed at consumer protection, and from all provisions belonging to title IV ("Solidarity") of the Charter of Fundamental Rights of the European Union, especially art. 35, devoted to health care. This objection, however, makes no sense. If it rains, we never try to stop the rain; we take an umbrella, instead. Price variations signal, at least most of the times, a variation of availability of goods and services. This relates to *what happens* and has nothing to do with solidarity.

Said in other words, the proposal to let the price fluctuation function as a relative scarcity index does not contradict solidarity duties nor the possibility (or duty) of public authorities to allow access to essential goods in favour of people who cannot afford to purchase them on the market. This is especially true when, as it is the case with COVID-19, availability of some goods (respiratory protection masks and other sanitation products) is necessary *also* for the protection of meta-individual interests such as protection of health.

It was noted, under § 4.1 above, that the "social" connotation of the market economy does not advocate an absolute *laissez-faire* system but, on the contrary, legitimises intervention of public authorities in the economy. This, as also noted, not only in order to improve the functioning of the market with respect to endogenous anticompetitive dynamics but also in order to satisfy social and political issues that would not be considered adequately satisfied in a system of free competition.

This is exactly the field in which solidarity comes into play.

However, this observation requires three clarifications. First, given that the model of free competition represents the general rule of market discipline, any public intervention aimed at avoiding price increases could be said to be legitimate only on condition that the principle of proportionality in the broad sense, already referred to in § 4 above, is respected, namely: that a constitutionally founded justification occurs (and the protection of public health could certainly be), that the measure is suitable to meet such justification, that the measure is necessary and adequate for its purpose.

By the way, it ought to be noted, any measure of price chilling should not operate by imposing price caps, since in a situation of scarcity price caps reduce supply and create further inefficiencies. One may think, as an example, to the fixing of the price for masks at € 0,50 imposed by Italian Ministry of Health Domenico Arcuri (order n. 11/2020 of 26 April 2020).[82] Such a measure was intended, of course, to allow distribution of masks at lower prices. Instead, it lowered availability of masks within the Italian market because, among others, distributors were required to sell

[82] http://www.governo.it/sites/new.governo.it/files/CSCovid19_Ord_11-2020-txt.pdf.

masks at a price lower than the price they could purchase masks from producers.[83] Therefore, any measure aimed at lowering prices for consumers should *not* be limited to imposing fixed prices on firms but would require public powers to intervene in order either to directly supply goods (even at a price lower than costs, if necessary) or support resellers in order not to impose them losses on each sale.

Secondly, and this is the most relevant note, any public intervention would, in any way, presuppose the previous free and "correct" functioning of the price mechanism. In fact, how would it be possible for public authorities to know the need to intervene for the production of a given good, its provision at "political" prices *etc.*? Of course, it is unthinkable that government periodically issues questionnaires to all citizens asking what goods are no longer (or in any case less) available on the market. The verification times would be excessively long and unnecessarily expensive. More simply, government would realise that solidarity calls for its intervention by examining price variations: if the price of a given good increases, it means that the demand is increasing on an equal (or less than proportional) increase in supply. If the same price rises rapidly, it means that there is an urgent need to intervene.

Finally, the previous observations determine a fundamental consequence for the purposes of this article. Given that the objective of containing prices is systematically proposed as a derogation from the correct functioning of the market and requires express legislative intervention by the public authorities; and given that the need for such intervention becomes perceptible to the authority exactly by following the correct functioning of the price mechanism (whose functioning, therefore, is *necessary* in order to solicit public intervention); any fights against firms charging higher prices resulting from this correct functioning appears totally unjustified.

In short: public authorities can contain or even neutralize the increase in prices by several means of extraordinary regulation, but the legal system cannot provide for the imposition of sanctions against firms which only (rationally) adjusted supply conditions to a forward shift in the demand curve.

[83] It appears that even the Italian *Protezione Civile* purchases masks at unitary prices higher than € 0,50: https://www.infodata.ilsole24ore.com/2020/05/02/mascherine-50-centesimi-prezzi-calmierati-libero-mercato-anche-la-protezione-civile-le-paga-piu/.

7. THE ROOM FOR INTERVENTION: NO NEED, AND NO WISH, FOR "ENHANCED" ENFORCEMENT.

At the end of the above reasoning, I am not claiming that EU competition law does not have any room for sanctioning, under artt. 101(1) or 102 TFEU increases of prices which may be observed in times of crisis. I claim, instead, that enforcement of such rules should not be *enhanced* when compared to normal times insofar as, in these times of crisis, market conditions may justify under several points of view price increases. Said in other terms: competition law should be applied, even in these times of crisis, as it was applied before, without any "facilitation" in favour of the EU Commission.

This is why I hope that the EU Commission will remain *extremely reluctant* to pursue exploitative abuse cases, as suggested by Advocate General Wahl in the past, and will carry on them only against *truly* dominant firms. It is equally desirable that the EU Commission will not further relax its standards for finding a concerted practice between competitors in case of parallel price increase, with the aim of *adjusting* competition law rules to the (biased) goal of sanctioning price increases *as such*. I believe that current case-law on concerted practices already abandoned the boundaries of lawfulness dictated by EU law and drew an illegitimate discipline, insofar as it transformed the (once) rebuttable *Anic* presumption into a (substantially) conclusive presumption, which may be rebutted only by reporting the fact to the relevant competition authority or public distancing within the definition provided by the same ECJ.[84] There is no reasonable ground to proceed further on this path.

The scope of competition law should not change in times of crisis, as noted by the European Competition Network[85], the International Competition Network[86], the UNCTAD[87] and the EU Commission itself.[88] Adaptations may be required to ensure the supply and distribution of scarce products and services that protect the

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84 I explained this critical remarks in detail in Marchisio, E., *op. cit.*, note 7, pp. 559 ff..

85 European Competition Network, *op. cit.*, note 4.

86 International Competition Network (2020), *Statement*, 8 April 2020, in https://www.international-competitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf.

87 UNCTAD - UN Conference on Trade and Development, "The UNCTAD urges competition authorities to use all their tools to combat the adverse consequences of COVID-19 in the markets", 8 April 2020, e-Competitions Preview, Art. N° 94543.

88 European Commission (2020a), Communication 8 April 2020, *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*, C(2020) 3200 final, in https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf; European Commission (2020b), *Antitrust rules and coronavirus*, in https://ec.europa.eu/competition/antitrust/coronavirus.html.

health and safety of all consumers[89], e.g.: in order to guarantee appropriate supply and distribution of food, health equipments and similar first-need goods and services to the whole population.[90] In these narrow limits, relaxation of EU competition law is agreeable on; any aggravation thereof would be undesirable, instead.

Besides what just noted, a different case would be that where the advancement of the demand curve, at the macroeconomic level, is caused by dissemination of false or in unfair information. In this case, however, illegality would not derive from the price increase but from the deception that led to the unfounded shift in the demand curve[91] - which issue is disciplined by consumer protection legislation that is not examined here.[92]

8. BRIEF CONCLUSIVE REMARKS. UTOPIAN ALTERNATIVES, ETHIC CONCERNS AND PUBLIC FUNCTIONS.

The institutional choice to adopt a market regulation model in accordance with the principle of free competition is a consequence of the belief that the "market", which is a hypostasis of the autonomous behaviour of millions of autonomous economic operators, determines the best allocation of resources compared to any alternative form of discipline.

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89 International Competition Network, *op. cit.*, note 86; European Competition Network, *op. cit.*, note 4; EU Commission, *op. cit.*, note 88; EU Commission, *op. cit.*, note 88.

90 EU Commission, *op. cit.*, note 88; EU Commission, *op. cit.*, note 88.

91 This seems to be the case in the Italian AGCM procedure n. PS11723, suspending the marketing of an antiviral drug "*sold for more than 600 euros*" and "*the darkening of the site https://farmacocoronavirus.it*", in respect of which, however, the problem appears to be that "*the drug in question ... is advertised as the" only drug against Coronavirus (COVID-19) "and the" only remedy to fight Coronavirus (COVID-19) "even if, at present, as stated by the world health authorities, there is no effective cure to fight the virus*" (https://www.agcm.it/media/comunicati-stampa/2020/3/PS11723). Likewise, the CODACONS complaint to AGCM, Guardia di Finanza and Postal Police, made public in the press release of 13 March 2020, concerns, among others, "*an oxygenator advertised on a website as a" prevention kit "to combat Covid- 19, sold for a modest sum of 995.70 euros. A product presented in a deceptive way, because it would suggest that its use could avoid being infected by the virus*" (https://codacons.it/coronavirus-truffe-sul-web-codacons-segnala-speculazioni/).

92 In application of the same principle, one may note, making reference , e.g., to the Draft Common Frame of Reference for European private law, that price increases may be scrutinised in a very narrow set of hypotheses, under provisions of oppressive clauses only insofar as price clauses are not drawn up in a simple and understandable way (Study Group on a European Civil Code – Research Group on EC Private Law, *Principles, Definitions and Model Rules of European Private Law*, draft common frame of reference, Műnchen, Sellier, 2009, Sec. II, 9:406(2); see also *Comments* sub. Sec. II.-9:406, A: "*judicial control of the adequacy of the price is incompatibile with the needs of a market economy*"). On the other hand, a rich list of remedies is provided for the cases of incorrect information to the counterparty, willfulness, violence and threat (Study Group on a European Civil Code – Research Group on EC Private Law, *cit.*, Sec. II, 7:204-207) - thus, again, reporting the problem of the lawfulness of price settings to that of the correct formation of the agreement.

If one shares this premise, it appears contradictory and irrational to contrast its operation precisely when its ability to convey relevant information through price changes fully demonstrates its superiority over any alternative hypothesis of economic planning.

The problem with price increases in times of crisis seems to be, in this as in other cases, that of claiming non-existent alternatives, in order to pursue "ethical" intentions which are impractical in reality; so that it should be asked if it is really "ethical" to support actions that lead to worse outcomes than those intended to be countered, only because they are supported with reference to theoretic ethical principles.[93]

It is no coincidence that within the history of contract law any attempt to propose, or impose, a discipline to protect the "just price" invariably failed[94], since any such attempt amounted to a mere utopia.[95] Ethics should claim paths of action leading to the highest and most shared welfare reachable in real life; in this research we supported the view that such path of action (of course: in "general" market regulation and not in sectors subject to special regulation, as already observed above), capable of reaching the best "substantial value" available[96], consists in letting price mechanism work as "index of relative scarcity", which is an elemental condition to efficiency of the economic system as a whole.[97] This is even truer with respect to competition law, which is expressly aimed at pursuing market efficiency.

It is not uncommon, in times of crisis, to perceive price increases as unfair, believing that all consumers should be able to purchase all the products they need at a price corresponding to that previously practiced. The problem is that, in reality, all the products are not on the market, or are no longer there, and the previous price represented a condition of encounter between the previous demand and the previous offer. Price increase represents a consequence of the displacement of the

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93 One may refer, in this regard, to the rhetorical wish to move from the preference of the "useful" to that of the "just", which is found in Keynes, J.M., *Economic Possibilities for our Grandchildren*, in Id., *Essays in persuasion*, New York, Norton & Co., 1963, p. 370, certainly suggestive but unsuitable for rationally establishing a price discipline system. On the contrary, one may think of how much more *useful* pragmatism can be found in de Mandeville, B., *Fable of the Bees: or, Private Vices, Publick Benefits*, 1723, where he criticised the hypocrisy of the society of those times and indicated how collective well-being often follows from the individual pursuit of interests deemed instead not virtuous.

94 The remark is in Scalisi, V., *Giustizia contrattuale e rimedi: fondamento e limiti di un controverso principio*, in Navarretta, E. (ed.), *Il diritto europeo dei contratti fra parte generale e norme di settore*, Milano, Giuffrè, 2008, p. 257.

95 Vettori, G., *Autonomia privata e contratto giusto*, in *Riv. dir. priv.*, 2000, p. 24.

96 Koslowski, P., *op. cit.*, note 66, p. 217; Veca, S., *Sull'idea di giustizia procedurale*, in *Riv. filosof.*, 2001, p. 219.

97 Barnett, R., *A Consent Theory of Contract*, in *Colum. L. Rev.*, 1986, pp. 283 ff..

two curves. Preventing the price increase or threaten firms charging higher prices means worsening the outcome of the distribution of goods among buyers without any advantage - if not the advantage allowed to hoarders to be able to purchase all the stocks available on the market.[98]

Public authorities can do a lot to supply citizens with essential goods at affordable prices. But price adjustments in response to shocks cannot be considered illegal as such and general EU competition law rules should not be relaxed in order to widen the reach of competition authorities. If deemed necessary, public authorities should start a production of goods in a condition of scarcity or have the courage (and take responsibility) to expropriate the products on the market or even the means of production necessary to produce them; but it is unacceptable to sanction private firms by attributing them the wrong of not having substituted, at their own expense, for the exercise of a public function.[99]

Also because, as noted, if prices did not rise ... probably the public authorities would not notice the need for their intervention. And stocks would run out earlier, to the benefit of a small number of buyers, without having had the opportunity to intervene promptly with any support measures that may be necessary.

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[98] Regardless of the intentions, in fact, the decision on whether or not to adopt a regulatory choice should be made on the basis of the consequences that it is rational to expect to achieve from that choice. As noted by Milton Friedman in his aforementioned Nobel lecture of 13 December 1976: "*in order to recommend a course of action to achieve an objective, we must first know whether that course of action will in fact promote the objective. Positive scientific knowledge that enables us to predict the consequences of a possible course of action is clearly a prerequisite for the normative judgment whether that course of action is desirable. The Road to Hell is paved with good intentions, precisely because of the neglect of this rather obvious point*": Friedman, M., *op. cit.*, note 58, p. 268.

[99] On similar issues, in principle, see also: Minervini, G., *Contro la 'funzionalizzazione' dell'impresa privata*, in *Riv. dir. civ.*, I, 1958, p. 618; Oppo, G., *L'iniziativa economica privata*, in *Riv. dir. civ.*, I, 1988, p. 309.

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Review paper

COMPETITION LAW IN BOSNIA AND HERZEGOVINA - HOW READY WE ARE FOR THE CHALLENGES OF THE MODERN AGE?

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ABSTRACT

Bosnia and Herzegovina, having an extremely complex state system and at the same time being a developing country and economy in transition with a commitment to membership in the European Union, faces numerous challenges in adapting national legislation to the acquis communautaire. One of the key segments of the introduction of European standards is the establishment of an effective mechanism for the protection of competition in legislative and institutional terms. With the adoption of the Competition Law in 2005, which brings new solutions and is largely in line with the acquis, Bosnia and Herzegovina has made a significant step forward from the previous state of legal irregularity in this important segment. However, sixteen years of the enforcement of the BiH Competition Law have shown certain shortcomings regarding the particular solutions contained in it. These shortcomings concern the part of the provision of the law that regulates procedural issues, but also the functioning of the authority responsible for the protection of competition in Bosnia and Herzegovina and it can be assumed that these are obstructive elements in response to the challenges of COVID-19 pandemic. In order to follow the international trends, companies in BiH have entered into a process of business digitalization, which, however, being accelerated due to COVID-19 pandemic, has created many challenges before the Council of Competition of BiH as the authority responsible

for public enforcement of the competition law. The aim of this paper is to question the extent to which COVID-19 pandemic has affected the work of the Council of Competition BiH, as well as to address some of the particular issues it has faced before the pandemic, including growing market concentration, growing power of digital platforms, protectionism, consumer vulnerability and consequent loss of public confidence. In order to meet the set research goals, the first part of the paper will present an analysis of the legal solutions in the context of the legal and institutional aspect of competition protection and will provide an overview of the situation regarding the digitalization of business operations in Bosnia and Herzegovina. The second part of the paper will provide an analysis of the work of the Council of Competition of BiH with special reference to the period of declaring the pandemic COVID-19.

Keywords: *competition law, digitalization of the economy, Council of Competition*

1. INTRODUCTION

In the last few decades, economy has been affected by new digital devices and technologies such as the Internet, wireless broadband communication, and artificial intelligence by changing its classic determinants and turning it into digital. Digital economy based on digital market is recording a structural shift towards an economy characterized by information, intangible assets and services and parallel changes towards new work organizations and institutional forms of economic entities. Digital economy is based on a combination of communications, computing and information. It is based on new business models and new markets, industries. Digital economy is characterized by investments in intangible assets such as knowledge, creativity and innovation. Therefore, the following are important features of digital economy: digitalization and intensive use of information and communication technologies; codification of knowledge; converting information into goods; and new ways of organizing labor and production.[1] These characteristics of digital economy are reflected in the process of competition in market. Although there is a general view that digital markets result in consumer benefits in the form of lower prices, higher quality and transparency, there is a tendency of digital markets to concentrate.[2] Indeed, individual digital markets have procompetitive effects in the form of:

1. greater efficiency, in terms of linking supply and demand (e.g., Uber or Amazon);

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1 Kehal S.H.; Singh P.V., *Digital Economy: Impacts, Influences and Challenges*, Idea group publishing, 2005, p.3

2 Joint report by the FCA and the Bundeskartellamt, Competition law and data, 2016; Joint report by the FCA and the Competition and Market Authority, The economics of open and closed systems, 2014

2. greater transparency of prices and quality, which facilitates the process of consumer decision-making, lower barriers to market entry because new entrants to digital markets typically face lower fixed costs;
3. creation of two-way platforms that enable interaction of two or more user groups and that lead a large number of users to the platform, which due to network effects result in lower prices.[3]

Given the characteristics of digital markets and changes in competition conditions, the question arises whether the existing legal and analytical tools available to competition authorities are sufficient to address competition law cases in digital economy that have been identified as threats to consumer welfare. In order to find an answer to this question, some researches[4] have been conducted, the results of which suggest that digital economy has affected the basic categories of competition law and that in this light it is necessary to change the legal and analytical tools used by competition authorities. It is evident that the problem of inadequate legal-analytical instruments in resolving competition-legal cases is faced by the authorities for protection of market competition of developed and less developed countries, but it can be assumed that this problem is more pronounced in less developed countries and countries in transition. The results of the mentioned studies were a motivating factor for writing this paper, which aims to examine whether the Council of Competition, as the authority responsible for the enforcement of competition law in Bosnia and Herzegovina, faces challenges related to resolving competition law cases under the conditions of digital economy, which are supposed to be more pronounced due to the work in the circumstances of COVID-19 pandemic, whether it recognizes certain problems and how it sees their solution. The paper consists of a theoretical framework of the problem in which relevant facts are presented, including the process of digitalization of economy in BiH, and an analysis in which a comparative method will answer the question of how ready the Council of Competition is for the challenges of digital economy.

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3 Honoré P.; Verzeni R., *Competition law in the digital economy: a French perspective*, Antitrust & Public Policies, Vol 4, No 2, 2017, p. 86

4 Crémer, J.; de Montjoye Y-A.; Schweitzer, H., *Competition Policy for the digital era*, Final report. Luxembourg: Publications Office of the European Union, 2019, [https://www.bibsonomy.org/bibtex/2f87b8251c8f49b69fd7bddedec8a7a49/meneteqel], Accessed 15 March 2021
Van Gorp, N.; Batura, O., Economic and scientific policy: *Challenges for Competition Policy in a Digitalised Economy Study,* Directorate general for internal policies policy department, 2015, [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU(2015)542235_EN.pdf], Accessed 15 March 2021
World Economic Forum, *White paper: Competition Policy in a Globalized Digitalized Economy*, 2019, [http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf], Accessed 15 March 2021

2. DIGITIZATION OF ECONOMY AND CHALLENGES OF COMPETITION LAW

Competition law represents the totality of legal regulations that protect market competition in its trichotomous meaning. Provisions of competition law prohibit socially harmful behavior that restricts, prevents or distorts market competition that reduces positive effects on consumers, producers, the state and economic development of a community in general. The indicated socially harmful behaviors refer to certain business practices that economic entities demonstrate on traditional markets. However, digitalization of economy has imposed digitalization of business processes and spawned digital markets, thus creating the need to re-conceptualize the classical notion of market and consequently open a number of regulatory issues. One of the questions that has been raised and on which some studies[5] have been conducted is whether the existing regulatory framework and the legal instruments based on it are adequate to protect competition in digital market.[6] The issues occupy a significant place in the debates of highly developed countries and countries that have inherited a competitive legal culture for centuries, but the question should be raised about less developed countries which have gone through a transition period and do not have extensive experience in modern competition law. Do the competition authorities in these countries recognize the danger of inadequately resolving competition law cases with elements of digitization in the current regulatory environment? Are they ready for the challenges of resolving such cases? Is their challenge greater in the face of COVID-19 pandemic, which may have accelerated the processes of digitalization of their economies? Previous researches have not highlighted this angle of observation or singled out this target group. It is almost clear that COVID-19 pandemic accelerated the process of digitalization of business in this group of countries and thus opened a space for transactions through digital markets, which undoubtedly creates the preconditions that make "digital cases" appear before the competition authorities.

3. DIGITIZATION OF BUSINESS IN BIH - COVID-19 AS AN ACCELERATOR OF DIGITIZATION OR NOT?

Recent findings from a study by a group of authors (2019)[7] say that "most companies currently have little or no internal technological knowledge in the field of

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5 Akman P. *Online Platforms, Agency, and Competition Law: Mind the Gap*. Fordham Int'l LJ, Vol. 43, No 2, 2019. Crémer; de Montjoye; Schweitzer, *op. cit.*, note 4.

6 Imamović-Čizmić K., *Digital economy, new concepts of competition of economic entities and challenges to competition law and policy*, Yearbook of the Law Faculty of the University of Sarajevo, LXIII, 2020, p. 157

7 Burks J.; Šipragić M.; Bogunović S., *Information and communication technology – fuel for SME competitiveness*, *Deutsche* Gesellschaft für Internationale Zusammenarbeit (GIZ), Sarajevo, 2019, p. 40

ICT, digitalization and 4.0 industry". Research shows that, although aware of the importance of digital business transformation, many companies, even before COVID-19 pandemic burdened with everyday business problems, do not have a clear picture of what digitalization entails, nor how much investment in equipment and knowledge is needed to make the transformation happen. In our case, this means that, in order to maintain their competitiveness, our manufacturing companies should update their processes and introduce digital solutions. "The companies in B&H mostly produce homogeneous products that are easily substitutable. So far, they have been able to hold their own in international markets due to comparatively low prices and good to high product quality. The profound transformation due to digitalization will hit production companies, in particular, those not prepared for the digital transformation and sticking to traditional methods. Digital transformation optimizes processes, changes structures and organizations in companies."[8] Digital transformation encompasses many areas such as digital marketing, digitalization and automation of business processes, business models, sales channels, digital procurement, Big Data.[9] Of course, there are many other processes associated with multidimensional transformation of companies. According to David L. Rogers, digital transformation is based on five different areas, which include consumers, competition, value, innovation and data.[10] In short, digital transformation is in the function of using technology and data with the aim of creating new products and services, as well as placing them on domestic and international market. Practically, and according to the findings of the profession that follows the trend of digitalization in the field of production and consumption, digitalization opens the possibility for companies to develop new business models and new customer groups and existing markets through innovation. Digitalization creates new products that, for example, contain services and data.[11] However, the change in business conditions caused by the pandemic requires a rapid change of opinion and creation of new priorities in the business of each company. Although it has been previously considered that digitalization requires preparation time, significant investment in equipment and knowledge, at the beginning of the pandemic the situation took on an urgent character: it ceased to be just one of the future activities and became a test of business sustainability and company survival. Purposeful research of this kind shows that companies from Bosnia and Herzegovina, under the conditions of conducting business during the pandemic, see digital transformation as one of the most important and inevitable solutions in the new

8 *Ibid.*

9 Jashari E., *The impact of COVID-19 on digital transformation*, Digital transformation - a pillar of economic recovery, Kosovo Chamber of Commerce and Konrad Adenauer Foundation, 2020, p. 7

10 *Ibid.*

11 Burks; Šipragić; Bogunović, *op. cit.*, note 7, p. 41

conditions of their operations. Because, "digital transformation means transforming the mentality of companies so that the use of digital tools and skills adds value and creates a competitive advantage".[12] In this sense, "the company's individual digitalization strategy forms the basis for the company's digital transformation".[13]

International organizations are also involved in supporting the digitalization of companies in BiH, among which UNDP has been particularly engaged through its DigitalBIZ project. The DigitalBIZ project evaluates the digital performance and readiness of companies through the online tool "Digital Pulse".[14] The project envisages cooperation with business development service providers in order for these organizations to improve their service offer in the level of demanding and dynamic market relations of our time. In accordance with its vision and mission, being guided by the goal of raising awareness of the importance of digitalization, information and education of entrepreneurs on the importance of digitalization and its easier and faster application in practice, the Foreign Trade Chamber has organized two conferences[15], prepared the edition Digitalization of the BiH Economy, and held numerous trainings. In addition, the Foreign Trade Chamber, as an economic association, realizing the current importance of digitalization of business, launched a project with a nominally symptomatic, i.e. practically indicative name and a clear message - "Digital Chamber".[16] However, for the right application of digitalization in practice, it is necessary to understand the digitalization of business on the basis of identified shortcomings of the digital capacity of enterprises in Bosnia and Herzegovina. Ultimately, DigitalBIZ plans to imple-

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12 Jashari E, *op. cit.,* note 9

13 Burks; Šipragić; Bogunović, *op. cit*., note 7, p. 43

14 UNDP BiH in cooperation with the Luxembourg Chamber of Commerce, *About us*, [https://www.digitalnaekonomija.ba/bs-Latn-BA/about], Accessed 12 April 2021

15 Oslobođenje, *Digitalizacija društva je nasušna potreba,* [https://www.oslobodjenje.ba/vijesti/bih/digitalizacija-drustva-je-nasusna-potreba-418240], Accessed 31 March 2021. One of the speakers at the conferences was dr. Vjekoslav Vuković, Vice President of the Foreign Trade Chamber of BiH, who said: "Digitalization is greater transparency and greater transparency in business, i.e., the speed of information exchange, is greater competitiveness."

16 Foreign Trade Chamber of Bosnia and Herzegovina*, Digitalna komora, Vrata u budućnost*, [https://www.komorabih.ba/?s=digitalna+komora], Accessed 01 April 2021. "The Digital Chamber is conceptually conceived as an online ecosystem of a multifunctional character that enables the integration of all business-relevant data in Bosnia and Herzegovina, but also for BiH business entities on the international business scene. In this context, the digital chamber primarily enables users to participate in a digital, online environment, that combines data on all BiH producers, both management in the ownership and management context, and financial or business with all the essential features of product ranges, prices, deadlines, etc. In this light, the digital chamber integrates data in one place from several internal (the business entity and its business partners) and external sources (a whole range of data collection and publication agencies both at the macro level, i.e., the level of the economy, and at the micro business level or in relation to a specific business entity)."

ment support measures for the digitalization of micro, small and medium-sized enterprises, including training and mentoring, and to provide incentives for digital transformation of their business.[17]

In order for each company to determine the situation, opportunities and its own readiness to introduce digital transformation, The United Nations Development Program, within the DigitalBiz Project, has activated the Digital Pulse, an electronic service that provides companies in Bosnia and Herzegovina with the opportunity to self-assess their digital maturity according to predefined questions and criteria. Based on the responses given by companies to the structured questionnaire, Digital Pulse generates basic recommendations for digitization in six business areas of companies. The information obtained through this tool will be used for better planning of support to the activities of both domestic and international partners in the field of digital transformation of the private sector in Bosnia and Herzegovina.[18] The development of experts at the enterprise level, the qualification and retraining of available staff for the use of digital technologies are key practical steps for successful digital transformation of any company. The new way of doing business, caused by the pandemic, did not leave enough time for the necessary preparation and implementation of the digital transformation. Due to the limited movement of people and goods, without significant preparations, where preconditions for that were present, flexible work organizations were created: work in virtual groups, established way of crisis communication, formed crisis teams, etc., which resulted in increased competition and self-organization in accordance with its own responsibility. Of course, digital transformation implies significant financial investments in equipment and acquisition of specific knowledge in this area. Introduction of digitalization implies continuous work on improving the internal and external processes of each company. It could be expected, and particularly so under the conditions of the pandemic (which will obviously take time), digitalization should improve the innovative capacity of companies, which contributes to the development of new, innovative business models.[19] In that sense, digitalization is not treated as a mode of buying a new technological device, but quite the opposite: as a process of transformation and a good opportunity to reduce operating costs. Among other things, and as already mentioned, digitalization was used to prepare companies to be more competitive in domestic and foreign

[17] UNDP BiH, *op. cit.,* note 14

[18] BiH Chamber of Foreign Trade, *UNDP: Notification on activation of tools for assessment of digital performance of companies in Bosnia and Herzegovina (Digital Pulse)*, [https://www.komorabih.ba/undp-obavijest-o-aktiviranju-alata-za-procjenu-digitalnih-performansi-kompanija-u-bosni-i-hercegovini-digitalni-puls/], Accessed 25 March 2021

[19] *Ibid.* p. 58

markets.[20] Studies show that the main obstacles hindering the digitalization process of companies are the following: lack of digital skills of the workforce, lack of technical knowledge for further progress of the digitalization process and lack of or access to finance.[21] However, many have used the covid-crisis as a catalyst for a future-oriented recovery. At the same time, digital transformation means much more than full integration of digital technologies. In the socio-psychological sense, digital transformation implies a specific internal change – transformation – of the mentality of companies, so that, in the professional register, the use of digital tools and skills adds value and creates a competitive advantage.[22]

Finally, there is no doubt that COVID-19 pandemic has accelerated the process of digital transformation of companies[23], making them treat it not only as an additional possibility, but also as a realistic, inevitable solution to the problem of their own survival. Ergo: digitalization has grown into an innovative mode that, with the power of its internal logic, makes it faster, more successful and more competitive in domestic and foreign markets.

4. REGULATORY FRAMEWORK FOR COMPETITION PROTECTION IN BIH

Bosnia and Herzegovina, as a developing country with economy in transition with a small open market, introduces a modern regulatory framework for the protection of competition with the 2001 Law on Competition. Until 2001, competition law and policy did not exist at the state level[24], but only certain institutes of competition law and policy were regulated in isolation and unsystematically within only a few provisions of the entity Trade Laws. These first steps towards creating a modern regulatory framework for market competition are the result of foreign pressure expressed through the development of the project titled "Single Economic Space in BiH". However, the 2001 Law on Competition had a number of limitations: the constitutional division of competencies between the state and the entities, a low level of integration of Bosnia and Herzegovina's economic space, underdeveloped institutions, locating competition and consumer protection at the entity level in the same body - the Office for Competition and Consumer Protection, very scarce substantive-legal regulation of monopolistic activity, including

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20 Jashari E, *op. cit.,* note 9, p. 14

21 *Ibid.* p. 4

22 *Ibid.* p. 7

23 *Ibid.*

24 Imamović Čizmić K.; Sabljica S., *Legal and Politological Aspects of Competition in Bosnia and Herzegovina as a Paradigm of the European Integration Process*, European Integration Studies, No. 14, 2020, p. 6

a new institute - concentration control, and the complete absence of sanctions for anti-competitive acts. This law is considered a failed attempt to transfer the European Union competition rights to the system of Bosnia and Herzegovina.[25]

These restrictions have created the need for a new competition law that will be in line with the European Union competition law. Pursuant to Article IV, paragraph 4a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina at its session of the House of Peoples, held on June 29, 2005, and at the session of the House of Representatives, held on June 29, 2005, adopted the Law on Competition.[26] It was the first official legal act that followed the practice and solutions of the modern European legislation - the legal heritage of the European Union, adopted in order to fulfill obligations on the path to European integration. The Competition Law is largely compatible with the rules and regulations of the European Union in the field of market competition. The enforcement of the Law on Competition should result in greater efficiency and transparency in the procedure of protection of market competition in Bosnia and Herzegovina, in terms of simplification of procedures, shortening the duration of certain stages of the procedure, etc. The law regulates certain issues in principle and leaves room for the Council of Competition to define them more precisely. In view of this fact, the Council of Competition has adopted a number of bylaws that follow the decisions of the European Union and are in line with the acquis communautaire.[27]

The main goal of the Law on Competition is to protect market competition in Bosnia and Herzegovina, strengthen and establish a single market at the state level, which should ultimately result in increased consumer welfare in the BiH market. The Law contains 62 articles, systematized in four chapters, which prescribe the rules, measures and procedure for the protection of market competition and com-

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25 Trifković M., *Defining monopolistic agreements of laws in Bosnia and Herzegovina and European Union*, Pregled - Journal for Social Issues, Vol. 4, LXXXVI, 2006, p. 63

26 Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

27 Regulation on the procedure of release or mitigation of punishment (leniency policy); Regulation on the manner of submitting the application and criteria for assessing concentrations of economic entities; Regulation on small value agreements; Regulation on amendments to the Decision on small value agreements; Regulation on determining the relevant market; Regulation on block exemption of agreements between economic entities operating at the same level of production or distribution (horizontal agreements), which specifically relate to research, development and specialization; Regulation on the block exemption of technology transfer agreements, licenses and know-how; Regulation on block exemption of insurance agreement; Regulation on defining the categories of dominant position; Regulation on block exemption of agreements between economic entities operating at different levels of production or distribution (vertical agreements); Regulation on block exemption of agreements on distribution and servicing of motor vehicles. Available at: Council of Competition, *Bylaws*, [http://bihkonk.gov.ba/en/category/legislation/bylaws, Accessed: 21 June 2021

petencies and the manner of work of the Council of Competition on the protection and promotion of market competition in Bosnia and Herzegovina. Although the adoption of the Competition Law has made a significant step forward in relation to the state of complete irregularity, it has certain shortcomings, primarily in the provisions of the procedural type, namely those governing the formation and decision-making of the Council of Competition. It is hoped that they will be eliminated by adopting amendments to the law for which the Working Group of the Council of Competition was formed in August 2020.

5. COUNCIL OF COMPETITION - WORK UNDER THE CONDITIONS OF COVID-19 AND THE CHALLENGES OF THE DIGITAL AGE

The Council of Competition, as an autonomous and independent body with the status of a legal entity, is responsible for the implementation of the competition law in terms of exclusive authority in deciding on the existence of anti-competitive behavior on the market of Bosnia and Herzegovina.[28] The Competition Council includes the Competition Offices in the Federation of Bosnia and Herzegovina and Republika Srpska, as organizational units outside the seat of the Competition Council in Sarajevo. Since the establishment of the Council of Competition until today, the enforcement of the competition law has more precisely defined its competencies in performing administrative and professional tasks related to various aspects of protection of market competition and the manner of conducting the procedure.[29] However, there are still certain solutions in the law that negatively affect the efficiency of the work of the Council of Competition.

The financing model of the Competition Council is determined by the Law on Competition in such a way that the funds for the implementation of competencies and performance of the activities of the Council of Competition are provided from the Budget of the institutions of Bosnia and Herzegovina.[30]

Article 22 of the Law on Competition[31] determines the composition of the Council of Competition, which consists of six members. Such legal solution, in terms of the number of members, is unusual and complicates the decision-making process of the body itself. Members are elected from among recognized experts in the relevant field, have a status equal to administrative judges that is incompatible with

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28 Council of Competition of Bosnia and Herzegovina, *Competencies and organization*, [http://bihkonk.gov.ba/nadleznosti-i-organizacija], Accessed 10 April 2021

29 *Ibid.*

30 *Ibid.*

31 Official Gazette of BiH No. 48/05, 76/07 and 80/09

the performance of any direct or indirect, permanent or periodical function, with the exception of academic activities and work in professional and scientific bodies for a term of six years with the possibility of re-election.[32]

The complexity of the constitutional and legal system, which implies the existence of political determinism in Bosnia and Herzegovina, is reflected both in the election of members of the Council of Competition and in the decision-making process in competition law cases.

According to the mentioned article of the Competition Law[33], the appointment of the members of the Council of Competition is carried out as follows:

a) Three members are appointed by the Council of Ministers of Bosnia and Herzegovina, one from each of the three constituent peoples;
b) Two members are appointed by the Government of the Federation of Bosnia and Herzegovina;
c) One member is appointed by the Government of Republika Srpska.

The Council of Ministers of Bosnia and Herzegovina, at the proposal of the Council of Competition, appoints each year a president from among the members of the council for a period of one year, without the right to re-election during the term of office of a member of the Council of Competition.[34]

According to Article 24 of the Competition Law, the Council of Competition may make valid decisions if at least five members of the council are present at the session, and decisions are made by a majority vote of the members present, provided that at least one member from the constituent peoples votes for each decision.[35]

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32 Article 22 (2) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

33 Article 22 (3) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

34 Council of Competition, *op. cit.,* note 28

35 The Constitutional Court of Bosnia and Herzegovina in plenary session, in case number U 25/14, resolving the request of Željko Komšić, at the time of submitting the request of the member of the Presidency of Bosnia and Herzegovina, pursuant to Article VI.3. a) of the Constitution of Bosnia and Herzegovina, Article 57 para. (2) indent b) and Article 59 para. (1) and (3) Rules of the Constitutional Court of Bosnia and Herzegovina - Consolidated text, Official Gazette of Bosnia and Herzegovina No. 94/14, at its session held on July 9, 2015, issued a Decision on admissibility and merits according to which it refused Željko Komšić's request for review of the constitutionality of Article 22, paragraph (3), item a) and Article 24, paragraph (2) of the Law on Competition, Official Gazette of Bosnia and Herzegovina No. 48/05, 76/07 and 80/09. The Court found that Article 22 paragraph (3) item a) and Article 24 paragraph (2) of the Law on Competition, Official Gazette of Bosnia and Herzegovina No. 48/05, 76/07 and 80/09, were in accordance with with Article II/4 of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

A member of the council may not abstain from voting.[36] The obligation that "at least one representative of each constituent peoples" must vote for the decision is a major anomaly because in practice there may be a situation that no decision can be made in a particular case, which is considered to have given tacit consent to the applicant e.g. to the company that filed a request to determine that it was not abusing its dominant position. Namely, according to Article 11 paragraph (2) of the Law on Competition, if the Council of Competition has not issued a decision within the period referred to in Article 41 paragraph (1) item c), it is considered that the concluded agreement or conduct of the business entity does not abuse the dominant position.[37] This can have unforeseeable consequences for competition on the BiH market because if two members of the two constituent peoples vote "for" and two members of the third constituent people vote "against", the decision cannot be made, which can be treated as a veto.[38] The specificity of the Competition Act also refers to Article 41, which regulates the duration of the procedure. The procedure for determining the violation of rights should not be limited in time, although it is prescribed by law when it comes to prohibited agreements, determining certain exemptions, abuse of a dominant position and determining the assessment of concentration.[39]

The competence of the Council of Competition is determined by Article 25 of the Law[40] in such a way that the Council of Competition:

a) issue regulations pursuant to the provisions of the Competition Law and other regulations for its enforcement;
b) prescribe definitions and calculation methods for specific activities i.e. banking, insurance, etc.;
c) prescribe and provide interpretation of general and specific definitions of the competition terms, as well as calculation methods for the key competition terms;
d) decide on claims for the initiation of proceedings and conduct the proceedings;
e) issue administrative acts to finalize a proceeding before the Competition Council;

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36 Article 24 (2) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

37 The Report on the work of the Council of Competition for 2018 just states that one decision on the concentration was not made because the conditions from Article 24 of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09, were not met.

38 Imamović Čizmić K.; Sabljica S., *op. cit.*, note 24, p. 9

39 *Ibid*. p. 6

40 Official Gazette of BiH No. 48/05, 76/07 and 80/09

f) provide opinions and recommendations on any aspect of competition, either *ex officio* or at the request of the state authorities, undertakings or associations;

g) issue internal acts on the internal organization of the Competition Council, except for the Rule-book on the internal organization and systematization which shall be issued with the approval of the Council of Ministers of Bosnia and Herzegovina;

h) initiate amendments to the Law on Competition;

i) propose to the Council of Ministers of Bosnia and Herzegovina the Decision on the amount of administrative taxes relating to the procedural actions before the Competition Council.

The Council of Competition reports on its work to the Council of Ministers of Bosnia and Herzegovina, which, after its adoption, publishes the Report in public.[41] In proceedings before the Council, unless otherwise prescribed by law, the Law on Administrative Procedure shall apply.[42] The Council of Competition shall initiate proceedings *ex officio*, if there is a reasonable suspicion that market competition is significantly prevented, restricted and distorted, or upon the request of a party.[43] A request to initiate proceedings, in accordance with the provisions of the law, may be submitted by: a) any legal or natural person having a legal or economic interest; b) chambers of commerce, associations of employers and entrepreneurs; c) consumer associations; d) executive authorities in Bosnia and Herzegovina.[44]

The law therefore regulated the procedure before the Council. Thus, in procedural terms, the procedure is initiated on the basis of the Council's Conclusion to initiate the procedure *ex officio* or after receiving the request, after which the Council appoints a responsible member who manages the procedure and appoints an official in charge of conducting the procedure.[45] In the investigation procedure, the law gave certain powers to the Council and provided for the obligation for parties and other legal and natural persons to provide all the required information in the form of written motions or oral statements and submit necessary data and documents for inspection, regardless of the type of the media.[46] Also, according to the law, the parties must enable direct access to all business premises, movable and im-

41 Article 25 (5) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

42 Official Gazette of BiH, No. 29/02

43 Article 27 (1) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

44 Article 27 (2) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

45 Article 34 (1) of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

46 Article 35 of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

movable property, business books, databases and other documents, and in doing so they shall not be prevented by any business, state or technical secret.[47] The parties are obliged to submit the necessary information and notifications about other persons that may contribute to solving and explaining certain issues on prevention, limitation or distortion of competition and enable other necessary actions with the aim of establishing all the relevant facts in the proceedings.[48] During the proceedings, the Council is obliged to provide access to the file, keep business secrets and conduct an oral hearing in cases when the proceedings were initiated at the request of the parties.[49] This obligation is a reflection of the promotion of the principles of transparency but also the protection of data confidentiality, which also contributes to legal security. Also, the Council may issue a decision on an interim measure, based on a preliminary violation, if it considers that certain actions prevent, restrict or distort market competition, threaten the emergence of direct harmful effects for certain economic entities, or certain branches of economy or consumer interests.[50] The duration of the proceedings before the Council is limited by the statutory time limit depending on the very nature of the case.[51] The Council may not issue a final decision, in cases where it deems that additional expertise or analysis is necessary to establish the facts and assess the evidence, or in the case of sensitive industries or markets.[52] Then the deadline for making a final decision can be extended up to three months, whereby it is obligatory to inform the parties on the decision in writing.[53] After the completion of the procedure, the responsible member of the Council submits a report on the conducted procedure with a proposal for a decision, and at the session a final decision is made whether there is a violation of the law. The dissatisfied party in the procedure may initiate an administrative dispute before the Court of Bosnia and Herzegovina within 30 days from the receipt of the decision, i.e., from the day of publication of the decision.[54]

Competition law cases are related to certain behaviors of economic entities in an economic process, in a particular market. In theory, the correlation between the level of economic development, the available budget and the efficiency of public enforcement of competition law has been proven. With this in mind, it is neces-

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47 *Ibid.*

48 *Ibid.*

49 Article 37 of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

50 Article 40 of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

51 Article 41 of the Law on Competition, Official Gazette of BiH No. 48/05, 76/07 and 80/09

52 *Ibid.*

53 *Ibid.*

54 Imamović-Čizmić K, *The modalities of legal regulation of market competition and their use in the economy of B&H*, Faculty of Law, University of Sarajevo, 2012, doctoral dissertation, pp. 309-313

sary to point out that BiH is a small, open economy whose GDP in 2020, according to the World Bank, amounted to 20,164.19 million US dollars and GDP per capita 6,108.5 US dollars.[55] Analyzing the work of the Council on individual cases for the reference period 2016-2020, it can be concluded that most cases were in the area of concentration of economic entities and that there is no change in the trend of resolving cases related to prohibited agreements and abuse of dominant position. If the work of the Council of Competition is compared with the work of the competition authorities of Serbia, Montenegro, North Macedonia, Croatia and Slovenia (Table 2 - Table 6)[56] then it can be stated that the trends in resolving individual cases are almost the same, indicating three important facts:

1. all the above-mentioned states had the same competition law heritage from the period when they were part of the Socialist Federal Republic of Yugoslavia (SFRY),
2. all these countries do not have the same degree and trend of growth, i.e., economic development or the size of national markets after the dissolution of the SFRY,
3. Slovenia and Croatia are members of the European Union and therefore their competition authorities apply the Union rules in accordance with Council Regulation (EC) no. 1/2003. on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

Table 1: Number of decisions of the Council of Competition on individual cases in BiH[57]

Case	2016	2017	2018	2019	2020
Concentrations	11	12	24	12	12
Prohibited agreements	6 [58]	5	4[59]	-	1[60]
Abuse of a dominant position	6[61]	1	2	1	3[62]

[55] World bank, *GDP per capita*, [https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?view=chart], Accessed on, 01 April 2021

[56] The methodology of compiling the work report differs in the countries, which was a limiting factor in the presentation of statistical data. The annual reports of the Kosovo Council of Competition cannot be accessed through the website

[57] Reports on the work of the Council of Competition of Bosnia and Herzegovina, [http://bihkonk.gov.ba/], Acceseed 21 March 2021

[58] The Report provides a summary of resolved cases for both types of prohibited conduct

[59] Two decisions were made to suspend the proceedings

[60] One request to establish a prohibited agreement has been suspended

[61] The Report provides a summary of resolved cases for both types of prohibited conduct

[62] Three requests for determining the abuse of a dominant position were left, and one request related to both prohibited competitive actions was also suspended

Table 2: Number of decisions issued by the Croatian Competition Agency in individual cases in the Republic of Croatia[63]

Case	2016[64]	2017	2018[65]	2019	2020[66]
Concentrations	16	14[67]		34	
Prohibited agreements	5	3	10	25	
Abuse of a dominant position	2(33)[68]	2	-	22	

Table 3: Number of adopted decisions of the Agency for Protection of Competition of Montenegro by individual cases in the Republic of Montenegro[69]

Case	2016	2017	2018	2019[70]	2020[71]
Concentrations	23[72]	27[73]	40[74]		
Prohibited agreements	3	4[75]	1		
Abuse of a dominant position	2	1[76]	-[77]		

63 Reports on the work of the Croatian Competition Agency, [http://www.aztn.hr/godisnja-izvjesca/], Accessed 22 March 2021

64 The Annual Report on the Work of the Croatian Competition Agency states the total number of administrative cases resolved in 2016 - 56. The numbers per resolved cases are not completely stated.

65 The Report states that the work of the Croatian Competition Agency was interrupted in the period from November 15, 2018 to January 25, 2019. Namely, on November 15, 2018, the mandate of three members of the Council expired, and the Croatian Parliament appointed new members on January 25, 2019

66 The Annual Report of the Croatian Competition Agency for 2020 is not available, [http://www.aztn.hr/godisnja-izvjesca/], Accessed 22 March 2021

67 The exact number is not stated in the Annual Report on the number of resolved cases

68 In 33 cases, after a detailed examination of the situation on the relevant market, the Agency rejected the applicant's initiatives by a decision because there were no conditions for initiating proceedings in the sense of the Competition Act

69 Reports on the work of the Agency for Protection of Competition of Montenegro, [http://www.azzk.me/jml/index.php/ostala-dokumenta/izvjestaji/izvjestaji-o-radu], Accessed 22 March 2021

70 The 2019 Work Report is not available on the website [http://www.azzk.me/jml/index.php/ostala-dokumenta/izvjestaji/izvjestaji-o-radu], Accessed 22 March 2021

71 The 2020 Work Report is not available on the website [http://www.azzk.me/jml/index.php/ostala-dokumenta/izvjestaji/izvjestaji-o-radu], Accessed 22 March 2021

72 The number indicates the decisions made based on the 2016 request. The total number of resolved cases in 2016 was 29, counting the transferred requests from 2015

73 The number indicates the decisions made based on the 2017 request. The total number of resolved cases in 2017 was 48, counting the transferred requests from 2016

74 The number indicates the decisions made based on the request from 2018. The total number of resolved cases in 2018 is 38, counting the transferred requests from 2017

75 Two decisions were made on the request for individual exemption of the agreement from the ban

76 The work report contains information on further actions in cases in which the Agency's Decisions were previously issued

77 The Report on Work for 2018 lists further actions in cases for which a decision was made in 2017

Table 4: Number of adopted decisions of the Commission for Protection of Competition in individual cases in the Republic of Serbia[78] [7980818283]

Case	2016	2017	2018	2019	2020[79]
Concentrations	111	148	166	197	
Prohibited agreements	5[80]	5[81]	5[82]	3[83]	
Abuse of a dominant position	3	3	2	7	

Table 5: Number of decisions issued by the Slovenian Competition Protection Agency in individual cases in the Republic of Slovenia[84]

Case	2016	2017[85]	2018[86]	2019[87]	2020[88]
Concentrations	34	26	41	32	
Prohibited agreements	1[89]	2	1	2	
Abuse of a dominant position	-	1	1	-	

78 Reports on the work of the Commission for Protection of Competition of the Republic of Serbia, [http://www.kzk.gov.rs/izvestaji], Accessed 22 March 2021

79 The Report on the work of the Commission for Protection of Competition is not available

80 21 decisions were made in the procedure for individual exemption of restrictive agreements from the ban

81 30 decisions were made in the procedure for individual exemption of restrictive agreements from the ban

82 22 decisions were made in the procedure for individual exemption of restrictive agreements from the ban

83 28 decisions were made in the procedure for individual exemption of restrictive agreements

84 Reports on the work of the Slovenian Competition Protection Agency, [http://www.varstvo-konkurence.si/en/activities-of-the-agency/reports-and-activities/], Accessed 22 March 2021

85 The Agency made two more decisions on the termination of the procedure, one from the domain of abuse of dominant position, and the other from concentration

86 A decision was also made to terminate the proceedings in the area of restrictive practices. In a separate procedural misdemeanor procedure, two misdemeanor decisions were made against the offenders of the legal entity and the responsible person in the field of competition protection

87 Two decisions were also made to suspend the proceedings, in the field of concentration assessment. In a separate procedural misdemeanor procedure, three misdemeanor decisions were issued against infringers of legal entities and responsible persons in the field of competition protection

88 The Report on the work of the Slovenian Competition Protection Agency is not available on the website [http://www.varstvo-konkurence.si/en/activities-of-the-agency/reports-and-activities/], Accessed 22 March 2021

89 Two decisions on suspension of the procedure were made

Table 6: Number of decisions of the Commission for Protection of Competition by individual cases in the Republic of North Macedonia[90]

Case	2016	2017	2018	2019[91]	2020[92]
Concentrations	31	50	61		
Prohibited agreements	3	6	4		
Abuse of a dominant position	2	1	2		

5.1. Comparative presentation of the perception of the work of the competition authorities for protection of market competition in the conditions of digital economy

The research was conducted in March 2021. In order to reach the set goal, i.e. to examine the perception and work of the Council of Competition using a comparative method, a survey was sent to the competition authorities for protection of competition in Serbia, Montenegro, North Macedonia, Kosovo, Croatia, Slovenia and Bosnia and Herzegovina. The reason why the mentioned countries were chosen is situated in the previously mentioned facts: the same legacy of competition, different level of economic development and growth rate after the dissolution of the SFRY and the fact that two of them are members of the EU. The survey contained 22 questions with a Likert scale of answers and was designed to examine experiences in working on competition law cases related to digital platforms, and to provide a perception of people working on these cases in terms of the adequacy of existing tools and improvements in the functioning of their bodies. The survey was completed by a total of 6 respondents, 4 of which were from BiH and 2 from Serbia, which is not a relevant sample for the research because it is estimated that in the competition authorities of these countries more than 100 employees work on solving the cases.

6. INSTEAD OF CONCLUSION

COVID-19 pandemic has certainly affected all spheres of social life, from education and culture to economy. It has influenced the change of the economic process itself, which we are witnessing ourselves as we are increasingly buying via the

[90] Reports on the work of the Commission for Protection of Competition, [http://kzk.gov.mk/category/godishni-izveshtai/], Accessed 22 March 2021

[91] The Report on the work of the Commission for Protection of Competition is not available on the web site [http://kzk.gov.mk/category/godishni-izveshtai/], Accessed 22 March 2021

[92] The Report on the work of the Commission for Protection of Competition is not available on the web site [http://kzk.gov.mk/category/godishni-izveshtai/], Accessed 22 March 2021

Internet and digital platforms. In order to create a picture regarding the degree of digitalization of business in BiH, part of the research is focused on assessing the importance of digitalization and knowledge of business determinants in terms of digitalization by companies in BiH using data from projects of the Foreign Trade Chamber of BiH and UNDP BiH. Studies show that the main obstacles hindering the digitalization process of companies are the following: lack of digital skills of the workforce, lack of technical knowledge for further progress of the digitalization process and lack of or access to finance. On the other hand, many have used COVID-19 crisis as a catalyst for a future-oriented recovery. The aim of the paper was to examine, through a comparative and analytical method using the SPSS program, how the pandemic affected the work of the Council of Competition as the authority responsible for the enforcement of competition law in BiH. In order to achieve this goal, a survey was sent to the competition authorities of Bosnia and Herzegovina, Serbia, North Macedonia, Kosovo, Croatia, Montenegro and Slovenia. Six respondents responded to the survey, four from BiH and two from Serbia, which is not a reference sample. However, the question of the cause of such a weak response may be raised. One of the answers may be the fact that during COVID-19 pandemic, the working conditions in these selected competition authorities were changed and that their employees due to the volume of work did not have time to fill in the survey for which the required time is 20 minutes. Another reason may be that the scope of work and activities is such that in the targeted competition authorities for the protection of market competition, the contribution to scientific research is not on the list of priorities. From the answers that arrived, it is clear that the need to change the organization and work of competition authorities in order to better address the resolution of competition issues in terms of market and economy digitalization.

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Review Paper

BLOCKCHAIN MARKET: REGULATORY CONCERNS ARISING FROM THE 'DIEM' EXAMPLE IN THE FIELD OF FREE COMPETITION[1]

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ABSTRACT

The purpose of this paper is to shed light on competition law issues arising from the extensive use of the blockchain technology. By using the example of the Diem, which has also aroused the interest of the European regulators, the author will try to illustrate the issues that the competent competition authorities will immediately have to deal with. These preliminary questions relate mainly to the re-definition of the concept of an 'undertaking' under the new circumstances and the attempt to define the relevant market on the basis of the existing theories. Indeed, legal scientists and economists have succeeded in highlighting the predominant theories for defining the relevant market in the blockchain environment. This study aims to support this vivid theoretical dialogue by suggesting an holistic theory which compromises all those previously expressed elements. In conclusion, this paper intends to investigate whether these new circumstances are endangering the very existence of competition law itself. The latter, in order to continue to fulfil its aim effectively, is probably very close to radical reforms, even in its most fundamental pillars.

Keywords: *Antitrust, Blockchain, Competition Law, Cryptocurrencies, Diem, Libra, Facebook, Relevant Market*

1. INTRODUCTION

Not too long after Facebook announced the introduction of the brand-new cryptocurrency 'Libra', the European institutions realized it was high time for regulatory intervention. As usual, competition law issues came to the forefront and the

[1] The paper has already been presented in the framework of the International (Online) Jean Monnet Module Conference on EU and Comparative Competition Law Issues in May 13, 2021.

competent authorities started to reconsider the possibility of regulating. More precisely, what previously was considered as precautious and far-fetched regulation suddenly turned into a matter of actual so-called 'urgent regulation'. In December 2020, the Libra Association was renamed Diem Association as an effort to prove the 'institutional independence' of the company and answer the regulatory concerns of the European Commission. Nonetheless, the road towards regulation was left wide open and all concerned European institutions were pretty convinced that changes and legislative production were admittedly inevitable.

However, before even attempting to urgently regulate the market, it is essential that both the regulatory authorities and competition lawyers understood the very special characteristics of this leading edge of technology and the way that the market of blockchains and cryptos is actually structured. Through the whole process of understanding, one could be able to navigate beyond the various types of cryptocurrencies and realize which is the role that Diem came to play into this market. Without the appropriate understanding of the technology, it is really difficult to decide if the whole structure would result in being rather problematic in respect to competition law. The bare fact that there is a possibility of straight opposition to the rational of consumers' welfare, if the playing field did not provide for the necessary rules for such an initiative, should not be taken for granted without any further examination. To this end, many experts tried to offer potential analyses and feedback in order to facilitate the corresponding activities of the responsible authorities and the courts. Yet, this rhetoric remains without essential sense, if ever not used and applied practically.

First of all, the main aim of this contribution is to elaborate on those fundamental elements that the interpreter should take into account in order to effectively apply antitrust legislation on blockchains. In particular, it aims to enhance the existing literature by adding and underlining those most crucial questions regarding the 'definition of the relevant market' for blockchains as well as the notion of the 'firm' itself. Absolute overregulation and application of traditional rules without a whole understanding of the issues would result in the suppression of a highly innovative technology. It is natural that one cannot reject the notion of the technology itself due to the inefficiencies and inadequacies of the present legal system and the lack of information.

Secondly, prompted by recent example, this paper will analyse Facebook's business plan behind Diem. It will highlight that blockchain technology can actually be useful in protecting consumer data, as well. The encrypted form of blockchains could be extensively used to authenticate users through online platforms instead of the use of the Facebook account. The latter requires much more data and is arguably more unsafe.

As a final remark, the author shall conclude to a brief opinion on the relation between antitrust and blockchain and answer to the theories that would not stop emphasizing that probably the existence of blockchain would mean the death of antitrust. To this substantial question, the necessity of regulatory intervention to the aim of further protection of antitrust principles and market conditions as a whole is stressed.

2. OVERVIEW OF THE BLOCKCHAIN STRUCTURE

2.1. The Blockchain mechanism in general

The main feature of the blockchain technology is its decentralized nature (namely without a central repository), which ensures the maximum possible data security for users (*distributed ledger technology*). In particular, the complete absence of intermediaries and the cryptographic method favorize the anonymity and safety of transactions[2]. As a result, this mechanism is basically based on the building of trust among users. This is exactly the heart and flesh of this new technology and where its novelty lies on the whole.

Practically speaking, blockchain as it is mostly being used today, is nothing more than an advancing list of encrypted records, namely the blocks (data packages), which store multiple transactions[3]. The overall structure of the most common blockchains is based on the existence and interaction of three actors: the creators of the software, the miners[4] and the users of the blockchain.

Existing blockchain mechanisms are divided into public (usually 'permissionless') and private (usually 'permissioned'[5]). On the one hand, the public blockchain is accessible to all, more transparent and fully decentralized, in the sense that there is no distinct entity to exercise substantial control. It is called 'permissionless' in the sense that anyone with an Internet connection can freely access them, obtain an account and conclude contracts without needing a special permission by an authority.[6] As permissionless blockchains are broadly accessible, there are people that will try to publish blocks in a way to distort the functioning of the system. For the prevention of these behaviors, blockchain networks often use a special

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2 Nofer N., Gomber P., Hinz Ol., Schiereck D., Blockchain, Business and Information Systems Engineering, Vol. 59, No. 3, 2017, pp. 183.

3 Nofer et al, *ibid*.

4 In some blockchain ecosystems, miners do not exist at all.

5 The term 'usually' is used because private blockchains are typically permissioned, but they can also be organised differently. *See supra note 2*.

6 Yaga D., Mell P., Roby N. and Scarfone K., Blockchain technology overview, 2018, pp. 5 [https://arxiv.org/ftp/arxiv/papers/1906/1906.11078.pdf] Accessed 30.06.2021.

multilateral 'consensus mechanism' which demands a certain process on behalf of the operators of the blockchain so that the blocks are finally published.[7] In this context, each user can keep a copy of the blockchain on their personal computer and ensure access and ability to trade within the platform through the providing of two personal keys, one public and one private. The transactions executed are added as data units at the end of an infinite transaction chain in encrypted form. By approving the transaction and creating the block, it becomes immutable.

The phenomenon, according which transactions are visible to an infinite number of people is called 'visibility effect' and constitutes the basic trait of public blockchains.[8] What is never revealed is the purpose and the subjects of the transaction ('opacity effect') and that is mainly the reason why blockchain is the most preferable means of transaction for prohibited activities. Before entering, each user should accept the blockchain protocol, which is mainly the rules governing the blockchain and cannot be changed unless all users commit to that.

In contrast, access to the permissioned (private) blockchain cannot be authorized unless someone is invited by a certain authority (the network administrators). They are based on a different policy and the transactions are not visible to everyone. Changes into the consensus mechanism can take place if the creators and the network administrators vote accordingly. In the permissioned ecosystems, the relations among the members of the blockchain tend to be based in mutual trust, as each user is authorized to publish blocks and since this authorization can be revoked in cases of misconduct.[9] Private blockchains are more likely to cause more problems of an anticompetitive nature than permissionless blockchains, as the control over the permissioned blockchain is more evident and intense. In this framework, the users work together to achieve the business goal and maintain stability into the blockchain system. However, this does not exclude in any case the possibility of anticompetitive conduct into the system of a permissionless blockchain, as well.[10]

2.2. The structure of Diem

Recently Facebook introduced a new cryptocurrency, Diem, to enhance its existing portfolio of information and to provide significant economic data. Diem will

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7 *Ibid*.

8 However visible to everyone does not necessarily mean 'permissionless': the number of users allowing to write into the blockchain each time can still be limited (or just one person), meaning it would be permissioned.

9 Yaga D. et al, *ibid*, 6.

10 Indeed, this would result in an actual more severe problem for the Competition authorities.

be able to be 'stored' in the wallet run by a company called Novi (formerly Calibra), in which Facebook participates as the main stakeholder and wallet possessor.

Diem belongs to the stablecoins and is based on a permissioned and private blockchain. That was exactly what drew the European Commission's attention in 2019,[11] because in contrast to all the other cryptocurrencies of the market which operate on the basis of a permissionless system,[12] Diem will initially have an entry control phase.[13] In the business plan of the initial company, it was clearly stated that after an undefined period of time, Diem will switch into a permissionless system.[14] The undefined element leaves adequate space for doubts on behalf of the responsible institutions both in the European Union and in the US.[15]

In addition, a permissioned blockchain cannot be as decentralized as the permissionless ones. As the validators belong to a certain closed association which governs the whole system cannot help but be fairly centralized.[16] This seems more similar to a corporate database than a cryptocurrency, such as Bitcoin, which is mainly in opposition to the main idea of distributed ledger technology.

3. REGULATORY CONCERNS

There is a strong debate on the application of the traditional dogmas of competition law in modern digital markets. In the case of blockchain technology (especially cryptocurrencies), the situation is made far more difficult and challenges arise given their decentralized and horizontal nature. In these markets, the roles of its classical players change and move away from the classic rules and theories, generally applied to centralized platforms. As a classical example, the collusive behavior among players can be stressed. The latter -unlike to all other situations- is to be considered as a necessary condition to the maximization of the value of the cryptocurrencies. For example, the Diem protocol seems to favorize such collusive

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11 Beyoud and White, *Facebook's Libra Currency gets European Union Antitrust Scrutiny*, 2019, [https://www.bloomberg.com/news/articles/2019-08-20/facebook-s-libra-currency-gets-european-union-antitrust-scrutiny] Accessed 08.02.2021.

12 The most prominent example being Bitcoin.

13 *See GKToday* [https://www.gktoday.in/current-affairs/what-is-diem/] Accessed 08.02.2021.

14 Schrepel T., *Libra: A Concentrate of Blockchain Antitrust*, Michigan Law review Online, Vol. 118, 2020, pp. 163; Diem White Paper [https://www.diem.com/en-us/wp-content/uploads/2019/06/LibraWhitePaper_en_US.pdf] Accessed 07.02.2021.

15 NYS Attorney General, *Attorney General James Gives Update on Facebook Antitrust Investigation*, 2019 [https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation] Accessed 08.02.2021.

16 *See* BinanceAcademy, *What is Facebook Libra (Diem)?,* 2021, [https://academy.binance.com/en/articles/what-is-facebook-libra-diem] Accessed 08.02.2021.

behavior by enhancing the founders to coordinate the capture of fees, excluding others from the process. This cooperation of the factors within a market inevitably leads to market sharing.[17]

The nature of the blockchain technology itself poses a great many challenges in the field of competition law. Pursuant to author's opinion, the distinctions between the mechanisms of public and private blockchain should impose a differentiation at a level of legislative treatment. Especially, the expansion and the need for a dynamic interpretation of important components of competition law should be come into consideration for the interpreters. Without the existence of appropriate methodological tools such as the aforementioned, the achievement of actually diagnosing infringements of competition law cannot but simply be a typolatric reproduction of rules and dogmas, without any significant impact on established real situations.

In particular, for the purposes of applying the provisions of Article 102 TFEU as well as the merger control regulation, the interpreter is confronted with a fundamental question. And this question arises even before attempting to identify potential forms of abuse in each particular case and in order to abstain from obvious errors in their analysis: 'Is the existence of a dominant market position in this case established?'. The answer may be particularly challenging even for the traditional markets despite the existence of all those available means of the theory of economic analysis throughout the years. Besides, if one gets deeper into the mechanism of blockchain, they realize that the difficulties arising are many more compared with conventional markets. In this context, 'the definition of relevant market' in order to establish a dominant position in private and public blockchain systems is an apple of controversy between analysts. Having done that is a good first step not only to define the market power of its firm competing in the market but also to define the actual persons -natural or legal- that bear the liability for the company's anticompetitive conduct.

3.1. The definition of relevant market

Examining the existence of a dominant position in a digital market, even when the firms involved function over an exclusive centralized system, should not solely focus on the price factor of competition[18], as in most of those markets companies compete at a "zero-price" level (e.g., Google, Facebook, Instagram, Twitter). That

[17] Schrepel T., *op. cit.*, note 7, 164.

[18] OECD, Abuse of Dominance in Digital Markets, 2020, [http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf] Accessed 07.02.2021.

is true for the Diem as well. It is collectively admitted that in this case the so called SSNIP (*short but significant and non-transitory increase in price*) test cannot be used in order to define the markets share. Actually, in those cases, one should take into consideration various parameters of competitions in order to decide on the market power of each company competing in the market, for example the quality of its services, expressed mainly via innovation or protection of privacy. To this end, in order to eliminate the disadvantages of the SSNIP test, courts and the Commission suggests the employment of another test; the SSNDQ (*short but significant and non-transitory decrease in quality*) test[19], which is mainly based on the 'decrease in quality parameter' rather than the price.

The actual question concerns whether those tests can be applied to the blockchain market which appears to have completely different traits compared even with multi-sided digital markets[20]. The answer to this question shall be negative. As an initial remark, one should keep in mind the decentralized nature of blockchain organizations which do not even constitute legal units. Indeed, the existence of blockchain doubts the notion of the 'dominant position' itself as it is perceived today[21]. Attached to that, one reasonable question could be whether it is possible for a non-legal entity to possess a dominant position or whether it is possible to have a 'monopoly without a monopolist'.[22]

As preliminary remark, before even attempting to answer the question, one should make an actual distinction concerning the product scope of the market that is going to be defined. Blockchain technology, as explained, presents multiple applications in business life nowadays and its potential uses still remain unknown. Therefore, by mentioning to the blockchain market, one can refer either to the blockchain technology as infrastructure or to the actual operators of the software (especially, persons 'running the blockchain'). For example, on infrastructure level, the discussion may concern Ethereum, or even a 'brand new' blockchain that was programmed for a company (for example, in the course of an initial coin offering

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19 Patakyova MT., *Competition Law in Digital Era-How to define the relevant market?,* 2020, pp. 175, [https://eman-conference.org/wp-content/uploads/2020/10/EMAN.2020.171.pdf] Accessed 07.02.2021.

20 Stylianou K. and Carter N., *The Size of the Crypto Economy; Calculating Market Shares of Cryptoassets, exchanges and Mining Pools*, Journal of Competition Law and Economics, Vol. 16, No. 4, 2020, pp. 516 (511-551).

21 Schrepel T., *Is Blockchain the death of Antitrust?*, Georgetown Law Technology Review, Vol. 281, No. 3, 2019, pp. 302.

22 *Ibid*; 4. Huberman G., Leshno J. and Moallemi C., Monopoly Without a Monopolist: An Economic Analysis of the Bitcoin payment System 2, 2017, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025604] Accessed 07.02.2021.

-ICO[23]). In contrast, on the operator level, there is very often companies behind the respective blockchain (again, for example the issuer) even if this entity relies on an established blockchain infrastructure. This is exactly the case of Facebook company with the Diem coin.

The aforementioned theoretical distinction is nothing new for the legal thinking; It can be seen just like the issues arising from the Internet was seen when it had been very first invented. For the interpreter one thing is crucial to answer: 'are we talking about the infrastructure, or about the respective website?'.

The notion of 'undertaking'

In order for the reader to answer this question, they have to go through the analysis of another essential term: the notion of 'firm' adapted to the requirements of the blockchain technology in competition law. In the traditional doctrine, the enterprise is the smallest economic unit, in which free competition law can be applied. The fact that the introduction of the blockchain complicates the boundaries of the company and makes its traditional definition redundant has given rise to a number of theoretical views with a view to redefining it.[24] Initiating from the classic Ronald Coase's theory of transaction costs as the most contributing factor to the more modern 'theory of granularity' introduced by Schrepel one thing is to be guaranteed; the issue still remains unsolved.

According to this latest theory, there is a narrow 'nucleus' among users of the same blockchain, which can define and control the entire structure of it, therefore bear the sole liability. This control is identified on the basis of various quantitative criteria, such as the technical capacity, the capacity to interfere with the blockchain economic value or the capacity to influence the blockchain norms. [25] However, even Schrepel's well-structured theory presents gaps to the extent that the concept of undertaking as an entity engaged in economic activity within a structured market is unfortunately lost. Users of blockchain can be natural persons with no involvement into the business market. The narrow 'nucleus' may consist of the sum of those people that cannot constitute in any case legal entities.

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[23] For definition, see" 7. What is an Initial Coin Offering, available at: [https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/initial-coin-offering-ico/] Accessed 07.02.2021; 'An initial coin offering (ICO) is a type of capital-raising activity in the cryptocurrency and blockchain environment. (…) The main idea of ICOs is leveraging the decentralized systems of blockchain technology in capital-raising activities that will align the interests of various stakeholders.'

[24] Schrepel T., The Theory of Granularity, 2020, pp. 14, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519032] Accessed 08.02.2021.

[25] Schrepel T., *ibid*, 46.

Of course, the adoption of the 'theory of granularity' challenges the interpreter who will give in to it to face significant evidentiary difficulties immediately afterwards. These mainly focus on the proof that a blockchain user actually belongs to the 'nucleus of a blockchain' on the basis of the above criteria. Could in the decentralized ecosystem of the blockchain, however, still be expected a centralized classical dominant undertaking, which controls the market in one of the traditional and prescribed ways? According to the author, something like that would not be possible for typical permissionless blockchain. If this were accepted, it would probably jeopardize the whole antitrust legal system and result in the impunity of the responsible ones for stopping the prohibited conduct. Therefore, to the question of whether there can be a monopoly without a monopolist, the answer inevitably ends up being positive. This is partially confirmed through the wording of the MiCa Regulation (see below). Naturally, there is an exception and this theoretical structure can easily be applied in permissionless blockchains that are organized in a different way; especially within those ecosystems only few people have the right to write the code and actually run the blockchain. In similar situations, this is deemed applicable. Nonetheless, such ecosystems are far from being the rule.

Secondly, even taken for granted that the answer to the previous question would be positive, it is a real fact that blockchain and non-blockchain institutions are in a thorough competition with one another. In this framework, every time a definition is going to take place the market will be defined rather broad, excluding per se the possibility of diagnosing dominance of one actor. For example, that is the case if one considers the market for online payments, in which companies, such as PayPal or VISA payments, are also major players. Blockchain reduces significantly the transaction fees, yet it does not itself constitute a separate market. Only under the scenario that one could argue that there is a separate market for infrastructure, there might be an argument for the inclusion of blockchain technology in it. Namely, to the extent that mining cryptocurrencies and verifying transactions are also subject to fees, just like the normal payments, the existence of a broader market cannot be doubted. However, even then, this theory overlooks the various functions of blockchain and focuses only one; the use as a payment system.

Market definition; different aspects

First theory

Despite the aforementioned theoretical obstacles, researchers are still struggling to find those necessary thresholds so that a definition of relevant market is still being viable. To this end, the available suggestions vary. The first theory suggests that each blockchain establishes a separate market in which all users enjoy domi-

nance and are co-responsible for probable abuses[26]. This definition of the relevant market, according to which each user can suddenly be found liable and therefore be confronted with fines by competition authorities, would probably create a deterrent incentive for the use of the blockchain. In any event, it could only be described as an insurmountable structural flaw in the author's opinion. The notion of dominant position requires the existence or even the possibility of existence of other players in the market, probably with smaller market shares. If each user holds in fact a dominant position, the definition of a relevant market would be in vain, since each user would have a monopoly on that market and would be pleased with it. In this context, there would be no room for anti-competitive practices, since it would be absurd for a monopoly to wish to harm itself. Supposedly that Diem constituted a relevant market itself, then all approved users would be liable for anticompetitive practices, despite the sole fact that Facebook holds the largest number of Diem dollars…

Second theory

A second theory uses as a benchmark the number of users in the blockchain. In this respect, all the blockchain systems constitute a single market in which those most popular among users also hold a dominant position.[27] This view has an important advantage in terms of economic analysis when examining market power compared to the previous one, namely the inclusion of so-called 'token effects' created by bringing more users into a blockchain (similar to "networks effects" on digital markets). If try to apply this theory to the Diem case, then a permissioned blockchain cryptocurrency could never hold power and therefore a dominant position in the relevant markets (taking into account that Bitcoin, Ethereum have obtained far more power).

On the other hand, it has a significant disadvantage: eliminates the different function and nature of the blockchain, its sui generis characteristics, but also the fundamental distinction between public and private blockchain systems. In this context, of course, there could not be any preamble or interchangeability in the various blockchains, while the different purpose of each decentralized system seems to be undervalued. The blockchain 2.0 version allows users to run different forms of software on the decentralized system in order to carry out so-called smart contracts. Clearly, these blockchains, such as Ethereum, respond to different types of users, mainly legal persons and companies, and of course their system carries

[26] Schrepel T., *Is Blockchain the death of Antitrust?*, Georgetown Law Technology Review, Vol. 281, No. 3, 2019, pp. 302.

[27] *Ibid*, 303.

out transactions of infinitely greater value. Even if this theory were accepted, all dominant blockchain users would still be held liable for breaches of competition law in the terms of a possession of 'collective dominance', yet even without the appropriate 'economic links' required[28].

Nevertheless, its application could be reasonable if accepted that firstly the relevant product and geographical market is determined and only once, it is done, it is compared to the number of users. So, here, you do not really ignore the characteristics of each cryptocurrency since they have been taken into account during the first step of the analysis. This may function as a solution if the number or users is the decisive criterion. The prominent disadvantage in this situation concerns mainly the necessity to approach every single case from the other side of the market, namely from the consumer's perspective. Under this theory, this kind of perspective seems to be disregarded. Therefore, this theory is also called into question by the author.

Third theory

A third view suggests that the power of the blockchain should be measured by the number of transactions executed in the blockchain, the value and the number of blocks[29].

This opinion also has, like the previous case, the disadvantage that all users are considered to be co-holders of dominant position, which cannot be accepted. Each user would potentially be confronted with high fines from the competition authorities because plainly they made the decision to enter a market. Thus, on the one hand, entering the market of a popular blockchain would automatically result in the responsibility for anticompetitive conduct on the grounds of abuse of dominant position. Under this perspective, a kind of *per se* abuse of dominance can be established without even an anticompetitive action. On the other hand, users that entered the market before the blockchain gain in popularity and fame will strangely be responsible in the future just for the bare fact that they happened to hold a crypto wallet in the past. Consequently, the high volatility of blockchain prices would strongly affect this parameter and therefore liability of the persons involved into the blockchain. Liability for damages without any anticompetitive conduct at all, to the author's opinion, can barely be perceived nowadays for competition law, even under the most recent form of self-learning algorithms.

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28 *Ibid*.

29 *Ibid*.

Fourth theory

A fourth theory suggests linking the users of the blockchain to their respective position in the market that they are actually active, namely in another external market[30]. Thus, if a Blockchain has Google and Amazon as its users, it's more likely to be considered dominant in the blockchain market. This view could not be accepted logically, since it makes the power of a blockchain in a market dependent on the power of its users in third independent markets. Apart from the fact that big companies normally invest simultaneously in more blockchains or build their own blockchain system (e.g., Facebook), if their blocks' number is small and only a small volume of transactions are carried out, then even a giant company will not give any real power to the blockchain. It should not be forgotten that in the Blockchain apart from the giant companies there are also other users who are put at risk by the mere fact that a large company has invested in the same blockchain as them. This would also weaken legal certainty in the blockchain ecosystem. Only exception, as also above mentioned, is this of a permissionless blockchain which is organized in a different way, allowing only to few users the right to actually exercise control.

Applied in the Diem case, the latter theory could function as a solution, as Facebook is a dominant undertaking in the advertising market. This could potentially limit its power and lead to its liability for potential abuses. However, other users are likely to have obtained a wallet and be co-responsible with Facebook, so it would end up being unfair for the majority of users with no market power. For the limitation of the liability in this case, the 'theory of granularity' may be extensively used. Facebook can be considered as the profound 'nucleus' of the blockchain, yet its role will not limit in the sole participation in the blockchain. One should always keep in mind that the whole Diem infrastructure was inspired and created by the Facebook group of companies, this would respectively result in a narrower relation between the two, maybe with the form of the prior formation of Diem's protocol or with the possession of administrative rights.

Fifth theory

Another theory supports the definition of the blockchain market according to the consensus mechanism or the mode of governance.[31] This leads to two markets, the public market and the purchase of the private blockchain. However, the mere differentiation in the way the blockchain operates could not ensure that the sup-

30 *Ibid*.

31 *Ibid*, 304.

plies of the blockchain, also in view of smart contracts, are not really similar and therefore interchangeable in a common market. The bare fact that Diem functions as a permissioned blockchain cannot exclude the possibility that it is in thorough competition with Bitcoin, for example. As a result, this hypothesis cannot be accepted.

Sixth theory

Finally, the sixth theoretical view, and probably the most prevalent one, supports the definition of the market based on the available software and products provided by each blockchain.[32] Therefore, on this basis, the various forms of the Blockchain and the nature of the so-called smart contracts will be used as thresholds for the diagnosis of market power. To this end, Blockchain 1.0 will not be able to be in the same market with Blockchain 2.0. This opinion sounds adequate in the sense that it can bear a common market with blockchain and non-blockchain activities. However, insisting on the definition of the market on the basis of a single decisive criterion can only show the disadvantages of unilateralism and that can be the basis of type I or II errors during its application. Even within the framework of the fully centralized two-sided markets, the Organization for Economic Co-operation and Development (OECD) uses plenty of factors determining the existence of dominance and does not plainly insist on the one criterion or the other[33]. Nevertheless, whenever the discussion comes into the nature of 'smart contracts', one should consider which are actually those elements to evaluate the power between blockchains using the same software applications[34]. In the Case of Diem, it enables the interaction of currencies that are not using blockchain application, such as normal fiat currencies.

Holistic approach

According to the author's view, as long as markets are moving towards decentralization and digitization, there can be no exclusive formula which is satisfied on every market. The overall analysis should be multifactorial, taking into account all economic data available in each case. The nature of the transactions and smart contracts in itself leads to a form-based approach, which may result in an excessive expansion of the relevant market and thus impunity for infringements of com-

32 *Ibid,* 304.

33 OECD, *Abuse of Dominance in Digital Markets*, 2020, [http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf] Accessed 07.02.2021.

34 Schrepel T., *Is Blockchain the death of Antitrust?*, Georgetown Law Technology Review, Vol. 281, No. 3, 2019, pp. 305.

petition law within the blockchain. Since market shares cannot be used strictly unlike all the other markets, it may be possible to establish a correlation index between the number of users in the blockchain, the volume and value of transactions and the various software that may run in the framework of the same blockchain. Therefore, a blockchain may involve several relevant markets, which will in future expand and make their existence more apparent to the competition authorities. Which will be the decisive factor in each case, depends on the characteristics of each new sub-market.

Another factor to be taken into account in determining a dominant position is the blockchain's own revenue from trading through its system. Decentralization as such does not imply that miners or validators do not enjoy any revenue to achieve their work and of course in those cases that the service is carried out 'for free' does not mean that this situation will remain unchanged in the future. As technology evolves, each case brought before the competition authorities is extremely unique. This uniqueness only allows for an *in-concreto* analysis based on all available data for a certain market. The only difficulty that is easily detected when such a theory of calculation of revenues is being employed is the comparison of the revenues among several blockchains as they are able to take different forms throughout the market.

US jurisprudence[35] has employed for the definition of the relevant market in the financial sector a good many relevant metrics: total assets, deposits, transactions value/volume, number of users[36]. These metrics shall apply to the cryptocurrencies, as well. Unfortunately, at the level of case-law every time a court was given the opportunity to define the relevant market for blockchains, it normally preferred to reject the appeals and thus, there is no precedence regarding this topic.[37] However, it is estimated that soon enough it would be binding for an authority or Court to decide on the issue. Blockchain is gaining more and more popularity and users should be aware of the potential dangers they can face with regard to competition law matters.

3.2. Regulatory initiatives; The MiCa Regulation proposal

However, Courts are not the only ones responsible to apply antitrust legislation. The aforementioned analysis can also be carried out ex ante in the context of the

35 *See for example;* US v. Phillipsburg National Bank & Trust, 399 U.S. 350; US v. Philadelphia National Bank, 374 U.S. 321.

36 Stylianou K. et al, *ibid*, 520.

37 Decision Gallagher v. The Bitcoin Foundation (CV 185892) (28.06.2019)/ Decision Leibowitz et al. v. iFines Inc (06.10.2019).

European Union merger control. Initiating from this thought, it comes as no surprise if international and European competition authorities decide to regulate the market before the introduction of a new blockchain from a competition law aspect. Precautionary policy is considered to be more efficient than ex post measures against an established and unknown situation. The first step is already done with the proposal for a regulation of the European Parliament and the Council on Markets in crypto-assets (MiCa proposal),[38] which in fact seems to impose clear and well specified rules to ensure legal certainty on the sector. [39]

One of the most interesting aspects that concern the object of this study is the introduction by the MiCa Regulation Proposal of an indirect prohibition on the issuance of stablecoins,[40] such as Diem, within the European Union, since the conditions require now the prior authorization by a credit or e-money institution.[41] The thresholds for that are so high that it would not be profitable for any stablecoin organizations to comply with them. That naturally prevents Diem expansion, yet it prevents the expansion of any stablecoin unjustifiably, as well.

Under Title VI of the MiCa Regulation 'Prevention of Market Abuse involving crypto-assets' (articles 76-80), there are some predictions concerning the prevention of market abuse practices. One can easily understand that this chapter indirectly recalls article 102 TFEU ('abuse of market power') and introduces somehow antitrust legislation. The first remark that partially confirms the theory that there can be a monopoly without a monopolist is the usage of the word 'persons' instead of the term 'undertakings' in the wording of the law.[42] It is a silent recognition that there are steps towards a new reality that is going to be introduced through the usage of this technology. One step further, that could potentially lead to the conclusion that antitrust legislation has started to abstain from the notion of 'undertaking' as detected in case-law and practice until recently. Actually, it consists one of the most major changes to the extent that it constitutes an indirect confession that non-legal entities can bear the responsibility for illegal, exploitative (as well as anticompetitive) conduct.

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38 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (COM/2020/593 final.

39 Hansen P., New Crypto Rules in the European Union-Gateway for Mass Adoption or Excessive Regulation?, 2021, [https://law.stanford.edu/2021/01/12/new-crypto-rules-in-the-eu-gateway-for-mass-adoption-or-excessive-regulation/] Accessed 08.02.2021.

40 A stablecoin is a new class of cryptocurrencies that attempts to offer price stability and are backed by a reserve asset (definition available at: Investopedia.com). The most famous stablecoin is Tether.

41 Hansen P., *op.cit.,* note 39.

42 Of course, if the coins are offered in a permissioned blockchain, there might well be a monopolist (or at least a company/entity behind everything).

It seems that the trend towards overregulation of the market is about to prevail, and the prior regime of total indifference of regulatory authorities tends to move towards risky and excessive legislative initiatives. In the author's view, one should pay attention not to reach to the other side with the overregulation of the market. Blockchain technology can surely bear challenges for the authorities, yet the possibility of development and improvement of the technology must remain wide open. Regulatory intervention should not end up being an expression of strength on behalf of the institutions for the simple reason that stablecoins and their blockchain mechanism can also bear efficiencies in the market (e.g., reduction of transaction fees, elimination of search costs and data protection). Too much regulation jeopardizes and eliminates innovation causing market stability and eventually consumer harm.

3.3. Blockchain as data protector vs. Facebook business plan

Indeed, the application of 102 TFEU will bring the issue of the definition of relevant market for blockchains in the foreground. It is a fact arising from the Commission's recent practice that the modern currency, which businesses are struggling to obtain in the information era, is 'data'. Business giants, like Facebook, use user data on the social media platform to provide information to advertising businesses, acting as a channel between two markets (also known under the term 'two-sided platform').

As mentioned, Diem was released as a permissioned blockchain with the prospect of being permissionless within an unspecified time period. This announcement caused panic internationally in the competition committees and it caused legislative action (see above MiCa Regulation). Indeed, since it has been implemented, one can see many risks of reporting on Facebook of extremely important economic data by users. Facebook will manage to obtain a really wide portfolio of data and become a monopolist in the online advertising market, namely without even competitors.

First of all, there is a possibility of tying Facebook and Novi services in the sense that only users with a personal account can acquire a wallet and therefore access to the cryptocurrency.[43] Secondly, there can be cases of misuse of power in the sense of 'refusal to deal' or 'exclusive dealing'. Initiating from this thought, it should be clearly stated whether an online platform be considered as an 'essential facility', according to the IMS Health or Magill judgement.[44] At present, such a possibil-

[43] Schrepel T., *op. cit*, note 7, p. 165.

[44] *Ibid*, 166.

ity can be strongly denied, yet one cannot easily predict the growth of Facebook's database after the introduction of Diem. It can be highly possible that Facebook will function as an essential facility for the modern advertising markets, especially if all potential competition is vanished.

This scenario is probably not at all desirable for regulatory authorities. It is evident that Facebook intends to expand its existing economic eco-system and hide behind modern technologies, such as the cryptos. Consequently, Facebook would be the one and only solution for every business that dreams of accessing the online market and advertise its products through online channels. Secondly, the database concentrated by Facebook is estimated to be that big that is going actually to function as market entry barrier for every company which potentially desire to exercise competition to Facebook for the market.

However, the regulatory treatment should be mediocre instead of completely neglecting the blockchain technology. Despite the potential anticompetitive threats that flow from Facebook's undoubted dominant position at present, blockchain technology -mainly permissionless blockchains- can, generally speaking, when not used by companies with too much power in the international markets, function as a solution to the collection of data problem. In fact, the transparent and encrypted system is the ideal way for users to keep their data safe and reduce the data collected through online platforms e.g., Facebook. It is natural that if those companies start losing a major part of their data due to the blockchains, the quality of their services as "data providers" will decrease. Competition authorities, nowadays, have ended up being the protector of consumer's data as an aspect of consumers' welfare. Blockchain technology, if widely used can as means to solve many problems that competition law itself cannot properly handle. The concern about Facebook's planning, at the end of the day, has less to do with the blockchain technology as such than with the expansion of its data portfolio. This is something that should sparkle the interest of the competent authorities, as well.

4. CONCLUSION

The specific characteristics of the blockchain technology far outweigh the possibilities of the available tools and instruments available to competition authorities throughout the world for effective enforcement of antitrust legislation. As proved, even prior to the introduction of blockchain in the market, there are terms that ought to be reformed'; the notion of 'undertaking', the definition of what is called 'relevant market'. The need for regulatory reforms to be developed and carried out by the various central institutions is essential and urgent. In this context, it has been argued in theory that the possible prevalence of the blockchain endangers the

whole structure of competition law as positive law in its present form, leaving it essentially unproductive and unjustified. [45]

The author's opinion is that competition law consists of rules designed to regulate the entire market and all sectors of the economy. Their laconic wording is clearly due to the fact that they are open not only to completing, but also to a dynamic interpretation of the terms and notions in question. As an example, already with the introduction of centralized platforms (Amazon, Google etc.), there is a large extension of the existing interpretative tools and competition law has shown in its implementation that it is bound neither by restrictive formalities nor by narrow definitions. The researcher can easily diagnose that all terms are being adapted to a rational of economic analysis from which they used to abstain and move towards a more form-based approach.

The latter also demonstrates the adaptability of competition law to market circumstances, just like civil law follows the complexity of human relations and transactions. The market as such is not a sum of static formulated relationships, but it is a living organization which constantly presents new forms of relations to help simplify business norms. If competition law was designed to regulate the market solely in a concrete period of time, then it would be vulnerable to self-extinction whenever a new situation jeopardized its validity. The conclusion is that the introduction of more specialized regulatory frameworks, the development itself, does not result neither in the extinction of competition law nor in the loss of its basic objectives. On the contrary, it seems to introduce a new phase of legal analysis, which will follow the digitalization of the available media.

As far as the objectives are concerned, the decentralization of markets does not itself guarantee the preservation of market competition or the maximization of consumer welfare, so that one could reasonably argue that there is no more need for antitrust law. The uselessness of intermediaries and the horizontalization of relations do not at all exclude the possibility of the continuation of anti-competitive practices or the exploitation of monopolistic positions. Competition law is the only one responsible to provide for the tools to safeguard market conditions, indifferent if there does exist a traditional "trustee" or not.[46] The word "antitrust" can easily be considered another cliché and remain in history books, just like so many other terms (e.g., the word 'quarantine' which used to be useless until recently).

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45 Schrepel T., *Is Blockchain the death of Antitrust?*, Georgetown Law Technology Review, Vol. 281, No. 3, 2019, pp. 334-8.

46 Collins W.D, *Trusts and the Origins of Antitrust Legislation*, Fordham Law Review, Vol. 81, 2013, pp. 2279. / Schrepel T., *Is Blockchain the death of Antitrust?*, Georgetown Law Technology Review, Vol. 281, No. 3, 2019, pp. 337.

The truth is that competition law rules need reform and dynamic interpretation in order to maintain their power and legitimacy.

As concluding remark: why is this considered as so necessary that one actually spoke of the 'death of antitrust' rather than the 'birth of the ex-ante regulation/ control of software' run over blockchain systems? This initiative would certainly enhance knowledge on the existing technology and favorize the understanding of the nature of blockchain markets. Competition comes as the appropriate element to supplement those cases that could not objectively be predicted by the responsible authorities. As market develops and changes, so does competition law throughout time.

It is a fact that the blockchain market has come up with a number of absurdities, which competition law is now called upon to resolve in order to safeguard the reasons for its establishment. Academic dialog is increasing and several theories have already been put forward to define it. The author hopes to have contributed to this academic exchange through this study.

Although the usage of examples cannot be considered a safe channel for concluding, the Facebook example provided the appropriate stimulus for dealing with a field of law that previously belonged to the sphere of science fiction. Large companies have already started to operate in the market and the first challenges for competition law have already begun to form. As markets tend to be more decentralized and obtain different characteristics, market leverage is likely to take various forms and expand through unchanneled ways. The conclusion is that no matter how rapid technology develops and market condition change, regulation and antitrust should not stop, but serve the legitimate objectives for the sake of which they were initially issued and which remain unchanged… throughout time.

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Review paper

OPEN BANKING AND COMPETITION: AN INTRICATE RELATIONSHIP[1]

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ABSTRACT

Open banking – promoted in the European Union by the access to account rule contained in the Directive (EU) 2015/2366 on payment services in the internal market (PSD2) – is supposed to enhance consumer's welfare and to foster competition. However, many observers are fearful about the negative effects of the entry into the market of the so-called BigTech giants. Unless incumbent banks are able to rise above the technological challenges, the risk is that, in the long run, BigTech firms could dominate the market, by virtue of their great ability to collect data on consumer preferences, and to process them with sophisticated tools, such as Artificial Intelligence and Machine Learning techniques; not to mention the possible benefits arising from the cross-subsidisation. This paper aims at analysing the controversial relationship between open banking and competition. In this framework, many aspects must be clarified, such as the definition of the relevant markets; the identification of the dominant entities; the relationship with the essential facility doctrine. The specific competition problems encountered in the financial sector need to be inscribed in the context of the more general debate around access to data in the digital sphere. The evolving scenario poses a serious challenge to regulators, calling them to strike the right balance between fostering innovation and preserving financial stability. The appraisal intends not only to cover EU law and policy, but also to make a comparison with other legal systems. In this respect, something noteworthy is taking place in the United States where, as of today, consumers' access to financial data sharing has been largely dependent on private-sector efforts. Indeed, Section 1033 of the Dodd-Frank

[1] Whilst the paper reflects the shared views of the authors, they clarify that Alessandro Palmieri authored, in particular, paras 1, 5, and 6, while Blerina Nazeraj authored paras 2, 3 and 4; they jointly wrote the Conclusions.

Wall Street Reform and Consumer Protection Act (passed in the aftermath of the financial crisis of 2008) provides that, subject to rules prescribed by the Bureau of Consumer Financial Protection (CFPB), a consumer financial services provider must make available to a consumer information, in its control or possession, concerning the consumer financial product or service that the consumer obtained from the provider. This provision, which dates back to 2010, has never been implemented. However, on 22 October 2020, the CFBP has announced its intention to regulate open banking, issuing an advanced notice of proposed rulemaking. In light of their investigation, the authors advocate the adaptation of the current strategies to the modified conditions and, in some instances, the creation of novel mechanisms, more suitable to face unprecedented threats.

***Keywords**: open banking, competition, payment services, innovation, access to data, comparative law*

1. INTRODUCTION

Although several definitions have been proposed[2], as a first approximation, open banking – or, as someone has suggested to rename it, consumer-directed finance[3] – focuses on the ability of banking customers to allow third-party providers to access their bank account data for several purposes. Open banking, which is currently at the centre of a worldwide debate, can be inscribed in the so-called financialization process[4], whose development is supposed to enhance competition in credit markets, especially in the area of payment services and for the benefit of consumers and small and medium-sized firms. In this scenario, incumbent banks are expected to face the challenges posed by genuine FinTech operators, as well as those coming from the area of BigTech companies. The term BigTech is used to refer to the major technology companies with established presence in the market for digital services, whose presence has enormously grown in the financial sector

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2 For instance, according to the Open Banking Implementation Entity (that was created by the UK's Competition and Markets Authority to prepare software standards and industry guidelines susceptible of driving competition and innovation in UK retail banking), the main feature of open banking is that it "opens the way to new products and services that could help customers and small to medium-sized businesses get a better deal" [https://www.openbanking.org.uk/customers/what-is-open-banking/], Accessed 18 June 2021). On their side, Gupta, P.; Tham, T.M., *Fintech. The New DNA of Financial Services,* de Gruyter, Boston-Berlin, 2019, p. 157, focus on the «adoption of common standards for collaboration between banks and other players within the banking ecosystem».

3 This term was proposed in Canada by the Advisory Committee on Open Banking, appointed by the Minister of Finance in 2018 (see the report titled "*Consumer-directed finance: the future of financial services*", [https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html], Accessed 18 June 2021).

4 The financialization process is characterized by the fact that "change is driven through complementarities and cohesion among supportive regulations, market forces and technological change, whereby new practices and arrangements emerge" (see Gozman, D.; Hedman, J.; Olsen, K.S., *Open Banking: Emergent Roles, Risks & Opportunities*, in AISel Research Papers, 2018, No. 183, p. 3).

in the last few years. Undertakings belonging to the said group would have the capacity to put more pressure on incumbent banks. Indeed, according to a member of the Executive Board of the European Central Bank, "if big tech can speed up loan application processing, reduce transaction costs and improve credit risk assessments, it could increase the overall degree of competition in credit markets"[5]. Yet the coin has another side. The very fact of the entry of tech giants into the market for payment services can be seen not only as something that improves efficiency, but also as an element that threatens to create a new kind of dominance if the market is incapable of correcting[6]. In the following paragraphs, after having outlined the pros and cons of the open banking movement, putting a special focus on BigTechs, we are going to illustrate some of the strategies developed in different geographical areas to deal with this phenomenon.

2. THE BENEFITS AND POTENTIAL DRAWBACKS OF THE EU APPROACH TO OPEN BANKING

Not many authors dealing with the European Union way of promoting open banking, based on the access to account rule contained in the Directive (EU) 2015/2366 on payment services in the internal market (PSD2), have tried to assess its repercussions on competition[7]. However, a common feature of these contributions is that the focus shall be put on the so-called access to account (XS2A) rule, set out in various provisions of PSD2. To this extent, one has to recall, at first, two general provisions concerning the access to payment systems[8] and to the

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5 Mersch, Y., *Lending and payment systems in upheaval - the fintech challenge,* speech given at the 3rd annual Conference on Fintech and Digital Innovation, Brussels, 26 February 2019 [https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190226~d98d307ad4.en.html], Accessed 18 June 2021.

6 According to Bilotta, N.; Romano, S., *Tech Giants in Banking: The Implications of a New Market Power*, IAI Research Papers, 2019, No. 13, p. 12, at the moment, it is uncertain "whether Techfins do in fact improve competition and efficiency in the banking market, leveraging on better products or services, or whether they actually create concentration powers, using their data superiority and networks effects to create new barriers within the industry".

7 Among the writings on this subject, see Borgogno, O.; Colangelo, G., *Data, Innovation and Competition in Finance: The Case of the Access to Account Rule*, in *European Business Law Review*, 2020, 31, no. 4, pp. 573-610; Borgogno, O.; Colangelo, G., *The data sharing paradox: BigTechs in finance*, [https://ssrn.com/abstract=3591205], Accessed 18 June 2021; Di Porto, F.; Ghidini, G., *"I Access Your Data, You Access Mine": Requiring Data Reciprocity in Payment Services*, in *International Review of Intellectual Property and Competition Law - IIC*, 2020, 51, pp. 307-329.
On the pros and cons of the UK Open Banking plan, see Borgogno, O.; Colangelo, G., *Consumer Inertia and Competition-Sensitive Data Governance: The Case of Open Banking*, [https://ssrn.com/abstract=3513514], Accessed 18 June 2021 (a revised version is forthcoming in *Journal of European Consumer and Market Law*).

8 Directive (EU) 2015/2366 of the European Parliament and of the Council, on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation

accounts maintained with a credit institution[9], and then other two provisions, devoted to specific services, namely to payment initiation services[10] and to account information services[11].

As it has been clearly pointed out in the relevant literature, the XS2A rule shall be considered as "a key factor to strengthen competition in the retail financial markets"[12]. No doubt that this was an important goal of the EU legislative action and, in order to pursue it, it is necessary to enable third parties to obtain access to the customer's payment accounts. Such an access, lowering entry barriers to new players, is a pre-requirement to compete on an equal basis with well-established credit institutions. Of course, the XS2A, and similar rules enacted outside the EU, need to be carefully managed by regulation authorities, which on their side look favourably on tools susceptible of increasing transparency and reducing information asymmetries.

The access to account rule is supposed to include financial technology entities into the relevant market, given their capacity to foster competition through innovation. The digital progress has transformed the traditional banking and financial sector, by allowing new competitors to provide innovative products and services based on consumers' expectations and needs. Such development relies on the availability of customers' bank account data and their processing, crucial for FinTech players' success. Established banks have accumulated that information thanks to their relationship with customers and may refuse to cooperate with market entrants because of the risk of losing control over their customers and being marginalized[13]. Art. 36 of PSD2 aims at avoiding foreclosure practices by granting real-time access to customer's account data for authorized payment services providers and thus reducing informational barriers to entry. This could result in an enhancement of consumers' welfare. As a matter of fact, the so-called front-end providers act as intermediaries between the customers (payees and payers) and the account servicing payment service providers (ASPSPs), such as banks, making transactions easier[14].

(EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35 (PSD2), art. 35.

9 PSD2, art. 36.

10 PSD2, art. 66.

11 PSD2, art. 67.

12 Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 575.

13 According to Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 585, "Under the PSD, banks could legitimately refuse to grant any access or to share sensitive information with TPPs due to intellectual property and security issues as well as to reputation risks and for liability reasons. In the same vein, customers who shared their account security information breached their contract with the bank exposing themselves to major consequences".

14 Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 579, distinguish these entities from end-to-end providers, which "are closed platforms that interact both with the payer and payee

In particular, payment initiation services providers (PISPs) initiate payments on the customer's behalf from her or his bank account and inform the payee that the funds' transfer was made; while account information services providers (AISPs) manage the information from multiple customer accounts, aggregating them so that the user can get an overall view of her or his financial position[15]. According to art. 67 of PSD2, this kind of FinTech provider can access both the information from designated payment accounts and associated payment transactions.

Nonetheless, the writings on this subject are not limited to emphasizing the hypothetical advantages of the Open banking revolution. The regulatory choices made by the EU legislator when enacting the XS2A rule have been highly criticized for various reasons. One of the authors has directed his criticism more particularly against the excessive attention given to concerns about the competitiveness of the business environment, which is likely to overshadow other values worthy of protection, such as consumers' interests and data protection[16]. In our opinion, the said values must be taken into account by those who are involved in the open banking movement, in the sense that a proper balance has to be found (and maintained) between the interests at stake. With respect to privacy concerns, one cannot deny that the XS2A rule is the cornerstone of one of the specific data access regimes created by EU legislation. Although these regimes aim at promoting objectives beyond the protection of personal data, they are necessarily to be coordinated with the general principles that grant to the data subject a strong control over her or his personal data[17].

Other commentators, although inclined to think that the provisions enacted at the EU level might boost competition in the consumer retail payments market, are fearful that the current efforts are not enough to undermine the hegemonic position of the largest banks. Path dependence plays a role here, preventing or slowing down fully optimal adjustments. A recent study has shown that, if con-

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arranging transactions within their system".

15 See Vezzoso, S., *Fintech, access to data, and the role of competition policy*, in Bagnoli, V. (ed.), *Competition and Innovation*, Scortecci, São Paulo, 2018, p. 32.

16 This is the view expressed by Stiefmueller, C.M., *Open Banking and PSD 2: The Promise of Transforming Banking by 'Empowering Customers'*, in Spohrer, J.; Leitner C. (eds.), *Advances in the Human Side of Service Engineering. AHFE 2020. Advances in Intelligent Systems and Computing*, vol. 1208, Springer, Cham, 2020, pp. 299-305.

17 According to Graef, I.; Husovec, M.; van den Boom, J., *Spill-Overs in Data Governance: Uncovering the Uneasy Relationship Between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes*, in *Journal of European Consumer and Market Law*, 2020, 9(1), pp. 3-16, in the EU the sector-specific data access regimes are internal market-focused. On its side, "GDPR can be regarded as a regime that sets the boundaries within which sector-specific data access regimes can regulate other objectives that inevitably relate to the processing of personal data" (p. 6).

sumers are asked to share their payments data, only a minority of them "would give consent to other banks they are not customers of or to newcomers in the payments market"[18].

3. THE ROLE OF BIGTECH PLAYERS

Assuming that the ongoing processes are successful in mitigating the problems deriving from the alleged hegemony of Big Banks, other risks are looming on the horizon. Indeed, established financial institutions will have to deal not only with emerging business entities, exclusively or mainly focused on the banking and financial industry, but also with the so-called BigTechs. In general terms, it is undeniable that FinTech firms, primarily those which provide services in the B2C segment, can act as credible challengers to traditional organisations[19]. This is precisely the goal, or at any rate one of the goals, that decision-makers and regulators hope to achieve[20].

Nevertheless, as we mentioned above, financial institutions will suffer – in fact, they are nowadays suffering – an attack from BigTech companies. The advantages and disadvantages of the entry of these firms into the retail payments market have already been identified. Contrary to what it may seem at a first glance, the descent into the field of BigTech players may be counterproductive for competition[21]. On the one hand, such companies might amplify the effects of FinTech disruptive impact; on the other hand, as it has been highlighted in a Report released by a leading international management consulting firm (Oliver Wyman) and the Inter-

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18 See Bijlsma, M.; van der Cruijsen, C.; Jonkera, N. *Consumer willingness to share payments data: trust for sale?*, TILEC Discussion Paper, 2020-015. The authors argue that: "Newcomers need to work on gaining people's trust, and show that their payments data is safe with them. Furthermore, they may attract customers by offering them financially attractive products, as consumers' demand for PSD2 services turns out to be sensitive to prices. They might be able to do so, in product markets where the margins are high and by making intelligent use of people's payments data so that they can make tailor made offers, which adequately price credit risks" (p. 19).

19 It is virtually unanimously acknowledged that FinTech "has become such a disruptive force in such a short time period that established financial institutions must quickly reconsider their business model" (see, for instance, Assay, B.E., *FinTech for Digital Financial Services: The African Case*, in Rafay, A., *FinTech as a Disruptive Technology for Financial Institutions*, IGI Global, Hershey, PA, 2019, p. 67).

20 According to Gozman, D.; Hedman, J.; Olsen, K.S., *Open Banking: Emergent Roles …*, *op. cit.*, note 4, p. 5, "today's fintech movement and provisions for access-to-accounts are partly being driven by regulators keen to accelerate the competition and digital disruption that is reshaping the financial services industry and also to further increase transparency and reduce information asymmetries".

21 De la Mano M.; Padilla, J. *Big Tech Banking*, in *Journal of Competition Law and Economics*, 2018, 14(4), pp. 494-526, argued that, although the entry of BigTech companies into the market could enhance competition in the short term, there is a significant risk that this will result in more concentrated credit markets in the long term.

national Banking Federation, BigTechs differs from FinTechs in several ways[22]. It is not just a quantitative matter. In the said Report, the divergences are analysed. Probably the most important of all is that BigTech companies, when deciding a certain financial service, aim at "monetizing existing core businesses and serving customers holistically than the financial service itself"[23].

Some authors predict that, relying on their great ability to collect data on consumer preferences, and to process them with sophisticated tools, such as Artificial Intelligence and Machine Learning techniques, in the near future BigTech companies will be able to dominate at least some segments of the retail banking industry[24]. This could happen regardless of whether these companies will act as intermediaries or marketplaces[25]. Of course, large banks make use of Artificial Intelligence. But BigTech companies may combine Artificial Intelligence with the ability to collect and process big data. This phenomenon has already attracted attention from competition authorities: one can simply recall the decision regarding Facebook's processing of users' data issued in 2019 by the Bundeskartellamt; and the investigations recently launched against the same platform by the European Commission and the UK Competition and Markets Authority.

Taking into account these factors, scholars usually criticize the EU approach because it does not really level the playing field, and it underestimates large technology companies' impact. The XS2A rule might prove to be disproportionate, given that it does not consider the differences between FinTech and BigTech entrants. We can take for granted that the advent of FinTech companies will be beneficial to the whole system: they can exploit efficient technologies without being burdened by legacy systems; they do not enjoy significant financial resources, an established

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22 The joint report, published in 2020, is titled, *Big Banks, Bigger Techs?*, and is available on the website www.oliverwyman.com.

23 *Big Banks, Bigger Techs?*, *op. cit.*, note 22, p.16.

24 See Padilla, J., *BigTech "banks", financial stability and regulation*, in *Estabilidad financiera*, 2020, issue 38, pp. 11-26; in particular, the phenomenon is expected to occur in the area of distribution of loans to consumers and SMEs (p. 14).

25 According to Padilla, J., *BigTech "banks"…*, *op. cit.*, note 24 p. 14-15, "BigTech platforms may enter as "intermediaries", in direct competition with incumbents, raising funds and lending them to consumers and firms, or as "marketplaces", offering customers the ability to engage with many financial institutions (banks and non-banks) using a single distribution channel. As intermediaries, they may be able to offer new services by bundling their existing offerings (e.g. online advertising, e-commerce, etc.) with traditional banking products; e.g. offering cheap credit to customers who subscribe to their online services or purchases in their e-commerce sites. […]. As marketplaces, they may benefit from network effects by bringing together banks. and borrowers. Banks may need join these platforms in order to reach out to borrowers. Borrowers will patronize them to obtain cheaper credit. Each of these marketplaces likely will auction the loans it originates amongst all, or at very least a significant fraction, of the banks participating in its platform".

customer base, a reputation and brand recognition; and, like banks, they are characterized by limited skills in managing big data analytics. From this point of view, the right to access will likely increase competition and contestability of banking markets as well as consumer welfare in terms of diversified products and services, lower transaction costs, and price reduction.

However, in the long term, the access to account rule may lead to monopolization by BigTech companies[26], which enjoy scale and scope economies, an established-loyal customer base, a vast amount of digital customer data, a solid reputation, and strong brands. Furthermore, they can collect information about consumers' behaviour from nonfinancial activities, such as research and social media and analyse them with artificial intelligence or cloud computing techniques to offer new and tailored services. Large Tech entities, when dominant, may engage in anti-competitive practices by bundling their services with banking products, discriminating incumbents in favour of their affiliates within their platforms, as well as privileging their own products and services. The latter strategy stands out mainly when they act both as an intermediary and a business operator[27]. Within this framework, traditional banks may suffer a competitive disadvantage, given that they gather only financial data and have to deal with rigid regulation and legacy technologies. The XS2A rule may distort competition by obliging them to share with big digital providers the only advantage they hold (customers' account data) without something in return.

In this regard, some commentators suggest the introduction of a "reciprocity clause" that should grant credit institutions access to the data owned by the beneficiary of the XS2A rule if this is a tech giant[28]. This solution may enable banks to

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[26] According to the Organisation for Economic Co-operation and Development (OECD), *Digital Disruption in Banking and its Impact on Competition*, 2020 [http://www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm], Accessed 18 June 2021), "FinTech will certainly increase the contestability of banking markets and increase competition in the short term. Whether the entry of BigTech platforms will entrench large players with dominant positions, and whether it may raise systemic risk concerns, is unknown".

[27] Borgogno, O.; Colangelo, G., *The data sharing paradox …*, *op. cit.*, note 7. See also OECD, *Digital Disruption in Banking and its Impact on Competition*, *op. cit.*, note 26, p. 22, where the potential strategies of incumbents and Big Tech platforms are analysed, pointing out that: "Incumbents have limited options for staying in business if BigTech firms enter the banking sector in full force. Either they can become platforms and compete directly with BigTech firms by trying to compensate for the latter's superior data capabilities, perhaps greater client trust and security (banks are good at keeping secrets), and better ability to navigate the regulatory maze, or they can become specialised in unique financial products that the BigTech firms cannot offer and therefore cannot commoditise. In any case, incumbents will have to restructure, and consolidation will occur".

[28] Among the others, see Di Porto, F.; Ghidini, G., *"I Access Your Data, You Access Mine" …*, *op. cit.*, note 7, p. 323.

exploit both customers' account data and other behavioural information to provide more efficient digital payment services. According to those who support the reciprocity clause (which would need amendments to PSD2[29]), data subject consent represents the legal ground of the reciprocity obligation. In order to clarify the scope of the reciprocity obligation, one has to solve the problem of defining the information to which banks should access as compensation for customers' account data sharing. In this respect, it has been argued that, unlike account information, behavioural data cannot be considered indispensable to provide digital payment services, and BigTech companies do not enjoy monopoly power in their generation and collection[30]. According to the reciprocity clause's supporters, banks should access only the data held by Big Tech platforms which are necessary to provide their own services and are authorized by the data owner, pursuant to art. 66 of PSD2[31].

It is worth noting that the XS2A rule seems to introduce access to an essential facility. Following the essential facility doctrine – and setting aside the complexity of defining it – a dominant company cannot refuse to share its assets if they are fundamental for competitors to provide their products or services[32]. Obviously, this doctrine aims at preventing the monopolist from excluding new entrants. The

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29 Di Porto, F.; Ghidini, G., *"I Access Your Data, You Access Mine"* …, *op. cit.*, note 7, p. 326, have proposed to integrate art. 66 PSD2 with a new lit. (i), formulated as follows: "(i) the payment initiation service provider with an initial capital of €XXX or above [or with an annual capital equal or above €XXX, or with more than XXX active personal clients] shall, immediately after confirmation by the account servicing payment service provider that its payment order was received, provide or make available to the account servicing payment service provider all information regarding the payment service user in its possession. A similar amendment should be made to Art. 67, with reference to AISPs".

30 Borgogno, O.; Colangelo, G., *The data sharing paradox* …, *op. cit.*, note 7, p. 10.

31 Di Porto, F.; Ghidini, G., *"I Access Your Data, You Access Mine"* …, *op. cit.*, note 7, p. 324. Speaking about big data, OECD, *Big Data: Bringing Competition Policy to the Digital Era, Executive Summary,* April 26, 2017 [https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf], Accessed 18 June 2021, has observed that competition authorities should assess, in each specific case, whether the data are replicable, if they can be obtained in other ways, how much data are needed to compete, in order to consider refusals to give access to data and discriminatory access to them as anti-competitive conducts (p. 4).

32 According to the European Commission, *Staff Working Document on the free flow of data and emerging issues of the European data economy*, January 10, 2017 [https://digital-strategy.ec.europa.eu/en/library/staff-working-document-free-flow-data-and-emerging-issues-european-data-economy], Accessed 18 June 2021, competition authorities can invoke the essential facility doctrine to grant access to data held by an economic operator if the four conditions laid down by the Court of Justice of the European Union are fulfilled. In particular, data should be indispensable for the downstream product, there would not be any effective competition between the upstream and downstream product, the refusal would prevent the development of the second product without an objective justification (p. 21-22). About the essential facility doctrine, see the following judgments of CJEU: Joined Cases C-241/91 P and C-242/91 P *RTE and ITV v Commission* [1995] ECR I-743; Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* [2004] ECR I-5039; Case C-170/13 *Huawei Technologies*

question is whether customers' account data can be considered an essential facility. Before the PSD2, third-party providers were able to collect account information thanks to the practice of screen-scraping, also known as web scraping, which consists in an "automated, programmatic use of software via which the customer allows a third party (such as a FinTech) to extract data or perform actions that users would usually perform manually on the website, by sharing with the latter their security credentials"[33]. This means that the data access at issue was not completely excluded for newcomers. Nowadays, customers' account data cannot be qualified as an essential facility because of the free-of-charge access granted by the XS2A rule and the absence of any agreement between the banks and third-party providers. Moreover, it should not be ignored the difficulty of defining the data relevant market, given the involvement of both antitrust law and specific financial regulation that may lead to conflicting outcomes[34]. The PSD2, indeed, does not attribute specific competences to financial authorities in order to ensure competition in the payment services industry, meaning that competition law is still applicable[35]. Additionally, even if the said limitations can be overcome, the bank's dominant position is a prerequisite that should be verified on a case-by-case basis, preventing the general applying of such an antitrust remedy[36].

Speaking about the existence of a dominant position, it is really questionable whether financial institutions (even those of large dimensions) can be considered hegemonic in the context of a market populated by agents labelled as BigTechs. For the reasons explained above, it is plausible to believe that the balance hangs on the side of these latter entities. Many authors agree on the fact that the access to, and the control of, huge amounts of data (not necessarily personal data[37]) is a source of market power[38]. Indeed, the economic success of digital platforms depends on the number of their users, seen as a data source. The more users there are, the more information can be gathered by these companies and exploited to

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Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH ECLI:EU:C:2015:477. See also the judgment of the Court of First Instance in Case T-201/04 *Microsoft Corp. v. Commission* [2007] ECR II-3601.

33 Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 588.

34 Di Porto, F.; Ghidini, G., *"I Access Your Data, You Access Mine" …*, *op. cit.*, note 7, p. 315.

35 Vandenborre, I.; Levi, S.D.; Janssens C., *Fintech and access to data*, in *Concurrences*, 2019, N° 4, p. 3.

36 Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 583.

37 With respect to interaction between competition and personal data protection law, see. Paal, B.P., *Market Power in Data (Protection) Law*, in *Global Privacy Law Review*, 2021, vol. 2, issue 1, pp. 8-15; the Author believes that "data protection and antitrust law do not communicate dissonantly, but rather harmoniously" (p. 15).

38 See, for instance, Santesteban, C.; Longpre, S., *How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science*, in *The Antitrust Bulletin*, 2020, vol. 65, issue 3, pp. 459-485; United Nations Conference on Trade and Development (UNCTAD), *Competition issues in the digital economy*, 2019, p. 6.

increase the quality of the service, also by selling the data at issue to advertisers for tailored advertising. This may represent a barrier to entry for potential entrants that do not enjoy such an opportunity[39]. Similarly to what is happening in other segments of the digital landscape, there is a widespread awareness that online platforms have gained a dominant position in their respective markets[40], or they are on the way to become dominant[41].

From a general point of view, presumably a novel approach must be developed to deal adequately with the competition dilemmas in the platform economy. Or at least, enforcers are called to adapt the existing tools [42]; and, of course, this adaptation could take place in different forms[43]. In any case, an adjustment of the current strategies, or sometimes the creation of new paradigms, seems inevitable, and we think that it is urgent too (although the performance of these tasks requires some time). These processes may lead to various outcomes, even unexpected ones. But the end result cannot reasonably be that the platform competing with banks in the retail payments market is always regarded as the dominant entity that, facing a number of small competitors, acts like a monopolist. One of the risks is that of

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39 UNCTAD, *Competition issues in the digital economy*, *op. cit.*, note 38, p. 4.

40 See Hermes, S.; Pfab, S.; Hein, A.; Weking, J.; Böhm, M.; Krcmar, H., *Digital Platforms and Market Dominance: Insights from a Systematic Literature Review and Avenues for Future Research*, PACIS 2020 Proceedings, 42.

41 Such risks are perceived all over the world. In China, the State Administration for Market Regulation issued (on February 7, 2021) the Platform Antimonopoly Guidelines, with the aim of preventing and stopping monopolistic behaviour in the platform economy. In Germany, the 10th amendment to the German Competition Act – which has entered into force on January 19, 2021 – focuses on the platform economy; according to the President of the German Competition Authority (Bundeskartellamt), the reform will permit "to prohibit big tech companies from engaging in certain types of conduct much earlier and, so to speak, shut the stable door before the horse has bolted" (the press release published by the Bundeskartellamt is available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html], Accessed 18 June 2021).

42 UNCTAD, *Competition issues in the digital economy*, *op. cit.*, note 38, p. 5, has expressed the view that "competition law and policy […] need to be adapted to the new market realities and business models. This is crucial to ensure competitive and contestable markets".

43 Sitaraman, G., *Too Big to Prevail: The National Security Case for Breaking up Big Tech*, 99 Foreign Aff. 116 (2020), pushes for breaking up BigTech companies. According to Hovenkamp, H.J., *Antitrust and Platform Monopoly*, U of Penn, Inst for Law & Econ, Research Paper No. 20-43 (forthcoming in 130 Yale L.J. (2021)): "Competition problems in digital platforms present some novel challenges, but most are within reach of existing antitrust law's capacity to handle them. The courts and other antitrust policy makers should treat digital platforms for what they are, which is business firms that have unique features but not very much that requires us to abandon what we know about competition in high-technology, product-differentiated markets" (p. 121).

defining markets too narrowly[44], and thus ignoring the competitive pressure of other firms.

We firmly believe that, in the absence of a profound renovation of the antitrust conceptual framework, further regulatory measures are required. And, in order to find an efficient solution, further research is needed to fully understand the mechanisms that govern the interaction between platforms and other market agents.

4. OTHER CRITICAL ISSUES REGARDING DATA SECURITY IN DIGITAL PAYMENTS

Since data are the main asset of online banking, there is a risk of illegitimate use and access to customer information. The client trust is a key prerequisite for the provision of digital payment services, given that without his or her consent there is no data flow. In order to ensure the confidentiality and integrity of customer data, the PSD2 prevents the PISP from accessing, using, or storing any data that are not necessary for the provision of the payment service requested by the payer. The bank shall give access to all the available data about the customer's account unless they are deemed sensitive. The PISP cannot share the user's security credentials with parties other than the user himself and the bank. Third-party providers must also identify themselves towards the credit institution and communicate with the latter, the payer, and the payee in a secure manner[45]. Furthermore, PISPs are expected to take appropriate measures to deal with operational or security incidents[46]. Finally, the PSD2 mandates PISPs to implement Strong Customer Authentication (SCA) processes, complying with the technical requirements developed by the European Bank Authority (EBA) in cooperation with the European Central Bank and approved by the European Commission[47]. The Regulatory Technical Standards regulate both the identification of providers and user authentication. The enhanced authentication is based on three elements, such as something only the customer knows (password/PIN), something only the user possesses (smartphone/device) and something inherent to the user (fingerprint/facial recognition)[48].

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44 On this issue, with specific reference to two-sided platforms, see Franck, J-U.; Peitz, M., *Market Definition in the Platform Economy*, CRC TR 224 Discussion Paper Series, 2021; Sarmas, I., *Market Definition for Two-Sided Platforms: Why Ohio v. American Express Co. Matters for the Big Tech*, 19 Fla. St. U. Bus. Rev. 199 (2020).

45 PSD2, art. 66.

46 PSD2, art. 96.

47 The PSD2 (articles 95, 96 and 98) has mandated the EBA to develop guidelines and drafts of Regulatory Technical Standards to ensure data security and implementation of the XS2A rule.

48 PSD2, art. 4.

The EBA prevents third-party providers from accessing customer data through screen-scraping, thus avoiding fraud and data abuse risks[49]. The screen-scraping mechanism is not considered secure[50]. Instead of this mechanism, the Authority endorses the use of application programming interfaces (APIs), which are sets of protocols that allow communication between computer applications (interfaces). They facilitate the connection between account providers, their customers and payment services providers, making accessible, unlike screen-scraping, only the payment information that the interface allows. Management of APIs is crucial for the effective enforcement of the access to account rule. The discussion among market players and policymakers focuses on whether standardize APIs or let ASPSPs free to exploit their own interfaces[51]. The European Parliament opted for the standardization strategy in line with the aim of harmonization and interoperability[52]. Additionally, the EBA has set up a Working Group on APIs to address their opportunities and challenges.

With respect to the relationship between PSD2 and data protection law, art. 4 of the General Data Protection Regulation (GDPR)[53] defines account data as personal data. Art. 94 of PSD2 states that payment service providers can access, process, and retain the personal data necessary to provide their payment services, with the payment service user's consent. But most important, art. 20 of GDPR grants the right to data portability, according to which the data owner has both the right to receive the personal data he or she has provided to a controller and the right

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49 See European Banking Authority, *Opinion of the European Banking Authority on the European Commission's intention to partially endorse and amend the EBA's final draft regulatory technical standards on strong customer authentication and common and secure communication under PSD2,* June 29, 2017: "Current access approaches, often referred to as 'screen scraping', in which the TPP impersonates the consumer and has access to all the consumer's data, rather than only the data necessary to provide payment services, would not be compliant".

50 See Zunzunegui, F., *Digitalisation of Payment Services*, Ibero-American Institute for Law and Finance, Working Paper Series, No. 5/2018, p. 26: "Since the passwords are assigned, all of the customer's data can be Accessed without any restrictions, except for the protections that the bank itself may develop for this kind of access".

51 Borgogno, O.; Colangelo, G., *Data, Innovation …*, *op. cit.*, note 7, p. 591, analyse the pros and cons of the APIs standardization. For instance, in the United Kingdom the main credit institutions has been mandated by the Competition and Market Authority to design "a single a single, open standardized set of APIs freely available for the whole industry". See also Borgogno, O.; Colangelo, G., *Data Sharing and Interoperability Through APIs: Insights from European Regulatory Strategy*, in *Computer Law & Security Review*, 2019, vol. 35, issue 5.

52 European Parliament, *FinTech: the influence of technology on the future of the financial sector*, May 17, 2017 [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0211_EN.html], Accessed 18 June 2021.

53 Regulation (EU) 2016/679 of the European Parliament and of the Council, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (GDPR).

to transmit those data to another controller. It is necessary to coordinate art. 20 GDPR with the XS2A rule, given that the bank customer could migrate his or her data from the traditional bank to the FinTech company relying on the right to data portability. The matter was solved by the EU "Working Party Article 29" using the *lex specialis* criterion, according to which the PSD2 shall prevail, given its sectorial regime[54]. Further details on this issue have been provided by the European Data Protection Board (EDPB) – the successor of the said Working Party – in the Guidelines on the interplay of PSD2 and the GDPR, adopted on 17 July 2020[55]. It has been clarified that the notion of "explicit consent" under the PSD2 is different from (explicit) consent under the GDPR. Indeed, the first one is an additional requirement of a contractual nature.

5. A LOOK AT THE STRATEGIES DEVELOPED IN THE GLOBAL FRAMEWORK

Attempts to regulate open banking are carried out in several geographical areas, in order to stimulate the competitiveness in the payments market and to avoid the creation of new, and potentially more dangerous, forms of distortions. Trespassing the borders of the European Union, we immediately encounter the United Kingdom, whose experience had its roots in the EU legislation, but then partially deviated from the common track.

Australia has implemented an open banking system, in a larger framework of promotion of the sharing of data among firms. Actually, in July 2020, the Australian Consumer Data Right Act came into force, which pursues the goal of improving competition and choice, as allows that transaction data, customer data and product data can be communicated with third-party comparison sites to increase the consumer's negotiation strength. The scope of this piece of legislation is overly broad: in the initial stage, it is applicable only in the banking industry; then it will apply to the energy and telecommunications sectors, before including other industries gradually on a sector-by-sector basis.

Speaking of recent developments, one cannot ignore how Brazil is coping with open banking. In May 2000, the Central Bank of Brazil (Banco Central do Brasil) has issued a regulation on the implementation of open banking. Like similar attempts to govern the phenomenon, the said regulation – which defines open banking as a standardized sharing of data and services through the opening and

[54] See Art. 29 Data Protection Working Party, *Guidelines on the Right to Data Portability*.

[55] EDPB, Guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR.

integration of systems – aims at encouraging innovation, promoting competition, and increasing the efficiency of the national financial system.

Of particular interest is the case of Canada, where in June 2019, the Senate Committee on Banking, Trade and Commerce asked the Government to take immediate steps to initiate an open banking framework. Then, in January 2020, the Advisory Committee on Open Banking, appointed by the Ministry of Finance, determined that the benefits of open banking outweigh its cost. In its report[56], the Committee observed that a robust consumer-directed framework: *i*) could give consumers greater control of their information; *ii*) could support a more innovative and competitive sector by setting rules and protections around data use and requiring data to be transferred in a more secure form. After the publication of this report, a new phase commenced in the design of an open banking regulatory framework. Currently, the focus is on determining how regulators and the financial sector can mitigate data security and privacy risks.

6. THE UNITED STATES EXPERIENCE: REGULATION IS NEEDED?

It is really remarkable what is currently taking place in the United States. Unquestionably, in this field, the United States have adopted for many years a laissez-faire strategy. Consequently, the developments have been market-driven[57]. However, some factors, and in the first place the unwillingness of many banks to provide third-party companies with access to customer accounts, delay the expansion of open banking in the United States[58].

But significant changes might occur soon. Recently, the Bureau of Consumer Financial Protection (CFPB) – a federal agency created under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) with the purpose to promote fairness and transparency for mortgages, credit cards, and other consumer financial products and services – made a move could be a bellwether for a potentially radical turn in the approach to the problem under discussion. The Dodd-Frank Act, enacted in response to the global crash of 2008, contained several measures aimed at preventing financial crises. What is relevant

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56 *Consumer-directed finance …*, *op. cit.*, note 3.

57 See Kaufman Winn, J.; Wright, B., *The Law of Electronic Commerce*, 4th ed., Wolters Kluwer, New York, NY, 2021, § 7.09[B].

58 In this respect, Liu, H.-W., *Two Decades of Laws and Practice Around Screen Scraping in the Common Law World and its Open Banking Watershed Moment*, 30 Wash. Int'l L.J. 28, 31 (2020), has observed that, in comparison to the European situation. "the financial data-sharing environment is less clear in the United States, which lags in building up Open Banking".

to our purposes is that there is a provision (section 1033) titled "Consumer rights to access information". This provision obliges consumer financial services provider to make available to a consumer, upon request, information in its control or possession concerning the consumer financial product or service that the consumer obtained from the said provider, including information relating to any transaction, series of transactions, or to the account, such as costs, charges, and usage data. It is specified that this information shall be made available in an electronic form usable by consumers.

The implementation of the statutory measures requires the promulgation of specific regulation by the CFPB. For about ten years the Bureau, although backing up in some way consumers' interest in access to (and control of) financial data[59], has not taken any step to put into effect the provisions. Finally, after the organization in February 2020 of a "Symposium on Consumer Access to Financial Records and Section 1033 of the Dodd-Frank Act", the CFPB issued, on October 22, 2020, an Advance Notice of Proposed Rulemaking (ANPR) to solicit comments and information to assist the Bureau in developing the necessary regulations[60].

The document underlines that "consumer-authorized data access and use holds the promise of improved and innovative consumer financial products and services, enhanced control for consumers over their financial lives, and increased competition in the provision of financial services to consumers". Then it aims at showing the positive effect, in terms of intensification of competition, of the implementation of the rule about consumer right to access information. More specifically, the ANPR supports the view that authorized data access is susceptible not only of fostering competition for existing products (which could be accessed by a larger number of customers, and at a lower price), but also of stimulating the offer of new types of products and services. Moreover, consumers are expected to gain also from the improvement of existing products.

The endeavour of the CFPB to create a congenial environment does not mean that the private sector will fade into the background. On the contrary, since private

[59] Among the initiatives promoted by the Bureau, before taking its fundamental step, Vallabhaneni, P., *CFPB Seeks Comments on Highly Anticipated Consumer Access to Financial Information Rulemaking* (Nov. 3, 2020), [https://www.whitecase.com/publications/alert/cfpb-seeks-comments-highly-anticipated-consumer-access-financial-information], Accessed 18 June 2021, recalls the "principles for Consumer-Authorized Financial Data Sharing and Aggregation covering access; data scope and usability; control and informed consent; authorizing payments; security; access transparency; accuracy; ability to dispute and resolve unauthorized access; and efficient and effective accountability mechanisms".

[60] 85 FR 71003.

sector initiatives are driving the adoption of open banking in the United States[61], it is advisable that the strategies pursued by the Bureau will be coordinated with those of financial institutions and technology companies.

The ANPR aroused many reactions. As far as we know, 99 comments have been submitted on the dedicated webpage, where they are accessible[62]. Remarkably interesting are the observations of the American Bankers Association, especially where the comment emphasizes the risk of implementing prescriptive standards, which may undermine the progress that has already taken place. The fear is that standards, which in their essence are static, are going to create obstacles to innovation[63]. In our view, since common standards facilitate the entry into the market by non-incumbent financial services providers, a flexible approach would be recommended, fostering market standards that are capable of accommodating innovation[64]. For instance, one could think of a single platform that allows applications to interoperate with distinct cloud providers' services using a normalized interface[65].

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61 According to a report prepared for the Federal Reserve Bank of Boston (Pandy, S., *Modernizing U.S. Financial Services with Open Banking and APIs* (Feb. 8, 2021) [https://www.bostonfed.org/publications/payment-strategies/modernizing-us-financial-services-with-open-banking-and-apis.aspx], Accessed 18 June 2021), three initiatives are noteworthy: 1) the creation of a Model Data Access Agreement, prepared by The Clearing House, a company owned by 24 of largest United States leading commercial banks, for which it provides payment, clearing, and settlement services; 2) the generation, in the market for consumer and small business financial services, of several frameworks directed to develop common standards for open banking; 3) the acquisition, by some companies operating in the said market, of data aggregators, which serve as central hubs for sharing bank account data with all the applications that need it.

62 The comments are available at [https://www.regulations.gov/document/CFPB-2020-0034-0001/comment], Accessed 18 June 2021.

63 On this point, see also Competition Bureau Canada, *Supporting a competitive and innovative open banking system in Canada* (Jan. 18, 2021), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04571.html], Accessed 18 June 2021: "a Common Standard can negatively impact innovation and dynamic competition when new standards arise. Common Standards are by definition rigid, and deviation from these standards, even in circumstances where there may be value in doing so, could require a number of bi-lateral agreements between financial service providers to act outside of the pre-determined Common Standard. This creates a lack of flexibility that can reduce the incentives for service providers to bring about innovative ways of exchanging data, to the detriment of dynamic competition" (§ 18).

64 In this line of thinking, see Competition Bureau Canada, *Supporting a competitive and innovative open banking system*, *op. cit.*, note 63, § 19.

65 See L.A. Bastião Silva, C. Costa, J.L. Oliveira, *A common API for delivering services over multi-vendor cloud resources*, in *Journal of Systems and Software*, 2013, vol. 86, issue 9, 2309-2317.

7. CONCLUSION

The Canadian Competition Authority noted that open banking is not automatically pro-competitive; the achievement of a satisfactory result "requires careful design and ongoing regulatory support. Accordingly, decision makers must actively ensure that regulatory rules are successful in achieving their intended policy goals"[66]. We agree with this point. As outlined above, the rise of open banking brings serious concerns for competition. These concerns must be addressed, not by creating rigid barriers for BigTechs (since, to a certain extent, their contribution could be beneficial to improve consumer welfare)[67], but regulating in a proper manner the coexistence between traditional financial institutions, 'ordinary' FinTech companies, and BigTech giants. In the absence of a specific regulatory treatment of BigTechs operating in finance[68], a new model of regulation should be adopted[69]. We are not worried about the emergence of new forms of competition in the banking and financial sector. And, as it should be clear from the above paragraphs, our purpose is not to defend the established hierarchies and structures. But we fear, in tune with other authors' way of thinking, that, unless the process is carefully controlled by legislatures and regulators, that online platforms will replace the hegemony of the traditional banks.

In this scenario, competition law should play a non-secondary role, especially when problems are specific to single firms[70]. And the answer to the failures of traditional antitrust enforcement to face digital gigantism cannot simply be the

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66 See Competition Bureau Canada, *Supporting a competitive and innovative open banking system*, *op. cit.*, note 63, § 9.

67 According to Borgogno, O.; Colangelo, G., *The data sharing paradox …*, *op. cit.*, note 7, p. 13, since "FinTech start-ups seem more likely to work alongside incumbent banks rather than compete with them, imposing entry barriers to BigTechs would remove the only effective source of competitive pressure for traditional banks".

68 See Crisanto, J.C.; Ehrentraud, J.; Fabian, M., *Big techs in finance: regulatory approaches and policy options*, FSI Briefs, 2021, No. 12, p. 8.

69 According to Crisanto, J.C.; Ehrentraud, J.; Fabian, M., *Big techs in finance …*, *op. cit.*, note 7, p. 12: "The entry of big techs into finance calls for a comprehensive public policy approach that combines financial regulation, competition policy and data privacy. Policy options that could be considered include adjusting the existing policy approach by recalibrating the mix of entity-based and activity-based rules, in favour of the former in certain policy areas; developing a bespoke regime for big techs; and strengthening cross-sectoral and cross-border cooperative arrangements between national authorities and foreign regulators. These options may support authorities in their considerations on how best to adjust the regulatory framework in their efforts to address the risks that the business model of big techs entails while preserving the benefits they create".

70 See Hovenkamp, H.J., *Antitrust and Platform Monopoly*, *op. cit.*, note 43, p. 120: "Antitrust's fact-specific, individual approach to intervention is superior to regulation when failures of competition are specific to the firm rather than inherent in the market". On their side, Borgogno, O.; Colangelo, G., *The data sharing paradox …*, *op. cit.*, note 7, p. 13, observe that "there will always be room for antitrust

re-proposition of the idea that 'big is bad', at the expense of consumer welfare[71]. Authorities and other decision-makers need to be extremely cautious when enacting restrictive measures, since over-regulating platforms involved in the provisions of payment services could be counterproductive. Looking specifically at the European context, EU institutions, to achieve a better result, should also analyse carefully what is going on in other geographical areas. Indeed, the establishment of an effective dialogue among the agencies that – in different (national as well as supranational) legal systems – are responsible for the sectors connected with consumer-directed finance (such as banking authorities, financial market authorities, competition authorities, data protection authorities) seems necessary to tackle a global problem. This might seem obvious, but experience has shown that synergy among the different authorities is quite difficult to achieve. So legislative measures are needed to incentivize cooperation.

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enforcement to challenge potential anti-competitive practices carried out by incumbent as well as new entrants".

71 On this issue, see Pardolesi, R., *Tutto (o quasi) quel che avreste voluto sapere sul principio del consumer welfare in diritto antitrust* (Mar. 5, 2021), [http://www.law-economics.net/workingpapers/L&E-LAB-COM-59-2021.pdf], Accessed 18 June 2021.

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Review paper

ALGORITHM TRANSPARENCY AS A SINE QUA NON PREREQUISITE FOR A SUSTAINABLE COMPETITION IN A DIGITAL MARKET?

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ABSTRACT

Algorithms play a fundamental role in the digital economy. Their impact on the situation of market participants is significant. Hence, ensuring transparency of algorithms, through access to them, is crucial for the proper functioning of the market. Several models of algorithmic transparency are analyzed in the paper: from lack of transparency to complete regulation of algorithms. In particular, transparency through explanation, and "on-demand transparency" were proposed.

The goal of the paper is to determine the optimal form and scope of regulation of this area, in order to ensure sustainable competition in the digital market. Hence, the paper focuses on the concept of algorithmic transparency, the nature of the competition in the digital market, the role of algorithms within the digital trade, and problems related to the regulation of algorithms. This allows to answering the question of whether algorithmic transparency is an indispensable condition for sustainable competition in the digital market, and what are the legal challenges, which may arise with respect to various models of algorithm transparency.

The paper is embedded within the EU legal framework, discusses new legislative developments in the EU law, such as the proposal for the Digital Markets Act, and includes analysis of EU antitrust case-law and market practices.

***Keywords**: algorithm, transparency, digital market, automated decision-making, competition law, Digital Markets Act*

1. INTRODUCTION[1]

One of the most commonly accepted definitions of "algorithm" provides that it is a '*well-ordered collection of unambiguous and effectively computable operations that when executed produces a result and halts in a finite amount of time*'.[2] It can be also defined as a solution to a given problem[3], and can be compared to a recipe consisting of input, set of instructions, and output[4], a technical instruction how various systems, applications, and devices operate. Another definition provides that an algorithm is a pre-set decision mechanism[5, 6].

Nowadays algorithms play a fundamental role in computer science and in the economy, constituting the basis for numerous technologies, from simple IT systems to applications of Artificial Intelligence (AI) and many others (algorithms provide the basis for functioning of numerous remote/intelligent/digital products and services).[7, 8, 9] Indeed their role in the digital economy should be spotlighted, as it is founded on three pillars: data (personal and non-personal), algorithms, which process it, and platforms that use them. Algorithms in cyberspace have the

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1 This paper is a part of research project: "Algorithmic contract as a challenge for commercial law" (no. 2019/35/D/HS5/04377), which is financed by National Science Center, Poland.

2 Schneider M.; Gersting J., *An Invitation to Computer Science*, New York 1995, p. 9

3 Britannica, T. Editors of Encyclopaedia, "*Algorithm*", in: *Encyclopedia Britannica*, [https://www.britannica.com/science/algorithm], Accessed 15 April 2021.

4 The notion of an algorithm is similar to the concept of a computer program, i.e. algorithm has a more general meaning, whereas the latter one denotes rather an implementation of an algorithm, which has been specified in a programming language, in a sense resembling the Turing machine: "*The idea behind digital computers may be explained by saying that these machines are intended to carry out any operations which could be done by a human computer*" Turing, A. M., *Computing Machinery And Intelligence*, Mind, Vol. LIX, Issue 236, October 1950, pp. 433–460, available at: https://academic.oup.com/mind/article/LIX/236/433/986238.

5 Gal M., Algorithmic-facilitated Coordination, OECD's Roundtable on Algorithms and Collusion, 22 June 2017, p. 7.

6 The origin of this term for a long time remained enigmatic, see: Knuth D. E., *The Art of Computer Programming: Fundamental algorithms Vol. 1*, Reading 1997, pp. 1-2.

7 Tucker A.; Belford G. "*Computer science*" in: *Encyclopedia Britannica*, [https://www.britannica.com/science/computer-science], Accessed 15 April 2021.

8 In computer science, the notion of "algorithm" proves to be problematic, dynamic, and complex. See: Gurevich Y. *What Is an Algorithm?*, Conference proceedings: SOFSEM 2012: Theory and Practice of Computer Science - 38th Conference on Current Trends in Theory and Practice of Computer Science, 2012, available at: https://www.researchgate.net/publication/221512843_What_Is_an_Algorithm, p.4.

9 "Algorithm" lacks a legal definition, however, with the rapid transformations occurring in the economy, such definition may turn out to be useful. In fact, algorithms differ greatly, in terms of complexity, importance, etc. Similarly, AI lacks a clear and universally accepted definition that would be practical in legal evaluations. See: Buiten M., *Towards Intelligent Regulation of Artificial Intelligence*, European Journal of Risk Regulation, Vol. 10:1, p. 45.

capacity to regulate behaviour of users, i.e. they determine allowed actions, and restrict others. Therefore, future of the market will be influenced by the scope and mode of their implementation.[10] This article will analyse one of the most important aspects of algorithm regulation, i.e. their transparency, to determine whether sustainable competition in the digital market is jeopardized through untransparent systems, and if adequate rules should be introduced.

2. REGULATION[11] OF ALGORITHMS AND THE CONCEPT OF ALGORITHM TRANSPARENCY

Although numerous legal issues arising from algorithm exploitation in the digital economy can be identified, *inter alia* their design, development, transparency, access, their functioning in the market and compliance with different norms, until now algorithms have not been thoroughly regulated. Naturally, many different legal norms impact algorithms, from the application, performance to the effects of execution, yet the topic of algorithmic regulation increasingly is gaining importance.

Algorithms play an important role in the decision-making processes, implicating legal effects on market participants and other members of the society. Recently highlighted examples of actions taken by algorithms, resulting in decisions having legal effects, include automated termination of Uber drivers' employment contracts[12], students grades decided by an algorithm[13], or automated prediction system utilized by the Dutch government in order to calculate chances of commit-

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[10] See: Kenney M.; Zysman J., *The Rise of the Platform Economy*, Issues in Science and Technology, Vol. 32/3, Spring 2016, pp. 61-69, available at: https://issues.org/rise-platform-economy-big-data-work. See also: Lessig L., *Code is law: On Liberty in Cyberspace*, Harvard Magazine, January 2000, available at: https://www.harvardmagazine.com/2000/01/code-is-law-html, who notes that in cyberspace the regulatory nature of the code denotes that the process of coding entails making choices of values, which are implemented in the digital environment. Moreover, C. Blacklaws indicates the crucial role of algorithms in modern society, claiming that: "*big data, machine learning, algorithmic decision-making and similar technologies have the potential to bring considerable benefit to individuals, groups and society as a whole"*, but *"could also create new injustices and embed old ones in ways that allow them to be powerfully replicated across national and international networks*". Blacklaws C., *Algorithms: transparency and accountability*, Philosophical Transactions of the Royal Society A, Vol. 376, Issue 2128, 2018, p. 1.

[11] Algorithms can be regulated, but they can regulate themselves. See: Lessig L., op. cit.

[12] Russon M.A.., Uber sued by drivers over 'automated robo-firing', 2020, [https://www.bbc.com/news/business-54698858], Accessed 15 April 2021.

[13] Satariano A., "*British Grading Debacle Shows Pitfalls of Automating Government*", New York Times, [https://www.nytimes.com/2020/08/20/world/europe/uk-england-grading-algorithm.html], Accessed 15 April 2021.

ting tax/benefit fraud.[14] The impact of the algorithms, and automated decisions, on the life of the society causes that they should be fair, transparent, and designed ethically[15]. Furthermore, some even assert that in the current circumstances knowledge about the algorithm is a fundamental right[16], and that the challenges raised by automated decision-making systems require regulatory actions[17].

The European Commission's (EC) *White Paper on Artificial Intelligence* provides that a lack of transparency results in difficulties in the identification of possible breaches of laws.[18] The Ethics Guidelines for Trustworthy Artificial Intelligence, formulated by the EU's High-Level Expert Group on AI included 7 main conditions, which AI systems should meet in order to be deemed trustworthy, and among them included transparency.[19]

Algorithms, which are used in commerce, are opaque and access to them is limited because they are protected as trade secrets, generally to avoid manipulation and exploitation by competition.[20, 21] Within the EU legal system trade secrets[22] are protected against unlawful acquisition, use and disclosure by Directive (EU)

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14 Toh A., "*Dutch Ruling a Victory for Rights of the Poor*", Human Rights Watch, [https://www.hrw.org/news/2020/02/06/dutch-ruling-victory-rights-poor], Accessed 15 April 2021.

15 Kearns M., Roth A., "*Ethical algorithm design should guide technology regulation*", The Brookings Institution, [https://www.brookings.edu/research/ethical-algorithm-design-should-guide-technology-regulation], Accessed 15 April 2021.

16 "*Privacy expert argues "algorithmic transparency" is crucial for online freedoms at UNESCO knowledge café"*, UNESCO, [https://en.unesco.org/news/privacy-expert-argues-algorithmic-transparency-crucial-online-freedoms-unesco-knowledge-cafe], Accessed 15 April 2021.

17 See: Felzmann H., Fosch-Villaronga E., Lutz C. *et al., Towards Transparency by Design for Artificial Intelligence*, Science Engineering Ethics, Vol. 26/2020, p. 3334.

18 European Commission's *White Paper on Artificial Intelligence - A European approach to excellence and trust*, Brussels, 19.2.2020 COM(2020) 65 final, p.14.

19 In particular, humans should be aware of the interaction with an AI system's, as well as of its capabilities and limitations, see: High-Level Expert Group on Artificial Intelligence*, Ethics guidelines for trustworthy AI*, Brussels 2019, p. 18.

20 Barriers to the transparency of algorithms may include *inter alia* intentional concealment by organizations using them, and technical illiteracy of the society in areas such as programming and machine learning. See: Goodman B., Flaxman S., *European Union Regulations on Algorithmic Decision Making and a "Right to Explanation"*, AI Magazine, Fall 2017, p. 55.

21 Some authors claim that companies can be better off by making their algorithms transparent, as their quality will increase. Although algorithm transparency may not always benefit the consumers. See: Wang Q. *et al.*, *Algorithmic transparency with strategic users*, Available at SSRN 3652656, 2020.

22 Under art. 2 (1) of Directive (EU) 2016/943 'trade secret' is defined as information that is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; AND it has commercial value because it is secret; AND it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Undoubtfully algorithms can fall into the scope of this definition.

2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Directive (EU) 2016/943).[23]

One of the proposed solutions to the problem of algorithmic transparency deficiency is to grant the regulatory authorities access to them. A similar approach can be noticed in different fields of law (e.g. financial regulation).[24] It has been argued that a comprise between disclosure and secrecy would make the source code being revealed to the regulator in case of a major issue, what would ensure fairness/lawfulness of an algorithm.[25] Such an approach places the regulatory burden on the public authorities, who are not necessarily competent to make this kind of assessments.[26] Additionally, it is not clear if in such instance, authorities would be responsible for finding faults and loopholes in the algorithm?

In some EU jurisdictions, courts require disclosure of algorithms used by public administration regardless of the protections guaranteed by intellectual property rights (IPRs), arguing that public interest in algorithm transparency prevails over IPRs. In other, the burden of proof that algorithms are in compliance with ethics and regulations is placed on entities using them.[27] In Spain, proposed legislation envisages giving gig-economy workers access to algorithms of digital platforms, which determine their working conditions.[28]

There are many proposed solutions for ensuring algorithmic transparency[29], but the problem of algorithms lies in the trade-off between accuracy and interpretabil-

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23 However, under art. 1 (2)(b), Directive (EU) 2016/943 does not affect the application of EU or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities. Hence, trade secrets may be disclosed in case of public interest.

24 Kearns M., Roth A., *op. cit.*

25 Hosanagar K., Vivian J., *We Need Transparency in Algorithms, But Too Much Can Backfire*, Harvard Business Review, [https://hbr.org/2018/07/we-need-transparency-in-algorithms-but-too-much-can-backfire], Accessed 15 April 2021.

26 Ibid.

27 Huseinzade N., Algorithm Transparency: How to Eat the Cake and Have It Too, European Law Blog, [https://europeanlawblog.eu/2021/01/27/algorithm-transparency-how-to-eat-the-cake-and-have-it-too], Accessed 15 April 2021.

28 Communication from the within the framework of Social Dialogue, 10 March 2021, available at: https://www.ceoe.es/sites/ceoe-corporativo/files/content/file/2021/03/11/107/comunicado-riders-11-3-21.pdf

29 E.g. a notion of an algorithm ombudsperson was proposed. Diakopoulos N., Towards a Standard for Algorithmic Transparency in the Media, Medium, [https://medium.com/tow-center/towards-a-standard-for-algorithmic-transparency-in-the-media-81c7b68c3391], Accessed: 15 April 2021.

ity of results[30], between efficiency and potential manipulations, which can result in inequalities, unfairness, discrimination, or biased decisions.[31] As such, transparency is not sufficient to solve the problem of equitability of automated decision-making systems. Hence, it is not satisfactory to make the source code available in isolation from other important factors, e.g. evaluation of data.[32]

Therefore an idea of explainable AI/algorithm that allows determining the motivation of the decisions made by algorithms based on machine learning, identify interconnections between inputs and outputs, simultaneously showing any potential biases underlying the decision was introduced.[33] An algorithm black-box could be created, and would constitute a basis for explaining the reasoning of the system using machine learning[34]. However, some authors argue that an AI system/algorithm in order to understood should complement transparency of a source code with a model of analysing input and output pairs, enabling to indicate main factors weighted by an algorithm in the decision making process.[35]

Some legal basis for explainable algorithms already exist in the EU law. In particular, the art. 22 (1) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) stipulates that the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. Simultaneously, paragraph 3 ensures that even if there are legal grounds for such a decision, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part

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30 Noto La Diega G., *Against the Dehumanisation of Decision-Making – Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection, and Freedom of Information*, Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 9/2018, p. 9.

31 Olhade S., Rodrigues R., *Fairness and transparency in the age of the algorithm*, Significance Magazine, April 2017, pp. 8-9.

32 Blacklaws C., *op.cit.*, pp. 1-2.

33 Hosanagar K., Vivian J., op. cit.

34 E.g. Amsterdam and Helskiki provide public services systems including "AI registers" to ensure that it is in compliance with "responsibility, transparency and security". Such systems provide an explanation of the operation of the AI systems, but also specifics of utilized data, how it is processed, risks, and human oversight. Wray S., *Helsinki and Amsterdam launch AI registers to detail city systems*, ITU, [https://www.itu.int/en/myitu/News/2020/09/30/07/41/Helsinki-Amsterdam-AI-registers-city-systems-Cities-Today], Accessed 15 April 2021.

35 Deeks A., *The Judicial Demand For Explainable Artificial Intelligence*, Columbia Law Review, Vol. 119/2019, p. 1837.

of the controller, to express his or her point of view and to contest the decision. Additionally, recital 63 constitutes that every data subject should have the right to know and obtain communication in particular with regard to the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing, whereas recital 71 provides that such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision.[36] Similar provisions were included in the Polish Banking Act[37], German media law[38], and French Digital Republic Act[39]. Transparency and explainability are also among OECD's 5 Principles for responsible stewardship of trustworthy AI.[40]

Explainability does not necessarily mean that an entire decision-making process needs to be disclosed, as it is satisfactory to determine main/decisive factors of the decision, and potential inconsistency of the system's outcomes.[41] Algorithm processes should be explained to entities affected with clarity and comprehension.[42] Then, properly applied algorithms can increase the level of transparency and fairness as compared to human decision-making.[43]

3. ALGORITHMS AND COMPETITION

The role of automated decision-making, intelligent systems, and algorithms in the economy is rising. Many governments try to utilize the AI for growth of produc-

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36 The transparency rights provided for in the GDPR ensure that organizations need to provide in-depth information and communicate it in an accessible way to the data subject, but this neither requires all information about the algorithm to be disclosed, nor guarantees access to the algorithm itself, nor. See: Kaminski M., The Right to Explanation, Explained, Berkeley Technology Law Journal, Vol. 34/2019, pp. 213-214.

37 See: Art. 105a The Banking Act of 29 August 1997 (Journal of Laws of 2020, item 1896).

38 § 93 Interstate Media Agreement (Medienstaatsvertrag, MStV) of 14/28 April 2020.

39 See art. L. 311-3-1 and art. L. 312-1-3, French Digital Republic Act 2016-1321 of 7 October 2016 (Official Journal no. 235 of 8 October 2016).

40 Which stipulates that meaningful information should be provided: for general understanding of AI systems, making stakeholders aware of interactions with AI systems, enabling comprehension of the outcome, and enabling challenges of such outcome based on plain/easy-to-understand information on the factors/logic that served as the basis for the prediction/recommendation/decision. See: Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449, OECD 2021, p. 8.

41 See: *Artificial Intelligence in Society*, OECD, Paris, 2019, p. 93.

42 Malgieri G., *Automated decision-making in the EU Member States: The right to explanation and other "suitable safeguards" in the national legislations*, Computer Law and Security Review, Vol. 35/2019, p. 4.

43 Goodman B., Flaxman S., *op. cit.*, p. 56.

tivity and innovativeness. This should however advance in parallel with ensuring a proper environment for fair competition.[44] One of the three main objectives of the EC in reference to the digital transformation is "*a fair and competitive economy (…) where companies of all sizes and in any sector can compete on equal terms, and can develop, market and use digital technologies, products and services at a scale that boosts their productivity and global competitiveness, and consumers can be confident that their rights are respected (…) in the digital age, ensuring a level playing field for businesses (…) is more important than ever (…) rules applying offline – from competition and single market rules, consumer protection, to intellectual property, taxation and workers' rights – should also apply online*".[45] Therefore, there is a special role for the EU competition law in ensuring a level playing field and benefit the society in the digital context. However, it needs to adapt to the rapidly changing market and technological conditions[46], but a fair digital economy is difficult to reach, as market inequalities distort competition: "*in the borderless digital world, a handful of companies with the largest market share get the bulk of the profits on the value that is created in a data-based economy*".[47]

There are multiple ways in which competition is harmed by algorithmic actions. Abuse of the dominant position can involve discouraging and excluding competition from the market, preference of own products and services, taking unfair advantage of information asymmetries, manipulations of algorithms, harmful changes of the platform algorithms, or predatory pricing. On the other hand, algorithms may also be responsible for collusions in the platform economy, in particular when they are designed to facilitate coordination of prices, ranking manipulation, price-optimization, and potential automated collusions.[48] In fact, algorithms can be responsible for any of the anti-competitive actions described in art. 101 and art. 102 Treaty on the Functioning of the European Union (TFEU), such as price fixing, market limitation/sharing, discrimination of trading partners, tying contracts, or imposing unfair pricing. Algorithmic collusions and abuse of market power via

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44 Communication from the Commission: *A New Industrial Strategy for Europe*, Brussels, 10.3.2020, COM(2020) 102 final. See also: Policy for development of Artificial Intelligence in Poland from 2020 (Attachment to the Resolution no. 196 of the Council of Ministers of 28 December 2020, Official Gazette of the Republic of Poland of 12 January 2021, item 23).

45 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Shaping Europe's digital future*, Brussels, 19.2.2020, COM(2020) 67 final.

46 *Ibid*.

47 *Ibid*.

48 *Algorithms: How they can reduce competition and harm consumers*, Competition and Markets Authority, 19 January 2021, [https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers#theories-of-harm], Accessed: 15 April 2021.

algorithms were already discussed in the literature.[49] Also, several cases in Europe involve collusions based on pricing algorithms.[50] CJEU's "Eturas" case[51] highlighted that actions of the algorithm/computer system can lead to anti-competitive effects. Additionally, in the Google Shopping case, the EC determined abuse of a dominant position because of Google's use of an algorithm for self-prioritizing in search results.[52] Another case of exploiting market power through algorithms to promote own products and business partners with the detriment to other market participants is currently investigated by EC.[53]

However, it should be noted that proper application and regulation of algorithms can result in increased transparency, development of new and improvement of existing products, stimulate market efficiencies, enhance entry chances, and benefit consumers by empowering them with tools supporting them in taking market decisions.[54]

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49 See e.g.: Ezrachi A., Stucke M. A., *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, 2016; Mehra S., *Algorithmic Competition, Collusion, and Price Discrimination*, in: Barfield W. (ed.), *The Cambridge Handbook of the Law of Algorithms* (Cambridge Law Handbooks), Cambridge University Press, Cambridge, 2020, pp. 199-208; Mehra S., *US v. Topkins: can price fixing be based on algorithms?*, Journal of European Competition Law & Practice, Vol. 7, Issue 7, July 2016, pp. 470–474; Spiridonova A., Juchnevicius E., *Price Algorithms as a Threat to Competition Under the Conditions of Digital Economy: Approaches to Antimonopoly Legislation of BRICS Countries*, BRICS Law Journal, Vol. 7/2020, pp. 94-117.

50 E.g. Decision of the Competition and Markets Authority in case no. 50223: Trod Ltd/GB Eye Ltd, 2016, [https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf], Accessed: 15 April 2021; see also: EC's decisions in cases AT. 40465(Asus), AT. 40469(Denon & Marantz), AT. 40181(Philips), AT. 40182 (Pioneer), *Antitrust: Commission fines four consumer electronics manufacturers forfixing online resale prices*, Brussels, 24 July 2018, EC Press Release [https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601], Accessed: 15 April 2021; *Lufthansa tickets 25-30 per cent more expensive after Air Berlin insolvency – "Price increase does not justify initiation of abuse proceeding"*, Bundeskartellamt, Press Release, 29.05.2018, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_05_2018_Lufthansa.html], Accessed: 15 April 2021.

51 Case C-74/14 "Eturas" UAB and others v Lietuvos Respublikos konkurencijos taryba [2016] *Digital reports*.

52 Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)), OJ C 9, 12.1.2018, pp. 11–14.

53 *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, Brussels, 10 November 2020, EC Press Release [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077], Accessed: 15 April 2021. See also: Espinoza J., "*EU struggles to build antitrust case against Amazon*", Financial Times, [https://www.ft.com/content/d5bb5ebb-87ef-4968-8ff5-76b3a215eefc], Accessed: 15 April 2021.

54 OECD*, Algorithms and Collusion: Competition Policy in the Digital Age*, OECD 2017, p. 14-15.

Additionally, one should note the specific situation of self-learning algorithms, which could fundamentally improve the quality of achieved results, as their functioning is dependent on big data sets. The abundance of data is a determinant of market power, and rivals who do not have access to such data sets, have limited chances to effectively compete with the quality of products/services.[55] Such algorithms are using predictive models, allowing the machine to learn through training based on a "trial and error" process, and to flexibly adapt to changing conditions in order to make decisions, which are best for achieving the objective. But the methods of performing these tasks are opaque, as no *a priori* domain knowledge is given, and strategy of operation is therefore hidden. Adaptation to market conditions and practices, e.g. through automated price adjustment, can breach competition law.[56]

4. ALGORITHM TRANSPARENCY IN EU COMPETITION LAW AND PRACTICE

The EU law (including case-law) in general, and competition regulations in particular, do not formulate a requirement of algorithm transparency. However, in recent years, legislative developments in the EU introduced measures, which are related to the concept of transparent algorithms.[57] One should note in particular the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation). Its objective, as specified in art. 1(1) is to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness, and effective redress possibilities Although this document includes a number of measures, which enhance the transparency of platform-to-

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55 See: Report of the German Commission on Competition Law 4.0: A new competitive framework for the digital economy (*Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft*), Federal Ministry for Economic Affairs and Energy, Berlin 2019, pp. 14-15.

56 Monterossi M. W., Algorithmic Decisions and Transparency: Designing Remedies in View of the Principle of Accountability, The Italian Law Journal, Vol. 5, no. 2, 2019, pp. 717-720.

57 E.g. art. 3(3) of the "geo-blocking" Regulation (Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I , 2.3.2018, pp. 1–15) constitutes that where the blocking or limitation of access, or the redirection is necessary for compliance with legal requirements a clear and specific explanation should be provided to customers regarding the reasons why the blocking or limitation of access, or the redirection is necessary.

business relations, the digital platforms are not obliged to disclose the detailed functioning of their algorithms.[58]

A qualitative breakthrough in algorithm transparency[59] is offered by the EU's Digital Services Package, comprising a proposal for the Digital Services Act (DSA)[60], and the Digital Markets Act (DMA).[61] The goal of the DSA is to standardize the rules on liability, due diligence, and regulation/monitoring of the functioning of providers of intermediary services in the internal market. In terms of algorithmic transparency, DSA's main focus is on prioritization and targeting of information, content moderation, and recommendation systems.[62] To ensure this, DSA envisages special privileges of EC and independent auditors, who would have access to algorithms of the very large platforms.[63] In terms of protection of competition, a special emphasis should be placed on DMA, which aim is to ensure contestable and fair markets in the EU digital sector. In particular, it introduces the notion of the gatekeeper (art. 3(1) DMA), i.e. a provider of core platform services, who has a significant impact on the internal market, and operates a core platform service which serves as an important gateway for business users to reach end users and enjoys (or is foreseeable to enjoy) an entrenched and durable position in its opera-

58 And ranking mechanisms, see: Regulation (EU) 2019/1150, recital 27 and art. 5(6).

59 Measures concerning access to algorithms were introduced also e.g. in Australia. See e.g. Australian Competition and Consumer Act 2010 (Act No. 51 of 1974 as amended, taking into account amendments up to Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021) Section 52S, Federal Register of Legislation https://www.legislation.gov.au/Details/C2021C00151.

60 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final.

61 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

62 See e.g. DSA, recitals 58, 62, and 64.

63 See e.g. DSA art. 57(1), and art. 54 (3). Additionally, recital 99 provides that EC *should have access to any relevant documents, data and information necessary to open and conduct investigations and to monitor the compliance with the relevant obligations (…) should be able to directly require that the very large online platform concerned or relevant third parties, or than individuals, provide any relevant evidence, data and information (…) should be empowered to require access to, and explanations relating to, data-bases and algorithms of relevant persons, and to interview, with their consent, any persons who may be in possession of useful information and to record the statements made. (…)*, whereas recital 60 provides that *given the need to ensure verification by independent experts, very large online platforms should be accountable, through independent auditing, for their compliance with the obligations (…) Auditors should guarantee the confidentiality, security and integrity of the information, such as trade secrets, that they obtain when performing their tasks and have the necessary expertise in the area of risk management and technical competence to audit algorithms.* Moreover, transparency is ensured by art. 12 DSA: *Providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions. That information shall include information on (…) algorithmic decision-making and human review.* There are further transparency requirements for very large online platforms, e.g. in art. 29, art. 30, art. 31.

tions. Such entities were given a set of new obligations[64] and special procedures were put in place to ensure that gatekeepers do not distort the market through their actions by incompliance with provisions of the DMA. Similarly to DSA, DMA granted EC access to the algorithms[65], as recital 69 envisages EC *should be empowered to request information (…) In particular (…) should have access to any relevant documents, data, database, algorithm and information necessary to open and conduct investigations and to monitor the compliance with the obligations (…), irrespective of who possesses the documents, data or information in question, and regardless of their form or format, their storage medium, or the place where they are stored*. Failure to provide access to algorithms was sanctioned with fines.[66]

5. IS ALGORITHM TRANSPARENCY A *SINE QUA NON* CONDITION FOR SUSTAINABLE COMPETITION IN THE AGE OF DIGITALIZED ECONOMY?

Previous sections presented the importance of algorithms for competition in the digital market. The role of automated processes and use of programming code for regulation of the market will only increase. Therefore, it seems apparent that a fair and the sustainable competition requires enhanced transparency, *inter alia,* of algorithms. Regulation of this area seems unavoidable and imminent. In fact, it may appear to be paradoxical that modern societies regulate nearly most aspects of life and economic sectors, but platforms and algorithms, which constitute the very fundament of the new economy remain to a great extent unregulated. Such a situation may at first glance look favourable for the market, as technologies can freely develop, but the "regulatory wild west" with respect to the subject-matter of algorithms may result in market distortions, unsustainable growth of biggest platforms at the expanse of SMEs, and could hamper fair competition. In this context, a regulatory action seems understandable and reasonable, in particular if the justification of regulation is the response to the demand of the public for the

64 Actually, many of these requirements were already formulated in the EU case law. Obligations/prohibitions for gatekeepers concern e.g. combination personal data; automatic signing in of end users to other services; free setting of market pricing; concluding contracts with end users outside the platform; access to platform services acquired outside the platform; interoperability of software; preferential treatment of services and products; access to the performance measuring tools for advertisement; portability and access to data, in particular, access to search data; conditions of access for business users to the platform's software application store.

65 See: DMA art. 19 (1), and art. 21 (3). Moreover, art. 19 (4) DMA provides that where the EC requires undertakings to provide access to its data-bases and algorithms, it shall state the legal basis and the purpose of the request, and fix the time-limit within which it is to be provided.

66 See: DMA art. 26(2)(e), and art. 21(1)(c).

correction of inefficient or inequitable market practices[67], especially that currently the EU antitrust regulations do not provide effective tools to protect against market manipulations through algorithms, and elimination of businesses from platforms without legitimate justification[68]. Furthermore, algorithmic transparency is a key factor in the determination of anticompetitive behaviour, in particular, coordination and discrimination[69]. Nevertheless, the eventual regulation of algorithms should involve different considerations, perspectives, and ensure a balance between fair access, functioning, and competition in the market, and legitimate interests of organizations developing and utilizing algorithms. The threat of algorithmic overregulation is actual.

Transparency of algorithms has to provide access to them, otherwise would be illusionary. But, access to algorithms, raises additional legal questions of significant meaning, in particular:

- Who would be entitled to access: only public authorities, or also market participants, and other members of the public, e.g. organizations of consumers?
- Who would be required to disclose algorithms: developments in the EU competition/digital law indicate that such requirement would involve only the biggest platforms. The notion of gatekeepers introduced in the DMA is an example of noticing the specific and particularly important role of the very large platforms in the market. In fact, GAFAM[70] organizations do not only dominate the market (in terms of market share and revenues) but they also control/organize the digital market. It is fair to say that as biggest platforms they provide markets themselves;
- Which institutions would be involved in supervising entities and monitoring process, and what would be their role (passive or proactive);
- Under which conditions the access would be granted: would a legal interest be required, would there be a formalized procedure?
- Which algorithms would be covered by the requirement of disclosure?
- What would be the scope of access to algorithms, in particular, would access be granted only to algorithms as such, or to other items as well, e.g. data, machine-learning processes – in such case how would security of personal data

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67 Such is the justification of regulation according to the theory of "public interest", see: Posner R., *Theories Of Economic Regulation*, Bell Journal of Economics, Vol. 5/2, 1974, p. 335.

68 Graef I., *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, Yearbook of European Law, Vol. 38/1, 2019, p. 452.

69 See: Gal M., op. cit., pp. 2-26.

70 An acronym used for denoting biggest business organizations in the online environment, i.e. Google, Apple, Facebook, Amazon, Microsoft.

be enforced and ensured, taking into account the personalization of services e.g. offered through search engines, where access to historical search data is considered as a primary factor for developing better search algorithms and increase competitive pressures on dominating entities[71]. Additionally the scope of the relevant market and timeframe of access would need to be determined, especially that algorithms may be adjusted to a specific location of the user and may be dynamic;

- How could the algorithm be further used, and what would be enabled by access? On the contrary, how the algorithm as a valuable intangible property be protected against misuse by other market participants?

Algorithm transparency can be achieved through various regulatory solutions. Therefore, one can identify several approaches to regulation of algorithms in order to ensure their transparency. Below they have been classified according to the relevant level of regulation, which would need to be provided.

1. Indirect transparency – an approach, which would not involve any specific requirement for algorithm disclosure. However, algorithm transparency could be achieved through more general provisions. Such approach could be distinguished e.g. in the P2B Regulation, which encourage the online platforms to be more transparent in their relations with the business users, but does not provide for a requirement of algorithm disclosure. Other factors, which could support such a mechanism of indirect transparency, are potential pressure from the society and regulators, soft law measures, and self-regulation.
2. Transparency through oversight – an approach, which also does not involve any general requirement for algorithm transparency, however the access to algorithms would be granted to specific public authorities, and only in limited instances (periodic or *ad hoc*). This would effectively be a form of an *ex post* regulation, and would not safeguard transparency by default. Such approach was taken e.g. in the DSA/DMA.
3. Transparency through explanation - an approach, which would involve creation of a specific right to an explanation. Although, in such case no general obligation of algorithm disclosure needs to be introduced into the legal system, the market participants would be empowered with the right to explanation (perhaps only from the biggest online platforms/gatekeepers) in case of an automated decision, which substantially affects them. Potentially such a right could be linked with a right to obtain a human intervention, with the right to express their point of view, and a right to challenge automated deci-

[71] Haucap J., Stühmeier T., *Competition and antitrust in internet markets*, in: Bauer J. M., Latzer M. (ed.), *Handbook on the Economics of the Internet*, Edward Elgar Publishing, Cheltenham, pp. 193-194.

sion. Similarly provisions, as indicated above, can be found in the GDPR (art. 22) – of course with respect to the data subjects.

4. On-demand transparency - an approach, which again does not involve a general requirement for algorithm disclosure. Instead, algorithms of dominant organizations/gatekeepers could be available "on-demand", for entities who are most affected by their practices. It seems that a formalized procedure for access to algorithms would be redundant, rather interested entities would acquire such access through negotiations, or possibly through a decision of a court. Hence, a legal threshold would need to be introduced (e.g. substantial legal interest), to avoid potential abuses and to protect corporate secrets. Such access "on-demand" could be limited only to exceptional circumstances. What is important, the CJEU's case-law, where access to items protected by IPRs was granted on the basis of antitrust regulations[72], can be referred to the situation of algorithms, and can provide a sound legal basis for such an approach.
5. Transparency through disclosure – this approach would provide a full transparency, through introduction of a formal requirement of algorithm disclosure. Potentially, such a requirement would apply only to those algorithms which are most relevant for the functioning of a specific digital market. However, additionally, in order to provide an effective transparency mechanism for market participants, algorithm disclosure would need to include also other items (e.g. relevant data, machine learning processes), which are substantially interconnected with the functioning of algorithms.
6. Smart regulation[73] - denoting the use of algorithms by public authorities to regulate the market and limit manipulations and inefficiencies. Such algorithmic market policing effectively would lead to market intervention with the help of algorithms. "Good" algorithms would be deployed in order to mitigate the effects of "bad" algorithms that are responsible for market distortions.
7. Regulation of algorithms as such – it is the most far-reaching model of algorithm regulation, involving a complete regulation of algorithms as such, encompassing among others such aspects as their design, implementation, and

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72 See: Case 418/01 IMS Health v NDC Health [2004] European Court Reports 2004 I-05039; Cases C-241/91 P and C-242/91 P. Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission [1995], European Court reports 1995 p. I-00743, Case T-201/04 Microsoft v Commission [2007], European Court Reports 2007 II-03601.

73 Smart regulation involving pricing algorithms that would monitor and set market-clearing prices. However, the use of such tools in the context of dynamic pricing implicates numerous problems: e.g. effective privacy protection, and more market intervention. Yet, there are some advantages of such an approach, e.g. as A. Ezrachi, and M. Stucke note, the current economy is not governed by an invisible hand, but rather a digitalized hand, the latter one being controlled by super-platforms. See: Ezrachi A., Stucke M. A., Virtual Competition…, op. cit., pp. 203-217.

functioning. What is important, such approach could also involve a combination of other methods of ensuring strengthened transparency of algorithms, e.g. disclosure, design control (a concept of an "antitrust compliance by design" has been proposed[74]), increased oversight, and right to explanation[75].

Table 1. Pros and cons of various models of regulation of transparency of algorithms.

Level of regulation	**Model of regulation**	**Pros and cons**
1	Indirect transparency	+ No risk of over-regulation; preferable conditions for the development of technology - Ineffective measures for enforcing transparency (lack of a legal requirement)
2	Transparency through oversight	+ Access granted only to public authorities and only in certain situations (limited risk of possible abuses); the legal basis for access to algorithms (increased legal certainty); additional legal mechanisms could be introduced to enforce algorithm fairness - Trade secrets disclosed; bureaucratic approach; lack of technical competence (professional auditors needed); difficulties in selecting relevant public authority, as different subject matters would be involved (e.g. privacy, IPRs)[76]; difficulties of enforcement transparency in a transnational setting

74 Hirst N., *When Margrethe Vestager takes antitrust battle to robots*, Politico, [https://www.politico.eu/article/trust-busting-in-the-age-of-ai], Accessed: 15 April 2021.

75 E.g. Statement on Algorithmic Transparency and Accountability of ACM U.S. Public Policy Council and of ACM Europe Policy Committee indicates 7 principles for algorithmic transparency and accountability: awareness, access and redress, accountability, explanation, data provenance, auditability, validation and testing. See: *Statement on Algorithmic Transparency and Accountability*, Association for Computing Machinery, [https://www.acm.org/binaries/content/assets/public-policy/2017_joint_statement_algorithms.pdf], Accessed: 15 April 2021.

76 OECD, op. cit., pp. 48-49.

3	Transparency through explanation	+ No need for algorithm disclosure (trade secrets protected); less bureaucracy; the legal mechanism provided for market participants, which increases transparency of the market - Enforcement difficulties, brief information may not be satisfactory
4	On-demand transparency	+ Access limited only to exceptional circumstances (a trade-off between transparency and protection of trade secrets); fewer formalities - Enforcement may be difficult and could involve burdensome legal proceedings
5	Transparency through disclosure	+ Apparently complete transparency - No incentives for developing new technologies/improving existing products; confidential data disclosed (not protected); risk of manipulations[77]; lack of proficiency to understand algorithms - complex and burdensome process of algorithm interpretation[78]; in fact disclosure may not be very useful (dynamic nature of algorithms; isolated information without other aspects such as relevant data – would be impractical; the complexity of advanced AI systems[79]; risk of tacit collusions[80]

77 Transparent algorithms can facilitate stronger coordination and response prediction, so competitors can better predict market decisions and adapt their practices. See: Gal. M., op. cit., p. 7.

78 OECD, op. cit., p. 45.

79 In particular, in such instances publication of the source code itself will not provide an effective tool to ensure transparency, as AI systems make partially/fully autonomous decisions. Hence, it may be impossible to explain the outcome achieved through automated systems, which are based on machine learning. See: OECD, op. cit., p. 48.

80 A. Ezrachi and M. Stucke note that elevated transparency in concentrated markets with homogeneous goods, increases the risk of tacit collusion. See: Ezrachi A., Stucke M., *Algorithmic Collusion: Problems and Counter-Measures*, OECD's Roundtable on Algorithms and Collusion, 31 May 2017, p. 7. See also pp. 21-22. Moreover, free flow of information may be considered as a value and therefore such actions may be deemed legitimate. See: Ezrachi A., Stucke M., op. cit., p. 19.

6	Smart regulation	+ Utilization of modern tools of regulation, adjusted to dynamic economic conditions; Not really clear how such algorithms would be designed, controlled, operate, and who would be responsible for their actions? - Market interventions through algorithms can lead to inefficiencies; can constitute a parlous precedent (e.g. risk for privacy protection)
7	Regulation of algorithms as such	+ In assumption, market inefficiencies could be addressed comprehensively; in assumption complete control of algorithms; increased certainty of law - Risk of over-regulation; significant regulatory action would need to be involved; barriers for innovation, fewer incentives to create new products/offer new services; regulators lacking algorithmic proficiency; dynamic nature of algorithms making them difficult to regulate[81].

Table 1 provides juxtaposition of advantages and drawbacks of different models of regulating algorithm transparency. The different regulatory scenarios presented in Table 1 indicate various advantages but also challenges related to the regulation of algorithms. Lack of legal mechanisms for stronger transparency of algorithms seems inadequate for modern economic realities, where very large platforms dominate the market. Increased oversight of the algorithms, as can be seen in the DSA/DMA proposals, indicate the direction of future regulation. These steps may still appear inadequate, and may not offer effective tools, in particular in terms of *ex ante* algorithm regulation. Nevertheless, they can constitute a pressure mechanism that will enhance transparency. However, the bureaucratic approach is unsound, in particular as long as technical proficiency is needed to understand the functioning and specifics of the algorithms.

On the other hand, comprehensive regulation of algorithms presently seem burdened with the risk of over-regulation and can stifle innovation, as there will be fewer incentives for technology development. More importantly, the dynamic nature of algorithms makes them difficult, not only to understand, but also to

[81] Haucap J., Stühmeier T., *Competition and antitrust in internet markets*, in: Bauer J. M., Latzer M. (ed.), *Handbook on the Economics of the Internet*, Edward Elgar Publishing, Cheltenham, p. 194.

regulate. A modern approach of smart regulation may offer an attractive measure to deal with market irregularities, but such economic interventionism can generate inefficiencies and new problems. In particular, complete transparency of algorithms does not seem like an accurate solution to the problem, as it can eventually lead to new market manipulations and disclosure of confidential business information. Moreover, the usefulness of such information could be questioned, in particular when an isolated algorithm without valid data is disclosed, and when advanced AI systems are involved.

Therefore, two solutions for algorithmic regulation appear most reasonable. First one is transparency through explanation, which does not envisage a requirement for disclosure of algorithms, but instead, market participants would be enabled with the right to explanation/right to human intervention in situations, which would involve automated decision-making. Such regulation would safeguard trade secrets and other confidential information of legitimate holders, and would ensure a legal mechanism for market participants to receive clarification in a situation, when a contested decision was made by an automated system.

The second solution – "on-demand transparency" – would create a scenario in which algorithms are available only in specific cases, when dominant platform operators' decisions, would substantially impact other market participants. Hence, a threshold (e.g. a requirement of a substantial legal interest), would be needed in order to avoid potential abuses and protect corporate secrets. What is important, the EU competition law already has worked out a set of conditions under which access to protected subject matter is given on the basis of antitrust regulations. While there will always be an unavoidable interference of IPRs with antitrust rules (since IPRs are legal monopolies), the CJEU's unambiguous line of decisions (*Magill*, *IMS Health*, *Microsoft,* and others) provided conditions under which access to relevant information is granted and under which sustainable competition prevails over legal protection granted through exclusive rights. Although refusal to grant access to relevant information by an entity having a dominant position in the market *per se* is not abusive, in exceptional circumstances, abuse of a dominant position can be related to the exploitation of exclusive rights.[82]

[82] The test of exceptional circumstances involves following considerations: limitation of introduction of a new product into the market; a potential demand for such product; a justification for refusal of access; potential preemption of the market. See note 72.

7. CONCLUSION

The prevalence of automated systems in the modern economy causes the topic of algorithmic regulation one of the key issues for the functioning of the digital market. Among numerous issues, which relate to the subject matter at question, a special emphasis should be placed on the transparency of algorithms. However, true transparency in this regard is very difficult to achieve, as disclosing the source code generally will not be sufficient, and several other factors, such as machine learning system involved, personalization of data, and autonomous decisions taken by AI, should be bared in mind. Lack of transparency facilitates maintaining control over the market and effective elimination of competition. On the other hand, as this paper notes, greater transparency can also lead to market manipulation and anticompetitive actions, such as e.g. tacit collusions. Some of the recent developments in the EU legislation and proposals from the EC provide indications on a potential regulatory approach to the topic of algorithmic transparency. However, in the paper, several approaches were studied and their weaknesses, inadequacies, and further legal problems they implicate were revealed. Therefore, transparency through explanation and proposed "on-demand transparency" appear to be the soundest solutions to the problem of algorithm transparency.

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PART II
PROFESSIONAL PAPERS

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Professional paper

NEW TENDENCIES IN PUBLIC PROCUREMENT – A WAY TOWARDS LEVELLING PLAYING FIELD OR A GLIMPSE OF PROTECTIONISM?

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ABSTRACT

The purpose of this paper is to present the White Paper on levelling the playing field as regards foreign subsidies, from the public procurement perspective. This is the first time that the problem of foreign subsidies within public procurement is approached by European Commission and it is useful to analyse Commission's findings on that regard. Due to the problems caused by COVID-19 pandemic and the forthcoming Next Generation EU initiative, the Commission is determined to develop and implement suitable legal instruments for dealing with distortions in the Internal Market, caused by foreign subsidies. Legal analysis within the paper is focused on the proposed Module 3 under the White Paper, trying to detect possible practical repercussions of implementing measures as are proposed in the White Paper. In addition, the paper seeks to identify primary function of the measures proposed and tries to examine if that function could result in protectionist effects.

Keywords: *foreign subsidies, level playing field, open competition principle, protectionism, public procurement, State aid*

1. INTRODUCTION

The COVID-19 pandemic has caused unprecedented worldwide challenges, primarily in the area of public health, followed with sharp repercussions within national economies, politics and social relations. EU has not been spared of such challenges, instead due to its unique supranational nature it must deal with some additional issues caused by the pandemic. To help its heavily affected economies, EU has prepared a Next Generation EU initiative - the temporary instrument designed to boost the recovery, based on EUR 750 billion of public funds to be

injected into European economies.[1] Preparation of Next Generation EU initiative coincided with designing the new Multiannual Financial Framework 2021-2027., amounting to EUR 1.074 trillion.[2] It may be safely anticipated that such large amounts of EU funds will boost public spending and public investments, which will certainly bring about a significant increase of complex and high value public procurement procedures.

Stating that public procurement and competition law have a lot in common would be the least original thing to assert. This is a matter already argued in detail within legal doctrine.[3] Not only that, a clear connection between public procurement and competition law is evident from the fact that the principle of competition is explicitly embedded in the EU procurement law[4], as a one of the fundamental or general principles of the EU public procurement regime.[5] While the issue of scope and reach of competition principle within public procurement is open for discussion, there is no question that any idea of implementing restrictive measures or approaches in connection to public procurement has its reflections in the field of EU competition policies, and as such it should be also assessed from a competition policy standpoint.

The pandemic crisis has strengthened initiatives within the EU, seeking for stronger protection of EU based economic operators against unfair competitors from non-EU countries, which are allegedly subsidized by their governments in a way that is contrary to the EU State aid rules. Those initiatives rest on a claim that due to such subsidies, foreign competitors obtain advantages over EU economic operators when participating in EU public procurement procedures. Although those initiatives are not quite new, due to economically and politically delicate situation, EU decided to took a firm step this time. Such reaction is unsurprising, given that the European economies are heavily affected by the pandemic, a recovery is mainly planned through public investments, which imply a lot of public procurements, and a large part of allegations on unfair subsidies are addressed to Chinese companies winning procurement procedures in EU Member States in recent years, all of that happening in a delicate moment in relations of EU and China. There is no

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1 EU's next long-term budget& Next Generation EU: key facts and figures, 2020, [https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf], Accessed 20 April 2021.

2 *ibid*.

3 A fascinating study on this matter is provided in: Sanchez-Graells, A., *Public Procurement and the EU Competition Rules*, Hart Publishing, Oxford, 2015.

4 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 (Directive 2014/24/EU), OJ L 94, art. 18 (1).

5 Sanchez-Graells, *op. cit.*, note 3, p.195.

doubt that a significant amount of pressure urging EU institutions to act against foreign subsidies comes from European based economic operators, their sectoral associations and trade groups. Their motive is for sure of economic origin, arising out of the fact that in recent years companies outside EU were awarded with several high-valued public contracts, especially in the sector of public infrastructure. In Croatia for instance, a key infrastructure project, construction of Pelješac bridge of total value over EUR 520 million, was awarded to China Road and Bridge Corporation, a Chinese state-owned company. But, at the same time motives connected with geopolitics and national security issues should not be overlooked or underestimated, especially when it comes to the procurement of sensitive or critical infrastructure. In that regard, it was noted recently by the media that some European countries are starting to block Chinese involvement in their economies, by cancelling public tenders that Chinese state-owned companies were set to win, drawing closer to positions advocated by the USA.[6] According to the same media sources, such shift is motivated by a mix of national security concerns and disappointment with the previous performance of Chinese contractors.[7] As always when it comes to national security questions, it is hard to assess to which extent such assumptions are founded. Either way, it does not escape notice that the Rijeka Port, acting as the contracting authority in the procedure of granting the concession for development and economic use of the Zagreb Deep Sea container terminal in Rijeka, at the end of 2020 annulled the granting procedure, after a consortium of Chinese companies submitted the best offer and was likely to win. The reasoning for the annulment offered in the decision rendered by the contracting authority very briefly invoked the pandemic as the main reason for the annulment, lacking any elaboration on the causal link between the pandemic and the annulment of the concession procedure.[8]

In order to address the issue of foreign subsidies, during 2020 the Commission has adopted a White Paper on levelling the playing field as regards foreign subsidies[9], aim of which is to deal with the distortive effects caused by foreign subsidies in the Single Market. Three modules have been developed in the White Paper, representing instruments of the future regulatory framework designed to address distortions caused by foreign subsidies in the Single Market.

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6 Michaels, D., Pop, V., *China faces European obstacles as some countries heed U.S. pressure*, The Wall Street Journal online edition, [https://www.wsj.com/articles/china-faces-european-obstacles-as-some-countries-heed-u-s-pressure-11614088843] Accessed 20 April 2021.

7 *Ibid.*

8 Decision of Port Rijeka Authority No UP/I-342-01/20-01/26 of 30 December 2020.

9 European Commission, White Paper on levelling the playing field as regards foreign subsidies of 17 June 2020, COM(2020) 253 final (White Paper).

The aim of this paper is to analyze current state of affairs in the field of the EU public procurement law and policy, in the context of the novelties announced by the White Paper. It should be noted that the White Paper is designed to tackle foreign subsidies issues not only within public procurement, but within a much broader scope of economic activities. However, this paper should focus only on the procurement matters, with an emphasis on a Module 3 designed in the White Paper.

2. FOREIGN SUBSIDIES AND EU PUBLIC PROCUREMENT – THE CURRENT STATE OF PLAY

2.1. General Remarks Given by the Commission in the White Paper

Among introductory remarks to the White Paper, the Commission presented a detailed overview of the current state of play as regards foreign subsidies in the Internal Market. The overview consists of general remarks on the openness of EU's procurement market to foreign economic operators, followed with a brief analysis of risks that could arise in connection to such openness. The Commission emphasized the role and importance of EU State aid rules in preserving level playing field in the Internal Market. Further, several objectives which non-EU countries pursue by subsidizing its economic operators engaging in the Internal Market are identified as well as certain regulatory shortcomings and gaps in the EU legal framework regarding foreign subsidies which should be overarched by the proposed measures and instruments.

In the White Paper the Commission emphasizes the importance of general openness of the EU economy to foreign investment, and substantiates this remark by recent economic data.[10] The same applies to the EU procurement markets, which are, from the Commission's point of view, largely open to third country bidders, while EU-wide publication of tenders ensures transparency and creates market opportunities for EU and non-EU companies alike.[11] At the same time, the Commission warns that such openness to foreign undertakings has come with increased risks, such as foreign subsidization, which needs to be controlled to avoid undermining competitiveness and the level playing field in the EU market.[12] With regard to public procurement, the Commission asserts that companies subsidized from the outside of EU may be able to make more advantageous of-

[10] White Paper p. 6.

[11] White Paper p. 7.

[12] White Paper p. 6.

fers, to the detriment of non-subsidized EU based undertakings.[13] In the same context, the Commission points out that the risk of intra-EU State subsidies are largely solved by the EU State aid rules, which help to preserve a level playing field in the Internal Market among undertakings.[14] However, Commission notes that currently there are no equivalent EU rules for subsidies that non-EU authorities grant to undertakings operating in the Internal Market, and that due to a lack of transparency there is only a limited information on the actual amount of foreign subsidies being granted to such undertakings.[15] The Commission is taking into account that, just as in the case of State aid granted by EU Member States, foreign subsidies can also distort competition in the Internal Market, result in an uneven playing field or lead to subsidy races between public authorities.[16] At the same time, the Commission rightly observes that many public buyers, mindful of their budgets, have an incentive to award contracts to bidders offering low prices regardless of whether those prices are facilitated by foreign subsidies.[17]

In an effort to identify and define possible consequences of foreign subsidies, the Commission brings the economic repercussions to the fore, by pointing out that foreign subsidies may lead to an inefficient overall allocation of resources and, more particularly, a loss of competitiveness and innovation potential of companies that do not receive such subsidies.[18] However, the Commission does not stop itself within economic terms. On the contrary, the Commission emphasizes that there could be several additional objectives which non-EU authorities pursue by granting foreign subsidies, not necessarily entirely of economic nature.[19] By way of example, the Commission asserts that in some cases, granting of foreign subsidies can also be driven by a strategic objective to establish a strong presence in the EU or to secure access and later to transfer technologies to other production sites, possibly outside of the EU.[20] Furthermore, according to the Commission's standpoint, foreign subsidies, not driven by normal commercial considerations, may be driven by strategic goals, in order to get a foothold in strategically important markets or regions, or to get privileged access to critical and major infrastructure within EU.[21] Although reasons of national and EU security are not invoked largely

13 White Paper p. 7.
14 White Paper p. 6.
15 White Paper p. 6.
16 White Paper p. 7.
17 White Paper p. 8.
18 White Paper p. 7.
19 White Paper p. 8.
20 White Paper p. 8.
21 White Paper p. 8.

in the White Paper, it is hard not to notice that mention of critical infrastructure in this context is a reference exactly to that.

According to the White Paper, foreign subsidies may take different forms. For example, subsidies can be awarded as direct grants, or could take a form of cheaper financing provided to an undertaking in the EU. Foreign states may also give a subsidy to a parent company located outside the EU, in which case such subsidies may also take a form of corporate tax regimes providing selective incentives, which then in turn finances the subsidiary located in the EU through intragroup transactions. Finally, foreign subsidies can also be channeled to the undertakings operating in the Internal Market through investment funds or intermediaries supported by a foreign government.[22]

2.2. Legal Framework Analysis and the Concept of Abnormally Low Tender as a Tool to Tackle Foreign Subsidies

The Commission invested significant efforts into detailed analysis of the existing EU legal framework, in order to detect regulatory gaps that are used for channeling the foreign subsidies into the Internal Market. As regards the EU public procurement legal framework, the Commission finds that it does not specifically address distortions to the EU procurement markets caused by foreign subsidies. As single market instruments, the EU Public Procurement Directives do not set out any specific rules regarding the participation of economic operators benefitting from foreign subsidies.[23] For instance, contracting authorities are not legally required to investigate the existence of foreign subsidies when evaluating offers and no specific legal consequences are attached to the existence of foreign subsidies causing a distortion.[24]

The White Paper recognizes that contracting authorities do not possess adequate tools to tackle foreign subsidies. For now, the only instrument available to deal with subsidies in general is envisaged in art. 69 of Directive 2014/24/EU.[25] In brief, this provision says that contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services. The contracting authority shall assess the explanatory information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not sat-

22 White Paper p. 8.

23 White Paper p. 10.

24 White Paper p. 10.

25 White Paper p. 11.

isfactorily account for the low level of price or costs proposed and are obliged to reject the tender if they establish that the tender is abnormally low because it does not comply with mandatory laws in the fields of social, labour or environmental law. In addition, the art. 69 envisages a separate basis for rejecting the tender in case a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid incompatible with the Internal Market. In that case the tender may be rejected on that ground alone, but the tenderer should be given the chance to prove that the aid in question was compatible with the Internal Market within the meaning of art. 107 TFEU.

The concept of abnormally low tender lies on the premise that a tenderer may submit an unusually low bid due to legitimate or illegitimate factors.[26] A competitive advantage of a tenderer, based on its greater efficiency or cheaper inputs could be used as an example of legitimate factors for low tendering. On the other side, illegitimate factors for a low tender could consist of underpayment of staff or subcontractors, or failure of a tenderer to abide by relevant legislation.[27] A rationale behind the provision governing abnormally low tenders is sometimes found in the argument that abnormally low tender might be unviable, due to technically, economically or legally unsound assumptions or practices,[28] causing increased risk of non-performance and undermining the objectives for which contracting authority initiated the procurement procedure. Some authors use this line of argumentation to conclude that the purpose of regulating the abnormally low tenders is primarily to protect contracting authorities, but that some elements of protection for the economic operators are also present, due to the fact that the art. 69 of the Directive 2014/24/EU prevents the contracting authority in rejecting a tender without giving the tenderer a chance to explain why the tender is abnormally low.[29] In contrast, other scholars emphasize the art. 69 should be understood as a mechanism to prevent discretionary or arbitrary decisions of contracting authorities, by imposing procedural guarantees to be complied with by contracting authorities prior to rejecting apparently abnormally low tenders.[30] Either way, it could be concluded that the primary purpose of the art. 69 is not to provide protection to other economic operators participating in the procurement procedure, against the tenderer who submitted allegedly abnormally low tender due to some illegitimate factor.

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26 Semple, A., *A practical guide to public procurement*, Oxford University Press, Oxford, 2015, p. 163.

27 *Ibid*.

28 Steinicke, M., Vesterdorf P., L., *EU public procurement law*, Nomos Verlagsgesellschaft, Baden-Baden 2018., p. 771.

29 *Ibid*. p. 772.

30 Sanchez-Graells, *op. cit.*, note 3, p. 401-402.

As a general remark, it should be added that a significant amount of the difficulties encountered at the application of the art. 69 arises out of the fact that the Directive 2014/24/EU does not define what constitutes an abnormally low tender. At the same time, there are no other rules outlining a method which can be applied in order to determine if a tender is abnormally low,[31] leaving it to national measures, or in their absence to the contracting authority, to determine how such tenders will be identified,[32] which leads to the conclusion that divergences in national approaches to the identification of abnormally low tenders could not be overcome.[33]

At first glance, it seems that art. 69(4) could be suitable to tackle tenders tainted by foreign subsidies. Indeed, under art. 69(4) in order to reject a tender, it is sufficient to establish that the tender is abnormally low because the tenderer has obtained State aid incompatible with the Internal Market. However, a major obstacle to invocation of art. 69(4) in cases of foreign subsidies lies in the notion of State aid, as used in this provision. It is obvious that the notion of State aid used in art. 69(4) is identical as the one given by art. 107 TFEU, limiting its scope to aid granted by a Member State or through Member State resources, hence not including subsidies granted by third states. In the same vein, the White Paper clearly states that the art. 69 contains no corresponding provision for foreign subsidies that enable bidders to submit low offers.[34]

Considering that art. 69(4) could not be invoked against foreign subsidies, another option is to use a general rule given by art. 69(3), which entitles contracting authorities to reject tenders if evidence supplied by the tenderer does not show viability of the tender, thus preventing the risk of non-performance. This approach was advised in an earlier communication from the Commission, giving guidance on the participation of third-country bidders and goods in the EU procurement market.[35] The Commission then recommended to public buyers to pay special attention to bids offering goods or services from third countries whose prices and costs may be distorted by state-backed financing. According to that guidance, the existence of financial support from a foreign state could form part of the global assessment of the viability of the offer.[36] The same approach is once again repeated in the White Paper, asserting that public buyers may consider the reliance on foreign subsidies when assessing the overall financial viability of an offer. For this

31 Steinicke, M., Vesterdorf P., *op. cit.*, note 28, p. 773.

32 Semple, A., op. cit., note 26, p. 163.

33 *Ibid*. p. 164.

34 White Paper p. 11.

35 European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market of 24 July 2019, C(2019) 5494 final.

36 *Ibid*. p. 53

assessment, art. 69 provides the contracting authorities with the possibility to reject offers they consider to be abnormally low in situations where the explanations and evidence supplied by the bidder do not sufficiently account for the low price offered.[37] But, even if the public buyers ultimately decide to reject an offer as abnormally low, the White Paper confirms that such a rejection needs to be justified by demonstrating that the foreign subsidies impede the viability of the offer and the bidder's capacity to execute the contract.[38] To conclude on this approach advised by the Commission, it should be stated that it is not quite clear in which way foreign subsidy may impede the viability of the offer. Namely, if a tenderer has been granted with a state-backed financing in support to its tender, then such subsidy in most cases would not impede the viability of its offer. On the contrary, such subsidy may be a key evidence of viability of the offer, because it proves that the contract can be performed as agreed, due to the subsidy granted by the third country. Having that in mind, it is not to be expected that art. 69 could be used efficiently to tackle foreign subsidies. At the end of the day, it is already stated above that the purpose of art. 69 is to provide protection to contracting authorities (against risk of non-performance) and to tenderers (against arbitrariness of contracting authorities) and not to remedy the distortions caused by foreign subsidies in the Single Market. The Commission reaches the same conclusion, stating that the existing rules in the field of EU public procurement are not sufficient to address and remedy the distortions caused by foreign subsidies. Hence, where foreign subsidies facilitate and distort the bidding in an EU public procurement procedure, there appears to be a regulatory gap.[39]

3. MEASURES PROPOSED TO TACKLE FOREIGN SUBSIDIES – A BRIEF ANALYSIS

3.1. Module 3 – Procedure and Redressive Measures

The White Paper brings a definition of foreign subsidy, stating that the suggested notion of "foreign subsidies" builds on the subsidy definition set out in the EU Anti-subsidy Regulation[40] and in the EU Regulation on safeguarding competition in the air transport sector,[41] as well as on the subsidy definition set out in the

37 White Paper p. 11.

38 White Paper p. 11.

39 White Paper p. 12.

40 Regulation 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176.

41 Regulation 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004, OJ L 123.

relevant WTO rules.[42] According to the White Paper a "foreign subsidy" refers to a financial contribution by a government or any public body of a non-EU State, which confers a benefit to a recipient and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries.[43]

It is important to note that the White Paper expressly states that the purpose of Module 3 is to ensure that foreign subsidies can be addressed in individual public procurement procedures.[44] It is the first indication that, unlike Module 1 and 2, Module 3 is focused more on the effects that foreign subsidy could produce to an individual procurement procedure, than on potential distortion of Internal Market. In the same sense, the White Paper further clarifies that it will be necessary to determine whether the foreign subsidy facilitates the participation in the public procurement procedure, enabling the economic operator benefitting from the subsidy to participate in the procedure, to the detriment of unsubsidized undertakings. In case of such distortive foreign subsidies, EU public buyers would be required to exclude from public procurement procedures those economic operators.[45] In this regard, it is apparent from the White Paper that the main protective function of Module 3 is designed to benefit the tenderers who do not receive foreign subsidies.

As a first step envisaged within Module 3, economic operators participating in public procurement procedures should submit their notifications on subsidies to the contracting authority. It was expected that the White Paper would envisage an obligation for economic operators to include consortium members and subcontractors into notification, but to some extend it came as a surprise that the tenderer must also include information on its suppliers.[46] The Commission contemplates on possibilities to set a threshold above which a notification will be mandatory, as well as to limit the relevant subsidy period to a period of three calendar years, in order to reduce the administrative burden and costs.[47] A notification will have to at least the following elements: (i) legal information, including ownership and governance of the tenderer, any consortium member and those subcontractors and suppliers having received foreign financial contributions; (ii) main sources of overall financing of the tender; (iii) total amount of foreign financial contributions received in the past 3 years; (iv) foreign financial contributions received specifi-

42 White Paper p. 46
43 White Paper p. 46
44 White Paper p. 30
45 White Paper p. 30.
46 White Paper p. 31.
47 White Paper p. 31.

cally for the purpose of participation in the public procurement procedure; (v) foreign financial contributions that will be received during the expected execution of the contract.[48] In the Commission's opinion, Strict and deterrent tools should be put in place to deal with cases where economic operators fail to comply with the notification obligation, in which cases they could be sanctioned by the contracting authority with significant fines and in extreme situations excluded from the procurement procedure.[49]

Once the notification is filed with the contracting authority, next step is to be taken before the competent supervisory authority at Member State level. The role of the supervisory authority is to investigate information provided in the notification and to assess the existence of a foreign subsidy. The investigation of the supervisory authority is intended to have two phases, a preliminary review and an in-depth investigation, the latter to be entered only if the preliminary review ends with a conclusion that a foreign subsidy may exists.[50] Final decision of the supervisory authority on existence of foreign subsidy is to be reached in close cooperation with the Commission, for which reason the supervisory authority shall inform the Commission on any draft decision.[51]

For the period of investigation, the contracting authority is obliged to refrain itself from awarding the contract to the investigated economic operator, but it is entitled to pursue the evaluation of the offers. If upon evaluation of offers the contract is to be awarded to the tenderer not to be the one under the foreign subsidy investigation, contracting authority is free to conclude the procurement procedure and to award the contract. Otherwise, if the evaluation of offers shows that the best offer is the one of the investigated tenderer, the procurement procedure will have to be suspended until the supervisory authority reaches its conclusions on the existence of foreign subsidies.[52]

If the supervisory authority comes to a conclusion that a tender under review is tainted with foreign subsidy granted to the tenderer, it shall refer the matter back to the contracting authority. In that case, a delicate task is conferred on the contracting authority: to determine whether that subsidy has distorted the public procurement procedure, and if so, to exclude the economic operator in question.[53] The exclusion may stay in force even for future procurements of the same con-

48 White Paper p. 31.
49 White Paper p. 32.
50 White Paper p. 32.
51 White Paper p. 33.
52 White Paper p. 33.
53 White Paper p. 34.

tracting authority, preventing the excluded tenderer to participate in forthcoming procedures. The Commission envisages that such determination should be conducted on the basis of a uniform methodology, which could be set out in guidance,[54] but provides no additional information on any criteria that should be used by the contracting authority when performing that task.

3.2. Legal Analysis of Solutions Envisaged by the White Paper in the Context of Public Procurement Procedures

Summary of the responses to the public consultation on the White Paper[55] shows that a majority of EU Member States and EU stakeholders support the initiative to tackle foreign subsidies, in general and specifically regarding Module 3 and public procurement procedures. However, it should not be overlooked that some serious concerns were expressed, especially about the proposal on the sharing of responsibilities between contracting authorities and supervisory authorities. According to the Summary, Member States broadly agree that contracting authorities should not be responsible for assessing whether a foreign subsidy distorts the public procurement procedure, and that this task should instead be incumbent on the national supervisory authority or the Commission.[56] It is hard not to share the same concern. Reasons in favor of this objection are well founded and correspond to everyday experiences in public procurement procedures. As first, contracting authorities lack the necessary expertise necessary to conduct such assessment, which could lead to numerous remedial procedures. Second, a risk of lack of impartiality could arise on side of contracting authorities, having short-term incentives to award tenders to subsidized bidders offering low prices. Third, a lack of efficiency may occur due to conducting of such assessments, resulting in prolonged procedures, and consequently negatively impacting the whole procurement.[57] In the same vein, it should be noted that the lack of information on the uniform methodology to be used by contracting authorities while determining whether a subsidy distorted the public procurement procedure, does not help clarifying the situation.

Further, if proposed concept of shared responsibilities between contracting authorities and supervisory authorities remains, it would mean that the supervisory

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54 White Paper p. 34.

55 Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies (Summary), [https://ec.europa.eu/competition/international/overview/WP_foreign_subsidies2020_summary_public_consultation.pdf], accessed 20 April 2021.

56 *Ibid*., p. 7.

57 *Ibid*.

authority, a public body specialized in matters of subsidies, will stay limited solely to the question whether foreign subsidy exists. By contrast, contracting authority, not specialized in that particular field, shall be obliged to decide whether the subsidy distorted the public procurement procedure, in which case it shall exclude that economic operator for the procurement procedure. A decision on exclusion has a potential to produce far more significant repercussions than a decision on existence of a foreign subsidy and yet it is envisaged in the White Paper that, unlike the latter, it should be rendered by a non-specialized contracting authority. At the same time, even the Commission acknowledges that in practice contracting authorities do not have the information necessary to investigate whether bidders benefit from foreign subsidies or to assess to what extent the subsidies have the effect of causing distortions in procurement markets.[58] It should be noted that the opposing views on this issue have also been expressed recently. In that vein, it is argued that the first responsibility to assess potential subsidies should remain in the hands of the contracting authorities – which are, according to that view, in the best position to interrogate vendors regarding alleged foreign subsidies.[59] To some extent this line of argumentation can easily be accepted, but it is clear that it does not provide answers to the questions raised above on the lack of expertise and impartiality among contracting authorities.

To conclude on the role of supervisory authority, it should be noted that the entire Module 3 is based on a concept of self-notification, that must be conducted by each economic operator participating in the procurement procedure. With that regard, it seems that the role of supervisory authority will in most cases be exhausted in processing of information provided by the economic operators themself. In such cases it is not clear what would be the role of the supervisory authority other than to examine the authenticity and the veracity of the notification containing self-assessment made by economic operators. Most cases of economic operator declaring financial contributions received from foreign government will probably end only in supervising authority's confirmation that such financial contribution represents foreign subsidy as defined in the White Paper. The definition of foreign subsidy is broad enough to prevent occurrence of a lot of cases of economic operators notifying on financial contributions as potential foreign subsidies, for which the supervisory authority later determines that do not fall within the definition provided by the White Paper. It seems that the role of the supervisory authority

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58 White Paper p. 11.

59 Biondi, A., Bowsher, M., Yukins, C., Rubini, L., Carovano, G., *"The EU Gives Foreign Subsidies Its Best Shot": One Take on White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, [https://ielp.worldtradelaw.net/2020/10/guest-post-the-eu-gives-foreign-subsidies-its-best-shot-one-take-on-white-paper-on-levelling-the-pla.html], accessed 20 April 2021.

will be highlighted only in cases of competitors' applications filed against an economic operator, arguing that it has received foreign subsidy and therefore should be excluded from the procurement procedure. If so, it can be concluded that the foreign subsidy argument will be mostly used as tool of other competitors trying to win the tender, which is actually in line with previously identified purpose of Module 3, designed to protect, in each individual case, the tenderers who do not receive foreign subsidies. Side effect of this approach could occur in significantly increased number of competitors' applications, due to the fact that all tenderers have strong incentives to eliminate other competitors, using any legal ground available. This side effect is already recognized by some authors as "Competitors' Strategic Manipulation" or "strategic whistleblowing".[60]

Among other remarks given to the White Paper, issues of administrative burden and possible delays in procurement procedures deserves particular attention. In that sense, some Member States expressed concerns that Module 3 risks being administratively heavy.[61] It is argued by others that competitors' applications filed to supervisory authorities have a potential to delay procurement for months while procuring agencies and the Commission assess the competitors' claims of foreign subsidies – and that those delays could be extended in a second round of disruption, as the affected parties brought bid challenges.[62] These risks are real and cannot be overstated. Everyday practice shows that contracting authorities of some Member States already deal with a considerable difficulty while conducting procurements of large-scale projects, especially in construction and infrastructure sectors. This is particularly evident when it comes to financial corrections and recoveries for the projects co-financed by EU funds. Such financial corrections are a consequence of irregularities made by contracting authorities during project implementation. Considering that most irregularities are not intentional but rather caused by lack of expertise on the side of contracting authority, it is clear that contracting authorities are already faced with a significant burden of regulatory requirements. In that sense, the obligation to assess and deal with foreign subsidies will for sure add to the complexity of their position.

Finally, a word should be said on the question posed in the title of this paper. It seems there are at least two reasons why it could be argued that Module 3 is not limited to the aim of levelling playing field, but also comprises of some protectionist features, or at least features not directly connected with the aim of levelling playing field. The first such glimpse can be found in the express acknowledgement

60 *Ibid*.

61 *op. cit*. note 55, p. 7.

62 Biondi, A., Bowsher, M., Yukins, C., Rubini, L., Carovano, G., *op. cit.* note 59.

made by the Commission that foreign subsidies are sometimes granted for achieving strategic goals of third countries, as to get privileged access to critical and major infrastructure.[63] If this was one of incentives for designing modules presented in the White Paper, it is clear that the purpose of these modules is not only to ensure level playing field in the Internal Market, but to protect strategic interests of the EU and Member States. Given that the notion of strategic interest is subject to interpretation, this approach could open the way for additional measures in the future, with a clearer protectionist note. The second indication of protectionist approach regarding public procurement is even more pronounced. It has been shown above that the main function of Module 3 is to protect the tenderers who do not receive foreign subsidies against the subsidized competitors. Beneficiaries of such protection primarily are economic operators with a predominant intra-EU ownership structure, colloquially termed as European companies. If there is a measure intended to protect domestic companies against foreign competitors, on any ground whatsoever, it could hardly be denied that such measure has a potential to be used for protectionist purposes. However, a mere potential for producing protectionist effects should not be understood as a certainty of its realization. This matter will largely depend on the practical application of Module 3 once the respective legislation enters into force. It can be expected that European companies will try to take advantage of this instrument, using it in a "strategic whistleblowing" sense, in order to eliminate non-EU competitors. It is up to legislators to set efficient legal barriers to such manipulative actions. At the same time, contracting authorities will need to invest a particular effort to identify and resist such actions.

4. CONCLUSION

COVID-19 pandemic brought to the forefront issues of foreign subsidies and of distortive impact such subsidies have in the Internal Market. The Commission addressed these issues by adopting the White Paper. It is a comprehensive document, aiming at levelling playing field in the Internal Market, in general and in some particular niches. With regard to foreign subsidies and the public procurement, the Commission analyzed in the White Paper the actual situation on the Internal Market and the adequacy of the existing legal framework, to detect if any significant regulatory gaps exist, enabling subsidized economic operators to take advantage over non-subsidized companies. As shown, the most obvious regulatory gap is manifested in the fact that the legislation in force does not envisage a ground for exclusion of the tenderer who received foreign subsidies, while at same time contracting authorities are obliged to exclude tenderers who received State aid

[63] White Paper p. 8.

incompatible with the Internal Market. Although there were attempts to overarch the regulatory gap by using the abnormally low tender provision, it was shown in the paper that this provision is not suitable for such role.

Upon a brief preview of the procedural steps envisaged by the White Paper within Module 3, the paper focused on analyzing the proposed measures, trying to establish key features of the approach designed by the Commission. It is noted that Module 3, designed for the area of public procurement, has an emphasized function of providing protection to non-subsidized companies, against the competitors who received foreign subsidies. In that sense, Module 3 differs to some extent from Modules 1 and 2, which are much more focused on the protection of the Internal Market taken as a whole, than on a protection of individual tenderers.

Although the White Paper has a strong support within the EU, certain concerns were expressed during the public consultation process, especially regarding the proposed idea of sharing responsibilities between contracting authorities and supervisory authorities, as well as in connection to additional administrative burden and possible delays in public procurement procedures, which may occur due to measures proposed to tackle foreign subsidies. Those concerns are not unfounded and should be taken into account while drafting the legislative proposal.

The paper ends showing that the reach of Module 3 is not limited just to ensuring level playing field, but it has potential to be used for protectionist purposes. Chances for protectionist effects to occur can be reduced by efficient legal barriers designed to prevent unfounded actions of other tenderers, interested in eliminating competition.

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Professional paper

THE RESPONSE OF THE ALBANIAN COMPETITION AUTHORITY TO THE COVID-19 CRISIS

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ABSTRACT

The outbreak of COVID-19 pandemic was a shock for the global economy. It affected almost every country, but certainly in developing countries its impact was harder. The immediate effect was the shortage of several medical and paramedical equipment which were necessary to prevent the virus spread. This shortage was felt in Albanian markets as well and was rapidly followed by a sharp increase of prices in paramedical products. The consumers suffered the highly increased prices amongst fear that in absence of these products, their life was threatened. This behaviour of the market participants was considered suspicious by the Competition Authority which decided to initiate a preliminary investigation to find out whether this behaviour was abusive, or it normally reflected the sudden shortage and the state of emergency. The instigation of this procedure was based on several complaints reported in the media and complaints directly submitted by consumers to the Competition Authority. At the first glance, the traders were exploiting the health emergency to maximise their profits. Subsequently, the Competition Authority (CA) decided to apply some preliminary measures on the wholesale market operators. Furthermore, the CA intervened even in a case of a company in dominant position which was furnishing selected pharmacies. These interventions aimed at restoring somehow the distorted competition in paramedical and medical products.

This article will try to shed light on the current market situation and on the effectiveness of the interventions of the CA. How should the Competition Authority behave to restore the distorted competition? Are the current introduced measures enough to help all market participants overcome this state of health emergency? These questions and other issues related with the peculiar situation will be addressed in the current article. The article will be organized as follows: First, a glimpse of the regulation of Albanian competition law will be given. Second, the situation under COVID-19 emergency will be elaborated taking into consideration the guidelines of

Communication of the Commission on "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak" (2020/C 116 I/02). Lastly, the evaluation of the measures introduced by the Competition authority will be analysed and recommendations will be provided.

***Keywords**: health emergency, competition, distorted competition, COVID-19 pandemic.*

1. INTRODUCTIONS

The outbreak of COVID-19 pandemic was a shock for the global economy. It affected almost every country, but certainly in developing countries its impact was harder. The immediate effect was the shortage of several medical and paramedical equipment which were necessary to limit the expansion of the pandemic. This shortage was felt in Albanian markets as well and was swiftly followed by a sharp increase in prices of paramedical products. The consumers suffered the highly increased prices amongst fear that in absence of these products their life was threatened.

This article will try to shed light on the current market situation and on the effectiveness of the intervention of the Competition Authority and the government. How should the Competition Authority behave to restore the distorted competition? Are the introduced measures enough to help all market participants overcome this state of health emergency? These questions and other issues related with the peculiar situation will be addressed in the current article.

The article will be organized as follows: First, a glimpse of the regulation of Albanian competition law will be given. Second, the situation under COVID-19 emergency will be elaborated taking into consideration the guidelines of Communication of the Commission on "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak".[1] Lastly, the evaluation of the measures introduced by the Competition authority will be analysed and recommendations will be provided.

The finalization of this article faced few challenges. First, it was the absence of decided cases from the Albanian Competition Authority (ACA), because as we will explain further on, they are still pending. Second, it was the lack of literature that addresses this specific topic. Notwithstanding the lack of specific, topic-related sources the authors will make the pertinent efforts to ensure the highest academic standards of this article.

[1] Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak [2020/C 116 I/02] OJ C 116I, 8.4.2020, pp. 7–10.

2. THE CHARACTERISTICS OF ALBANIAN COMPETITION LAW

Albanian competition law is a relatively new piece of legislation. The first act that was enacted to introduce rules to impose restrictions on the market operators dates back to 1995.[2] Before 1995 there were no provisions specifically dedicated to competition. The Civil Code[3] enacted in 1994 only contained two provisions related to unfair competition but in the framework of intellectual property. These provisions foresaw the obligation of any entity not to use the intellectual property of another party and not to use means directly or indirectly against the principle of fairness to the detriment of the other party. Any behaviour in breach of these principles would give rise to damages for the injured party.[4]

Obviously, more detailed, and accurate competition rules were needed to address the whole variety of behaviours that distorted competition. Therefore, in 1995 the law "On Competition" was enacted but was soon repealed in 2003 because it was not fully aligned with the European standards. It did not create any independent authority, rather it created a special directory within the Ministry responsible for commerce to deal with competition cases.[5] Anyhow, it contained the very first regulation that disciplined market competitors' behaviour to preserve competition.

Since it was not a piece of legislation aligned with the acquis it was quickly repealed by the law no. 9121, dated 28.7.2003 "On the Protection of Competition", as amended subsequently.

This act and the sublegal acts enacted to supplement it have enshrined the European Union legislation and the ample jurisprudence of the Court of Justice of the European Union. Upon entrance into force, this act has had minor amendments that were deemed necessary to keep the law up to date with the changes and developments of the acquis.[6]

For the first time, under this regulation, the ACA was established as an independent body to oversee the compliance with the law requirements.[7] According to this

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2 Law no. 8044, dated 7.12.1995 "On Competition", Official Journal No. 27/1995.

3 Civil Code, Law no. 7850, dated 29.7.1994, articles 638 and 639, Official Journal No. 11,12,13,14/1994, as amended.

4 Civil Code, Law no. 7850, dated 29.7.1994, as amended, article 639, Official Journal No. 11,12,13,14/1994.

5 Article 57, Law no. 8044, dated 7.12.1995 "On Competition", Official Journal No. 27/1995.

6 Malltezi, A., Rystemaj, J., Pelinku, L., *Aspekte të së Drejtës së Biznesit në Shqipëri*, Tiranë, Mediaprint, 2013.

7 Article 18, Act no. 9121, dated 28.7.2003, Official Journal No. 71/2003. The Competition Authority started to operate on 1.3.2004. Annual Report of the Competition Authority, 2006, p. 6, [report_shqip_ndarje ngjyre.indd (caa.gov.al)], Accessed 9 March 2021.

act, the members of the commission of the ACA are elected from the Parliament as a sign of their independence.[8]

The ACA has had an increased activity over the years[9] and it has mainly dealt with banking, energy, telecommunication, public procurement markets, etc.[10] The pharmaceutical market was listed as a priority for the 2020 as to anticipate the developments that this year would reserve for the whole humanity and especially the developments in the pharmaceutical market and health sector. The attention towards this market was linked with the direct effect that it had to the consumers' wellbeing.[11]

Before the onset of the pandemic the pharmaceutical market has had a very limited attention form the ACA. Only few cases regarding distorted competition in pharmaceutical market were dealt by the ACA.

3. THE ONSET OF THE PANDEMIC AND ITS EFFECT ON COMPETITION

It has been more than a year now since the coronavirus pandemic emerged threatening the health of people and economies of countries. In Albania, the first confirmed case was recorded on 9 March 2020[12] followed immediately by a very strict lockdown that aimed at preventing the transmission chain.[13]

The lockdown was not easy either for the psychological health of the citizens or the economy. Anyhow, it was deemed the appropriate measure to protect public health. The lockdown was imposed through a normative act which set forth the restrictions taking place and imposed fines in case of breaching these rules. Besides halting any public gathering or organization of public events[14] the normative act also regulated few issues regarding competition. It impeded the normal trade flow and stopped the exportation of medications and medical supplies.[15] This was a protectionist measure to preserve any medical supply that might have been needed in the "war" against the virus.

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8 Article 21(1), Law no. 9121, dated 28.7.2003, as amended, Official Journal No. 71/2003.

9 Annual Report of the Competition Authority, 2019, [Raporti-Vjetor-2019.pdf (caa.gov.al)], Accessed 8 March 2021.

10 *Ibid.*, p. 11, [Raporti-Vjetor-2019.pdf (caa.gov.al)], Accessed 8 March 2021.

11 *Ibid.*, p. 11, [Raporti-Vjetor-2019.pdf (caa.gov.al)], Accessed 9 March 2021.

12 Albania: Health officials confirm first cases of COVID-19 March 9 [garda.com], Accessed 9 March 2021.

13 This was imposed through the Normative Act no. 3, dated 15.3.2020, Official Journal No. 37/2020.

14 Very high fines were foreseen for the wrongdoers under the Normative Act.

15 Article 3(1) of the Normative Act no. 3, dated 15.3.2020, Official Journal No. 37/2020.

Another provision with direct effect in competition, especially aiming at consumer protection was sanctioning any entity which set higher prices for medications, medical supplies, and services. The sanction was rather considerable because any wrongdoer was charged with a fine of 5.000.000 ALL (Albanian Lek) (approximately 40.000 Euros) and in case the behaviour was repetitive this sanction was accompanied by a closure of the business for 6 months.[16] The price was deemed to be increased if compared to the previous year, it was higher and not imposed by the importer.[17]

Apparently, the new reality now was dictated by the course of the pandemic. The market was not in a normal situation and consequently normal competition rules may not be applied, especially in the health sector. That was the reason the normative act stipulated for private health institutions to provide all the necessary support to public health institutions, if that was needed, and was ordered by the Minister responsible for health.[18] The focus of these measures, introduced by the government, gravitated towards the protection of consumers' health and rights.

Similar approaches were followed by several competition authorities in other countries[19] and the ECN which stated that "it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices."[20] Also, the Competition and Market Authority in UK explicitly stated that "… the CMA's work should be focussed on what matters most to consumers."[21] Furthermore, the guidelines listed the allowed cooperation between businesses within the pandemic context emphasising that this was not "a free pass" for business.[22] As regards the essential products the CMA noted "It is of the utmost importance to ensure that the prices of products or services considered essential to protect the health of consumers in the current situation (for example, face masks and sanitising gel) are not artificially inflated by unscrupulous businesses seeking to take

16 Article 3(12), *Ibid.*

17 Article 3(12), *Ibid.*

18 Article 3(16), *Ibid.*

19 CMA approach to business cooperation in response to coronavirus (COVID-19) [www.gov.uk], Accessed 13 April 2021.

20 Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis [202003_joint-statement_ecn_corona-crisis.pdf (europa.eu)], Accessed 13 April 2021.

21 CMA approach to business cooperation in response to coronavirus (COVID-19), [CMA approach to business cooperation in response to coronavirus (COVID-19) - GOV.UK (www.gov.uk)], Accessed 13 April 2021.

22 *Ibid.*

advantage of the current situation by colluding to keep prices high or, if they have a dominant position in a market, by unilaterally exploiting that position."[23]

Amid the pandemic, the competition law faced two major challenges: the first was consumer protection and the second was to ensure flexibility for undertakings that might engage in a closer cooperation due to the crisis. In these circumstances, as the Communication from the Commission has noted "it is more important than ever that undertakings and consumers receive protection under competition law".[24]

4. THE INTERVENTION OF THE COMPETITION AUTHORITY

Immediately after these developments, the Albanian market reflected a shortage of paramedical equipment which were necessary in safeguarding health. This shortage was subsequently followed by a sharp increase in prices of these essential products which were considered to have vital importance for health protection. This behaviour of the market participants was considered suspicious by the Competition Authority which instantly decided to initiate a preliminary investigation to find out whether this behaviour was abusive, or it normally reflected the sudden shortage and the state of emergency. The main driver of the ACA was the consumers' wellbeing, especially in a peculiar situation as the COVID-19 outbreak.[25] The instigation of this procedure was based on several complaints reported in the media and complaints directly submitted by consumers who noticed a shortage in the retail market of paramedical products (such as disinfectant gels, alcohol, and face masks) and a rapid and unjustifiable increase of the prices of these products.[26] The preliminary investigation lasted until 15.10.2020[27] when the ACA decided to start the in-depth investigation procedure against these companies which was planned to last six months as of this announcement.

The ACA immediately after announcing the initiation of the preliminary procedure in the paramedical supply market, to preserve competition and to avoid any irreparable damage, decided to stop undertakings in this relevant market to

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23 CMA approach to business cooperation in response to coronavirus (COVID-19) [CMA approach to business cooperation in response to coronavirus (COVID-19) - GOV.UK (www.gov.uk)], Accessed 13 April 2021.

24 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02), OJ 116I, 8.4.2020, pp. 7–10.

25 Decision no. 684, dated 18.3.2020 of the Commission of the CA.

26 Decision no. 685, dated 18.3.2020 of the Commission of the CA.

27 Decision no. 716, dated 15.10.2020 of the Commission of the CA.

impose unjust prices directly or indirectly. It also ordered them to comply with the transparency requirements as regards prices of paramedical products and to apply cost-oriented prices.[28] The ACA called all the undertakings in the relevant market to be transparent when setting prices for the paramedical products and to publish them in their websites or other communication channels.[29] Apparently, this pandemic served as an opportunity to use a legal tool, such as interim measures, that have been used infrequently.[30] In this case, the application of this interim measures fulfilled both criteria: the prima facie infringement of competition and urgency. However, it is surprising that the ACA, despite setting the 6-month deadline to finish the in-depth investigation (of a case that prima facie was an infringement but had not the certainty for a final decision), while this presentation was being written no report and/or decision from the ACA was published.

These temporary measures (that had effect only during the investigation period[31]) were disregarded by some of the undertakings operating in the market. Thus, the ACA intervened and with the decision no. 717, dated 15.10.2020 by fining many undertakings[32] which during February-May 2020 continued to unjustifiably increase the prices of the paramedical products (face masks, alcohol, and disinfectant gels).[33]

Again, the ACA intervened in another case which is, even though not directly, linked with the pandemic. The ACA imposed an interim measure to one of the pharmaceutical undertaking which was the only one importing the flu vaccine INFLUVAC SUB-UNIT TETRA, Suspension for injection x (15mcg HA+15mcg HA+15mcg HA+15mcg HA)/0.5ml, Box x 1 pre-filled syringe with needle.[34] From the inspection authorized by the Commission, it was found that the vaccine was available only in a chain of pharmacies where undertaking owned 75% of the shares.[35] All other pharmacies that were part of the investigation declared that

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28 Decision no. 685, dated 18.3.2020 of the Commission of the CA.

29 Decision no. 685, dated 18.3.2020 of the Commission of the CA.

30 Costa-Cabral, F., Hancher, L., Monti, G., Ruiz Feases, F., *EU Competition Law and COVID-19*, Francisco, p. 11, SSRN Electronic Library, Accessed 9 April 2021.

31 Decision no. 684, dated 18.3.2020 of the Commission of the CA.

32 "CFO Pharma" SHPK, "Delta Pharma – AL" SHPK, "Pharma One" SHPK, "Intermed" SHPK, "Alfarmakos" SHPK, "Trimed" SHPK, "Megapharma" SHPK, "Evita" SHPK, "IMI – Farma" SHPK, "Fufarma" SHA, "Medicamenta" SHPK, "Mini Invest Albania" SHPK, "Delta Med" SHPK, "O.E.S Distrimed" SHPK, "Montal" SHPK, "MSE" SHPK, "Farma Net Albania" SHPK, "Tresi – Farm" SHPK, "Incomed" SHPK, "Florifarma" SHPK, "Lekli" SHPK, "Dial – ALB" SHPK, "Sirol 2008" SHPK, "Aquila Group" SHPK.

33 Decision no. 717, dated 15.10.2020 of the Commission of the CA.

34 Decision no. 715, dated 15.10.2020 of the Commission of the CA.

35 Decision no. 715, dated 15.10.2020 of the Commission of the CA.

their demand for the flu vaccine was refused by the only company that owned the right of distribution. This was the second case where the Commission applied the interim measure during this pandemic, obliging the undertaking to offer to all demanding pharmacies the flu vaccine.[36]

5. STATE AID AND COVID-19 CRISIS

In Albania state aid is regulated by the act "On State Aid"[37] which creates the State Aid Commission and State Aid Directory as bodies that oversee and control state aid.[38] The State Aid Commission, which is chaired by the Minister of Economy, is the main decision-making authority while the Directory provides the pertinent information to the Commission and makes proposals.[39] Under this model of organization it is somehow questionable the independence of this body, and the objectivity of its decision-making.[40] Nevertheless, this issue is not part of this presentation, therefore we will subsequently give an overview of the grants that were approved by the State Aid Commission.

In these paragraphs we will highlight the aids granted by the State Aid Commission (SAC) to reduce the negative effect the initial curfew had on enterprises. After the initial lockdown, no such drastic measures were applied in Albania, but few limitations have been taking place since the relaxation of measures and almost total opening in June 2020.

The state aid was planned as a grant for undertakings and individuals operating in any activity, because unlike future interventions from SAC, the aid given due to the pandemic was distributed to any operating firm meeting the requirements. The government offered two stimulus packages for employees and other categories of unemployed and people receiving economic aid. The first package was approved in March 2020 and started on 1 April 2020 with an extension of no more than three months as of its commencement[41] and the second package was approved in April and lasted for three months as of its approval.[42]

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36 Decision no. 715, dated 15.10.2020 of the Commission of the CA.

37 Law no. 9374, dated 21.4.2005, as amended, Official Journal No. 36/2005.

38 Law no. 9374, dated 21.4.2005, as amended, Official Journal No. 36/2005.

39 Law no. 9374, dated 21.4.2005, as amended, Official Journal No. 36/2005.

40 Fjoralba C., *Nocioni i Ndihmës Shtetërore që Çrregullon Tregun e Lirë dhe Konkurrencën sipas Legjislacionit dhe Praktikës Ndërkombëtare*. 2019, doctoral thesis, [NOCIONI I NDIHMËS SHTETËRORE QË ÇRREGULLON TREGUN E LIRË DHE KONKURRENCËN SIPAS LEGJISLACIONIT DHE PRAKTIKËS NDËRKOMBËTARE – UNIVERSITETI I TIRANËS (unitir.edu.al)], Accessed 13 April 2021, pp. 207 et seq.

41 Decision no. 96, dated 27.3.2020 Authorization of State Aid "COVID-19: Grant Support Scheme".

42 Decision no. 98, dated 28.4.2020 Authorization of State Aid "COVID-19: Grant Support Scheme 2".

The first decision of the SAC lists as beneficiaries the enterprises (physical or legal persons) that exercise a commercial activity with an annual income of 14 000 000 ALL (Albanian Lek) (approx. 114 000 Euros) and individuals, either being employees in the aforementioned business or unemployed or receiving social assistance.[43] Whereas the second stimulus package specified as beneficiaries: 1. Employees of firms with an annual income of 14 000 000 ALL (Albanian Lek) (approx. 114 000 Euros) which had their activities closed during the curfew, 2. Employees of firms with an annual income of 14 000 000 ALL (approx. 114 000 Euros)that were authorized to continue business and 3. Employees of physical persons or legal persons that operate in accommodation facilities.[44] The latter were granted the right to benefit wage subsidies of 40.000 ALL (approx. 320 Euros).

For businesses, the government offered an aid in the form of two instruments of sovereign guarantee that covered either the interest of the loan or part of the principal. The loans were granted by banks and were designated either for employees' wages or the circulating capital or investments.[45]

6. EVALUATION OF THE MEASURES OF THE COMPETITION AUTHORITY

The role of the ACA during this extremely difficult time has been rather inconsistent in handling specific COVID-19 related cases and apathetic as regards handling the overall crisis emerged by the COVID-19. As highlighted above, the ACA has intervened in two cases regarding essential medical products, but only one is directly related with the health emergency crisis caused by COVID-19. The latter, despite taking more than a year for (preliminary and in-depth) investigation is still pending and awaiting decision. The instigation of this investigation was ignited by the good aim to protect consumers from unscrupulous business which exploit this crisis to maximise their profits. But despite this good aim, the ACA has not been active to timely decide on this issue. Consumers are still suffering the effects of the opportunistic behaviour of undertakings operating in the medical supply market. Yet, there are numerous reports in the social media for extremely high prices consumers are facing especially in the health sector, either for specific medications or health services.

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43 Decision no. 96, dated 27.3.2020 Authorization of State Aid "COVID-19: Grant Support Scheme".

44 Decision no. 98, dated 28.4.2020 Authorization of State Aid "COVID-19: Grant Support Scheme 2".

45 Ministria e Financave dhe Ekonomisë, [Ministria e Financave dhe Ekonomise], Accessed 13 April 2021.

However, when assessing the intervention of the ACA, it is noteworthy to highlight that, unlike many other competition authorities in other jurisdictions that are designated to safeguard competition and oversight the market, in Albania the CA has only the competence to monitor the correct implementation of the provisions of the Act "On the Protection of Competition".[46] Consequently, the market conducts that do not constitute an anticompetitive behaviour do not fall within the ambit of the ACA activity. There are other structures created by the legal framework that could have handled this issue properly. For example, the Consumer Protection Commission (CPC) created by the act "On consumer protection"[47] which is the body designated to deal, amongst others, with unfair contract terms and apply the relevant sanctions.[48] Another structure, that is the State Inspectorate for Market Surveillance (SIMS), is created to monitor the market and safeguard consumers' rights but only as regards products safety and intellectual property rights.[49] Given this background, the specific behaviour of the market participant at issue, does not fall within the competence of the SIMS, but rather under the ambit of the CPC[50]. However, the latter may initiate investigations based on consumers complaints or in cooperation with other structures that exercise market surveillance (such as SIMS).[51] Basically, the SIMS should have signalised the CPC to intervene and investigate what was happening with the market and consumers.[52]

When assessing the ACA decisions, one may normally raise the question: which is the anticompetitive behaviour that the ACA has sanctioned in this case: is it abuse of dominant position or an agreement between competitors?

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46 Article 24 of the Act no. 9121, dated 28.7.2003 "On the protection of competition", as amended, Official Journal No. 71/2003.

47 Article 52 of the Act "On Consumer Protection", nr. 9902, dated 17.4.2008, Official Journal 61/2008, as amended.

48 Dollani, N., *Ligji për Mbrojtjen e Konsumatorëve: Teksti me Shpjegime*, Pegi, 2018, pp. 445-448.

49 Established through the Decision of the Council of Ministers no. 36, dated 20.1.2016 "On the establishment, organisation and functioning of the State Inspectorate for Market Surveillance"

50 Even though this issue is debatable, given the specific conditions imposed by the pandemic (the extreme need for consumers to purchase these products), the CPC should have intervened, despite the fact that it was an essential contract term and according to the law, these terms are not included in the list of unfair terms. See Dollani, N. *Op. Cit*, Fn, 48, pp. 151-153.

51 Dollani, N. *Op. cit*., Fn 48, p. 446

52 Another viable alternative to handle this market situation may have been to engage the tax authorities to implement the provisions of the Normative act that precluded undertakings to set higher prices for the medical products during the state of health emergency. These authorities may have applied the fines as stipulated in the normative act either through direct inspection or through the complaint received by other state bodies.

Certainly, there was abuse that was reflected in the market, but did it stem from the conduct of the firms altogether or was it a mere parallel of interest? In this light, it would be useful to dwell into a discussion on the how the shortage during the pandemic reflected into the market a distorted competition.

In the decision that the ACA applied the temporary measure, does not indicate in which anticompetitive behaviour the undertakings were involved. One can assume that it was abuse of dominant position, but can 27 undertakings altogether be at the same time in a dominant position in a relevant market? This seems highly unlikely.

It is true that European courts (CFI and ECJ) have asserted in several cases[53] the concept of joint/collective dominance. To ascertain that this was the form of abuse (by the aforementioned firms) few criteria must be fulfilled. Firstly, to conclude that a collective dominance has taken place, a common/joint policy that is implemented by all the undertakings concerned must exist.[54] It is clear from the conduct of the undertakings concerned that they are applying high prices for essential products, but this reflects the shortage that is felt in the market. They are merely oriented towards higher profits, taking advantage of the pandemic and this line of action does not require any coordination between them. Was this conduct abusive? Yes! But was it a form of economic strength that led to this abusive behaviour or was it just a conduct oriented towards higher profits at any cost? More likely, the latter. To prove that a collective dominance occurred in the market, the links between the firms must be confirmed and that these links allowed them to act independently of law pressures of competition[55]. Can just the shortage of some goods in the relevant market that lead the firms to set higher prices be considered a link between these independent undertakings? Obviously, it cannot be considered as such.

Secondly, the common policy must be sustainable over time.[56] Again this is not the case for the undertakings at issue, because as soon as the market was normally supplied with alcohol, face masks and disinfectant gels, the prices of these products returned to a more normal range.

Apparently (without the full investigation being disclosed), when analysing the characteristics of the collective dominance, we reach the conclusion that the concerned undertakings do not form a collective dominance.

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53 Such as: Compagnie Maritime Belge Transports SA, Compagnie Maritime Blege Sa and Dafra-Lines A/S v. Commission [2000] ECR I-1356, Case 22/71 Beguelin Import G.L. Import Export [1971 ECR 949], French Republic and others v. Commission [1998] ECR I-1375.

54 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, pg. 48

55 Dabbah, Maher M., *EC and UK Competition Law, Cambridge University Pres*s, 2004, p. 592.

56 *Ibid.*, pg. 49.

Likewise (given the lack of the factual background), this behaviour could not constitute an agreement, because it was necessary for the ACA to have enough evidence that the undertakings concluded an agreement or were behaving according to a common understanding. Given this background, we may conclude that this measure applied by the ACA raises questions upon its legality.

Furthermore, as regards the overall management of the crises, taking the examples of other competition authorities the ACA did not adapt the current market condition with more relaxed competition rules such as for example to allow some necessary forms of cooperation especially in the health care sector or the pharmaceutical industry. Currently there are no clear guidelines as regards the behaviour of undertakings that may be excluded from the scope of application of the provisions of the competition law. Unlike other competition authorities such as Competition and Market Authority (in the UK) and Communication form the Commission[57] that have set clear criteria when undertakings may be exempted from competition rules, unfortunately no such action has been taken from the ACA.[58] Certainly, this does not mean that companies may have the right to ignore any competition rules, but to balance the extraordinary situation with the need to protect the market and consumers.

Given the lack of intervention form the ACA, domestic undertakings were not, and we assume are still not clear which form of cooperation between them may be exempted from the application of the competition regulatory framework.

In this background, it would have been useful and transparent for undertakings to have a better view of cooperation initiatives that do not fall within the ambit of the competition law, under the new conditions imposed by the state of health emergency. Therefore, a reference to the standards set in the Communication of

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57 Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, C 116 I/7, dated 8.4.2020, OJ C 116I, 8.4.2020, pp. 7–10.

58 For example as those set by the he CMA, which state that the latter will not take enforcement action if temporary measures are taken by business to coordinate actions when: "(a) are appropriate and necessary in order to avoid a shortage, or ensure security, of supply; (b) are clearly in the public interest; (c) contribute to the benefit or wellbeing of consumers; (d) deal with critical issues that arise as a result of the COVID-19 pandemic; and (e) last no longer than is necessary to deal with these critical issues,". CMA approach to business cooperation in response to coronavirus (COVID-19) [CMA approach to business cooperation in response to coronavirus (COVID-19) - GOV.UK (www.gov.uk)], Accessed 13April 2021. The Italian Competition and Market Authority, [AGCM - Autorita' Garante della Concorrenza e del Mercato], Accessed 13 April 2021; or the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak.

the Commission and the other national competition authorities would have been helpful for market operators.[59]

Also, the ACA has not indicated any contact point where the companies can seek advice whether a certain behaviour in the market can be sanctioned or may be exempted from the application of the legal framework or where consumers may directly address concerns regarding abusive behaviours. It would have been beneficial in the light of certainty and predictability for the market and especially undertakings to have clear boundaries where they can extend cooperation.

In this background, the establishment of a task force that could handle COVID-19 crisis would have been a good tool to deal with undertakings enquiries as regard the legality of their conduct. Some competition authorities around the world have created similar structures.[60]

7. CONCLUSION

Given the analyzation of the measures and the role of the Albanian CA, we may conclude that:

First, the ACA should have taken e more active role in managing the crisis caused by COVID-19. That entails the obligation of the Albanian CA to protect consumers and undertakings as well. This may have been accomplished via providing timely intervention in the market and providing guidelines for undertakings. It is the first time that Albanian market faces this emergency. The Albanian competition authority is relatively a new body and lacks the excessive experience to deal with situation of crises. Other national competition authorities may have handled other market crisis, such as the financial crisis, thus their approach may have been followed.

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[59] Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, C 116 I/7, dated 8.4.2020, pp. 12, OJ C 116I, 8.4.2020, pp. 7–10. a. Coordinate joint transport for input materials; b. Contribute to identifying those essential medicines for which, in view of forecasted production, there are risks of shortages; c. Aggregate production and capacity information, without exchanging individual company information; d. Work on a model to predict demand on a Member State level, and identifying supply gaps; e. Share aggregate supply gap information, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production). Se also, the Italian Competition Authority announcement, [AGCM - Autorita' Garante della Concorrenza e del Mercato], Accessed 13 April 2021.

[60] Costa-Cabral, F., Hancher, L., Monti, G., Ruiz Feases, F., *EU Competition Law and COVID-19*, Francisco, SSRN Electronic Library pp. 12, Accessed 9 April 2021.

Second, a contact point for receiving all complaints from consumers and undertakings should have been designated and furthermore a specific task force to timely handle these cases should have been created. This did not require major structural organization, but prioritizing cases and fuel the structure with the necessary resources to timely handle competition issues.

Finally, we conclude that a more vigorous approach should have been taken from the Albanian Competition Authority to inform consumers and companies.

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Professional paper

NEW EUROPEAN SOLUTIONS FOR STRENGTHENING COMPETITIVENESS IN DIGITAL MARKETS

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ABSTRACT

The assumption that undertakings in digital markets will, as in "traditional" ones, compete among each other to provide always better and diverse products and services, and that users will be allowed to easily find these products and services, compare them and choose those that suit them best, turned out to be incorrect. The same happened with the assumption that existing EU and national competition law will be able to effectively address issues that occur in digital markets and that are (usually) a consequence of the anti-competitive behavior of the biggest digital undertakings. The purpose of the paper is to examine why and how these digital undertakings cope to escape control of the competition authorities, and what are new solutions that are proposed at the EU and national level to strengthen competitiveness in digital markets. Therefore, we will firstly single out few main characteristics of digital markets, then identify challenges that competition law faces in these markets due to the presented characteristics. In the fourth and the main part of the paper, we will present key provisions proposed in the draft Digital Markets Act to complement competition law and ensure contestable and fair digital markets across the EU. We will thereafter present some of the new national competition rules recently adopted in Germany, which are similar to those proposed under the draft Digital Markets Act.

Keywords: *Digital Market, Competition Law, Digital Markets Act, Gatekeeper, Merger*

1. INTRODUCTION

For the last decade, at least, we are witnessing how digitalization changes the world we have known so far in every single aspect: the way we work, communicate, receive information, etc. Digitalization brought numerous innovations, new products and new services, and has become an integral part of our daily lives. This has become particularly true with the beginning of the COVID-19 outbreak

and the shutdown of many countries around the globe. Digital infrastructure and sophisticated digital solutions have played a central role to keep the economies running; and not only the economies but our social life as well.

Apart from the many benefits that digital innovation has undoubtedly brought, we are aware of certain concerns and issues that come with them as well. For instance, there is a fear of the loss of privacy, misuse of data, cyber-attacks, reinforcement of economic inequality by new technologies and so on. On top of that, there is an increasing anxiety about the ever-growing digital companies and their dominance in the market.

At the beginning of the expansion of the Internet, it was expected that digital undertakings will compete to provide as good and as diverse services as possible, and the users will be allowed to compare these services and easily switch from one provider to another. However, the market developed in a completely different way, meaning that today only a few largest digital undertakings have become the new gateways through which people use the Internet. Most of the Western population uses Google to find information and content on the Internet, Facebook/WhatsApp to connect and communicate, Amazon to shop online, etc.[1] The influence of these large digital undertakings can cause various economic, political and social issues.

This paper will focus only on issues that large digital undertakings cause to the competitiveness in digital markets. Namely, these undertakings are left on their own terms and enabled to misuse entrenched positions in the market, since they manage to escape the control and eventual intervention by competition authorities. This is possible because digital markets have some specific characteristics that differentiate them from "traditional" markets (to which competition rules can apply adequately) and that are particularly beneficial for large digital undertakings. We will firstly observe these characteristics through the eyes of an undertaking that provides services in the digital market and does not belong to the group of a few largest digital undertakings. This undertaking will be referred to as "undertaking X" in the paper. Thereafter, we will see that, as a result of identified characteristics, competition authorities face challenges regarding the definition of the relevant market, assessment of the market power of the undertaking, assessment of the anti-competitive behavior of the undertaking and merger control. Many legislators are trying to figure out how to tackle these challenges. In that regard, the European Commission (Commission) proposed the draft Digital Markets Act

[1] Crémer, J.; de Montjoye Y.A.; Schweitzer, H., Report *Competition policy for the digital era*, 2019, p.13

Regulation (DMA) to secure that "*what is illegal offline is equally illegal online*".[2] In light of the DMA's objectives to tackle issues that cannot be (effectively) addressed by the EU and national competition law and secure fair and contestable digital markets, we will analyze provisions that contain criteria for designating gatekeepers and the obligations that should be directly imposed on them. The purpose of this analysis is to see how proposed solutions complement competition rules and enable regulating large digital undertakings' behavior, despite identified challenges. In addition, new national competition rules adopted in Germany that are similar to solutions offered in the DMA will be presented. We will try to assess whether and how these new EU and national solutions can tame digital undertakings that act as rule-makers and gateway for one group of users to reach another in digital markets.

2. CHARACTERISTICS OF DIGITAL MARKETS

Digital markets are usually understood as a meeting place for supply and demand through the digital platforms.[3] They have a set of characteristics[4] that are very specific and that distinguish them from "traditional" markets[5]. We will present below four main characteristics, which are closely connected to each other.

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2 Europe fit for the Digital Age: Commission proposes new rules for digital platforms, Press release as of 15 December 2020, [ec.europa.eu/commission/presscorner/detail/en/ip_20_2347], Accessed 15 March.

3 Tavassi, M. A., Bellomo, G., *Chapter 19: Online Markets, Geoblocking and Competition*, in Muscolo, G., Tavassi, M.A., The Interplay Between Competition Law and Intellectual Property: An International Perspective, International Competition Law Series, Volume 77, 2019, p. 278.

4 There are different classifications of characteristics of the digital market. For instance, Hoernig recognizes eight types of characteristics (i) returns to scale and scope, (ii) network effects, (iii) multi-sidedness, (iv) data-driven, (v) feedback mechanisms, (vi) ecosystems and conglomerates, (vii) algorithmic decision-making, (viii) gig economy. (Hoernig, S., *The Digital Markets and Services Act: Context and Outlook?* Policy Paper for the Institute of Public Policy Lisbon, 2021, p. 4-6) The DMA, which is the subject of this paper, identifies six of them: (i) the size, including turnover and market capitalisation, operations and position of the provider of core platform services; (ii) the number of business users depending on the core platform service to reach end users and the number of end users; (iii) entry barriers derived from network effects and data-driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; (iv) scale and scope effects the provider benefits from, including with regard to data; (v) business user or end user lock-in; (vi) other structural market characteristics. The Report "Competition policy for the digital era" focuses on three features: (i) extreme returns to scale; (ii) network externalities; and (iii) the role of data (Crémer, J.; de Montjoye Y.A.; Schweitzer, H., *op.cit.*, note 1, p.2)

5 However, some authors argue that digital markets are not so different from traditional markets (for instance, see Massarotto, G., *From Standard Oil to Google: How the Role of Antitrust Law Has Changed*, World Competition, Issue 3, 2018, p. 395-418.)

The first characteristic of digital markets is known as an extreme return to scale and, in practice, it means that the cost of providing services significantly falls as the undertaking expands (on the other side, for "traditional markets", the dimensional growth is profitable only up to a certain point (marginality criteria)).[6] In fact, the costs of providing services online can be so low that they are disproportional to the number of users, which enables the biggest digital undertakings to offer their services for a very low price or even for free. Offering services for free to pull up end users is common among digital undertakings that use advertising as the main source of business revenue, because the more users undertakings have, the more attractive they will be for new advertisers. The increase in number of users and revenue secures to these large digital undertakings a significant competitive advantage compared to the other (existing or new) undertakings, including undertaking X, which has lower disproportionality between costs of providing services and the number of users to whom these services are provided.[7]

The second characteristic is reflected in two- or multi-sidedness.[8] By saying this, we mean in the first place on digital undertakings that have a capacity to connect many business users with many end users through their two- or multi-sided platforms.[9] It is interesting to note that some multi-sided platforms have built ecosystems around their core activities, including services they provide in competition with their business users. Such ecosystems enable digital undertakings to create a large unrivalled user base[10], i.e., to gather more users' data and use that data to improve and personalize services (these benefits will be analyzed in the following two paragraphs). Consequently, the value of each product and service offered in the digital ecosystem is higher than it would be if the same product or service is offered separately. Being aware of that, undertaking X will be interested to be a part of a digital ecosystem and cooperate with other undertakings by complementing each other's services. A problem arises if undertaking X provides services that do not complement but compete with services offered by another undertaking in the digital ecosystem, and that another undertaking is, for instance, Google. In that case, undertaking X will be in a disadvantaged position because (i) if decides to stay in the digital ecosystem, it will have to "fight" against the so-called tech giant,

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6 Tavassi, M. A., Bellomo, G., *op.cit.*, note 3, p. 279.

7 Jenny, F. *Competition Law and Digital Ecosystems: Learning To Walk Before We Run*, 2021, [https://ssrn.com/abstract=3776274], p. 1, Accessed 5 March 2021

8 Parker, G.; Petropoulos, G.; Van Alstyne, M.W., *Digital Platforms and Antitrust*, 2020, [https://ssrn.com/abstract=3608397], p. 5-6, Accessed 20 March 2021

9 Two- or multi-sided platforms bring two or more groups of users, e.g. buyers and sellers, on the same place (platform) and enable those users to connect with each other.

10 Bongartz, P., Langenstein, S., Podszun, R., *The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers*, Journal of European Consumer and Market Law, Issue 2, 2021, p.61

and (ii) if decides to offer services outside of the digital ecosystem, undertaking X will not be able to profit from the benefits mentioned above and its services will therefore be less valuable for users.[11]

The strong network effect presents the third characteristic of digital markets. This means that the convenience of using services provided by the digital undertaking increases as the number of users of services rises. For example, users benefit the situation when as many as possible persons join Facebook because they can easily connect and communicate, there is more content available and advanced options are offered to users. Let us now imagine that undertaking X starts offering social media platform services as well - no matter how innovative its services may be, it will be extremely difficult to compete with Facebook. Undertaking X will have to not only invest in services to offer better quality at lower prices (or for free) but also to convince users to change the provider, i.e. to start using its services. As a result, undertaking X and many other similar to it will be discouraged to enter or invest in the digital market where there is already a dominant digital player[12].

Finally, digital markets are data-driven, meaning that data plays an extremely important role. In fact, almost all of the listed characteristics in one way or another lead to data, i.e. collecting and storing a large amount of users' data by digital undertakings, in a course of providing their services. Collected data are further used to analyze users' behavior online and have an insight into their needs and preferences. [13] Output received from this analysis will serve for improving existing services and tailoring them to better satisfy users' needs or for eventually developing new services. We explained that undertaking X can have access to (some of) this data if it is a part of the digital ecosystem. Otherwise, it will gather significantly less data if it does not have many users; hence, it will be in a disadvantaged position again.

3. HOW CHARACTERISTICS OF DIGITAL MARKETS CHALLENGE EXISTING COMPETITION RULES?

We can conclude from the previous part of the paper that characteristics of digital markets (extreme return to scale, two- or multi-sidedness, strong network effect and the role of data) can create significant benefits for undertakings operating therein, especially for those undertakings that have an entrenched position and for whom mentioned characteristics are the most relevant. We can also conclude that

11 Jenny, F., *op.cit.*, note 4, p. 5

12 Parker, G.; Petropoulos, G.; Van Alstyne, M.W., *op.cit.*, note 5, p. 6

13 Crémer, J.; de Montjoye Y.A.; Schweitzer, H., *op.cit.*, note 1, p. 2

smaller and new undertakings are not left with many options – they can either try to challenge the large one, which is exhausting and resource-consuming, sometimes almost impossible, or they can decide to pull back from the market or provide only those services that do not compete but rather complement services of the large digital undertakings. Ultimately, some undertakings may recognize and invest in a niche market, which would be a part of the larger market but with its own features. We will go back to these undertakings when analyzing mergers in digital markets.

Under the articles 101 and 102 TFEU, the competition authorities can only intervene *ex post*, i.e. after they assess on a case-by-case basis that the conditions for intervention are met.[14] This means that the competition authority cannot simply assume that a provider of online platform services enjoys a dominant position within the meaning of Article 102 TFEU, even when it has a large turnover and a large number of business or end users. It should rather first define the relevant market and evaluate its features to find whether such a platform is dominant or not. If the competition authority finds that the platform at issue has a dominant position in the market, it has to show that platform at issue abused such position.

However, in the digital markets, it is particularly difficult for the competition authorities to make the assessments properly on whether the conditions for their intervention are met. In that regard, we can identify four main challenges that the competition authorities face in digital markets: (i) defining the relevant market[15], (ii) assessing the market power, (iii) assessing the anti-competitive behavior of the undertaking, and (iv) tracking mergers that are not notifiable under the EU law and assessing whether notified mergers can significantly impede effective competition.

Defining the relevant market is the first step in analyzing a case regarding the anti-competitive agreements, abuse of a dominant position or merger control. Given the multi-sided characteristic of digital markets, adopting a narrow definition of the relevant market could result in missing important insights that need to be considered for the analysis. To be specific, one individual side of a platform may not be defined as a relevant market because the platform does not intend to maximize its profits on that side independently of the other side; it rather takes into consideration the interaction between the users on both sides. However, if

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[14] For more information on constrains on competition authorities see: Ibáñez Colomo, P., *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 2021, [https://ssrn.com/abstract=3790276], p. 14-18, Accessed 5 April 2021

[15] For more information on this topic see: *A new competition framework for the digital economy*, Report by the Commission "Competition Law 4.0", Federal Ministry for Economic Affairs and Energy of Germany, 2019, p. 27-30 and *Challenges for Competition Policy in a Digitalised Economy*, Study for the ECON Committee, 2015, p. 52-58.

the competition authority assumes that the entire platform should be covered by definition, the assessment of the market power will be more complex due to the broadness of the definition.[16]

Second, as the assessment of the market power depends on the definition of the relevant market, it is not surprising that the traditional measures for market power, such as market shares and concentration ratios based on market shares, do not work very well too.[17] In that regard, it is worth noting that the question of whether data can contribute to gain market power in products and services has been much debated recently, and the relevance of this question has also been recognized by the German and French competition authorities in a joint report on data and its implications for Competition Law.[18]

Third, regarding the assessment of the anti-competitive behavior of an undertaking, Articles 101 and 102 TFEU provides an exemplary list of anti-competitive multilateral and unilateral behavior, which list can be adapted to the specificities of digital markets. However, dominance in the digital market is not the same as the one in the "traditional" market in a way that it may not have the same negative consequences for consumers and may be compatible with active competition for the market. [19] Moreover, application of both articles requires extensive investigations of facts on a case-by-case basis, which may be time and resource-consuming and not effective enough in fast-changing and unpredictable digital markets.[20]

Last but surely not less important challenge that competition law faces is related to mergers in digital markets. We will analyze two key issues in that regard: first, the issue of mergers that escape the competition authorities' control because they do not trigger traditional merger notification thresholds due to low annual turnover (acquisition of small but promising companies, mostly start-ups) and second, the issue of assessing of whether the notified merger in the digital market is pro- or anti-competitive. [21]

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16 Robertson, V., *Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy*, 2020, [https://ssrn.com/abstract=3631002], p. 6, Accessed 22 March 2021

17 Parker, G.; Petropoulos, G.; Van Alstyne, M.W., *op.cit*., note 5, p. 4

18 Wasastjerna, M., *Chapter 4: Interlinkage Between Competition and Data Privacy*, in Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?, International Competition Law Series, Volume 86, 2020, p. 117 – 160.

19 Robertson, V., *op.cit*., note 14, p. 11-14

20 Motta, M.; Peitz, M., *Intervention triggers and underlying theories of harm*, Expert advice for the Impact Assessment of a New Competition Tool, 2020, p. 31-33.

21 Holmström, M.; Padilla, J.; Stitzing, R.; Sääskilahti, P., *Killer Acquisitions? The Debate on Merger Control for Digital Markets* in Yearbook of the Finnish Competition Law Association, 2018, [https://ssrn.com/abstract=3465454], p. 12-19, Accessed 5 April 2021

Regarding the first issue (acquisition of small but promising companies), it is crucial to note that the EU Merger Regulation sets up quite high thresholds for merger notifications to competition authorities.[22] In numerous cases in the digital environment, these thresholds will not be reached, leading to a situation where many acquisitions of small potential competitors by larger undertakings are "invisible" for authorities. For the sake of illustration how frequent these mergers are, since 2008, Google has acquired more than 150 companies and Facebook more than 70 companies without any merger control, while in both cases many of them were potential competitors in certain segments.[23] Namely, some smaller companies, particularly start-ups that provide services in niche markets, as mentioned at the beginning of this part of the paper, have the potential to become successful, attract users or develop innovative technologies and know-how. The potential of a start-up is not always reflected in its turnover because, in the beginning, many founders invest in improving their product instead of collecting profit. Some of them do so hoping that another large and successful undertaking will recognize its potential and buy it under favorable conditions. The acquisition can be a "good deal" for founders (monetization of their business idea) and for large undertakings (early elimination of potential competitor), while at the same time it can be detrimental to innovation and competition.

As for the second issue (assessment of whether the notified merger in the digital market is pro- or anti-competitive), when the merger is notified, the authority has to conduct a comprehensive investigation to assess whether it is anti-competitive. In accordance with the Merger Regulation, the Commission will prohibit the concentration if assesses that it significantly impedes effective competition. While some acquisitions are only realized to eliminate potential competitors, most of them would have a goal to improve and/or complement existing services. This is particularly true when the acquisition target does not operate in the acquirer's core market but rather in a separate market. Also, due to characteristics of the digital markets (notably network effects and extreme return to scale), increasing the size of the undertaking enables the quality of its services to increase as well, and that benefit passes on to consumers.[24] Since merger control intervenes *ex ante* to protect the future competitiveness, competition authorities have to compare the expected effect of a merger at issue with the expected developments on the identi-

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22 Council Regulation 2004/139/EC on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24

23 Chatillon, A.; Henno, O., *op.cit.*, note 11, p. 68-69

24 The importance of data, another characteristic of digital markets, is also relevant for mergers in a way that the competition authority should assess if (i) the acquirer will be able to access data gathered and accumulated by the acquisition target and (ii) if the merge will negatively affect the privacy protection and the quality of service provided by merged undertakings. (Jenny, F., *op.cit.*, note 4, p. 21).

fied relevant market, which is particularly difficult in the digital market. Only after that, it can decide whether to approve, with or without commitments or to prohibit the merger at issue.

Most of the challenges mentioned above are not likely to occur in "traditional" markets; even if they do, existing competition rules provide solid mechanisms to address the issue and work toward a fair and competitive market. Namely, the principal aims of the competition law are to enhance the efficiency of the market and to protect consumers from harm through anticompetitive behavior.[25] In the digital environment, it is far more difficult to reach these objectives. While competition has traditionally been understood as the presence of a large number of undertakings producing similar products and competing to acquire market share through lower prices and innovation, this is often not feasible in the digital environment. As it was noticed in the French Senat's Report, players with considerable market power in digital markets manage to escape the historical concepts and instruments of competition policy.[26]

4. NEW PROPOSALS AND LEGISLATION TO ADDRESS CHALLENGES IN DIGITAL MARKETS

4.1. A new proposal on the EU level

In order to catch up with today's digital reality, the European Commission published a proposal for the Digital Markets Act (DMA)[27] at the end of last year. According to the DMA, weak contestability and unfair practices are mainly related to highly-concentrated multi-sided platform services, where a few large digital

[25] It has even been argued that the ultimate purpose of competition law is to ensure the satisfaction of all reasonable wishes of consumers, being it of price or non-price nature, such as variety, innovation and privacy protection (See *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy,* Preliminary Opinion of the European Data Protection Supervisor, 2014, p. 17). In that regard, though with the less supportive attitude, Van den Bergh and Weber conclude "the recent Facebook case has further complicated the current state of German competition law by intermingling competition goals with concerns of privacy protection" (Van den Bergh, R., Weber, F., *The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?,* World Competition, Issue 1, 2021, p. 30.) – this statement will be elaborated in chapter 4.3 of the paper.

[26] To support this assertion, it states that the control thresholds can fail to detect (and eventually prevent) so-called predatory acquisitions and the approach to dominance in terms of price does not take into account the advantages related to data ownership or network effects. (Chatillon, A.; Henno, O., Rapport d'information, Sénat N° 603, [www.senat.fr/rap/r19-603/r19-6030.html], p. 67, Accessed 13 April 2021.

[27] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final

platforms act as gateways for business users to reach their customers (end users) and their power can easily be misused.

Following provisions contained in the DMA are considered to be a good solution for effective and timely intervention in digital markets: (i) an exhaustive list of core platform services, (ii) requirements for the designation of providers of core platform services as gatekeepers and specific criteria for assessing whether they are met, and (iii) directly applicable obligations for designated gatekeepers.

Core platform services currently listed in the DMA are online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services and online advertising services. Following a market investigation, the Commission will have a possibility to update this list.

An undertaking that provides core platform services does not necessarily have to be qualified as a gatekeeper, unless if: (i) has a significant impact on the internal market, (ii) operates as an important gateway for business users to reach end users, and (iii) either (a) enjoys an entrenched and durable position or (b) is expected to enjoy such a position in the near future.

To avoid unnecessarily broad interpretation of these three objective requirements, the DMA contains quantitative thresholds for assessing whether to designate an undertaking as a gatekeeper. First, an undertaking will be presumed to have a significant impact on the internal market if its annual turnover or the average market capitalization meets the threshold[28] set up in the DMA. Second, an undertaking operates as an important gateway if it has more than 45 million monthly active end users established or located in the EU (corresponding to 10% of the entire population of the EU) and more than 10 000 yearly active business users established in the EU. The third requirement is fulfilled if an undertaking has reached the number of users specified above in the last three financial years (iii(a)), or it is likely to reach a specified number and ensure an entrenched and durable position in the near future.

The Commission is provided with a certain level of discretion in assessing whether an undertaking has a gatekeeper role even if it does not satisfy all of the quantitative thresholds. Such an assessment has to be based on the market investigation,

[28] Article 3 paragraph 2 point (a) of the DMA: the undertaking to which a provider of core platform services belong should achieve an annual turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalization or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States.

by taking into account these thresholds and the level of innovation, the quality of digital products and services, the characteristics of digital markets that are particularly relevant for the undertaking at issues, as well as high growth rates and similar indicators. [29] This is one of the important novelties that the DMA brings because it enables an early intervention against undertakings that have not yet become entrenched.

The third set of provisions we identified as relevant for the complementation of competition rules consists of the list of directly applicable obligations that should regulate the conduct of gatekeepers on an ongoing basis.[30] These obligations can be grouped into two categories: the self-executing obligation (listed in Article 5 of the DMA) and obligations that should be further specified based on the regulatory dialog with gatekeepers (Article 6 of the DMA). Restraining from combining personal data from different sources and from requiring users to register with one core platform service as a condition to accessing any other are some of the obligations falling in the first category, while examples of obligations to be further specified are not to use data generated through activities of the business users on the platform to then compete with them, not to treat more favorably in ranking own services or products compared to similar services or products of third parties (so-called self-preferencing), to enable data portability and real-time access to data generated through the users' activities, etc. It should be noted that undertakings designated as gatekeepers under (iii(b)) will not be subject to all obligations that are imposed on gatekeepers who have already an entrenched and durable position, but only those obligations that are necessary and appropriate to avoid the qualified risk of unfair conditions and practices.

Based on the presented sets of provisions, we can conclude that the main complement to the competition law that the DMA offers is reflected in its approach that should prevent the occurrence of anti-competitive behaviors. Such prevention is

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[29] Article 3 paragraph 6 of the DMA: (a) the size, including turnover and market capitalization, operations and position of the provider of core platform services; (b) the number of business users depending on the core platform service to reach end users and the number of end users; (c) entry barriers derived from network effects and data-driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; (d) scale and scope effects the provider benefits from, including with regard to data; (e) business user or end user lock-in and (f) other structural market characteristics.

[30] Some authors critique that the DMA lacks a principled approach and that obligations imposed on gatekeepers, in particular, look like a random selection of past and ongoing cases. It is proposed to follow three principles when setting up the obligations: contestability of markets, fairness of intermediation and independence of decision. For more information, see: Podszun, R.; Bongartz, P.; Langenstein, S., *Proposals on How to Improve the Digital Markets Act*, 2021, [https://ssrn.com/abstract=3788571], p. 4-6, Accessed 2 April

enabled by imposing specific obligation directly on all undertakings that fulfill the objective requirements to be designated as gatekeepers, plus undertakings that do not fulfill the requirements but the Commission assessed that they should be designated as such. Two groups of obligations imposed on gatekeepers under the DMA can be seen as specific case examples of abusive behavior.[31]

The DMA does not provide guidance on how to deal with previously specified challenges (definition of the relevant market, assessment of the market power and the anti-competitive behavior of the undertaking), but rather oblige all gatekeepers to behave or not behave in a certain way that should ensure competitiveness in the market. In an ideal scenario, each undertaking that provides core platform services in the digital market and qualifies as gatekeeper will respect the obligations contained in the DMA. If it fails to do so, it will be fined under the DMA. This approach should enable the Commission to save resources and to avoid defining relevant markets, assessing market dominance or examining whether these practices can restrict competition. Moreover, the gatekeeper cannot challenge its regulatory duties by claiming that, even though it qualifies to be designated as gatekeeper, its conduct does not have anti-competitive effects because the DMA says that this would not be relevant.[32]

Regarding the forth challenge to competition law, i.e. merger control, the DMA introduces an obligatory notification rule. Namely, the gatekeeper is obliged to notify the Commission of any intended merger that involves another provider of core platform services or any other services provided in the digital sector, irrespective of whether it would be notifiable to relevant authority under the EU or national merger rules. The submitted notification should, among others, contain the information on annual turnover for the acquisition target, the core platform service provider's annual turnover, number of yearly active business users and monthly active end users, as well as the rationale of the intended concentration.

The introduced mandatory notifications for gatekeepers of any acquisition in digital markets aim at solving the first issue we have identified within the merger challenge. In other words, this obligation can address the issue of acquiring companies

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31 Leistner, M., *The Commission's vision for Europe's Digital Future: Proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act – A critical primer*, 2021, [https://ssrn.com/abstract=3789041], p. 3, Accessed 5 April 2021

32 Authors of *The European Proposal for a Digital Markets Act – A First Assessment*, Centre on Regulation in Europe, January 2021, recommend introducing the explicit possibility for the gatekeeper to defense in order to escape the application of some obligations by demonstrating that its practices are not unfair, nor do they harm market contestability. Moreover, they recommend providing the Commission with the possibility of not imposing a specific obligation to a specific regulated gatekeeper at all, if this would be justified because there is no measure which would be effective and proportionate (p.7).

and start-ups with high potential but low turnover, and enable tracking of the developments on the market while ensuring more control. However, it does neither guarantee fewer (approved) mergers of this type nor a more adequate assessment of whether a merger is pro-competitive or not.

Also, the DMA does not deal with the case when a gatekeeper merges with an undertaking outside of the digital market. It indeed aims at regulating the online behavior of gatekeepers; still, it is noteworthy that this kind of merger may still have an impact on the strengthening of gatekeeper's position in the (both) market(s). These are not frequent (yet) but should not be neglected, because a gatekeeper can benefit from digital markets' characteristics (particularly from the use of gathered users' data) to expand its services to "traditional" markets as well. Take for an example the case of Amazon buying the Whole Food Market.[33]

4.2. New provisions on the national level – a case of Germany

A necessity for adaptation of the competition law to this new digital environment has been recognized worldwide. Aware of the fact that different issues occurring in the digital market that are related to its specific characteristics cannot be (effectively) covered by the existing competition rules, several countries are putting forward their proposals. Some EU Member States are also advancing with their laws, thus contributing to a regulatory fragmentation within the internal market. Germany, as a leading country when it comes to preventive rules for large digital undertakings[34], has recently taken the biggest step forward.

Few weeks after the DMA is proposed, Germany updated its national competition law by adopting the 10th amendment on the Act against Restraints of Competition[35] and provisions that mostly cover the same issues as the DMA. Specifically, the German Federal Cartel Office (*germ*. Bundeskartellamt) (FCO) is now enabled to determine by an order that certain undertakings have paramount cross-market

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33 Amazon, a large core platform services provider that usually first comes to mind when talking about gatekeepers, has bought a couple of years ago a leading organic food supermarket based in the US. This deal benefits Amazon in many ways, including an entry into the offline grocery store business and access to a huge amount of data.

34 The German competition authority has already gone ahead when assessing anti-competitive conduct in the digital markets - for more information on this topic see: Schneider,G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Oxford University Press, Vol. 9, Issue 4, 2018. Also, in 2017, Germany introduced additional notification thresholds based on transaction value by adopting the 9th amendment on the Act against Restraints of Competition.

35 Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. Juni 2013 (BGBl. I S. 1750, 3245) (German Act against Restraints of Competition (German Act))

significance for competition[36], which is similar to the Commission's designation of gatekeepers. It is important to note that adopted rules apply to all undertakings that have a strong market position on two or more markets, but they should primarily tackle large digital platforms. There are no objective requirements or quantitative thresholds to be met; it is up to the FCO to conduct a case-by-case investigation and assess if undertaking at issue has such paramount significance. Criteria that should be taken into account when making an assessment include undertaking's market dominance in one or more markets, financial strength and access to other resources, access to competitively relevant data and similar. The order can be effective for a maximum of five years and it can be disputed before the Federal Court of Justice, which will act as the first and final instance.[37]

Undertakings that are determined by order to have paramount cross-market significance for the competition can be obliged by the FCO to restrain from engaging in certain activities.[38] This is another similarity with the DMA and the list of obligations provided therein. For instance, the undertaking at issue should not take measures that directly or indirectly hinder competitors on markets where this undertaking can rapidly expand its position, even without being dominant. This practically means that the FCO can prohibit *(ex-ante)* the undertaking for performing certain activities even in markets where the undertaking is not dominant, thus prevent abusive expansion into non-dominated markets. However, the FCO will not prohibit any of these conducts if the undertaking successfully proves that its conduct is objectively justified (as mentioned, gatekeepers do not have this possibility under the DMA).

Regarding the merger control, the update that is relevant for the paper and similar to the provision in the DMA, relates to the new possibility for the FCO to conduct sector investigation and require by order the undertaking to notify any merger[39] in one or more specified sector if (a) the undertaking has achieved worldwide sales of more than 500 million euros in the last fiscal year, (b) there are objectively reasonable grounds for believing that future mergers could significantly impede effective domestic competition in the specified sector and (c) the undertaking has a share of at least 15% of the supply of or demand for goods or services in Germany in the specified sector.[40]

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36 Article 19a(1) of the German Act

37 Article 73(5) of the German Act

38 Article 19a(2) of the German Act

39 However, a merger where acquisition target has not achieved sales of more than 2 million euros in the last financial year and has not generated more than two thirds of its sales in Germany does not have to be notified. Article 39a(2) of the German Act

40 Article 39a(1) of the German Act

4.3. Relationship between the DMA and (national) competition policy

The Recital 10 DMA tries to draw a line between the legal interests of the proposed regulation and the competition policy by stating that Article 101 and 102 TFEU and national competition rules have as their objective the protection of undistorted competition on any given market, while the DMA aims at ensuring "that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market."

Considering that services provided by gatekeepers have a cross-border nature and can be provided in all Member States, one objective of the DMA is to prevent regulatory fragmentation that would undermine the functioning of the single market. Therefore, it prohibits in Article 1(5) the Member States from imposing further obligations on gatekeepers for the purpose of ensuring contestable and fair markets. In other words, Member States can impose any obligation compatible with the EU law on undertakings, including providers of core platform services, as long as these providers do not qualify to have a status of gatekeeper under the DMA.

The very next paragraph (Article 1(6)) states that the DMA is without prejudice to the application of Articles 101 and 102 TFEU and respective national rules. Basedow interprets this provision in a way that it is without prejudice to the application of national competition rules regarding not only undertakings that do not fulfill objective requirements to be designated as gatekeepers under the DMA, but as well to those undertakings that fulfill objective requirements (designated gatekeepers).[41]

Given the characteristics of digital markets and challenges caused by them, the competition authority will not often find that the large digital undertaking's conduct is anti-competitive and decide to apply competition rules. Yet, one of the rare cases happened in 2019 when the German competition authority found that Facebook has breached national competition rules that prohibit the abuse of a dominant position by using the terms of use that provide for the processing and use of user data that is collected when the Internet is used independently of the Facebook platform.[42] This case was both welcomed and criticized at the same

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41 Basedow, J., *Das Rad neu erfunden: Zum Vorschlag für einen Digital Markets Act (Reinventing the Wheel: The Proposal for a Digital Markets Act)*, Zeitschrift für Europäisches Privatrecht, Vol. 29, 2021, forthcoming, Max Planck Private Law Research Paper No. 21/2, [https://ssrn.com/abstract=3773711], p. 6, Accessed 6 April.

42 The Federal Court of Justice provisionally confirms the allegation of abuse of a dominant market position by Facebook by qualifying the lack of choice on the part of consumers, and not the violation of

time.[43] Additionally, we see that new national competition rules in Germany prohibit certain forms of unilateral conduct even in markets where the undertaking is not dominant. These rules will be applied to undertakings with paramount cross-market significance for competition and, having in mind criteria to assess if an undertaking has such significance, we can say with certainty that gatekeepers will be covered by these rules. It is not clear from the current DMA text weather these rules (and potentially similar ones in other Member States), which are part of the national competition law, would remain valid after the enactment of the future DMA Regulation.[44] If not, new German solutions might lose their importance, since they are adopted above all to regulate the conduct of undertakings acting as gatekeepers.

To conclude, although the DMA is envisaged as an ex-ante regulatory tool to address the issues that cannot be (effectively) tackled by the EU and national competition policies and should be without prejudice to the application of these policies, parallel existence of this regulation and competition law could lead to over – or double-enforcement – against the same undertaking for the same behavior. In order to avoid the overlapping, Georgieva suggests both temporal and conceptual separation of the ex-ante DMA regulation and ex-post competition enforcement on digital markets.[45]

5. CONCLUSION

Ever-growing and fast-developing digital markets, together with undertakings operating therein, set a difficult task in front of competition authorities – they have to ensure effective competition, but they are disabled to effectively apply competition rules. Challenges that competition authorities face when try to assess

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data protection laws, as an infringement of German competition law. Press release, [www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html], Accessed 10 April 2021

43 Authors Van den Bergh and Weber (Van den Bergh, R., Weber, F., *op.cit.,* p. 39-40.) underline the principle "that different goals require the use of different instruments, non-competition goals must be achieved by legal rules outside the scope of competition law", referring to the Facebook decision where the violation of data protection laws was qualified as an abuse of dominant position. They argue that this finding substantially waters down the causation requirement (between market dominance and the use of unfair contract terms, in the case at issue).

44 Bongartz, P., Langenstein, S., Podszun, R., *op.cit.*, note 10, p. 67. Authors of *The European Proposal for a Digital Markets Act – A First Assessment* (*op.cit.*, note 32, p.10) interpret the Article 1(5) DMA in a way that new rules adopted within the 10th Amendment of the German law can remain applicable next to the DMA, once enacted, as these new rules are based on national competition law.

45 Georgieva, Z., *The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles*, European Papers, Vol. 6, No 1, 2021, p. 25-28, ISSN 2499-8249 - doi: 10.15166/2499-8249/448

whether anti-competitive conduct occurred and their intervention is needed, are connected with specific characteristics of digital markets, i.e., extreme return to scale, multi-sidedness, network effect and a role of data.

Many countries worldwide endeavor to fully understand how these markets function and anticipate in which direction they will evolve, to find appropriate solutions to establish control over them. In particular, legislators intend to regulate the behavior of large digital undertakings that connect many users, make other undertakings dependent on them and present a serious threat to competitiveness in digital markets.

The European legislator proposes a new *ex ante* approach to these undertakings that are designated as gatekeepers. This approach implies that the Commission, as a competition authority, does not have to deal with the definition of the relevant market, measurement of the market power of the gatekeeper in the defined market, nor with the assessment of whether the gatekeeper's conduct is anti-competitive. Instead, it can impose the obligation specified in the DMA to undertakings solely on the basis that they meet requirements to be designated as gatekeepers. These obligations are created in a way that, if gatekeepers behave accordingly, they will significantly decrease the likeliness for anti-competitive conduct to occur and for competition to be jeopardized in digital markets. Therefore, we conclude that the DMA does not offer guidance on how to deal with challenges but rather complements competition law by offering solutions on how to avoid dealing with them.

Regarding new German competition rules, we see that they are mainly adopted with the objective to regulate the behavior of undertakings with paramount cross-market significance for competition, and they are also based on *ex ante* approach. Unlike the Commission, the FCO has to conduct an investigation prior to issuing an order and imposing obligations on undertakings, including the obligation to notify any merger in the specified sector(s).

Finally, we see that the DMA's prohibition to the Member States from imposing further obligations on gatekeepers can raise come concerns. Yet, we should remember that Germany will have significant influence in finalizing and adopting the DMA Regulation, so we can expect those obligations to be contained in the regulation and those envisaged by new German competition rules will not be (too) diverse. Moreover, the FCO's experience in the application of new rules in digital markets will show how effective these rules are, and it might serve as an example of what (not) to include in the final DMA version.

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FINES AND DAILY FINES UNDER THE ACT ON THE AMENDMENTS TO COMPETITION ACT WITH SPECIAL EMPHASIS ON MITIGATING AND AGGRAVATING CIRCUMSTANCES

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ABSTRACT

The paper analyzes the amendments to Title VIII of the Croatian Competition Act regulating penalty clause or the fines, daily fines, and the methods for their imposition, adopted in April 2021. Daily fines are a new institute that further extends the Croatian Competition Agency's (CCA) power as a general, national regulatory authority responsible for the protection of competition in all markets. Therefore, e*ach amended article of that Title is analysed to accurately reflect what has changed and with which provision of the Directive (EU) 2019/1 it has been harmonized. The paper also provides a detailed tabular overview and comparison of the amount of the fine and mitigating and aggravating circumstances that the Agency considered into account when imposing them in cases in the period from 2013 to the end of 2020, so that, finally, it can be concluded if there is a consistent relationship between the number of mitigating and aggravating circumstances and the amount of the fine that CCA imposes when there are infringements of the national and EU competition law.*

Keywords: *Competition Act, Amendment, fines, daily fines, mitigating and aggravating circumstances*

1. INTRODUCTION

The amendments to the Title VIII of the Competition Act[1] (hereafter 'CA'), which regulates the penalty clause or the fines, daily fines, and mitigating and aggravating circumstances for their imposition, will be analysed below. However, to be able to talk about fines and how they are imposed, as well as amendments in the

[1] The Competition Act, Official Gazette No. 79/09, 80/13, 41/21

CA regarding fines and the introduction of daily fines, it is first necessary to say something about the authority that imposes them.

„The Commission shares with the national authorities the power to rule upon the admissibility of agreements, decisions and concerted practices and abuses of a dominant position (Arts 104-105 TFEU)", therefore, the European Commission is working closely with the national competition authorities on the application of the European competition law.[2] To the national authorities to be considered competent to decide in a particular case, there must be a material link between the infringement and the territory in which the infringement was committed.[3]

Based on the above considerations, points should be noted that the Croatian Competition Agency (hereafter 'CCA') is a Croatian general regulation that applies to all forms of prevention, restriction, or distortion of competition by undertakings on the territory of the Republic of Croatia or outside its territory if it affects it.[4] According to the CA, the cartel, abuse of dominant position, and market concentration are three forms of conduct by market entrepreneurs that can be injurious to competition. The concentration is subject to the control of the CCA in such a way that control is carried out before the proposed concentration and it is possible only with the approval of the CCA. The concentration will be approved only if it does not distort the competition. Therefore, the CCA, headed by the Competition Council, is the competent national authority that investigates and decides on infringements of the national and EU competition law. [5]

One of the key powers of the CCA is the imposition of fines, which were introduced into the CA in 2009[6]. A fine is a specific type of legal sanction provided for by the CA and in substantive terms, this type of infringement is not considered an offense or criminal offense.[7] Apart from fines, the paper deals with newly established sanctions for non-compliance with the provisions of the CA - daily fines. Daily fines are the new sanction which the CCA will issue when it considers that it is proportionate to the gravity and duration of the infringement, the consequences

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2 Moens, G.; Trone, J., *Commercial Law of the European Union*, Dordrech, Springer, New York, 2010, p. 217

3 Akšamović, D., *Podnošenje pritužbi Europskoj komisiji radi povrede pravila tržišnog natjecanja*, Novelties in Competition Law after the Accession of the Republic of Croatia to the European Union, Ekonomski fakultet Zagreb, Zagreb, 2014, p. 144

4 Art. 2 of The Competition Act, Official Gazette No. 79/09, 80/13, 41/21

5 Bolanča Kekez, Đ., *Liability for damages for infringements of the competition law provisions*, Zagreb, 2019, doctoral thesis, pp. 304, 307

6 The Croatian Competition Act, Official Gazette No. 79/2009

7 Akšamović, D.; Vlaović, J., *Fines in Croatian and European competition law,* Journal of law and social sciences of the Law Faculty of University J. J. Strossmayer in Osijek, Vol. 33, Issue 2., 2017, p. 49

of that infringement for other undertakings on the market and consumers, that is to say, as regards the short duration of the infringement.[8] Therefore, fines and daily fines are considered as violations *sui generis*[9] or it can be concluded that they are the sanctions for the infringements under the CA and Article 101 or 102 of the Treaty on the Functioning of the European Union[10] (hereinafter called the: „TFEU").

Finally, for this work, research of decisions taken by the CCA from 2013 to the end of 2020, imposing a fine on undertakings for non-compliance with the provisions of the CA, was carried out. The research gives the phases of observation, analysis, classification of facts, and a conclusion. It is desired to determine whether the CCA is consistent in imposing the amount of the fine concerning the mitigating and aggravating circumstances to which it refers and to conclude what are the most common mitigating and aggravating circumstances that the CCA takes into account when imposing a fine in practice.

2. AMENDED ARTICLES OF THE TITLE VIII OF THE COMPETITION ACT

The CA is a general regulation governing the issue of competition law in Croatia. The Act on the Amendments to Competition Act, Official Gazette No. 37/2021[11], (hereinafter called the 'AACA') was adopted to comply with the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter called the „Directive (EU) 2019/1").

In the continuation of the paper, only the articles of the CA from Title VIII that have been changed are presented, and the implemented changes are explained in more detail. This serves to give a simple overview of the news of that part of the amended CA and thus make it easier to understand that news.

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8 Art. 63.a of *the Act on the AmendAments to Competition Act, Official Gazette No. 41/2021*

9 Derenčinović, D., *Upravno-kaznene mjere zbog zlouporabe tržišta*, Informator, No. 6316-6317, 2014, pp. 1

10 See: Article 101 and 102 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C326, 26/10/2012 P. 0001-0390

11 *The Act on the Amendments to Competition Act, Official Gazette No. 37/2021*

2.1. Article 60 of the Competition Act – Imposition of fines

The word 'fine' (*cro*. upravno-kaznene mjere) in the CA has been amended to a different word in the AACA (*cro*. novčane kazne).[12]

Therefore, the CA has taken over the name 'fine' used in European acts, but also other national actimations, for example, in the Spanish legislation 'fine' is also used as a term for the penalty for infringement of competition law.[13] Serbian Competition Act also uses the term 'fine', but for them, Commission is not authorised to impose fines in case of non-compliance with a commitent made.[14]

2.2. Article 61 of the Competition Act - Fines for severe infringements of competition rules

Article 61, regulating the fines for severe infringements of competition rules, was partly amended. As a result of the partial harmonisation of the provisions of the Act with Article 13 of the Directive (EU) 2019/1[15], stipulates that a fine up to a maximum of 10% of the value of the total turnover generated by the undertaking at the global level in the last year for which there are concluded annual financial reports, undertaking intending or negligently: either concludes a prohibited agreement or otherwise participates in an agreement which distorts competition (described in the provision of Article 8 of CA and Article 101 of TFEU), abuses a dominant position (as described by the provision of Article 13 of the CA and Article 102 of the TFEU), participates in the implementation of the prohibited concentration of an undertaking, does not act upon a decision by the CCA setting out the measures to establish competition or impose interim measures. Likewise, this Article defines the meaning of the concepts of intentions and negligence, which indicate the interpretation of the Court of Justice of the EU and not the Croatian criminal law.[16]

Article 61 of the CA is consistent with Article 13 of the Directive (EU) 2019/1 which states that the Member States may at least ensure that national administrative competition authorities may, by decision of their enforcement procedure,

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12 Art. 46 of t*he Act on the Amendments to Competition Act, Official Gazette No. 41/2021*

13 Figueroa, Pablo, *Fines and Antitrust Infringements under the New Spanish 2007 Competition Act*, Competition Law International, Vol. 5, Issue 1., 2009., pp. 39

14 Petronijevic, Srdana; Soljaga, Zoran, *Commitent Procedure under Serbian Competition Act,* Yearbook of Antitrust and Regulatory Studies, Vol. 16, pp. 167

15 Art. 13 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

16 Art. 46 of *The Act on the Amendments to Competition Act, Official Gazette No. 41/2021*

impose effective, proportionate, and dissuasive fines, or may, in the course of criminal proceedings, request that such fines be imposed on them. Such fines shall be fixed in proportion to their total global income, if either intentionally or negligently: refuse to submit to the search (as referred to in Article 6); damage to stamps placed by officials or other persons accompanying them authorised or appointed by national competition authorities; in response to the question referred to in Article 6 give an incorrect or misleading answer or refuse to provide a full response; supply incorrect, incomplete or misleading information in response to the request referred to in Article 8 or provide no information within the time limit set; do not respond to the call for an interview as referred to in Article 9; do not comply with the decision referred to in Articles 10, 11 and 12 of the Directive (EU) 2019/1.[17]

2.3. Article 63a of the Competition Act – Daily fines

Article 63a introduced an institute of a 'daily fine' due to full adaptation with Article 16 of the Directive (EU) 2019/1, which calls such penalties "Periodic penalty payments". Periodic penalty payments are tailored to force undertakings and associations to comply with a Commission decision.[18] According to the AACA, the CCA is authorized to impose a daily fine on the entrepreneur and the association of entrepreneurs if: does not act on the CCA's request (Article 41(1) and (3) of the CA), does not respond to a mandatory interview (Article 41a of the CA), interferes with the execution of the order of the High Administrative Court of the Republic of Croatia on the conduct of an unannounced search (Article 42(6) and (7), Article 43 and Article 44 of the CA), does not act on the CCA's decision in the part of the enforcement order for infringing Article 8. or Article 13 of this Act and/or Articles 101 or 102 of the TFEU or which lay down measures relating to the undertaking's commitments referred to in Article 49 of this Act or which lay down provisional measures referred to in Article 51 of this Act (Article 58(1), 4, 10 and 11 of the CA). The same Article also regulates how such daily fines are imposed. The CCA shall issue a solution defining the total turnover of the undertaking at the global level in the preceding business year by the number of days in the financial year and multiplying the amount thus obtained by 1 day by the number of days, calculated from the date of the infringement found in the order imposing the daily penalty payment imposed by the CCA on the CCA's order imposing a

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17 Art. 13 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018

18 Lister, Charles, *Dawn Raids and Other Nightmare: The European Commission's Investigatory Powers in Competition Law Matters*, Journal of Reprints for Antitrust Law and Economics, Vol. 22, Issues 1 and 2, 1993, pp. 530

daily penalty payment. Furthermore, the maximum daily fine which may be omitted shall not exceed 5% of the value of the average daily income in the preceding business year for each day of not acting on the CCA's solution calculated from the date specified in the order. Undertakings fulfilling a liability whose non-execution was the basis for the payment of the daily penalty payment, the CCA may determine the final amount of the daily fine payment which may be lower than the amount initially established in the CCA's order. The CCA will issue a daily fine payment when it considers that the daily fine is proportionate to the gravity and duration of the infringement, the consequences of that infringement for other undertakings on the market and consumers, that is to say, as regards the short duration of the infringement and therefore the imposition of daily fine payment is appropriate and has a gross effect and all of that instead of imposing fines.[19]

If world regulation is looked at, it can be observed that European countries are greatly aware of the institute of daily fines or day fines in several jurisdictions, unlike, for example, an American law that has only gradually introduced such a sanction in its legal system.[20]

2.4. Article 64 of the Competition Act – Method of setting fines

Paragraph 1 of Article 64 has not been amended, on the other hand, a completely new paragraph has been introduced. It states that if the infringement committed by the association of undertakings relates to the activities of its members, the maximum amount of the fine that can be imposed on the association of undertakings cannot, in any case, exceed 10% of the sum of the total revenue generated worldwide by each member of the association who acted on the market where the infringement occurred by the association of undertakings. When imposing a fine on an association of undertakings for violation of this Act and Articles 101 or 102 of the TFEU, the CCA will take into account the income of its members or may take into account the income of the association of undertakings. If the CCA finds that the association of undertakings is not solvent and cannot pay the fine referred to in paragraph 2 of this Article, the association of undertakings shall request payments and/or additional payments from its members in order to settle the fine. The financial obligation of each member of the association referred to in paragraph 4 of this Article relating to the payment of a fine for that infringement may not exceed 10% of its total worldwide revenue in the year for which there are closed financial statements. If the fine imposed referred to in paragraph 2 of this Article is not fully paid within the time limit set by the CCA, the CCA shall

[19] Art. 63.a of *the Act on the AmendAments to Competition Act, Official Gazette No. 41/2021*

[20] Hillsman, Sally T., *Fines and Day Fines*, Crime and Justice: A Review of Research, Vol. 12, pp. 49

request the payment of the fine or its balance directly from any undertaking whose representatives were members of the decision-making bodies of that association of undertakings. If the fine imposed referred to in paragraph 2 of this Article cannot be charged in the manner referred to in paragraph 6 of this Article, the CCA shall request the payment of the fine or its remaining amount from each member of the association of undertakings acting on the market where the infringement occurred. The obligation referred to in paragraphs 4 to 7 of the same article does not apply to an undertaking which demonstrates that it has not implemented a decision of the association of undertakings representing an infringement and who did not know that such a decision existed or had actively fenced itself off from such a decision before the start of the procedure. The Payers of the fine referred to in paragraphs 6 and 7 of that Article will be determined by the CCA in a decision imposing a fine.[21]

2.5. Article 65 and 65a of the Competition Act – Reduction of / immunity from fines

Article 65 has changed completely and it is now in line with articles 17 to 22 of the TFEU which are part of Chapter VI governing leniency programs for secret cartels. New Article 65 states that the CCA may exempt from the payment of a fine from that participant of a cartel or a secret cartel that first informs the CCA of a cartel or a secret cartel and provides it with information, facts, and evidence enabling the CCA to initiate proceedings and carry out a targeted unannounced search relating to a secret cartel, provided that the CCA does not yet have sufficient evidence to initiate the proceedings and conduct a targeted unannounced search or has not yet carried out such a search or which, according to the CCA, are sufficient to be able to identify the infringement covered by the penitentiary programme referred to in Article 8(1) of the Regulation. of this Act and/or Article 101of the TFEU, provided that the CCA does not yet have sufficient evidence to establish that infringement and that no other undertaking has previously met the conditions for authorisation of leniration in relation to that secret cartel. An undertaking may submit such an application as a full or summed-up application for leniration. The exemption from payment of a fine cannot apply to an undertaking that has forced other undertakings to join or remain in a cartel. The CCA may impose a reduced fine on those participants in a cartel or a secret cartel that does not qualify for leniency but have provided the CCA with additional valid evidence that constitutes significant added value for demonstrating an infringement covered by the leniency programme, in relation to the evidence already available to

[21] Art. 64(2-9) of *the Act on the Amendments to Competition Act, Official Gazette No. 41/2021*

the CCA at the time of filing the application. The CCA shall not take into account such additional facts as a result of an increase in fines compared to the fines that would otherwise be imposed on participants in a cartel or secret cartel. Applicants for leniency from fines or for the reduction of the fine-penance, statements of penitentiaries concerning full or abbreviated applications are submitted in Croatian or in another official language of the European Union agreed bilaterally between the CCA and the applicant. Imposing a fine under this Act is of no effect on the criminal liability of the person to whom that fine was imposed. On the proposal of the CCA, the Government of the Republic of Croatia will elaborate in detail the criteria for exemption from the fine or for the reduction of the fine, in accordance with the criteria arising from the application of competition rules in the European Union, within the meaning of Article 74 of the CA.[22]

Behind Article 65 of the European adds Article 65a which states that current and former directors, managers, and other employees of undertakings that have submitted to the CCA for lenient exemption under the lenient scheme will not be fined in administrative proceedings and administrative disputes, in connection with their participation in a cartel or secret cartel to which the application for lenient from the fine applies if: 1. application for leniency of the entrepreneur meets the criteria set out in the regulation governing the criteria for leniency or reduced fines 2. current and former directors, managers and other employees actively cooperate with the CCA and 3. application for exemption from the fine of entrepreneurs is submitted before these current and former directors, managers and other employees learned from the competent authorities of the procedure leading to the imposition of fines referred to in paragraph 1 of this Article. If the protection referred to in paragraph 1 of this Article is not the competent CCA but a competition authority in another Member State of the European Union, the CCA shall provide the necessary contacts between that authority of another Member State and the body responsible for sanctioning or prosecuting when the competent authorities of the Republic of Croatia are responsible for sanctioning or prosecuting them. The decision on the initiation of criminal proceedings against persons referred to in paragraph 1 of this Article is made by the State Attorney, in accordance with the regulations of the criminal legislation of the Republic of Croatia. For the reasons of paragraph 3 of this Article, the Public Prosecutor may decide not to initiate criminal proceedings or may propose to the competent court an easing of the sanction to be imposed in criminal proceedings, if the Public Prosecutor considers that the contribution of the person referred to in paragraph 1 of this Article in the detection of cartels exceeds the interest of prosecuting and/or sanctioning those persons. This Article is without prejudice to the right of injured parties who

[22] Art. 65 of *the Act on the Amendments to Competition Act, Official Gazette No. 41/2021*

have suffered damage caused by an infringement of competition law to claim full compensation for that damage, following the regulation governing infringement compensation procedures.[23]

3. MITIGATING AND AGGRAVATING CIRCUMSTANCES FOR THE IMPOSITION OF FINES IN LAW AND PRACTICE

The continuation of the work will analyse the legal provisions governing the mitigating and aggravating circumstances that the CCA takes into account as it imposes fines on undertakings. After that, the results of the research of mitigating and aggravating circumstances in CCA's practice that have been carried out to draw up the conclusions of this work are presented.

3.1. Mitigating and aggravating circumstances for imposing a fine through legal provisions

Article 64 has not changed and it regulates mitigating and aggravating circumstances taken into account when imposing a fine or a daily fine. This takes into account all mitigating and aggravating circumstances such as the gravity of the infringement, the duration of the infringement, and the consequences and infringements for other market undertakings and consumers. The two-stage methodology for calculating the fine shall apply by establishing the basic amount of the penalty for the undertaking and then reducing or increasing the amount thus determined depending on the mitigating and/or aggravating circumstances identified. The basic amount of the fine shall be calculated up to a maximum of 30% of the income generated by the undertaking solely from the performance of activities in the established relevant market in which this Act or Article 101 or 102 of the TFEU has been infringed, which is multiplied by the number of years of the infringement and thereafter decreases or increases depending on the mitigating and/or aggravating circumstances identified.[24]

Mitigating circumstances under the Act will be considered: the delivery of evidence of the termination of unlawful conduct, promptly upon the knowledge of the entrepreneur about the initiation of proceedings by the CCA. Exceptionally, in the case of cartels, the delivery of evidence of an interruption of unlawful conduct will not be regarded as a mitigating circumstance. Then the provision of evidence of infringement of this Act or Article 101 or 102 of the TFEU as a result of the inaudance of the undertaking and the provision of evidence that the

[23] Art. 65a of *the Act on the Amendments to Competition Act, Official Gazette No. 41/2021*

[24] Art. 64(2-3) of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

undertaking, although a participant in the prohibited agreement did not apply that agreement, or that in the relevant market, despite the existence of the agreement, acted per competition regulations. The most mitigating circumstance is the cooperation of entrepreneurs with the CCA in a manner and to the extent that exceeds the obligations of the entrepreneur for the release or reduction of the fine regulated by the Act.[25]

On the other hand, aggravating circumstances are particularly: the continuation of the unlawful conduct of the undertaking or the repetition of the same or similar conduct in breach of the provisions of this Act or Article 101 or 102 TFEU, following the service of the CCA's decision establishing that such conduct infringed competition by the undertaking. In this case, the basic amount of the fines shall be increased by 100% for each identified case of repeated infringement, refusal to cooperate with the CCA or obstruction of the CCA during the implementation of the procedure, the role of the initiator or instigator of other undertakings to the infringement of this Act and Article 101 or 102 of the TFEU, i.e. any actions taken by that undertaking in order to ensure the participation of other undertakings in the infringement.[26]

According to Article 64, CCA may increase fines if necessary for confiscation of the proceeds generated by the undertaking in breach of the Act or Article 101 or 102 of the TFEU, where such benefit can be assessed. However, the CCA may also further reduce the amount of the fine to an undertaking in a serious financial situation if it demonstrates that imposing such a penalty would irreversibly jeopardize its economic viability and lead to a complete loss of the value of its assets. Likewise, the CCA is entitled to impose symbolic fines if the infringement of competition was not significant, i.e. there was no negative impact on the market. Article 64 The last paragraph of the 17th Act was also entered, which states that the Government of the Republic of Croatia will elaborate in detail the criteria for imposing the fine referred to in this Article in accordance with the criteria arising from the application of competition rules in the European Union by decree of the CCA.[27]

3.2. Research of mitigating and aggravating circumstances that the CCA took into account when imposing fines from 2013 to the end of 2020

For the purpose of this work, research of decisions taken by the CCA from 2013 to the end of 2020, imposing a fine on undertakings for non-compliance with

[25] Art. 64(4) of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

[26] Art. 64(5) of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

[27] Art. 64(7-9) of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

the provisions of the CA, was carried out. The research is based on the inductive method, therefore, after the phases of observation, analysis and classification of facts, a conclusion is made.

This research aims to determine whether the CCA is consistent in imposing the amount of the fine in relation to the mitigating and aggravating circumstances to which it refers, that is to say, it is desired to determine whether there is a connection between the amount of the fine and the number of mitigating and aggravating circumstances for imposing it. The survey also wants to see what are the most common mitigating and aggravating circumstances that the CCA took into account when imposing a fine and also whether there are large discrepancies between the highest and lowest fines imposed.

In the continuation of the paper, there is a tabular presentation of the mitigating and aggravating circumstances that the CCA took into account when imposing fines. The table gives the date of the decision and the classification of the case, the name of the case, the amount of the fine, and the mitigating and aggravating circumstances to which the CCA referred for the imposition

Table 1. Tabular presentation of the results of the research of the fines imposed by the Croatian Competition Agency from 2013 to the end of 2020

DATE AND CLASS	CASE	THE AMOUNT OF THE FINE	MITIGATING CIRCUMSTANCES	AGGRAVATING CIRCUMSTANCES
10/9/2020 UP/I 034-03/2020-03/003	CCA vs. Pivovara Medvedgrad d.o.o., Zagreb	10.000,00 HRK[28]	Pivovara Medvedgrad had not previously been punished for infringement of the provision of the CA, for which the fine in question was imposed on it.	Pivovara Medvedgrad ignored CCA's requests for the submission of data within the set deadlines, acted contrary to Article 32(1)(a) of CA[29] thus achieving characteristics of the work referred to in Article 63[30] of the CA, as well as the fact that it did not cooperate with the CCA during the proceedings.
10/9/2020 UP/I 034-03/2020-03/004	CCA vs. Prvo hrvatsko pivo 1664 d.o.o., Zagreb	10.000,00 HRK	Prvo hrvatsko pivo had not previously been punished for infringement of provision of the CA and it cooperated with the CCA during the present proceedings.	Prvo hrvatsko pivo ignored CCA's requests for the submission of data and did not provide an explanation on the existence of reasons for non-submission of data.
27/11/2020 UP/I 034-03/2020-03/001	CCA vs. Osječka pivovara d.d., Osijek	10.000,00 HRK	Osječka pivovara had not previously been punished for infringement of provision of the CA.	Osječka pivovara ignored CCA's requests for the submission of data within the set deadlines, thus acted contrary to the provision of Article 32(1)(a) CA and achieving the character of the work from Article 63 of the CA.

[28] "HRK" is the relevant code for the kuna, the monetary unit od the Republic of Croatia, https://www.hnb.hr/en/currency/banknotes, 11 April 2021

[29] : Art. 32(1)(a) of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

[30] See: Art. 63 of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

13/06/2019 UP/I 034-03/2018-02/015	CCA vs. Maca LM d.o.o., Zagreb and Radio Trsat d.o.o., Rijeka	24.000,00 HRK	Maca LM admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed the will to not repeat such violations in the future. Furthermore, it cooperated with the CCA during the present proceedings.	There were no aggravating circumstances.
14/11/2018 UP/I 034-03/2018-02/005	CCA vs. Extra FM d.o.o. Zagreb and HIT FM d.o.o. Zagreb (now Extra FM Zagreb d.o.o.)	1.000,00 HRK	Extra FM admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed that will to not repeat such violations in the future. Furthermore, it cooperated with the CCA during the present proceedings.	Extra FM failed to submit a mandatory notification of the intention to implement the concentration to the CCA for assessment, and that it carried out a concentration contrary to the provisions of Article 19, paragraph 5 of the CA.
07/09/2018 UP/I 034-03/2017-02/014	CCA vs. Teramedia d.o.o., Zagreb and Nezavisna Televizija d.o.o., Zagreb	13.000,00 HRK	Teramedia admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed the will to not repeat such violations in the future. Furthermore, it cooperated with the CCA during the present proceedings.	The founders of Teramedia had previously, due to the same act of implementation of a concentration, been punished by a fine in proceedings before the CCA. Also, Teramedia repeated the said act since the said persons were the founders of Teramedia at the time of the commission, i.e. the acquisition of control of Nezavisne televizija and Televizija Dalmacija.
24/01/2018 UP/I 034-03/2017-03/001	CCA vs. Josip Živković, owner of „Jole“, Bilice	10.000,00 HRK	Josip Zivković had not previously been punished for infringement of the provision of the CA.	Josip Zivković fully ignored requests of the CCA for the submission of data, as well as the fact that he did not provide an explanation on the existence of reasons for non-submission of data, and that he did not cooperate with the CCA during the proceedings.

15/09/2017 UP/I 034-03/2017-02/003	CCA vs. Ivan Jurić-Kaćunić and Radio Enter, Zagreb and Radio Dalmacija, Split	30.000,00 HRK	Ivan Jurić-Kaćunić admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed a will to not repeat such violations in the future. Furthermore, he cooperated with the CCA during the present proceedings.	The CCA previously imposed a fine to Antena FM, of which Ivan Jurić-Kaćunić at the time being was the sole founder, for the act of failure to file a notification of the implementation of the concentration to CCA.
23/11/2017 UP/I 034-03/2017-02/007	CCA vs. Katijan Knok and Uma FM, Zagreb and Radio Croatia, Zagreb	30.000,00 HRK	Katijan Knok admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed the will to not repeat such violations in the future. Furthermore, he cooperated with the CCA during the present proceedings.	The CCA previously imposed a fine to Capital FM, of which Katijan Knok at the time being was one of the founders and later the sole founder, for the act of failure to file a notification of the implementation of the concentration to CCA.
23/11/2017 UP/I 034-03/2017-02/008	CCA vs. Hrvoje Barišić and Antena FM, Zagreb and Obiteljski radio, Zagreb	19.000,00 HRK	Hrvoje Barišić admitted to committing the violation of Article 62 (1) and (5) of the CA and expressed the will to not repeat such violations in the future. Furthermore, he cooperated with the CCA during the present proceedings	The CCA previously imposed a fine to Uma FM, of which Hrvoje Barišić at the time being was the sole founder, for the act of failure to file a notification of the implementation of the concentration to CCA.
20/12/2016 UP/I 034-03/2016-02/002	CCA vs. Tahia FM d.o.o., Zagreb and Radio Croatia d.o.o., Zagreb	10.000,00 HRK	Tahia FM had not previously been punished for violating the CA, also it admitted to committing the violation and expressed the will that such violations will not be repeated in the future. Furthermore, it cooperated with the CCA during the proceedings. Also, Tahia FM, committed a violation of negligence.	There were no aggravating circumstances.
20/12/2016 UP/I 034-03/2016-02/004	CCA vs. Uma FM d.o.o., Zagreb and Radio Croatia d.o.o., Zagreb	1.000,00 HRK	Uma FM had not previously been punished for violating the CA and it admitted to committing the violation and expressed the will that such violations will not be repeated in the future. Furthermore, it cooperated with the CCA during the proceedings. Also, Uma FM committed a violation of negligence.	There were no aggravating circumstances.

15/09/2016 UP/I 034-03/2016-02/003	CCA vs Antena FM d.o.o., Zagreb and Obiteljski radio d.o.o., Zagreb	4.000,00 HRK	Antena FM had not previously been punished for violating the CA, it admitted to committing the violation and expressed the will that such violations will not be repeated in the future. Furthermore, it cooperated with the CCA during the proceedings. Also, Antena FM committed a violation of negligence.	There were no aggravating circumstances.
11/12/2015 UP/I 034-03/2015-02/008	CCA vs. Mile Kaselj, Đakovo and Novi radio d.o.o., Đakovo	4.500,00 HRK	Mile Kaselj had not previously been punished for violating Article 62 (1) and (5) of the CA. Furthermore, he cooperated with the CCA during the proceedings. Also Mile Kaselj committed a violation of negligence.	There were no aggravating circumstances.
04/11/2015 UP/I 034-03/2015-02/006	CCA vs. CAPITAL FM d.o.o., Zagreb and Janus d.o.o., Osijek; and Radio Velika Gorica d.o.o., Velika Gorica	25.000,00 HRK	Capital FM had not previously been punished for violating Article 62 (1) and (5) of the CA and expressed the will that such violations will not be repeated in the future. Furthermore, he cooperated with the CCA during the proceedings. Also, Capital FM committed a violation of negligence.	There were no aggravating circumstances.

17/07/2015 UP/I 034-03/2014-02/009	CCA vs. Radio Trsat	10.000,00 HRK	Radio Trsat had not previously been punished for violating Article 62 (1) and (5) of the CA. Furthermore, it cooperated with the CCA during the proceedings. Also, Radio Trsat committed a violation of negligence.	The holder of 100% share in the share capital of Radio Trsat, Cratis Retis has already been fined for infringement of the CA by a fine in the amount of HRK 10,000.00. However, due to the financial difficulties of Radio Trsat, due to the aforementioned aggravating circumstance, the increased amount of fine in terms of Article 64, paragraph 5, item 1 of the CA would lead to exceeding the maximum fine for minor infringements of market regulations competition rules of 1% of the total revenue generated by the undertaking in the last year for which there are annual financial statements as required by Article 62 of the CA, therefore the Council decided, applying Article 64, paragraphs 7 and 8 of the CA, that Radio Trsat is imposed a symbolic fine in the amount of HRK 10,000.00.
11/06/2015 UP/I 034-03/2014-02/008	CCA vs. NCP d.o.o., Šibenik / Županijski radio Šibenik d.o.o., Šibenik	10.000, 00 HRK	The NCP was not previously penalised for the breach of Article 62(1) and point 5 of CA. Furthermore, it cooperated with the CCA during the proceeding. Also, it infringed Article 62(1) of the CA by negligence.	There were no aggravating circumstances.
11/06/2015 UP/I 034-03/2014-03/004	CCA vs. Totalni radio d.o.o., Zagreb	10.000,00 HRK	Total Radio (now: Capital FM) was not previously penalised for breaches of Article 62(1) and point 5 of CA, and in particular, the fact that it admitted to committing that CA infringement. Furthermore, Total Radio, cooperated with the CCA during the proceedings in question. Also, Total had infringed Article 62(1) of the CA 5 by negligence.	There were no aggravating circumstances.

11/06/2015 UP/I 034-03/2014-03/003	CCA vs. Expres radio d.o.o., Zagreb	10.000,00 HRK	Expres radio admitted to committing the infringement referred to in Article 62(1) and 5 of the CA, and it had not been penalised before. Furthermore, Expres radio cooperated with the CCA during the proceedings in the present proceedings. Expres had infringed Article 62(1) of the CA 5 by negligence.	There were no aggravating circumstances.
13/10/2014 UP/I 034-03/2014-03/001	CCA vs. Ivan Obad, owner of „Auto Obad" servis, Zagreb	50.000,00 HRK	Ivan Obad had no prior record of an infringement of the provisions for which it was imposed on him.	Ivan Obad did not comply with the CCA's requirements and he did not provide an explanation of the existence of reasons for the lack of data, during the procedure he did not cooperate with the CCA. Also, he is the president of the Chamber of Trades and Crafts Zagreb, who should also be an example to other entrepreneurs and cooperate with the CCA because of his position. In doing so, it should be noted that in the market research in the present market, all other undertakings from whom the CCA requested observations, data and documentation in order, satisfied its request.
06/12/2013 UP/I 034-03/2013-03/005	CCA vs. The Croatian Composers Society (CCS) – Copyright Music Rights Protection, Zagreb	102.000, 00 HRK	CCS, on its own initiative, refunded all undertakings paying compensation on the basis of invoices paid, i.e. the amount of the difference between the invoices without the maximum discount included and with the maximum discount included. Until the adoption of this decision, it had not received submissions against the CCS's conduct.	There were no aggravating circumstances.

04/10/2013 UP/I 034-03/2013-03/006	CCA vs. Mercator – H d.o.o., Sesvete	30.000,00 HRK	MERCATOR – H d.o.o. provided evidence of an interruption of the unlawful conduct upon the knowledge that proceedings had been initiated by the CCA. Also, MERCATOR – H d.o.o. was not previously penalized for violating the provisions of the CA. Also, it expressed regret over this omission and organized the implementation of the education of its employees on the obligation to act on the requirements of the CCA.	MERCATOR – H d.o.o., did not comply with the CCA's requirements and did not provide an explanation of the existence of grounds for non-data even before the initiation of the procedure. The Council appreciated the fact that the data requested represented important data for the determination of the relevant market in the Republic of Croatia and the calculation and analysis of the market shares of undertakings engaged in activities on the relevant market.
13/05/2013 UP/I 034-03/2012-03/004	CCA vs. Kmag d.o.o., Gornji Stupnik	150.000,00 HRK	The agreement at issue did not have a significant impact on the market, namely that the distortion of competition in the present case was not significant. Therefore, the Council decided to impose a symbolic fine, as this will achieve the objective of adequately punishing Kmag d.o.o.	Kmag d.o.o. as an entrepreneur who, under the contractual relationship with KIA Motors, has acquired the authorization to establish a distribution and service network for the territory of the Republic of Croatia, as the party that determines the criteria for entering its sales and service network bears special responsibility for the treatment of service entrepreneurs in its service network.

Source: The table is the result of research conducted for the purposes of this paper, based on the cases of the CCA available on the Website: *Cases,* http://www.aztn.hr/en/cases/, Accessed 6 January 2021 – 5 March 2021

After observing the table, it is necessary to make an analysis of the obtained research results.

Firstly, it is important to present the reasons for imposing fines shown in the table. Therefore, reasons for imposing fines in those cases were: failure to submit the requested statements and data with the deadline (set by the second CCA request), failure to submit within the deadline for mandatory notification of intent implementation of concentrations on the assessment of the CCA, carrying out the concentration and gaining direct or indirect control over the other undertaking and not acting upon the received request. Also, there is specific reasons for imposing a fine in the case „CCA vs. The Croatian Composers Society (CCS) – Copyright Music Rights Protection"[31]. Therefore, Croatian Composers' Society – Copyright Music Rights Protection, is fined for abusing his dominant position in collecting fees for reproducing a work of authorial property for private or other own use in the Republic of Croatia, in such a way that in the period from 1 January 2013 to 31 December 2013, he was sentenced to 10 years in prison. From 1 January 2006 until the date of adoption of the CCA's decision, i.e. 3 November 2009, it applied to entrepreneurs for similar activities different discounts on fees, thus applying an uneven playing field to the same certain undertakings have disadvantaged the market for the sale of products for which compensation is paid in relation to their competition and thereby distorted competition in that market within the meaning of Article 16(2) of paragraph 3 of the CA. Also, there is one more specific reason for imposing a fine in the case „CCA vs. Kmag d.o.o.". Kmag d.o.o. was imposed a symbolic fine for restricting competition with its authorised service persons in the relevant market for the sale of spare parts and the provision of KIA motor vehicle repair and maintenance services on the territory of the Republic of Croatia between 1 January 2006 and 2 December 2010, within the meaning of Article 9(1) of the CA.

In the continuation of the work, the mitigating and aggravating circumstances referred to by the CCA in the cases shown in the table will be presented.

The mitigating circumstances invoked by the CCA in the cases shown in the table are: no prior punishment for non-compliance with the law, cooperation with the CCA during the proceeding, recognition of the violation, expressing that it will no longer commit such violations, committing an infringement of the CA of negligence and termination of unlawful conduct following the fact that the CCA has

[31] Croatian Competition Agency against The Croatian Composers Society – Copyright Music Rights Protection, HDS-ZAMP, Zagreb, No. UP/I 034-03/2013-03/005

initiated proceedings.[32] But, in addition to the above mitigating circumstances mentioned in the vast majority of cases, it is necessary to mention separate specific cases which are in the table. In the case „CCA vs. The Croatian Composers Society (CCS) – Copyright Music Rights Protection"[33] the CCA took the following fact as a mitigating circumstance: CCS, on its own initiative, refunded all undertakings paying compensation on the basis of invoices paid, i.e. the amount of the difference between the invoices without the maximum discount included and with the maximum discount included. Furthermore, the specificity of „CCA vs. Mercator – H d.o.o."[34] the case is that CCA took into account as a mitigating circumstance the fact that this entrepreneur organized training for his employees to avoid further violation of the CA. Also, in the case „CCA vs. Kmag d.o.o."[35] the mitigating circumstance was the fact that the agreement at issue did not have a significant impact on the market, namely that the distortion of competition in the present case was not significant.

The aggravating circumstances invoked by the CCA in the cases shown in the table are: ignoring requests to submit data by a certain deadline or the failure to file a notification of the implementation of the concentration to CCA, failure to explain the existence of reasons for non-submission of dana, non-cooperation with the CCA during the procedure, the implementation of a concentration contrary to Article 19. of the CA and the existence of a prior penalty for non-compliance with the CA. However, as with mitigating circumstances, there are certain specific aggravating circumstances that the CCA referred to in the presented cases. In the case „CCA vs. Teramedia d.o.o., Zagreb and Nezavisna Televizija d.o.o."[36] the aggravating circumstance was the fact that the founders of Teramedia had previously, due to the same act of implementation of a concentration, been punished by a fine in proceedings before the CCA. Also, Teramedia repeated the said act since the said persons were the founders of Teramedia at the time of the commission, i.e. the acquisition of control of Nezavisne televizija and Televizija Dalmacija. Also, the specificity of the case „CCA vs. Radio Trsat"[37] is that the holder of 100% share in the share capital of Radio Trsat, Cratis Retis has already been fined for infringement of the CA by a fine in the amount of HRK 10,000.00. However, due to the

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32 The data are based on the conclusions obtained from the previously presented table and based on the research conducted for the purposes of this paper.

33 Croatian Competition Agency against The Croatian Composers Society – Copyright Music Rights Protection, HDS-ZAMP, Zagreb, No. UP/I 034-03/2013-03/005

34 Croatian Competition Agency against Mercator – H d.o.o., Sesvete, No. UP/I 034-03/2013-03/006

35 Croatian Competition Agency against Kmag d.o.o., Gornji Stupnik, No. UP/I 034-03/2012-03/004

36 Croatian Competition Agency against Teramedia d.o.o., Zagreb and Nezavisna Televizija d.o.o., Zagreb, No. UP/I 034-03/2017-02/014

37 Croatian Competition Agency against Radio Trsat, No. UP/I 034-03/2014-02/009

financial difficulties of Radio Trsat, due to the aforementioned aggravating circumstance, the increased amount of fine in terms of Article 64, paragraph 5, item 1 of the CA would lead to exceeding the maximum fine for minor infringements of market regulations competition rules of 1% of the total revenue generated by the undertaking in the last year for which there are annual financial statements as required by Article 62 of the CA, therefore the Council decided, applying Article 64, paragraphs 7 and 8 of the CA, that Radio Trsat is imposed a symbolic fine in the amount of HRK 10,000.00. Furthermore, in the case „CCA vs. Ivan Obad, owner of „Auto Obad" servis"[38] the aggravating circumstance was the fact the Ivan Obad is the president of the Chamber of Trades and Crafts Zagreb, who should also be an example to other entrepreneurs and cooperate with the CCA because of his position. In doing so, it should be noted that in the market research in the present market, all other undertakings from whom the CCA requested observations, data and documentation in order, satisfied its request.

If the level of fines imposed by the CCA is observed, it can be seen that there is a significant difference between the highest and the minimum fine. According to the data in the table, the most common fine is 10.000,00 HRK, of which the smallest one was HRK 1,000, and the highest was HRK 150,000. There is no proportional relationship between the amount of the fine and the mitigating and aggravating circumstances. Cases, where there were more mitigating circumstances and no aggravating at all, were punished with higher fines and those with more aggravating circumstances than mitigating, were punished with lower fines.

Furthermore, it is interesting to see the relationship between mitigating and aggravating circumstances and the amount of the fine that was imposed in cases in table. For example, if you look at cases „CCA vs. Maca LM d.o.o., Zagreb and Radio Trsat d.o.o., Rijeka"[39] and „CCA vs. Extra FM d.o.o. Zagreb and HIT FM d.o.o. Zagreb (now Extra FM Zagreb d.o.o.)"[40] in the table, you can see that the difference in the amount of the fine is significant (HRK 24,000 vs. HRK 1,000.00). However, if you look at the mitigating circumstances in both cases, it is seen that they are identical. In contrast, in the first case, where a much higher fine of HRK 24.000,00 was imposed, there are no aggravating circumstances at all, while in the second case, where the fine is only HRK 1.000,00, there are several significant aggravating circumstances. Both entrepreneurs committed a minor

[38] Croatian Competition Agency against Ivan Obad, owner of „Auto Obad" servis, Zagreb – repair, maintenance and resale, No. UP/I 034-03/2014-03/001

[39] Croatian Competition Agency against Maca LM d.o.o., Zagreb and Radio Trsat d.o.o., Rijeka, No. UP/I 034-03/2018-02/015

[40] Croatian Competition Agency against Extra FM d.o.o. Zagreb and HIT FM d.o.o. Zagreb (now Extra FM Zagreb d.o.o.), No. UP/I 034-03/2018-02/005

violation of the provisions of the law, so the fine may amount to a maximum of 1% of the value of the total income generated by the entrepreneur in the last year for which there are concluded annual financial statements. In the case „CCA vs. Maca LM d.o.o., Zagreb and Radio Trsat d.o.o., Rijeka" the Council decided to determine the basic amount of the fine of HRK 48,000.00 for failing to notify the intention to implement and enforce the concentration of Maca LM and Radio Trsat, and thus entrepreneurs Vanga, Maca LM and Miroslav Kraljević and Maca LM and Radio Brod, and due to mitigating circumstances, this amount was reduced, which makes a total of a single amount of HRK 24,000.00, which represents 0.71% of the total revenue generated by the entrepreneur Maca LM in 2017. On the other hand, in the case „CCA vs. Extra FM d.o.o. Zagreb and HIT FM d.o.o. Zagreb (now Extra FM Zagreb d.o.o.)" the Council decided in the present case to determine the basic amount of a fine of HRK 5 000,00 for missing notification of the intention to implement and enforce the Extra FM and Extra FM Zagreb concentration, before HIT FM, and, due to mitigating circumstances, this amount represents 0,71% of the total revenue generated by Extra FM in 2017. From these two cases, it can be seen that the final fine does not depend much on the number or existence of mitigating and aggravating circumstances as on the broader aspects of the case that the CCA takes into account.

Therefore, it can be observed that the fines are significantly different in some cases, namely that there is no continuity in the amount of the fine imposed by the CCA. It can be concluded that the fines imposed by the CCA mostly depend on whether there has been a serious or minor infringement of the CA. A fine of up to 10% of the value of the total income generated by the entrepreneur at the global level in the last year for which the annual financial statements have been concluded shall be imposed on the entrepreneur who intentionally or negligently violates regulations.[41] On the other hand, a fine of up to 1% of the value of the total income generated by the entrepreneur in the last year for which annual financial reports have been concluded shall be imposed on the entrepreneur - party in the procedure that commits a minor violation of regulations.[42] Also, a fine of 10,000.00 to 100,000.00 kuna shall be imposed on an entrepreneur who does not have the position of a party in the procedure, and who does not act upon the request of the Agency.[43] It must be emphasized that the survey was conducted before the daily fines[44] had never been imposed, so they will not be mentioned in the survey results. Furthermore, the maximum amount of a fine that may be

41 Art. 61 of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

42 Art. 62 of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

43 Art. 63 of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

44 Art. 63.a of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

imposed on the basis of CA may in no case exceed the amount of 10% of the value of the total income generated by the entrepreneur in the last year for which annual financial reports have been concluded within the meaning of Article 61 of the CA.[45] However, the CCA is not strictly limited by the amount of the fine it may impose, but may, at its discretion, adjust the fine to each undertaking depending on the existence of mitigating and aggravating circumstances for its imposition. The mitigating and aggravating circumstances that the CCA can take into account have already been mentioned above, however, some mitigating and aggravating circumstances that are not provided by CA can be seen in the table, as a result of the CCA's discretionary assessment.

4. CONCLUSION

The Competition Act (Official Gazette 79/09, 80/13) has been changed due to the obligation to comply with the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The changes were significant throughout the Act, and especially in Title VIII of the CA governing penalty clauses.

The Croatian Competition Agency is a general, national regulatory authority responsible for the protection of competition in all markets and it imposes fines and daily fines. The term „fine" or cro. upravno-kaznene mjere in the CA has been amended to a term cro. novčane kazne in the AACA. Article 61, regulating the fines for severe infringements of competition rules, was partly amended and Article 63a introduced an institute of a „daily fine" that have not existed in the CA until now. The CCA will issue a daily fine payment when it considers that the daily fine is proportionate to the gravity and duration of the infringement, the consequences of that infringement for other undertakings on the market and for consumers, that is to say, as regards the short duration of the infringement and therefore the imposition of daily fine payment is appropriate and has a gross effect and all of that instead of imposing fines. Furthermore, a new paragraph in Article 64 regulates the maximum amount of the fine that can be imposed on the association of undertakings. Finally, Article 65 has changed completely and it is now in line with articles 17 to 22 of the TFEU which are part of Chapter VI governing leniency programmes for secret cartels.

Following a tabular overview of mitigating and aggravating circumstances that the CCA considered into account when imposing a fine from 2013 and the end of

[45] Art. 64 of the Croatian Competition Act, Official Gazette No. 79/2009, 80/2013, 41/2021

2020, it can be concluded that the most common mitigating circumstances that CCA took into account when imposing fines were: previous impunity, acknowledgment of the infringement committed, cooperation with the CCA during the procedure, confirmation that the infringement will no longer be committed in the future, the existence of an agreement between the parties that is partially applied in practice, infringing, self-initiation recovery of all amounts subscribed, expression of penance for the work done. On the other hand, the table shows that the most common aggravating circumstances were: ignoring requests for data, avoiding the delivery of data to the CCA, missing the mandatory notification of the intention to implement the concentration, earlier penalty for the same act, and non-cooperation with the CCA. It can be concluded that there is no continuity in the amount of the fine imposed by the CCA, nor is there a certain consistent relationship between the number of mitigating and aggravating circumstances and the amount of the fine. Also, it should be inferred that the biggest role in imposing a fine, according to the data in the table, is the fact that the infringement belongs to a serious or minor infringement of the CA and in broader circumstances that the CCA takes into account at its discretion.

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TEMPORARY REGULATION OF COMPETITION AND CORONAVIRUS

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ABSTRACT

Competition law as one of the foundations of a market economy whose main purpose is to ensure an equal position of entrepreneurs in the market, regardless of the size, market power and other features of the implied system of state aid both at central and local and regional level. The aim and purpose of this research is a clear and tentative way of pointing out the importance of competition in relation to coronavirus. In order to achieve this goal, the paper seeks to provide scientifically based answers to a number of current issues, starting from detention from the definitions of competition and coronavirus. In addition to the above, it is necessary to consider how this disease affected entrepreneurship, which had positive and negative consequences. In addition, it is important to note that it has left a significant impact on our mental health. The main results of the research point to the fact that the coronavirus as a global, economic and health crisis suddenly caught us all overnight and as such changed our lives. In addition to greatly affecting the economy, there is also a blow to the company. In case of suspicion of infection, the obligation to call a doctor, ie a territorially competent epidemiologist, and the obligation to go to an outpatient clinic are determined as a preventive measure. In this paper, qualitative research in correlation with quantitative research was used. Starting from the fact that quantitative research is based on the description of individual conditions, ie the establishment of cause-and-effect relationships, the paper in a representative way seeks to simplify the concept of competition as the driving force of a market economy that entails many benefits consumer choice, innovation. In addition, considering the coronavirus from a quantitative point of view, it is manifested in how the coronavirus as a new strain of virus, discovered in humans, 'stirred' the whole world as such forced people to care about their health and the health of our loved ones. Also, an obligation to adhere to epidemiological measures to prevent the spread of coronavirus infection has been introduced. Qualitative research, as a term used to describe research that focuses on the way individuals and groups view and understand the world, also has a significant impact on this work, primarily because it considers how the pandemic affected the health of people interacting with each other.

Keywords: *Competition law, coronavirus, disease, quantitative research, qualitative research, pandemic*

1. INTRODUCTION

The aim of competition law as a primary feature of the economic structure in which the redistribution of resources is based on supply and demand in the market is to ensure the efficient operation or functioning of the internal market, and consequently other objectives.[1] In the context of competition, it is important to establish a relationship between national law and EU competition, depending on whether a follow-up procedure is initiated after a public body has established the existence of an infringement or an independent procedure, if any.[2] In modern competition, it is necessary to look at the concept of entrepreneur, which is defined as any entity involved in economic activity, regardless of its legal status or method of financing. In order to more efficiently and systematically ensure the right to compete in the market, it is necessary to create such conditions that will ensure free competition for entrepreneurs. On the other hand, in order to protect the interests of consumers, it is necessary to establish a ban on communication, which would artificially change the conditions on the labor market. Therefore, it is necessary to create conditions in which entrepreneurs will be guaranteed freedom of competition. Due to the coronavirus, many companies were hit, and their business was significantly endangered and thus their survival was called into question. Today we are facing one of the greatest epidemics in human history called the coronavirus. For a clearer understanding of the above, there will be more words in the coronavirus below as an important indicator of the impact on human health and normal functioning. The coronavirus, under the official name SARS-CoV-2, causes the infectious disease COVID-19 and from December 2019 to May 2020 conquered the whole world. In Wuhan, the capital of the Chinese province of Hubei, the virus was transmitted from an unknown reservoir to humans in December 2019, after which further classical human-to-human spread continued when animals in the infection transmission chain were no longer needed; referred to in epidemiology as the "spillover." Since we have pointed out that coronaviruses (but also many other viruses) are found in different animals, Chinese markets can also be considered incubators of infections that can be passed from many animals to humans. At first, it was not clear whether the virus could be transmitted from one person to another, or whether all infected people became infected from a common, same source. When the health care workers who cared for the infected people also became ill, the human-to-human transmission quickly became clear. From China, the disease has spread to many countries, and Europe currently has the highest number of cases in Italy. The first case in Croatia was described on February 25, 2020, and by the second half of April, almost two thousand infected

[1] Kunda, Ivana, *Law relevant for violations of competition law*, Proceedings of the Faculty of Law, University of Rijeka, Vol. 39, No. 1., 2018, p. 183.

[2] *Ibid*., p. 206.

citizens had been recorded. In mid-April, there were about two million confirmed cases of infection globally, with about 160,000 fatalities. The spread of the disease took place on a global scale, so its spread began in China, after which it spread to Europe and then to America. The United States is considered the most affected country. It is evident that the virus is spreading very fast in populous countries that lag far behind in the application of relevant measures such as measures of social distancing, testing and isolation of infected persons and their contacts. In order to prevent the spread of the disease of the same name, many countries were forced to take various measures to protect the health of the population. Thus, one of the measures referred to the closure of borders and various strict epidemiological measures. The most important measures were the ban on movement, gatherings, work from home, the closure of kindergartens, schools, colleges, public parks, schools, service activities, and city and intercity traffic.

2. COVID 19 AND ENTREPRENEURS

The COVID 19 pandemic affects all aspects of our lives, starting with how we live, how we eat, what we do, how we spend money and what our basic life priorities are. In addition, it is necessary to consider how it affected entrepreneurship, what positive consequences it left on the same and what negative consequences it left on the same. A large number of SMEs have experienced a drop in demand with their products and services. Precisely because of this, it is not surprising that a number of drastic measures were needed, such as changes in the budget, changes in the dismissal of workers and the allocation of resources. An important fact is that in the last two months, 20,000 people have lost their lives. In addition to causing great change one should not lose faith, and one should believe that every change is a new opportunity. Here are some guidelines that entrepreneurs should follow if they want to continue their business successfully. It is first necessary to get acquainted with the specific situation and consider all aspects of the further development of the disease and its impact on entrepreneurship. It should then consider what changes a possible crisis will bring and which products and services will benefit consumers. Many customer changes will require new products and services, and they need to be analyzed in detail and find the ones that can be most useful to them. It is possible that some new market leaders in such situations will rise while others lag behind. "Who would be worse now is down" - this is where the door opens for new market competitors. Namely, it is necessary to be ready for new changes and quick adjustment of new strategies. One of the key elements to success is to quickly adapt to the changes and needs of its customers in a market that has undergone drastic changes. In this situation, it is not the time to relax and it is necessary to gain insight into the needs of its customers, primarily by talking to them, colleagues, employees. In the end, though,

we're all in this together. One of the important instructions to entrepreneurs regarding working from home is that if working from home has proved successful, it is necessary to consider allowing them to work from home in the future. If not every day, then at least a few days a week. What is necessary is to arm yourself with optimism and keep the entrepreneurial spirit. The most important thing now is to arm yourself with good will and adapt to the 'new normal'. In doing so, it is necessary to remain true to its values and transparent to its customers. Since we now have more time, why not use it to better plan, rethink our goals and strategies, and set new goals that can be achieved to better avoid a crisis. We need to believe that this will end and that we will all be able to return to a relatively normal life after that.[3]

3. HEALTH EFFECTS OF CORONAVIRUS

The new strain of coronavirus has attracted a lot of attention, starting with how it originated, how it spread, how it affected the labor market and most importantly how it affected human health. Some people, especially the elderly and those who are already ill in particular can be ill. It is therefore crucial that we all work together to prevent the spread of the virus. Here are some key tips to prevent the spread of the infection. The first piece of advice is to stay home if we feel sick and if we are told so. Also, it is required to maintain a kind of distance of at least a meter and a half and other people. It is necessary to practice good hand hygiene and avoid coughing and sneezing. One of the first neurological symptoms of coronavirus is the effect on the brain, ie the loss of smell and hearing. But as the pandemic progresses, researchers are increasingly learning about how the eponymous disease affects the brain. Recent research has given us clues that have shed light on why COVID 19 can be so serious for humans and why symptoms can last so long. How many times during the day do we even remember to breathe? And isn't that when we sigh, because it's hard for us for some emotional or mental reason? Breathing is an exceptional function of our body, it is a sign that we are alive, but it can also reveal a lot about how to live our own life. Like most movements in our lives, the breath is automatic and our thoughts and feelings are also related to breathing. Scientists believe that the COVID 19 virus is not a respiratory disease. Once it infects the brain, it can affect the lungs, heart and everything. The brain is a very sensitive organ. It's a CPU for everyone. It could be said that the brain is one of the areas where viruses like to hide.[4]

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[3] Plechinger, Ivana, *COVID-19 and entrepreneurs - how to take advantage of a bad situation for positive change; Entrepreneurship and COVID-19,* https://www.radionica.hr/covid-19-i-poduzetnici/, Accessed 28 June 2021

[4] Šimić, Vladimira, *The latest coronavirus: how does COVID-19 affect the brain?* https://www.adiva.hr/zdravlje/koronavirus/posljedice-koronavirusa-kako-covid-19-utjece-na-mozak/, Accessed 29 June 2021

4. LEGAL REGULATION OF CONCENTRATION OF ENTREPRENEURS WITH SPECIAL REFERENCE TO THE INFLUENCE OF CORONAVIRUS ON SELF-ENTREPRENEURS

Regarding the legal regulation of coronavirus, it is important to highlight the Commission Communication, is the Fifth Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Pandemic and the Annex to the Commission Communication to Member States on the Application of Articles 107 and 108. Union on short-term export credit insurance. Accordingly, on 19 March 2020, the Commission adopted a Communication entitled "Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Pandemic". On 3 April 2020, it adopted the first amendment with the aim of providing support intended to accelerate the research, testing and production of products essential for combating the spread of disease. The second amendment was adopted on May 8, 2020, with the aim of increasing the availability of capital and liquidity of companies affected by the crisis. A third amendment was adopted on 29 June 2020 to provide additional support to micro, small and start-ups and to encourage private investment. In addition, the fourth amendment of 13 October 2020 was adopted in order to extend the temporary framework and provide support to cover part of the uncovered fixed costs of crisis-affected undertakings. The aim of the temporary framework is to ensure an appropriate balance between the positive effects of the support measures covered by entrepreneurs and all possible negative effects on competition and trade in the internal market. Targeted and proportionate control of state aid in the European Union ensures the effectiveness of national support measures in terms of aid to affected companies during the COVID-19 pandemic, while limiting unjustified distortions of the internal market, distorting its integrity and ensuring fair competition. In this way, it seeks to contribute to maintaining the continuity of economic activity during the COVID-19 pandemic and to provide a basis for economic recovery after the crisis, bearing in mind the importance of achieving a green and digital transition in line with Union legislation and objectives.[5] In the development phase of global competitiveness and globalization, company concentrations are an integral and mandatory part of modern business practice as such. One of the main reasons why entrepreneurs implement concentrations is to strengthen competitiveness, expand into a new market or to preserve existing or current market positions. Concentrations of undertakings as such, as a

[5] Commission Communication, Fifth Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Pandemic and Amendment to the Communication to the Commission Communication to Member States on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to Short-Term Export Credit Insurance, (2021) OJ C34/06

rule, have the ultimate goal of strengthening competition and improving competition, since they contribute to the improvement of production and innovation, and thus, to the competitiveness of undertakings. Before the same analyzes and entering into the issue of concentration as such, it is necessary to first elaborate the legal framework, whereby the Law on Protection of Market Competition was first established.

4.1. Competition Act

The harmonized development of law and practice as such has built an effective system of legal rules that consistently seek to implement competition policy. The Law on Protection of Market Competition is a basic and regulatory act which regulates the matter of market competition as such. Furthermore, it regulates the organization, powers and tasks of the competition authority as well as the procedure related to its implementation. But its application is not limited to the above. Namely, the same applies to all forms of prevention, restriction or distortion of competition by entrepreneurs, both in the territory of the Republic and outside the territory of the Republic of Croatia, if they have an effect on the Republic of Croatia. Pursuant to Article 15 of the Law on Protection of Market Competition, concentrations as such arise through mergers and acquisitions, the acquisition of control or dominant influence of one undertaking over another and the creation of a joint venture acting on a more permanent basis as an independent entity.[6] The term concentration is understood as various forms of connecting companies, both on a status and contractual basis. A common feature of concentrations as such is to create a legal or economic community between the parties to the concentration who were legally and economically independent undertakings prior to the implementation of the concentration.[7]

4.2. Entrepreneur competition

The basis and basis of concentration as well as the key to its emergence is the acquisition of control. Control is exercised by transferring rights, contracts, or other means by which one or more undertakings, either individually or jointly, acquire the possibility of exercising dominant influence over one or more undertakings or part of one or more undertakings on a more permanent basis.[8] In today's business

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6 Competition Act, (Zakon o zastiti trzisnog natjecanja), (Official Gazette, No. 79/09, 80/13, 41/21)

7 Akšamović, Dubravka, *Legal Regime for Concentrations of Entrepreneurs in Competition Law*, Collected Papers of the Faculty of Law, University of Rijeka, Vol. 29, No. 2., 2008, pp. 1034-1036

8 Momčinović, Hrvoje, Concentration, http://www.aztn.hr/trzisno-natjecanje/nadleznosti/koncentracije/ Accessed 29 June 2021

conditions in which the increasingly demanding domestic and foreign markets prevail, it is important to emphasize the strengthening of the competitiveness of entrepreneurs as one of the factors that should not be neglected. In order to preserve market positions and strengthen competition in market competition, entrepreneurs are obliged to adhere to all legal institutes, taking into account that their connection is legitimate and permissible, especially from the point of view of competition regulations. In today's business conditions, it is important to emphasize the strengthening of the competitiveness of entrepreneurs as such in both domestic and foreign markets. In order to preserve market positions and preserve competitiveness in market competition, it is necessary to intensify competition in terms of lowering prices and ensuring better quality of goods and services. In the conditions of global competitiveness, where strengthening the competitiveness of entrepreneurs is the backbone of the economic policy of each country, the considered measures are a very important balance for establishing a balance between the implementation of competition policy and economic development policy. It is important to note that one of the possible goals of competition, when it comes to concentrations as such, is to provide innovative solutions, reduce production costs and improve production and other benefits for consumers and society as a whole.[9]

4.3. Punishing the concentration of entrepreneurs

Considering the concentration of undertakings, it is first necessary to examine whether in this particular case it is a concentration of undertakings. According to the Croatian competition law, when one undertaking acquires control over another, the notification of the intention to implement the concentration must be submitted by the one who acquires control. If the entrepreneur fails to file the application, and was obliged to do so, the sanction may amount to up to one percent of the value of the total annual income of the entrepreneur. If the prohibited concentration of undertakings is actually implemented, the undertakings participating in it may be fined up to ten percent of the total value of income.[10]

5. IMPACT OF CORONAVIRUS ON THE LABOR MARKET

The coronavirus pandemic has caused profound and lasting changes in the global labor market. At the same time, it is important to point out the collapse of certain sectors and the rise of new ones, as well as the increasingly widespread work from

[9] *Ibid.,* pp. 1059-1060

[10] Zrno, Marija, , *How to make money on panic due to coronavirus; Protection of competition: How to avoid penalties in case of concentration of undertakings*, Lider - business weekly, Vol. 16., No. 752.,2020, pp. 49.-51.

home. It is a delusion to think that everything will go back to normal. Unfortunately it won't, nothing will be the same as before. It is believed that we must have a vision of a new normal that will allow us to adapt to new circumstances. At least 90.5 million people worldwide have been infected with the coronavirus so far, while about 1.9 million people have died as a result of the infection. The pandemic has fundamentally changed companies and workers in almost every country in the world, in parallel with the introduction of strict blockades. It is important to point out that a huge loss of jobs has been observed and that it creates a fiscal gap that could further deepen inequality between richer and poorer countries. The International Labor Organization is watching and warning about the same. Workers were affected by the pandemic in a way that reshaped their working day, as millions were forced to work from home. Namely, many were satisfied that they no longer have to travel long distances by public transport, but their working hours are reduced to having to move from room to room. Namely, research has shown that the vast majority of workers would prefer a combination of working from home and working in the office in the future. Also, the need for a more flexible and innovative approach to education will not disappear with a pandemic. The question is: "How many children today will be doing jobs that don't currently exist? The answer is still unknown.[11]

5.1. Preservation of jobs during coronavirus

Measures to preserve jobs, ie regulations on the labor market, have generally been introduced in order to improve employment and job security through cash benefits or social security programs. What needs to be put at the center is to look at the extent to which jobs have been preserved in this current pandemic, ie how often business-related redundancies occur, whether and how they can be avoided, and what measures are needed to address this problem. . The fact is that no matter which part of the world or which sector is affected, the crisis has a dramatic and comprehensive impact on the world of work. Therefore, policy measures should focus on the immediate easing of the position of workers and employers in the labor market by providing livelihoods and economically viable operations, especially in activities hard hit by the pandemic and developing countries. Therefore, limited public resources should be used in a way that will encourage employers to retain existing and / or create new jobs. In the early stages of the COVID crisis 19, many governments modified existing job preservation schemes to introduce the above objectives and introduced new ones. limiting the application of main-

[11] Barač, Ivana, Coronavirus is permanently changing the global labor market, https://privredni.hr/koronavirus-trajno-mijenja-globalno-trziste-rada, Accessed, 30 June 2021

tenance subsidies to those jobs that would certainly be preserved or to those that are unprofitable in the long run. Employment policies and packages to support employers and protect workers from unemployment risks, but also to develop new employment opportunities have been implemented in many countries as an immediate response to the emerging pandemic. The most commonly used measures are: support schemes for job maintenance, wage support, initiatives for work-sharing and shortening of working hours, temporary suspension of tax payments16 and social benefits, etc.[12]

5.2. Measures of the Government of the Republic of Croatia for the preservation of jobs

With the adoption of the Decision on declaring the epidemic of the COVID-1943 disease on March 11, 2020, numerous changes in employment relations and in the manner of performing work occurred for employers and workers. These are the following measures: support for shortening working hours; support for the preservation of jobs in the textile, clothing, footwear, leather and wood production sectors; support for the preservation of jobs in activities affected by coronavirus (COVID 19); support for the preservation of jobs in sheltered workshops, integrative workshops and work units. The Government of the Republic of Croatia authorized the Minister of Finance to sign the Voluntary Guarantee Agreement between the Republic of Croatia and the European Commission for temporary support to reduce the risk of unemployment in an emergency situation after the outbreak of COVID-19, ie approved entry into the SURE program. 59 Hereinafter, the two most commonly used measures will be presented: shortening of working hours and support for the preservation of jobs in activities affected by coronavirus (COVID 19).[13] This measure is financed from the aforementioned SURE program. The support can be used by employers who perform economic activity and employ ten or more workers. The basic criterion as a condition for using the measure is the expected decline in the total monthly working hours of all employees employed by the employer on a full-time basis in the month for which support is required of at least 10%. In addition, the employer must demonstrate a link between the impact of the COVID 19 epidemic on business and the expected decline in the total monthly working hours fund. Evidence of the connection between the Croatian Employment Service is a decrease in turnover of receipts in each month for which support is requested of at least 20% compared to the same month last year and one of the following reasons: a decrease in orders on the drop

[12] Bilić, Andrijana, Mokrović, Domagoj, *Preserving jobs during the covid pandemic crisis 19*, Proceedings of the Faculty of Law in Split, Vol. 58, No. 2., 2021, pp. 535-536

[13] *Ibid*., pp. 528.-529.

in orders for the month for which support is requested; inability to contract new jobs during the epidemic; inability to deliver finished products or contracted and paid raw materials, raw materials, machinery, tools; impossibility of new orders of raw materials, raw materials, tools and machines necessary for work. It is granted for temporary only if there has been a reduction in the monthly fund of working hours by more than 70%. The amount of the subsidy is a maximum of HRK 2,800 per month net per worker.[14]

5.3. Shortening working hours

Employers who perform economic activity and employ ten or more workers. The basic criteria as a condition for using the measure are the expected decline in the total monthly working hours of all workers employed by employers on a full-time basis in the month for which they seek support of at least 10%. In addition, the employer must prove the connection between the impact of the COVID 19 epidemic on business and the expected decline in the total monthly working hours fund. The Croatian Employment Service considers proof of the connection a decrease in the turnover of receipts in each month for which it seeks support of at least 20% compared to the same month last year and one of the following reasons: decrease in orders orders for the month for which support is requested; inability to contract new jobs during the epidemic; inability to deliver finished products or contracted and paid raw materials, raw materials, machinery, tools; impossibility of new orders of raw materials, raw materials, tools and machines necessary for work. It is granted for temporary only if there has been a reduction in the monthly fund of working hours by more than 70%. The amount of the subsidy is a maximum of HRK 2,800 per month net per worker.[15]

5.4. Support for job preservation in activities affected by COVID-19

This aid could be conditionally called a "fundamental" measure, given that it was the first of these measures to apply. Employers need to prove that in the period from 1 April to 30 September 2020 they had a decrease in income / receipts compared to the same period in 2019, unless they could not work due to Staff Decisions when comparing their income with September 2019, but in that case, they can use the support only for the month in which their work was disabled.[16]

14 *Ibid*., p. 537.

15 *Ibid.,* p. 537.

16 *Ibid*., pp. 537.-538.

5.5. Abuse of aid to preserve jobs

Shortly after the payment of the first aid for the preservation of jobs, there were also cases of their abuse by employers. Namely, there are a number of employers who do not pay the benefits they receive from the state to the workers at all, or pay them only partially, or reduce the salary only to the amount of the aid or part of the aid. would achieve personal gain to the detriment of their own workers.[17]

6. OVERVIEW OF OTHER COUNTRIES'S ACCESSIONS TO MEASURES TO PRESERVE JOBS

6.1. Republic of Slovenia

Similar to the Republic of Croatia, the Republic of Slovenia presented a legal package of measures for the purpose of financial assistance to workers on 2 April 2020 (with retroactive application from 13 March) and supplemented and amended it 4 more times by the time this paper is written. The initial package, depending on the intensity of termination of employment, provides for 3 options: 1. to all workers who remained in their jobs, the state paid pension insurance benefits for April and May. 2. in case of temporary cessation of work (eg leave), the state undertook to pay salaries in the amount of 80% of the average salary of workers in the past 3 months to the average salary in the Republic of Slovenia in 2019 and social contributions, if the employer expects of 10% compared to 2019. 3. Workers who lost their jobs during the pandemic and did not qualify for unemployment benefits received compensation in the amount of EUR 513.64 gross per month. The self-employed, agricultural workers and religious workers who expected a drop in income of at least 10% compared to 2019, were entitled to a fixed monthly allowance of 350 euros for March and 700 euros for April and May, in addition to social security contributions for April. and May. Special attention was paid to workers who were forced to stay at home and take care of their children due to the closure of kindergartens and schools or the closure of public transport and borders - they were also provided with compensation in the amount of 80% of salary and social security contributions. The package of measures from May 29 extended the salary compensations in case of temporary termination of work, but also introduced measures for the introduction of part-time work programs. Namely, the state will subsidize up to 20 hours per week for employers who cannot provide at least 90% of the usual workload for a minimum of 10% of employees. It is in use until the end of 2020. The fifth package of September 23, in addition to extending the existing measures, has strengthened assistance to the self-employed and micro-

[17] *Ibid*., p. 538.

entrepreneurs by entitling them to a monthly amount of 1,100 euros by the end of the year if they have a revenue decline of at least 30% compared to 2019. But the most interesting news comes with the introduction of a system that puts the amount of wage compensation to which a worker is entitled in relation to his behavior and travel during a pandemic. Thus, a worker who is in quarantine due to contact with an infected person within the workplace is entitled to compensation of 100% of the salary. A worker who is quarantined upon return from the country from the green or orange list due to the risk of infection at the time of departure is entitled to 80 percent compensation. A quarantined worker because he traveled to a redlisted country for justified reasons (death of a spouse or common-law partner, child or parent; birth of a child;) is entitled to 50% of the salary he would have received if he had worked, and at least 70% of the minimum wage; summons to court) with prior notice to the employer. Other workers who are quarantined for travel to red-listed countries for reasons other than those listed above are not eligible for any wage compensation.[18]

6.2. Republic of Germany

Germany has entered a partial economic lockdown in order to prevent the so-called. the second wave of the pandemic. Accordingly, the measures it proclaims are more of an economic nature - fees and one-off grants with the aim of helping companies in business, which only indirectly achieves the effect of preserving jobs. The government undertakes to compensate companies that employ less than 50 workers 75% of the income generated in November 2019, and those with more than 50 employees up to 67 working hours. Companies in which at least one tenth of workers (including temporary workers) have a decrease in the amount of work are entitled to benefits for the implementation of the program, and the state fully bears social security benefits (health insurance, pension insurance, etc.). The amount of compensation is 60% of the previous net salary, but in case the measure lasts, in the 4th month of implementation it increases to 70 or 80% from the 7th month of implementation until the end of 2021. Access to unemployment benefits is facilitated and the period of their payment is extended, and support mechanisms are created for start-up companies and artists. In terms of taxes, the food tax in the hospitality industry will be reduced from 19 to 7% by June 30, 2021. Other tax breaks include a moratorium on tax debts and a suspension of sequestration.[19]

[18] *Ibid*., p. 540

[19] *Ibid.,* pp. 540.-541

6.3. Republic of Austria

In the Republic of Austria, even before the outbreak of the pandemic, the law governing action in the event of an epidemic was in force (Epidemiegesetz 1950). The outbreak of the COVID 19 pandemic complements its standards to make them applicable to the current situation, which includes the power of the state to declare the closure of certain activities to prevent the spread of infection. The powers under this Act go so far that, under certain conditions, inspections may also enter the homes of residents in order to perform testing and implement measures. This same law also prescribes the right of legal and natural persons to demand compensation from the state in the event of a drop in income caused by one of the prescribed reasons (quarantine; living and working in an area subject to traffic restrictions; working on jobs covered by restrictions or complete closure; managing such affairs). In addition to the above existing legislation, since the beginning of the current pandemic, the Republic of Austria, like Germany, has decided to indirectly protect jobs through economic measures to compensate companies with the implementation of part-time measures in accordance with SURE program EU-Program of part-time work in Austria. Kurzarbeit ", allows companies in all sectors to reduce working hours from 10 to 90% for a period of 6 months in the event of economic difficulties caused by a pandemic. Also, the application procedure for unemployment benefits has been facilitated and the amount of benefits granted to families of lower economic status or whose members have become unemployed has been increased. Unemployed people are also paid a one-time benefit in the amount of 450 euros. A salary subsidy in the form of a "new start-up bonus" is also planned, intended for employment and quick filling of vacancies, calculated from the difference between the net compensation for work done and about 80 percent of the net unemployment benefit, including social security contributions up to a maximum of 950 euros net.[20]

6.4. Great Britain

With the onset of the pandemic, the United Kingdom decided, on the one hand, to adopt a package of measures that did not exist until then, but also to adapt the already existing social security measures to the new situation. First of all, the statutory sick pay (SSP) has been changed in such a way that persons are entitled to it from the first day of absence from work due to illness, unlike the previous rule according to which they exercised their right only after the 4th day. . Also, a package of benefits for small and medium-sized enterprises is added to this system by reimbursing the employer for up to 2 weeks of paid compensation for a

[20] *Ibid*., pp. 541.-542.

worker who was absent from work due to COVID 19. To help the self-employed, a measure called Self-employment Income was adopted. Support Scheme which pays people up to 390 pounds per month for up to 3 months. The main measure to help workers has been adopted under the name Coronavirus Job Retention Scheme. It was brought at the beginning of the pandemic and extended several times. This measure currently covers 80% of a worker's salary for hours he has not worked (whereby the worker has had to be absent from work for a minimum of 7 consecutive days), up to £ 2,500 a month. to £ 3,000 monthly support. The United Kingdom has paid special attention to young people with minimal work experience, ie those who have yet to gain it, so it has adopted a measure called 552 long-term unemployment risk covering 100 percent of the national minimum wage for 25 working hours per week for up to 6 months. In addition, lump sums are provided under the Apprentice Scheme or Traineeship Scheme, but these measures apply only in England. Other measures taken to retain workers in the workplace and recover the economy include: miscellaneous benefits for businesses and the self-employed in the hospitality industry; Coronavirus Business Interruption Loan Scheme and Corona Large Business Interruption Loans Scheme as measures to facilitate access to and conditions for bank loans and credits; extension of deadlines and tax relief, etc.[21]

6.5. Republic of Finland

Finnish labor law is characterized by three specifics that influenced the approach of the Government of the Republic of Finland in creating measures to preserve jobs during the pandemic: 1. Great emphasis is placed on the association of employers and workers in associations to the extent that almost all regulations related to labor law bring in the process of tripartite participation of the Government, employers and workers, noting that today over 70% of Finns belong to at least some form of workers' association. Thus, the workers themselves in Finland make payments to various funds of associations of their choice to provide funds for the payment of severance pay in the event of dismissal, unemployment benefits and other benefits in the field of social security. 2. The Law on Employment Contracts prescribes several mechanisms and obligations of employers so that the termination of the employment contract is really the ultima ratio. This is achieved primarily by the provisions of the law which impose on the employer the duty to try to find an adequate job for the employee in various ways or professionally improve him for another job before deciding to terminate the employment contract. Also, the institute of the so-called a lay-off which in special cases allows the employer

[21] *Ibid*., pp. 542.-543.

to declare temporary suspension of work and pay salaries, but that their other employment rights (length of service, right to annual leave, etc.) continue to run. Workers covered by such a measure may, at their option, receive unemployment benefits during that period or start working for another employer, which is terminated when the lay-off ceases. government agency established in 1937, primarily funded by the state (75% in 2017), then health insurance payments (19%) and payments of local territorial units (6%), 81 with the aim of providing health and social insurance to residents, students and workers in Finland. It provides a variety of social and health benefits(benefits for parents with children under 17; benefits for single parents; benefits for kindergarten expenses, rent payments to students studying abroad and living in rented apartments, transportation fees; subsidized meals; treatment fees and rehabilitation, disability benefits, benefits in the event of the death of a family member, etc.) and serves as a backup source of benefits in the field of labor and social security for persons who are not members of trade unions or have already exercised their rights to benefits, unemployment benefits, pensions benefits for living and housing costs of pensioners).[22]

7. STATE AID FOR ECONOMIC SUPPORT DURING THE COVIDA PANDEMIC 19

7.1. Legal framework for state aid in the context of the COVID pandemic 19

Measures to help the economy as an economic and existential necessity are frequently discussed these days. The limitations offered by the existing legal framework for the granting of state aid to entrepreneurs have fallen into the background. However, the European Commission, as the "guardian of the Treaty" (now the TFEU) and the watchdog of the European Union's internal market, closely and systematically monitors developments and flexibly offers solutions and support to Member States in their intentions to preserve their economies. for the granting of permitted state aid. The following are some general remarks and several possible legal bases for granting state aid in this emergency situation. Considering financial support from EU or national public funds provided to health services or other public resolution services, COVID-19 does not fall under the state aid control regime. This also applies to any other financial support given directly to citizens. Namely, Member States can directly grant financial support to citizens, ie consumers, eg for canceled services, tickets or tickets that would not be reimbursed by the operator of such services. These measures also do not fall within the scope of State aid control and Member States may implement them immediately, without the involvement of the Commission. Under EU state aid rules, Member States can

[22] *Ibid.,* pp. 543.-544.

devise abundant aid measures to support certain undertakings or sectors suffering from the effects of the COVID-19 epidemic in accordance with existing rules. In this respect, the following shall apply: 1. Member States may decide to take measures applicable to all undertakings, without discrimination. For example, wage subsidies or the suspension of corporate taxes and levies, value added taxes or social security contributions. Such measures alleviate the financial burden on companies in a direct and efficient way and do not contain a selective advantage for certain companies over others in comparable situations and therefore do not fall under the control of state aid and can be established immediately by Member States without the involvement of the European Commission. , that is, without her prior approval. Article 107 (3) TFEU provides that State aid rules allow Member States to adopt aid measures to meet acute liquidity needs and support victims facing possible bankruptcy due to the outbreak of the COVID-19 pandemic. Prior approval of the Commission is required as a condition for achieving this. It also provides for the right of Member States to grant emergency and temporary assistance in the form of loan guarantees or loans to all types of firms in difficulty. Such measures could cover the expected operational needs of the company for a period of 6 months. In addition, the possibility of assisting firms in difficulty and facing acute liquidity needs due to extraordinary and unforeseen circumstances such as the outbreak of COVID-19 is envisaged, taking into account relevant market conditions, especially given the level of the fee that the user is required to pay for a state guarantee or loan. Also, Member States could adopt state aid for small and medium-sized enterprises, which includes meeting their liquidity needs for a period of 18 months.[23]

8. THE IMPACT OF THE COVID 19 PANDEMIC ON THE FISCAL SYSTEM AND TAXATION

The impact of public policies on the COVID pandemic 19 in most countries of the world has had a direct and major impact on fiscal systems as such. Measures taken in all public policies to combat or reduce the pandemic are maintained on fiscal policy in all its segments, which is evident in the expenditure and revenue segments of the fiscal system since it affects the budgets, their revenue and expenditure sides. Of course, the fiscal response to the health and consequent and wider economic crisis shows the success or failure of public sector financial management. Crisis indicators also speak to the dramatic effects on public finances and the fiscal system as a whole. Namely, the fiscal system with its measures is at the

[23] Law firm, Liszt & Partners, *Legal framework for state aid, related to the outbreak of the covid-19 pandemic*, http://www.lipo.hr/docs/COVID_19%20i%20DR%C5%BDAVNE%20POTPORE%20-rev.pdf, Accessed, 29 June 2021

same time an instrument for fighting the pandemic, but it is equally affected by it. Public revenues as such decreased by 15-30 percent in the first three months, and at the same time expenditures increased by some 30-40 percent, compared to the same period last year. Such a negative effect is exacerbated by growing deficits and growing public debt. Measures taken within all public policies are short-term and subject to constant adjustment, which is necessary given the relatively rapidly changing social, economic, social and fiscal environment and circumstances. At the same time, it is possible to monitor coordination in responding to the crisis at the international, European and even national level. The OECD and the European Union are preparing long-term measures and instruments, and at Union level, along with other instruments, a kind of temporary SURE framework has been offered. In this capacity, it is important to emphasize the types and manner of decision-making on all measures to combat the pandemic, as well as their fiscal system as a whole. Public finances will be adjusted through the change of classical but also adjusted instruments and through the creation of new instruments of fiscal policy to combat existing and possible future crises.

8.1. Fiscal policy in response to the pandemic crisis

Due to the great crisis that affected the whole world, the governments of a large number of member states were forced to take the necessary measures that were a kind of response to the pandemic, health and economic crisis. Although the differences vary both in scope and in the size of fiscal packages, they are all equally aimed at mitigating the direct impact of the sharp decline in economic activity on entrepreneurs, companies and households, and especially at preserving production capacity. Certainly, when considering challenges in the preparation and implementation of fiscal packages, fiscal policy measures specifically included the issue of criteria as well as the definition of necessity and necessity. What is especially important to note is the fact that countries apply a kind of lockdown, ie locking the entire economy and society, all in terms of a ban on work that is treated as an epidemiological measure in the fight against infection, which has a major impact on the fiscal system. undertake. Due to the above, it is important to single out social costs that confirm that these are unprecedented challenges. Namely, the crisis on the one hand leads to a sharp decline in fiscal revenues. In addition, a major fiscal effort is needed to preserve entrepreneurship while mitigating the growth of poverty and inequality as a pandemic crisis.[24] Regarding the fiscal consequences in Croatia due to the response to the pandemic, it is important to emphasize that

[24] Zunić-Kovačević Nataša, *Consequences and effects of the COVID 19 pandemic on the fiscal system*, Proceedings of the Faculty of Law in Split, Vol. 58., No. 2., 2021, pp. 485-486.

in the extraordinary circumstances caused by the COVID pandemic, the Government of the Republic of Croatia has taken a number of measures to achieve economic goals. One of the main economic goals is to preserve or prevent a blow to the liquidity of the economy and entrepreneurs and households with the obligation to preserve jobs. When considering the effectiveness of these measures, it is necessary to distinguish between epidemiological measures adopted with the aim of preventing the infection, which are being introduced gradually and as such are becoming increasingly rigorous. The economy as such already requires a certain level of certainty and requires business people to make business decisions just as timely and quickly. Any government measure taken as a result of the crisis requires a reduction in government revenues while increasing the need for borrowing. Due to the above, the state is forced to give up some fiscal expenditures planned at a time when the crisis did not exist and could not have been foreseen.[25] In addition to the above, it is interesting that the first case of COVID-19 in Croatia was confirmed in Zagreb, on February 25, 2020, by a young man who returned to the country from Italy. All this left great consequences on the entire fiscal system and at the same time led to the necessary changes in the tax system. On the other hand, the consequences in the fiscal system are especially visible through the reduction of all public revenues, both tax and non-tax. At the same time, there is a visible increase in public expenditures, ie public spending, primarily through the granted benefits, grants and aid, all with the announced tax relief.[26]

9. EUROPEAN AND INTERNATIONAL COORDINATION IN RESPONSE TO THE PANDEMIC CRISIS AND RELATIONSHIP WITH NATIONAL FISCAL SYSTEMS

On 20 March 2020, the European Commission adopted a Communication on the activation of the general clause derogating from the Stability and Growth Pact. The purpose of this clause is to weep over the coordination of the budgetary policies of the clauses at a time of severe economic downturn. In its Communication to the Council, the Commission stated that the current conditions allow the activation of this clause due to the expected serious economic downturn caused by the COVID-19 pandemic. Activation of the general derogation clause allows for a temporary deviation from the fiscal rules, provided that this does not jeopardize fiscal sustainability in the medium term. In the field of economy, a kind of investment initiative has been proposed in response to the coronavirus, which should allow flexible use of EU structural funds to respond to rapidly growing needs in

[25] *Ibid*., p., 487.

[26] *Ibid*., p., 488.

the most exposed sectors. The most exposed sectors are health, small and medium-sized enterprises and labor markets, assistance to the most vulnerable areas such as health, SMEs and labor markets, and assistance to the most vulnerable areas in the Member States and their citizens.[27]

10. GLOBAL HEALTH AND STATE INTEREST RELATED TO CORONAVIRUS

As one of the last world crises, the coronavirus pandemic points to the circumstance of limiting international relations due to the protection of the population and the spread of the infection. In the following, we will try to present the complex character as well as the logic of the global spatial order in the field of health. The coronavirus has caused far-reaching political consequences for the coronavirus pandemic in terms of international political relations as well. In addition to slowing down global institutions with its work, it has also influenced the establishment of an insecure world as such. own power. International cooperation as such certainly exists and systematic work should be done to improve it, but cooperation between states is rather weak and the thesis is that "the state fears that others will either not adhere to their obligations or will benefit from cooperation." The "new reality" in which the power of the state is emphasized has introduced new measures to prevent the spread of the virus, starting with the closure of borders, quarantine, travel bans, etc. As a political issue, a pandemic requires the location of the state, its motives and interests in a broader context. The pandemic is primarily a political problem of global health management. In general, the notion of global governance is difficult to define as it refers to a space in which as such there is no hierarchy or established distribution of responsibilities.[28]

10.1. Working from home in the age of the crown - advantages and disadvantages

Advantages

Smart working, that is work from home, is a form of cooperation between workers and the work organization that has been constantly growing in the last few years. There is no doubt that there are many important positive benefits of working from home for a worker. A few will be listed below; greater privacy, productivity, motivation, flexibility at work or independence in determining working hours and breaks, saving time on the way to work and back and no stress on the way to

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27 *Ibid*., pp. 490.-491.

28 Popović, Petar, *Global Health and the Interest of the State*, Annals of the Croatian Political Science Association: Journal of Political Science, Vol. 17., No. 1, 2020, pp.103-105,

work, no nervous colleagues, flexible working hours, no high costs, such as the cost of petrol, a better balance between business and private life, more time for work as well as for ourselves, the possibility of going to the gym and nature during working hours.

Disadvantages

Regarding the shortcomings of working from home, it is important to point out inadequate sleep, a feeling of claustrophobia if the apartment is small, chaos in the house, disturbing other family members, more work, overtime unpaid. Also, one of the disadvantages is the frequent work on Saturdays and Sundays, which can significantly disrupt relations between household members. When a worker works in a small apartment, a full day stay in it can lead to a feeling of claustrophobia, a feeling of discomfort from the closed space, and when the worker is not alone at home and family members interfere with his work, this condition can cause nervousness, frustration, deconcentration. Furthermore, they are not a good condition for a worker, when the worker does not have a real desk and accompanying technology, when he does not have an ergonomic chair but sits on an ordinary chair or works from the bed, on the floor. When a worker has difficulty with self-discipline and difficulty concentrating which leads to him doing work tasks all day while feeling isolated. Poor communication with leaders and the entire team in these individuals further exacerbates his condition of isolation and leads to confusion. Staying in the house and being close to the refrigerator can lead to increased appetite and the use of food as an anti-stress which will lead to eating disorders. Workers from home can start from boredom eating less healthy food, sweets, baked and fried foods. On the other hand, people who live alone and do not leave the house all day can significantly reduce food intake. Prolonged working hours and late bedtime also lead to sleep disorders.[29]

11. RECOMMENDATIONS FOR MAINTAINING MENTAL HEALTH IN THE AGE OF CORONAVIRUS

Concern and anxiety about the corona virus and its impact can be a source of great stress for most people. Social distancing makes the whole situation even worse. Because of all this, it is important that we learn how to adequately deal with this pandemic and its impact on our entire lives. The coronary virus pandemic - COVID-19 has brought many changes in our lives, and thus uncertainty, a change in daily routine, fear for existence and social isolation. We take care of our health

[29] Kostelić-Martic, Andreja*, Coronavirus and mental health*, Psychological aspects, advice and recommendations, Croatian Psychological Chamber, Zagreb, 2020, pp. 336.-339.

every day, the length of the pandemic and ultimately what our future will be like. Information overload, various rumors and misinformation can lead us to a feeling of losing control in which we do not know what to do. It is normal these days to feel stress, anxiety, fear, sadness and loneliness. However, mental health disorders, including anxiety and depression, can get worse. Because of all this, it is important to learn how we can help ourselves so that we can cope with the everyday life that lies ahead.[30]

12. CONCLUSION

Coronavirus as a global, economic and health crisis suddenly caught us all and changed our private lives overnight, but also reorganized professional activities in such a way that in just a few days by mental health experts sought radical changes in established practices. In addition to the economy being exposed to multiple shocks, there is also a supply shock caused by supply chain disruptions, a demand shock caused by reduced consumer demand, a negative effect of uncertainty on investment plans and finally a limited liquidity effect on companies. It is important to emphasize that various restrictive measures have been adopted in order to shorten and limit the duration of the strike. This primarily refers to measures of social exclusion, travel restrictions, quarantine and confinement. It is important to emphasize that these measures are current in relation to supply and demand and affect companies and employees, especially in healthcare, tourism, culture, retail and transport. In addition to the direct consequences for mobility and trade, the COVIDA-19 pandemic is increasingly affecting mobility and trade, as well as companies in all sectors, small to medium and large. Namely, in extraordinary circumstances caused by a pandemic, companies of all kinds could find themselves in a situation of serious lack of liquidity. Solvent and somewhat less solvent firms could experience a sudden shortage or even unavailability of liquid assets. Small and medium-sized enterprises are particularly at risk. That is why in the short and medium term it could seriously affect the economic situation of many healthy companies and their employees, with long-term consequences for their survival. In addition, it is important to emphasize that banks and other financial intermediaries have a key role to play in mitigating the effects of the COVID 19 pandemic as they maintain the inflow of credit into the economy. If there is a serious restriction on the inflow of credit, economic activity will slow down sharply as companies will find it difficult to pay suppliers and employees. It is therefore appropriate that Member States may take measures to encourage credit institutions and other

[30] Brezičević, Tamara, *Mental health at the time of the corona virus pandemic (COVID-19),* http://zzjzbpz.hr/images/stories/OVISNOSTI/2020/Mentalno-zdravlje-u-vrijeme-pandemije.pdf, Accessed 29 June 2021

financial intermediaries to continue to play their role and to continue to support their activities in the Union. The question arises, how to prevent coronavirus. Here are some measures to prevent the spread of the infection in a systematic and effective way. The first and basic way is to wash your hands often and thoroughly with soap and water, avoid touching your eyes, mouth and nose with unwashed hands, avoid contact with people with symptoms of respiratory infections and avoid places where a lot of people gather. If you suspect an infection, you need to call a doctor or a territorially competent epidemiologist, do not go to the clinic and isolate yourself, and finally sneeze and cough into wipes or bent elbow in the absence of wipes. Of course, the basic guiding thought should be the patient-physician relationship, and the patient as such should always be in the first place, both his health and mental health.

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Professional paper

THE NON-APPLICATION OF COMPETITION RULES IN POST-CONFLICT DEVELOPMENT

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ABSTRACT

Competition has been claimed to be a very liberal economic tool where market players are meant to be free in arranging their technologies, production and sales on a particular market. In this paper we are developing a new hypothetical of the functioning of market economies which are in a global sense and considering new markets very different and specific. All the global powers, whose centre of influence might change in time, are trying to gain a bigger share regarding raw materials and potential markets. In post-conflicts societies and in particular in our case study of Kosovo and Serbia we can see the more clear market interests of all local, regional and global powers. The research of post-conflict societies is providing us with some answers regarding the possible future developments in certain societies and regions. The EU made Brussels Agreements in Kosovo has managed to establish new enterprises as a solution of a political compromise where energy, telecommunication and natural resources played a key role. The Washington Agreement has liberalized the infrastructure achievements but in some aspects limited the use of energy and telecommunication infrastructure from certain sources. In this sense we can observe the limited capacity of competition rules application in post-conflict societies and in particular Kosovo in this case. These agreements have therefore limited the influence of economic, strategic and energy related influence from main USA competitors which have not been named in the agreements, but are well known. In both agreements it is visible how economic activities and cooperation is encouraged with various non-economic incentives. Competition is accordingly more of a political will than an economic reality for some in post-conflict societies. The introduction of various companies into the Kosovo legal framework and their control by Serbia is an obvious tool how natural resources could be shared for a benefit of citizens where conflict is resolved using free market and competition rules.

Keywords: *post-conflict, development, Kosovo, Brussels Agreement, Washington Agreement*

1. INTRODUCTION

Competition has been seen as tool to achieve a greater satisfaction of customers and ultimately offer more and give a chance to choose. It has been outlined in the EU legal framework that competition is one of the core values in the EU and everyone is free to compete on the free EU market. This understanding is different when it comes to the EU neighbourhood and the various legal approaches trying to ultimately bring these countries closer to the EU, competition norms, market and products. Although very actively participating in resolving conflicts from its neighbourhood and bringing divided sides closer EU has found itself, obviously without its fault, in a very complex situation where EU policies are opposed by some other regional powers. Russian geopolitical interests joined recently by the Chinese are not completely in line with the EU and in some cases directly are the opposite. "The developments are in line with the logic of geopolitical competition, which had developed over the years, but enters a fundamentally new stage, where competition turns into conflict."[1] Although Russia and China are not countries which encourage competition inside its borders their external policies do tend to challenge and make their industry compete on the global level. We will research this clash of systems in some post-conflicts societies mainly focusing on Kosovo and Serbia dialogue and the recent agreements related to the establishment of new entities in Kosovo which surprisingly, solve multiple questions and also are introducing some competition on Kosovo. The importance to research this bright example from Kosovo is even more important when we observe what is happening globally and how some post-conflict states are being left aside. "Certain behaviorisms suggest that a neo-colonialism is spreading again, especially in African countries."[2] In this sense the absence of competition is possibly pushing certain states to a stadium of submission to the interests of some, where again the interests of citizens, consumers and producers are ignored. The research of Kosovo is therefore very valuable for the understanding of competition itself from both the bottom up and top to down perspectives. "Societies in economic and political regime transition are in a danger zone and in great need of attention."[3] As another aspect of our paper is the research of the post-conflict environments we have to be additionally cautious and have more understanding towards specific needs. The huge influx of people from various conflict states has pushed the EU to act and take

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1 Casier, T., *From logic of competition to conflict: understanding the dynamics of EU–Russia relations,* Contemporary Politics, Vol. 22, No. 3, 2016, pp. 376 - 394

2 Zepf, V. *et al., Strategic Resources for Emerging Technologies,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp. 259 - 272

3 Bringa, T., *Transition and Conflict in Multiethnic Postsocialist Societies: The Case of Bosnia-Herzegovina* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 168 - 181

into consideration more and various needs, sometimes ignoring its own interests as well. "Workers are bound to their locations by family, community, and culture so wage differentials must surpass significant thresholds in order to function as incentives to move."[4] Being a world leading economy EU is in constant demand for workers, where many are coming from post-conflict societies such as Kosovo, Ukraine and Syria now and many others before in the previous decades of development of EU member state economies. The presence of a conflict in a certain state also gains the attention and support of others where in the EU neighbourhood it is usually EU and USA on one side and Russia and China on the other. The EU is specifically being challenged by the Russia initiated Eurasian Customs Union (ECU) and Eurasian Economic Union. "The EU's unwillingness to enter into a formal dialogue with the ECU was seen as a confirmation of its geopolitical ambition to build a sphere of influence at the expense of Russia."[5] Therefore the research and understanding of the Kosovo conflict is vital in the process of trying to find solutions to other conflicts where the same actors are confronted like in Ukraine, Syria, Nagorno-Karabakh or even the ones far from EU borders. All the conflicts and the resolution processes are meant to help local citizens in satisfying their everyday needs and helping the local industry in order to benefit its citizens, control emigration from divided societies and enhance global peace ultimately.

2. DEVELOPMENT RELATED ISSUES

We are aiming to pose and answer the research questions and find the best possible match for the post-conflict development in the framework of agreements achieved under the supervision and influence of some foreign stakeholders. As energy, telecommunication and overall resources are important for both local and international economies we will compare the possible mutual influences and their outcomes in the framework of the post-conflict development. Such agreements tend to be highly politicized and therefore the resources, development and overall the competition is not encouraged by them in post-conflict societies but the main aim is its dependence with limited capacities to use resources and govern the economy. From inside such agreements can be seen positive as they are benefiting the overall efforts for reconciliation and promote competition from below but from above the conflict is managed and overall belongs to one global power where competition has not much to say. The polarization of conflicts globally is seen as a trend and is to be blamed for the constant backlog of post-conflict societies and

[4] Shaikh, A., *Capitalism : competition, conflict, crises,* Oxford University Press, Oxford, 2016, p. 750

[5] Casier, T., *From logic of competition to conflict: understanding the dynamics of EU–Russia relations*, Contemporary Politics, Vol. 22, No. 3, 2016, pp. 376 - 394

their development just as it is the case with Kosovo with very few investments and the constant trade war with Serbia.

Such development related issues are in recent times very closely connected to the BRICS group which is joining together in efforts to compete with the West. The main role in this group belongs to Russia and China and they are now not afraid to openly compete and even contrast the various measures and politics applied by EU and USA. "Despite the realpolitik language of the great powers, they use economic tools to achieve their objectives or strengthen their positions."[6] Since the majority of the countries orientates to a certain great power there are only few countries on the crossroads, usually the post-conflict countries such as Ukraine, Syria, Nagorno-Karabakh and finally Kosovo which will also serve as our case study in this paper. As everywhere on the globe the economic interests of a certain country are not represented directly in the interference to the local economy but more in the sense of having their multinational companies do business there, ideally not respecting competition rules. "Hence, while the methods of mercantilism could always be dominated by the methods of war, in the new 'geo-economic' era not only the causes but also the instruments of conflict must be economic."[7] Therefore the issue of gaining new sites to mine resources and place products for sale are in a constant demand. All political systems or groups of countries are looking for exclusivity, both in the sense of excavations and trade. This position, as some would say monopoly, is a burden to every democracy and serves as a target to their enemies with an aim not to limit it but more to allow themselves do the same elsewhere. "Rather, almost all of successful export-oriented growth has come with selective trade and industrialization policies."[8] It is evident that exporting technology or technologically advanced goods will be always in a huge demand, especially in post-conflict countries where the production industry has been demolished. Such post-conflict countries might have resources and raw materials which could be traded off for technology and know-how instead of goods which that way also limit their development potentials. The race for raw materials has never stopped and in recent times it intensified due to both scarcity of some and due to the obvious time limited availability of other, like e.g. Petrol. "Yet the message should be that for emerging technologies, no matter how advanced they are or how effective and efficient, the materials side could be a show stopper both

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6 Bayramov, A., *Conflict, cooperation or competition in the Caspian Sea region: A critical review of the New Great Game paradigm*, Caucasus Survey, 11 Jun 2020, pp. 1 - 20

7 Luttwak, E. N., *From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce,* The National Interest, No. 20, 1990, pp. 17 - 23

8 Shaikh, A., Capitalism : competition, conflict, crises, Oxford University Press, Oxford, 2016, p. 494

on short, mid and long term."[9] Therefore guaranteeing the undisturbed access to certain resources is of a key importance at the moment, even by initiating conflicts in some countries with an aim to make them a dependant post-conflict society which will on a long term be a stable source of resources but politically completely subordinated to their liberator. In this way the political, sometimes even military, assistance is usually paid back in the fact of accessibility to resources. When we speak about resources it has to be mentioned that also the geopolitical location of some states could be of vital importance, so is the case with Ukraine, Syria and Kosovo. States in the EU neighbourhood have a strategic importance and their belonging to some and not the other is more important than the availability of resources per se. The story of Kosovo started in 1999 but later continued in 2008 with the self-proclaimed independence and has since then gained the support of many UN and EU member states but failed to gain the unanimous recognition of the UN and EU as a whole. EU has a status neutral position towards Kosovo which has also in 2013 produced the "Brussels Agreement"[10] as a tool to pacify Serbia-Kosovo relations and EU internal struggle as well. The Brussels Agreement (BA) regulates many aspects of everyday life in Kosovo, with an aim to help its citizens primarily to have a normal life. As far as economy and development are concerned there have been some solutions made in the telecommunication and energy sector which have advanced since then. On the other hand many questions have remained open and one of them is the management of the big water reservoir (Gazivode Lake on Serbian or Ujmani Lake on Albanian) on North Kosovo. As the lake is of a tremendous importance for development and industry it has been a hard bone to discuss and only the previous USA President Donald Trump has managed to bring the Serbs and Albanians agree about the way to share this valuable resource. In the "Washington Agreement"[11] as signed in 2020 the Lake

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9 Zepf, V. *et al., Strategic Resources for Emerging Technologies,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp. 259 - 272

10 Kosovo, Republic of., *The Republic of Kosovo Government Program on the Brussels Dialogue 2014 – 2018, Prishtina, 15 January 2015,* [https://kryeministri-ks.net/wp-content/uploads/docs/Kosovo_Government_Program_for_Brussels_Dialogue_2014-2018_150115.pdf] Accessed 20 March 2021
With chapter 35, Serbia will be obliged to fully implement the Brussels agreements and to reach a legally binding international agreement with Kosovo. Such a conditioning on Serbia, most likely to be adopted in the near future, has come as a result of the hard work of the Kosovo Government which has managed to provide factual evidence of Serbia's failure to meet its obligations in implementing the reached agreements.

11 Republic of Kosovo., *Implementation Plan of the Washington Agreements Economic Normalisation Between Kosovo and Serbia,* [https://kryeministri-ks.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement_19102020.pdf] Accessed 20 March 2021
The Washington Agreement (Economic Normalization) has been signed in Washington on 4th September 2020 between President Aleksandar Vucic for Serbia and Prime Minister Avdullah Hoti for Kosovo during a meeting in White House hosted by USA President Donald Trump.

issue is solved and will be used by both parties to the benefit of all citizens. Still many other challenges have been put in front of the Serbian and Kosovo government which have both agreed to align their policies with USA and EU in a much broader way which has accordingly brought them into confrontation and possible future economic isolation from the Russian and Chinese influence.

3. COMPETITION RULES IN POST-CONFLICT SOCIETIES

Competition is present in many different forms on the global level of trade. Only some patterns are very typical for post-conflict societies. Also it is typical to see how societies are responding to the fact of scarcity of some resources and their unavailability on the market. "The statistical results demonstrate that scarcity is no cause of internal violent collective action, which would be a very valuable insight by itself."[12] Obviously societies which need resources will not solely blame their governments for the scarcity but the others, usually their neighbours, previous or even future enemies. The economic needs and demands are in a situation of scarcity seen completely differently and not within a prism of economy but more with a national and ethnic connotation. "Where the differences are of an ethnic nature, competition for the scarce goods of modernization may be increased and, thus, ethnic relations aggravated."[13] The territorial dimension as we have previously mentioned is very important and if a resource is kept by one side or recovered by the other it serves as an initiation of conflict boosting mechanism. The recently found Oil supplies in the waters around the divided island of Cyprus have boosted the many decades long conflict, in such cases the divided sides which do not want to share anything in common suddenly want to cooperate, share and reach an agreement. Same applies to the find of valuable metals, gold and diamonds in Africa where many resources are misused in an attempt to maintain a conflict on various levels thus calling such materials dirty as either the way or purpose of their excavation is unlawful. "Some mining of such conflict metals is brutally controlled by the conflicting parties and revenues obtained are financing purchases of weapons, hence further fanning the conflict."[14] Therefore as we turn the box we can observe that both the scarcity and availability of resources can start or boost conflicts. Accordingly, only the fair share of resources for which no final and gen-

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12 Wittek, R., *Resource competition and violent conflict: Cross-cultural evidence for a socio-ecological approach,* Zeitschrift fur Ethnologie, No. 115, 1990, pp. 23 - 44

13 Khazanov, A. M., *Ethnic and National Conflicts in the Age of Globalization,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 162 - 167

14 Hageluken, C., *Closing the Loop for Rare Metals Used in Consumer Products: Opportunities and Challenges,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp. 103 - 119

eral solution is present today globally can serve as a solution. "This is how the logic of competition follows its own dynamics: reading everything through a prism of competition and rivalry, each negative action is understood as necessitating a counter reaction."[15] This is also the aim of our work to research the agreements which have been previously taught to be impossible but now are in the process of implementation. Both The Brussels Agreement (BA) and The Washington Agreement (WA) are bright examples how outcomes can be brought out of situations being thought to be in a permanent dead end. The key solution found in both agreements is the fact of sharing resources and most importantly sharing rights, duties and competences in a mutually acceptable way. Obviously the will to reach such agreements had to pass a long way to get to this position and we can also argue that the moment was not the right previously. Similarly to the Kosovo case the post-conflict countries in the post-Soviet space tend to reach similar agreements to similar conflicts they have in the sense of ethnic, territorial and resource based disagreements. The permanent struggle to gain something and evolve is present in every society, some just need a decade or two to recognize that need and to accordingly position themselves in their region and broader. "Since 2000 the newly independent regional states have also been recognized as the players of the new great game due to their economic and political positions."[16] Some states initially do not have such an importance locally or as regional or global players. So was the case with Azerbaijan which has been seen as an important player in the Oil sector and the Caspian Sea region just to be able to after some 30 years turn the conflict with Armenia into its own benefit. The new position of Azerbaijan against Armenia has evolved out of its resource based policy which has been recognized by many and most importantly Russia which silently supported the recent 2020 Autumn War in Nagorno-Karabakh. With this recent war in Nagorno-Karabakh a big benefit is also claimed by Russia as it has somehow stabilized the political situation in the Caspian region and therefore secured the intact flow of goods and raw materials globally and from Iran specifically into this region and wider. Other great powers such as EU also tend to stabilise and outline the short and long term flow of raw materials and goods into the EU. "During 2009 and 2010 the Ad Hoc Working Group on Defining Critical Raw Materials of the European Commission evaluated 41 non-energy raw materials, out of which 14 were identified as critical for the EU economy."[17] Therefore keeping on mind the sources, paths and stability of

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15 Casier, T., *From logic of competition to conflict: understanding the dynamics of EU–Russia relations*, Contemporary Politics, Vol. 22, No. 3, 2016, pp. 376 - 394

16 Bayramov, A., *Conflict, cooperation or competition in the Caspian Sea region: A critical review of the New Great Game paradigm*, Caucasus Survey, 11 Jun 2020, pp. 1 - 20

17 Hageluken, C., *Closing the Loop for Rare Metals Used in Consumer Products: Opportunities and Challenges,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp.

the suppliers EU is also keen to maintain and establish good relations with partners who are supplying raw materials needed for the smooth run and continuity of the EU democracy. Also both on a short and long run EU wants to encircle its geopolitical positions into which Ukraine and the Eastern Partnership countries might not fall but certainly the Western Balkan countries including Serbia and Kosovo do belong.

4. SERBIAN INTERESTS AND COMPETITION RULES

The long lasting conflict between Serbs and Albanians in Kosovo has stepped into a new stadium with the 2008 Kosovo declaration of independence, which has been support by some half of the UN member states so far and almost all EU member states but five. Accordingly the Serbs in Kosovo have also been included into this recognition issue and the ones on North Kosovo have boycotted Kosovo institutions with the support of Serbia while the ones inhabiting Serbian municipalities (enclaves) South of Ibar River have accepted them. Our aim is to deal with institutions which have an economic connotation and have been used in this decade long conflict. Serbia continued to use in North Kosovo its Postal services, Telecommunication/Mobile providers and most importantly controlled Electricity. Electricity is vital for every household and even when there have been frequent cuts in North Kosovo it was served with electricity throughout this period, interestingly without a successful debt collection mechanism. As this and many other issues had to be solved at some moment the 2013 Brussels Agreements has dealt with them in more detail. "Discussions on Energy and Telecoms will be intensified by the two sides and completed by June 15."[18] With the developments in the Energy and Telecommunication fields we will go into more detail in the following chapters whereas an additional step in the process of conflict resolution has been agreed. The future establishment of the Association/Community of Serbian municipalities (A/C) with a presently unclear legal status and possible future activity in various economic fields has also been envisaged. "The Association/Community will exercise other additional competences as may be delegated by

103 - 119

[18] Kosovo, Republic of., *Law No. 04/L-199 on ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia,* [https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=11205] Accessed 21 March 2021
Serbia, Republic of., *Brussels Agreement,* [https://www.srbija.gov.rs/cinjenice/en/120394] Accessed 21 March 2021
The Brussels Agreement is treated as an international agreement and has a form of a law in Kosovo. In Serbia it is treated as a written document of various acts/changes to be made and implemented which have been mutually agreed during the talks in Brussels

the central authorities."[19] As until now, almost one decade of its prescribed future establishment, the A/C has not yet been formed and we can just guess how it will look like. Accordingly, to the Serbian side, it will have the authority like Republika Srpska in the sovereign state of Bosnia and Herzegovina whereas according to Kosovo officials, it will be just an advisory body to The Serbian Municipalities in both North and South Kosovo, with a form of an NGO.

4.1. Serbian telecommunication enterprises in Kosovo

One of the big successes of the BA is the agreement and practical implementation of the agreements related to telecommunications. Since 2008 the phone lines between North and South Kosovo have been interrupted, they had different Mobile providers and in fact functioned as two different state systems, now this is changing and the customers on North and South Kosovo will be able to call each other. "On fixed telephony a full license for fixed telecommunications services will be issued to a NewCo, subsidiary of a Serbian company registered in accordance with the Kosovar regulatory framework."[20] The landline network used and based in North Kosovo will be now a separate new entity in this framework and connected to Kosovo, similarly to the Serbian state owned MTS mobile provider which has been widely used in North Kosovo. Interestingly the other Mobile/Cell phone providers present in Serbia were not active on the North Kosovo market. "The temporary authorization will expire once the Kosovo authorities issue a new full, unrestricted, mobile telephone license as a result of a tender/auction."[21] The issue of tendering a new provider is very interesting since neither Kosovo has a need for a new provider and neither Serbs or Serbia in Kosovo want to give up on its provider. "Telekom Srbija a.d. Beograd is the founder of MTS D.O.O. and its sole member with 100% stake."[22] Although everything is possible and even the privatization of the North Kosovo Mobile network, MTS doo, is possible this transfer of assets, service territory and conflict resolution mechanism is a very good example

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[19] Ibidem
In Kosovo many settlements with a Serb majority have a status of a separate municipality. The four municipalities on North Kosovo namely: Kosovska Mitrovica, Zvecan, Leposavic and Zubin Potok exercise a very autonomous decision making and are directly and openly supported by Serbia.

[20] Office for Kosovo and Metohija., *Telecommunications,* [http://www.kim.gov.rs/eng/p05.php] Accessed 22 March 2021

[21] Ibidem

[22] MTS D.O.O., *O Nama,* [https://mtsdoo.com/o-nama/] Accessed 20 March 2021
In keeping with the referenced agreement and the action plan, the Regulatory Authority of Electronic and Postal Communications (RAEPK) entered mts D.O.O. into the register of electronic communications and granted to it a full licence for fixed telecommunications and a temporary authorization for mobile telecommunications which entered into force on December 16th, 2016.

how conflict sides can agree for the common benefit of citizens. Although MTS Serbia had previously a dominant position on the North Kosovo market, which has not changed until now, the new balancing mechanism is a very good tool in achieving not just more competition but definitely a better quality in providing services in this sector.

4.2. Serbian electricity enterprises in Kosovo

Regarding electricity a very interesting and complex solution has been agreed in Brussels in order to solve the case of unpaid electricity bills in Kosovo, among others. The Serbian side will be allowed to establish, according to Kosovo law, two companies from which one will be a power trading company and the second a power supply company named 'ElektroSever'. This company or Društvo Elektrosever D.O.O.[23] is meant to solve the issue of unpaid bills in North Kosovo and establish a stable system of future collection and thus energy stability overall. Both companies in Kosovo will be initiated and managed by Elektro Privreda Srbije (EPS) which is a Serbian state owned electricity company, having a monopoly position on the Serbian market itself. As far as competition is concerned it is very important to note that a new electricity trading company will be established in Kosovo which will help in establishing competition and market rules. "This company will apply for, and be granted a license that covers import, export and transit."[24] Therefore it is rightly argued by Kosovo that the Serbian side will get a lot of opportunities with this agreement and even be able to spread its business in favour of the state owned EPS in Kosovo and wider. Both Kosovo and Serbia have arguments and are claiming that their economic interests are endangered by the acts of the other side. "In the meantime, Serbian side shall continue appealing and trying to talk with Priština to stop stealing electricity from within the RG CE ENTSO-E power system, given that it jeopardized the energy stability of the entire region."[25] Energy stability in the region might not be in such a danger but the unpaid bills in North Kosovo are certainly a big and not sufficiently reasoned obstacle for the functioning of normal life. The constant mutual claims of Ser-

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23 Business Registration Agency of Kosovo., *Društvo Elektrosever D.O.O.,* [https://arbk.rks-gov.net/page.aspx?id=2,38,174962] Accessed 20 March 2021

24 Conclusions of the EU facilitator on the implementation of the 2013 Energy Agreement, [http://www.kim.gov.rs/eng/p20.php#][https://kryeministri-ks.net/wp-content/uploads/docs/150825-Conclusions-on-the-Implementation-of-Energy-Agreement_en.pdf] Accessed 21 March 2021

25 Office for Kosovo and Metohija and Office for the Coordination of Affairs in the Process of Negotiation with the Provisional Institutions of Self-Government in Priština., *Progress Report on the Dialogue Between Belgrade and Priština (Covering the period from May 1 to December 15, 2018),* [http://www.kim.gov.rs/doc/pregovaracki-proces/Sestomesecni%20izvestaj%20o%20dijalogu%20dec%202018%20%2011%2002%202019%20en.pdf] Accessed 20 March 2021

bia and Kosovo against each other are continuing to be a burden as both parties claim both the infrastructure and resources found in Kosovo to its own side. A very interesting example is the company of JP PK „KOSOVO" – Obilić[26] which functions in the framework of EPS but has been moved from its base in Obilić Kosovo to Belgrade, Serbia. Obviously, companies can't work if there are no resources which are meant to be excavated and similarly the resources in Kosovo can't be excavated if the conflict continues and blocks the development and work of companies such as Trepcha which has halted its mining since many years before.

4.3. Serbian resources in Kosovo

The Serbian resources in Kosovo or the non-accessible resources by Serbia in Kosovo are forming a long list and certainly are benefiting Kosovo economy as much as they are harming the Serbian. Together with the recent trade war and ban of Serbian products from the Kosovo market by the imposition of 100% taxes are just a piece in the pile of disagreements between these two sides. Therefore the biggest success and advance has at the moment been made in the sector of telecommunication and it should be of a bigger focus and also serve as a benchmark for other topics. "This allocated frequency spectrum will be used for the provision of public mobile telephone services and mobile broadband services on a technologically neutral basis, i.e. 2G, 3G, 4G technology will be used in allocated spectrum on all existing sites…"[27] The WA is in some instances going directly against the interests of both Serbia and Kosovo and also its citizen altogether. "Both parties will prohibit the use of 5G equipment supplied by untrusted vendors in their communications networks."[28] In other words this means that the equipment supplied by the Chinese company Huawei will not be accepted on these markets and it is a big problem when we know the popularity, price and accessibility of its products on the global markets and especially in Serbia which has a very specific and friendly relationship with China. This is a measure meant to support the USA recent animosity case with China and Huawei but not just with them, as the other big competitor of USA in the region Russia has also been targeted by the WA. Since, both parties will diversify their energy supplies.[29] This solution means for Serbia

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26 EPS JP PK „KOSOVO" – Obilić, *O nama,* [http://pkkosovo.rs/]Accessed 20 March 2021

27 Office for Kosovo and Metohija., *Conclusions of the EU Facilitator on Telecoms, 13 November 2016,* [http://www.kim.gov.rs/eng/p23.php] Accessed 22 March 2021
Serbia will send to the ITU agreeing that code +383 can be allocated to Kosovo

28 Republic of Kosovo., *Implementation Plan of the Washington Agreements Economic Normalisation Between Kosovo and Serbia,* [https://kryeministri-ks.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement_19102020.pdf] Accessed 20 March 2021

29 Ibidem

that it should not be in such a close connection with the Russian energy suppliers, which is hard for every European country, but most likely turn more and more to the USA supplied energy resources instead. This is a very interesting solution also going in line with the various competition rules and expectations, but still on the global level it is more acceptable to ban competition than to limit it on a local level to ordinary consumers. "The dominant position holds an undertaking that because of its market power in the relevant market can substantially independently operate in relation to actual or potential competitors, customers, suppliers or consumers."[30] Therefore all the previous agreements and in specific the BA and WA have to be more in harmony and less in conflict as we keep adding on a daily basis issues which are dividing the sides not just in our Serbia-Kosovo case study but much wider in other post-conflict or even ordinary societies.

5. KOSOVO INTERESTS AND COMPETITION DEVELOPMENT

The situation in Kosovo is very complex in the sense of understanding and the realization of Agreements from Brussels and Washington. As an outcome of this on the recent parliamentary elections in Kosovo the majority has elected a government which is negating the outcomes of the talks with Serbia and supports the permanent confrontation idea. Additionally they have an idea of going back and resetting everything according to what was the factual situation before these agreements. "In addition, the Technical Dialogue has resulted in draft agreements on telecommunications and energy issues that have been finalized during the dialogue for normalization."[31] Accordingly the focus of the Kosovo government should be not just the normalization of relations with Serbia but the work on the property issues for the rest of enterprises which could rise employment in Kosovo. There is a usual Disclaimer[32] in the recent agreements regarding the property rights in Kosovo and one of the biggest steps is to deal with the Trepcha mine which is of a vital interest to all the citizens of Kosovo. Mining was one of the biggest sectors for job creation in Kosovo before the conflict and especially in the previous Communist era where jobs and incomes were more secure. "In this case, one should expect

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30 Art.15 of the Law on Protection of Competition, Official Gazette of the RS No. 51/2009 and 95/2013

31 Kosovo, Republic of., *The Republic of Kosovo Government Program on the Brussels Dialogue 2014 – 2018, Prishtina, 15 January 2015,* [https://kryeministri-ks.net/wp-content/uploads/docs/Kosovo_Government_Program_for_Brussels_Dialogue_2014-2018_150115.pdf] Accessed 20 March 2021

32 Kosovo considers that, in accordance with Kosovo Constitution and Laws, and international law , namely UNSCR 1244 and respective UNMIK Regulations, the property within the territory of Kosovo is ownership of the Republic of Kosovo.
Serbia considers that, that in accordance with domestic and international law, namely UNSCR 1244, property within the territory of Kosovo is ownership of Serbia, under specific provincial regulation and in full accordance with the Constitution of Serbia.

growth of nationalism as a reaction to the difficulties and shortcomings connected with the globalization process."[33] This feeling of globalization is typical not just to post-conflict societies but to other transitioning societies in Eastern Europe. On the end this radical shift in the Kosovo politics is coming at the same time and together with other similar shifts in Eastern Europe like Hungary and Poland but also including BrExit on the wider EU political scene.

5.1. Kosovo and the Serbian telecommunication enterprise

It can be said that the biggest and quickest change has been achieved in the telecommunications sector from all the topics dealt within the BA. Although the postal service is also vital for the functioning of the economy and in particular for the state administration it was one of the most straight forward agreements where the market has been shared between the providers. "Current operations of the two postal operators of universal postal services on the territory of Kosovo and Metohija will not change with the signing of the Protocol on establishing the postal traffic."[34] When it comes to Mobile operators there are two of them in Kosovo from which Vala is a state owned operator and IPKO is private. Accordingly it can be stated that the Kosovo market does not suffer from monopoly in this sense but when it comes to providing services to state institutions it is different. On North Kosovo it was demanded that the newly formed state institutions also get involved into the formerly signed contracts from the Kosovo state. "These Priština demands received support of the EU facilitator, who invoked Pristina's decision whereby Vala is the only operator allowed to provide mobile and land line telephony and the Internet services to the so-called state institutions in the territory of Kosovo and Metohija."[35] This issue can be seen everywhere where autonomy is seen as an issue and the authorities who aim at more power will also request the power to sign contracts by themself. In this case the aim to argue for the contracts regarding state institutions are also not related to the price but to the power and autonomy

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33 Khazanov, A. M., *Ethnic and National Conflicts in the Age of Globalization,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 162 - 167

34 Office for Kosovo and Metohija., *Annex 3 of the Memorandum on understanding between Chamber of commerce and industry of Serbia and Kosovo Chamber of Commerce,* [http://www.kim.gov.rs/doc/pregovaracki-proces/2.2%20Annex%203%20MoU%20PKS-PKK%20febr%202015%20eng.pdf] Accessed 20 March 2021

35 Office for Kosovo and Metohija and Office for the Coordination of Affairs in the Process of Negotiation with the Provisional Institutions of Self-Government in Priština., *Progress Report on the Dialogue Between Belgrade and Priština (Covering the period from May 1 to December 15, 2018),* [http://www.kim.gov.rs/doc/pregovaracki-proces/Sestomesecni%20izvestaj%20o%20dijalogu%20dec%202018%20%2011%2002%202019%20en.pdf] Accessed 20 March 2021

of an institution to care for its own arrangements. "The Serbian side rejected the proposal since this solution was older than the Arrangements regarding Telecommunications, and maintained that the 'mts d.o.o.' should provide these services to the judicial institutions in the north of Kosovo and Metohija."[36] It can also be seen as a challenge since if an agreement gets signed for a period longer than the actual prescribed duration time of the MTS doo company itself it can endanger the work of the court. As we have argued before the future status of MTS doo might be unclear in the Kosovo legislation but concerning local demands and North Kosovo politics it is hard to imagine it leaving and giving up its market and infrastructure to another company. "It will not be a third mobile operator in Kosovo, because in order to do so international tendering of multiple bidders is required as provided by legislation of the Republic of Kosovo. This temporary permission for this company will be valid until the opening of the international tender for a third mobile operator."[37] For such a small market a new provider might also not be economically feasible and the already present national predisposition of the MTS doo shows that the final agreement is still far. Even if Serbia decides to sell the main MTS Company in Serbia the Kosovo branch of its MTS doo could still remain and potentially be owned by one of the municipalities on North Kosovo or even the future Association/Community of Serbian municipalities.

5.2. Kosovo and the Serbian electricity enterprises

In the sense of economy and development the biggest challenge and obstacle in Kosovo and actually in North Kosovo is the challenge related to unpaid electricity bills. The official Kosovo electricity supply company KEK (Kosovo Energy Corporation) has never managed to collect the money for unpaid bills in full on North Kosovo. The resistance of the Serb minority on North Kosovo to pay for its electricity bills can be seen as a double benefit as they are by not paying bills saving money and also failing to recognize the authority of the Kosovo run KEK company and waiting for EPS to act, while having frequent electricity cuts and shortages respectively. "Kosovo will allow EPS to establish a supply company in Kosovo, in line with its non-discriminatory obligations under the Energy Community and in accordance with the Kosovo legal and regulatory framework."[38] This interesting

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36 Ibidem

37 Kosovo, Republic of., *Brief Summary of The Brussels Agreement Package, 27 August 2015,* [https://kryeministri-ks.net/wp-content/uploads/docs/Brief_summary_of_the_Brussels_Agreement_Package_270815.pdf] Accessed 20 March 2021

38 Conclusions of the EU facilitator on the implementation of the 2013 Energy Agreement, [http://www.kim.gov.rs/eng/p20.php#][https://kryeministri-ks.net/wp-content/uploads/docs/150825-Conclusions-on-the-Implementation-of-Energy-Agreement_en.pdf] Accessed 21 March 2021

battle for a territory and the recognition of one authority or the other shows how post-conflict societies are suffering and can be ready to sacrifice their personal for a common good. This situation has lasted for more than 10 years and it has not even now yet fully been solved, although the new Serbian run Kosovo Corporation is on its way. The name of this company will be 'ElektroSever'[39] and its main aim will be to collect electricity bills which would make it a more administrative than really a for profit company. "ElektroSever will be entitled to carry out billing and collection, since these are the normal activities of a supply company."[40] The aim of this company will be more of a social character and will be responsible exclusively for the four Serbian municipalities on North Kosovo. This solution is not going in line with ideas of competition but certainly the social need and it is also possible that it will once become, just as the MTS doo, part of the wider framework of Serbian companies under the framework of the A/C of Serbian municipalities. "This new company will supply electricity and may provide distribution services (such as billing, collection, maintenance and physical connection of new customers) to customers in the four northern Serb majority municipalities, and will be able to buy and sell power on the open market."[41] Buying electricity on the open market will make it a player on the energy market as it will be able to use also some possible benefits from other companies formed in the framework of the BA and in particular the other Serbian run electricity trading company with a license that covers import, export and the transit of electricity. "The regulatory authorities of both sides shall, upon application, without delay, and in line with the requirements of the existing licensing framework in their jurisdiction, issue licences covering trade (import, export, transit) and supply to KEK, KEDS and EPS, respectively."[42] This solution really introduces competition on the Kosovo market and boosts trade as well on fair and economic grounds. Such solutions could be seen as very good hybrid conflict resolution mechanisms as they from one side solve conflicts and from the other include competition on various post-conflict markets.

5.3. Kosovo and its various shared resources with Serbia

Definitely all the solutions from agreements have various benefits for either Kosovo citizens, competition enforcement or business development. "It has been reiterated that this is just the beginning of the process and that all efforts are to be

39 Ibidem

40 Ibidem

41 Office for Kosovo and Metohija., *Arrangements regarding energy,* [http://www.kim.gov.rs/eng/p04.php] Accessed 21 March 2021

42 Ibidem

continued until all challenges related to business environment are removed."[43] The idea behind the EU agenda is that the local stakeholders have to reach to the point where they can agree about almost everything. This is in line with EU standards and the future prerequisites for a potential EU membership, including both Serbia and Kosovo together. Both agreements are in line with the Western development ideas and although they might have slightly different focuses both are negating the influence and presence of Russian and Chinese influence. "The structure of the program focuses considerable attention on matters related to rebuilding a unified state transportation system as a major stabilizing factor for the economy."[44] All the transportation systems are foreseen to be improved and are also necessary by the respective economies and development potential, although considering the present trade war regime between Kosovo and Serbia it is more of a plan than a real possibility at the moment. Kosovo has its USA made infrastructure connecting it through Albania to the sea which network Serbia is meant to use as well according to the WA. Also while Serbia has both road and rail infrastructure supported by China and serving both Chinese and Serbian interests, potentially also useful to other countries in the wider region. On a more local perspective it is necessary for the states to learn how to use together and share the potentials and resources which could be of a mutual use, sharing Gazivoda/Ujmani Lake, as a reliable water and energy supply[45] is just one of the unique solutions. The issue of this lake in North Kosovo has been widely debated and since it is a necessity for the Kosovo economy as a whole it will be accordingly shared in the future. "The renewable energy transformation in Germany is based partially on the strategy of decentralization and local energy supply."[46] So guaranteeing a local independence in the energy sector we can see the automatic rise in the standard of citizens and competition on the local, regional and global markets. Also by strengthening local industries development becomes more possible and instead of feeding just central companies like it is the case in both Serbia, EPS and Kosovo KEK the profit produced by SMEs can boost the economy and rise the employability. At

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43 Eurochambers., *Serbia and Kosovo Chambers reach agreements to boost business relations,* 2013, [https://www.eurochambres.eu/wp-content/uploads/2020/02/51-SerbiaKosovoAgreements_13Dec13-2013-00851-01.pdf] Accessed 20 March 2021

44 Khoperskaya, L. L., *The Dynamics of the Ethnopolitical Situation and Conflicts in the North Caucasus,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 120 - 129

45 Republic of Kosovo., *Implementation Plan of the Washington Agreements Economic Normalisation Between Kosovo and Serbia,* [https://kryeministri-ks.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement_19102020.pdf] Accessed 20 March 2021

46 Hartard, S., *Peace and Security by Resources Self-Subsistence Strategies,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp. 187 - 199

the moment Budgeting[47] is an issue in Kosovo since it is an independent country with very few and limited income, therefore agreements and a good relationship with its neighbours and especially Serbia is vital for the development of SMEs as well. Development as a prerequisite for EU integration is also a regional task as the countries in Western Balkans will be forming a future union which will be unifying authorities for this region, just as the BA and WA have been setting up the basis for it. "Due to political and diplomatic circumstances, Kosovo was not included in the mini Schengen agreement."[48] Now according to the WA it has to be part of this agreement and together with the CEFTA agreement there will be very little left for the respective governments to decide as markets will on a micro regional level of Western Balkans be as free, liberal and competitive as anywhere else in the EU. For various conflicts and disagreements stemming from BA and especially WA the most ideal solution is Arbitration[49] which is already a standard accepted in the liberal world.

6. COMPETITION AS A KEY TO DEVELOPMENT IN POST-CONFLICT SOCIETIES

Competition has been declared as the most beneficial treatment of customers and citizens in regard the satisfaction of their market needs. Anyway there is a wide array of various breaches to competition rules in the framework of global economy, where states who claim competition as their main achievement do not lack the scandals regarding various missuses on the free market. "At the opposite extreme, there is the intense positive interaction between politically weighty businesses in need of state support on the world economic scene, and the bureaucracies or politicians that they seek to manipulate for their own purposes."[50] Apart from

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47 Kosovo, Republic of., *The Republic of Kosovo Government Program on the Brussels Dialogue 2014 – 2018, Prishtina, 15 January 2015,* [https://kryeministri-ks.net/wp-content/uploads/docs/Kosovo_Government_Program_for_Brussels_Dialogue_2014-2018_150115.pdf] Accessed 20 March 2021
In the process, deficiencies and constraints have been noted in this model of budgeting,

48 Republic of Kosovo., *Implementation Plan of the Washington Agreements Economic Normalisation Between Kosovo and Serbia,* [https://kryeministri-ks.net/wp-content/uploads/2020/10/Implementation-Plan-for-the-Washington-Agreement_19102020.pdf] Accessed 20 March 2021

49 Kosovo, Republic of., *The Republic of Kosovo Government Program on the Brussels Dialogue 2014 – 2018, Prishtina, 15 January 2015,* [https://kryeministri-ks.net/wp-content/uploads/docs/Kosovo_Government_Program_for_Brussels_Dialogue_2014-2018_150115.pdf] Accessed 20 March 2021
The Rambouillet Peace Conference in 1999 ended the war in Kosovo and paved the way for the liberation of Kosovo, while Vienna's status talks paved the way for Kosovo's independence. Kosovo has emerged victorious from both peace processes, while Serbia failed with the non-signing of the agreements.

50 Luttwak, E. N., *From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce,* The National Interest, No. 20, 1990, pp. 17 - 23

the very actual problem being faced by SMEs in losing their right to work many jurisdictions as we see today are offering state aid and are influencing an ever huge system of state incentives. As an outcome of such acts we will one day have a huge unbalance on a global level which will be outside of the scope of any competition rules previously applied. "The question of whose rules to comply with is made all the more difficult by the fact that many rules have been given extraterritorial effects which means that they can capture trades which have a weak connection, if any, to the rule-issuing jurisdiction. In such a system jurisdictional conflicts are omnipresent."[51] Accordingly we are once again coming back to the actual situation post-conflict societies are facing and the unclear rules being applied to. "Special attention is being focused on creating a system of justices of the peace, who will be called upon to relieve the regular courts of less significant cases, and on monitoring the effectiveness of the operations of the regular courts and arbitration courts…"[52] The local court systems anyway do not have a big influence on the global markets and as is the case in USA and Huawei conflict the enforcement mechanisms of USA are not able to reach out to China but are able to limit its presence on various other markets just as is the case with the recent Washington Agreement for territories of Serbia and Kosovo.

6.1. Competition and the rule of law in the EU framework

The overall framework and implications of EU regarding the resolution of the conflict between Serbia and Kosovo are using a holistic approach. The Brussels Agreement is not solving just one issue but systematically advancing and transforming the whole conflict taking various perspectives. "Only a wise use of all resources together and doing this by incorporating socio-cultural (moral), ecological and economic considerations, seems to be the most advantageous and promote successful emerging technology."[53] If the solutions of the BA show the necessary and expected results we can expect to see the divided sides move closer to the resolution of disagreements regarding even more capital solutions, in particular the Trepcha mines, various state properties and of course the future status questions in both regional and EU connotations. "It is true that a strong link between unitary and more or less homogeneous states, on the one hand, and economic and

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51 Marjosola, H., *Regulate Thy Neighbour: Competition and Conflict in the Cross-border Regulatory Space for OTC Derivatives,* EUI Working Paper, Law 2016/01, 2016, pp. 1 - 23

52 Khoperskaya, L. L., *The Dynamics of the Ethnopolitical Situation and Conflicts in the North Caucasus,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 120 - 129

53 Zepf, V. *et al., Strategic Resources for Emerging Technologies,* in: Hartard S.; Liebert W. (eds.), Competition and Conflicts on Resource Use, London, 2015, pp. 259 - 272

social advancement, on the other, is not imperative, but it is far from clear that nation states are weakening, declining, eroding, and withering away because of transnational economic forces."[54] Apart from the EU it is the most actual example of cooperation after a conflict on the European continent, therefore it is not acceptable to expect Kosovo not to cooperate with Serbia even if Serbia declines its recognition. It is further expected to see the UNMIK and EULEX missions in the future at Kosovo as well without a clear intention of when and if Kosovo will gain its full UN membership and sovereignty after all. "The authorities implementing the legislations should also have clear and compatible mandates."[55] In line with this the recent trade war between Kosovo and Serbia is disrespecting not just CEFTA standards but is against the wider EU expectations too.

6.2. Competition and the rule of law in Kosovo

In the past 20 years of post-conflict development Kosovo has made steps towards the market economy and competition in particular. One of the biggest obstacles to the development of the economy is corruption and the control of the economic activities by political elites. "Abuse of a dominant position by one or more enterprises on the corresponding market is prohibited…"[56] Although well regulated the very harsh business environment in Kosovo has resulted in a fact that multinational companies are not investing much here. The recent formation of Serbian companies might not enhance competition much but certainly the administrative obstacles their formation has faced are not encouraging, and the whole process is still not over yet. "Should it not be possible to reach a common settlement within 6 months, both parties agree to submit these claims to international arbitration."[57] The agreements themselves might not need to be arbitrated but some certain procedures and obstacles could be clarified more through arbitration. It is very important to outline that such agreements like BA and WA in the framework of conflict resolution should not be challenged in their basic form, also if parties can't agree about the actual meaning of the agreement it has very little to do with arbitration on the end. Therefore it is necessary for not just the government but to the people of Kosovo to understand that such agreements have been done in their

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54 Khazanov, A. M., *Ethnic and National Conflicts in the Age of Globalization,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 162 - 167

55 Marjosola, H., *Regulate Thy Neighbour: Competition and Conflict in the Cross-border Regulatory Space for OTC Derivatives,* EUI Working Paper, Law 2016/01, 2016, pp. 1 - 23

56 Art. 11 of the Law on Protection of Competition, Official Gazette of the Republic of Kosovo, Law No. 03/L-229, 07 October 2010

57 Office for Kosovo and Metohija., *Arrangements regarding energy,* [http://www.kim.gov.rs/eng/p04.php] Accessed 21 March 2021

best interest, and they should fully live up to use the opportunities arising from them. "Surely, liberal democracy per se is not a solution for ethnic and national problems."[58] Ethnic and national problems could be overcome and there could be very nice examples for such, as one is the very close cooperation of Albanian government with Serbia on the formation of the Mini Schengen, where Kosovo will also belong one day according to the WA as least. The Mini Schengen agreement is meant to have the 6 Western Balkan non EU member countries as members and by introducing the free movement of persons have one day possibly the freedoms such as the ones present in the EU, including competition after all.

7. CONCLUSION

Although competition is an excellent tool for development and in particular regarding societies with a post-conflict background it is hard to always guarantee and achieve it. In the framework of a post-conflict development there are multiple sources which could influence economic activities. As we have seen it on the case of Serbia and Kosovo, these two countries are surrounded with various influences which are trying to help them but also secure own interests. The crossroads of the Balkans are tremendously influencing countries like Serbia and Kosovo equally and mutually but they are also influenced by USA and EU. On the other side Serbia also have a considerable influence stemming from Russia and China. This global competition of power is ultimately related to the fact of sharing the markets for both the supply of resources and goods placement on markets. All the powers are aiming at gaining a higher level of support of local political elites and citizen altogether. With both The Brussels Agreement and The Washington Agreement there have been a wide array of changes agreed which are waiting for their full implementation. Regarding competition it is very important to outline the future establishment of various enterprises regarding telecommunications, energy, water and economic development in post-conflict Kosovo. Even with the hesitation of the Kosovo government to fully apply The Brussels Agreement it was recently strengthened by The Washington agreement where disagreements have been solved and a broader economic cooperation has been agreed. Regarding competition we can see that some areas have been de-monopolized and also regulated for the first time which gave a complex situation where conflicts are solved in a nationally acceptable way. Competition locally has been achieved to a certain level and on a wider global level we can predict that it will continue offering similar outcomes in other post-conflict societies. Limiting the local economies and binding them to

[58] Khazanov, A. M., *Ethnic and National Conflicts in the Age of Globalization,* in: Proceedings of a Russian-American Workshop, Conflict and Reconstruction in Multiethnic Societies, The National Academies Press, Washington, 2003, pp. 162 - 167

certain powers is not just additionally polarizing the world but also undermining the efforts to achieve democracy, development and full competition ultimately.

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Professional paper

INTERACTION BETWEEN CONSUMER LAW AND COMPETITION LAW IN PANDEMIC TIMES[1]

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ABSTRACT

If in the case of consumer law, as protected persons are the consumers, then in the case of competition law, the protected entities are the competitors.

A combination of actions in competition law presupposes that the same commercial offer satisfies several individual interests of consumers. In the strictest sense, such a combination implies the same legal fact, simultaneously opening up more possibilities for the consumer to choose due to loyal offers from a professional, if he is monopolistic or dominant in the market. More broadly, it can also be accepted that offers can be combined from several competing professionals relating to the same product or service and concerning the same individual interest of a consumer.

The possible complementary effects of common law, which would justify the non-limitation of a specific piece of legislation, can never lead to a new monopoly. In some cases this will make competition law more effective and, in other cases, provide marginal and non-exclusive protection to consumers who do not have a direct right guaranteed by competition law.

The purpose of this article is to demonstrate the interdependent relationship between competition law and consumer law, from the perspective that both have the same common goal, namely to limit abuses by professionals in their economic activity, especially during pandemic times.

Keywords*: competition, consumer, Covid-19, unfair competition, liability, damage, protection.*

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1. INTRODUCTION

Competition and consumer protection represent the quintessence of the market economy, on the one hand in the case of competition the protected entities are the consumers, and on the other hand in the case of the consumer right, as protected we have the consumers. Respectively, competition means the consumer's choice of several alternatives of products or services offered.

Where there is competition, a more efficient allocation of resources is achieved, as the producer constantly monitors the relationship between them and costs, and at a competitive quality and price for the consumer in a market based on fair competition. However, the producer does not influence the market alone, but only through competitive relations with other producers, which always lead to a decrease in prices and, implicitly, to market diversification by stimulating purchases.[2]

The concept of "competition" is a set of relationships between professionals resulting from their desire to offer the consumer the best possible price, thus ensuring a better place in the market. It should be noted that the phenomenon of competition is naturally linked to the consumer's freedom of choice, competition being the most important regulatory force on the market economy. Inseparably, any product and/or service has as final destination the consumer, who can be any natural person who procures, benefits from the product and/or services for purposes not related to the entrepreneurial activity.[3] The given notion of the national consumer was perfectly transposed by the Republic of Moldova from the European Union Directives.[4]

Competition is an inherent feature of a market economy, based on free initiative generated by private property. Moreover, it can be said that the mechanism of any true market economy is a competitive one. A competitive and healthy market leads to increased productivity and competitiveness, lower prices and costs, and innovation. In the Republic of Moldova, only a few years ago the foundations of a systemic competitive environment began to be laid. Due to the decades in which there was a total lack of a market economy, the process of adapting and learning

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2 Fugaru C. Anti-competitive practices and antitrust policies in the European Union. In: Journal of the Faculty of Economics and Business Administration West University of Timisoara, 2006, p.110

3 art.1 of the Law on consumer protection no.105-XV from 13.03.2003 of the Republic of Moldova, Official Gazette no.126-131/507/2003

4 Council Directive 2011/83 / EU on consumer rights, amending Council Directive 93/13 / EEC and Directive 1999/44 / EC of the European Parliament and of the Council and repealing Directive 85/577 / EEC of the Council and Directive 97/7 / EC of the European Parliament [2011] OJ L 304/2011

new values was difficult and too long. The Constitution of the Republic of Moldova provides in art. 9 para. (3) that the market, free economic initiative, and fair competition are the basic factors of the economy. Moreover, according to art. 126, the Republic of Moldova economy is a market economy, socially-oriented, based on private and public property, engaged in free competition, and the state must ensure fair competition[5].

In the context of the obligations assumed by the Republic of Moldova under the Partnership and Cooperation Agreement between the Republic of Moldova and the European Union[6], as well as the Moldova-EU Action Plan[7] it was necessary to develop a legislative framework to promote economic development by improving the investment climate. ensuring non-discriminatory conditions for conducting business. This implies, by implication, an adequate legislative framework in a liberalized economy and a fair competitive environment. The adjustment of the competition law of the Republic of Moldova took place over several years, with external assistance. It seems that Moldova has made progress compared to other countries in the region. However, further efforts are needed to complete the reforms that are already underway. The culmination of the efforts of the specialists from the Republic of Moldova in the field of competition law, of the competition authority, and the support of foreign experts was represented by the elaboration and adoption by the Parliament of the Competition Law no. 183 from 2012.[8]

Although some consider that the very detailed provisions of the law should be reflected in the secondary legislation, such as regulations and internal guidelines, this normative act is an innovative one for the Republic of Moldova and faithfully transposes the provisions of art. 101-106 of the TFEU[9] and other secondary European provisions, a fact confirmed by the Joint Document of the European Commission on the progress of the Republic of Moldova in implementing the European Neighborhood Policy of 2013[10] which states that competition law "is well aligned with EU rules". We must recognize that Competition Law no. 183/2012 is one of the most progressive pieces of legislation because it introduces new atti-

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5 Constitution of the Republic of Moldova. Official Gazette of the Republic of Moldova, No.1/1994

6 Partnership and Cooperation Agreement between the European Communities and the Republic of Moldova, signed in Brussels on November 28, 1994, ratified by the Decision of the Parliament of the Republic of Moldova, No. 627 [1995] OJ L 181, pp. 0003 - 0048.

7 Republic of Moldova - European Union Action Plan for the period 2005-2007, International Treaties No.38/2006

8 Competition law of the Republic of Moldova no. 183/2012. Official Gazette No.193-197/2012

9 Article 10 (1) TEU (Lisabon)

10 European Commission Joint Staff Working Document Implementation of the European Neighbourhood Policy in Republic of Moldova: Progress in 2012 and recommendations for action. SWD, 2013, No. 80 final, 20 p.

tudes, procedures, and mechanisms, which will have to be dealt with by the Competition Council. Moreover, the recent conclusion of the Association Agreement,[11] which incorporates provisions of the deep and comprehensive free trade area with the European Union, marked an important point in the trajectory of European integration of the Republic of Moldova. This agreement will provide an important basis for mutual trust in trade relations between the EU and the Republic of Moldova, along with specific benefits for Moldovan businesses and consumers in the market economy. But it also imposes, at the same time, scientific research on the content of the obligations assumed by the Republic of Moldova, obligations reflected in the Competition Law no. 183, adopted in 2012. To this end, legal professionals, the competition authority, as well as businesses and consumers, must be familiar with European Union law and practice on prohibited activities, such as horizontal anti-competitive agreements, existing leniency policies. , etc.

The COVID-19 pandemic has caught every person medically and economically unprepared, and the governments of each country have found it difficult to manage the medical equipment crisis, the economic crisis that has stopped production, circulation, etc. Respectively, to avoid making the same mistakes, people have to learn from the mistakes made at the beginning of the pandemic. One of the weaknesses in which some countries proved to be completely unprepared was the fair competition and consumer protection sector. The simple examples from which such conclusions can be drawn are the price of masks and hand sanitizer at the beginning of the pandemic that was produced in small batches but began to be requested en masse by all countries, being essential in these difficult times. The law of the market acted according to the situation, the increase in demand induced the increase in the price of the product and it is not necessarily an obvious negative law. Thus, due to the unpreparedness of these state agencies, consumers themselves proved able to buy a box of disposable masks of 50 pieces at a price 600% above the price that this box had before the pandemic. Some examples can be found in the following countries: France a box of 50 pieces could be bought for 3 euros before the pandemic and 16 euros during the pandemic, Italy the same box that cost 2.5 euros before the pandemic could be purchased by 12 euros a few months after the beginning of the pandemic.[12]

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[11] Association Agreement between the Republic of Moldova and the European Union, No. 112/2014. Official Gazette, No.185-199/2014

[12] Sagan, A., Mask makers raise prices as material, labour costs rise amid pandemic, June 2020 [https://www.mromagazine.com/2020/06/15/mask-makers-raise-prices-as-material-labour-costs-rise-amid-pandemic/], Accessed 5 April 2021

From our point of view, an important role in society should have the state, which must act promptly and effectively enforce competition law concerning consumer protection, in the context of the emergency that has been established in all countries, and it is necessary to establish a close link between consumer demand and supply offered by professionals in conditions of a pandemic product crisis.

2. THE EUROPEAN SCIENTIFIC APPROACH TO THE RELATIONSHIP BETWEEN CONSUMER PROTECTION LAW AND COMPETITION LAW.

In a liberal vision of the market economy that flourished in the nineteenth century and is now widely taken up by the European authorities, competition is to the benefit of consumers[13]. Competition policy aims to enforce rules to ensure that companies compete fairly with each other. It helps to stimulate entrepreneurship, innovation and productivity: it makes it possible to broaden the offer for consumers by improving the quality of products and services while ensuring a reduction in prices, and in particular:[14]

a) Low prices for all: The easiest way to gain market share is to offer a better price. In a competitive market, prices are pulled down. This is an advantage for consumers, but not only: companies are encouraged to produce if more people can afford to buy their products, which stimulates the whole economy.

b) Better quality: Competition also provides an incentive for companies to improve the quality of the products and services they sell to attract more customers and increase their market share. Quality can mean that: products that last longer and work better; more efficient after-sales or breakdown services; a better welcome from the customer.

c) More choice: In a competitive market, companies seek to distinguish their products from others. For the consumer, this means more choice and the possibility of opting for the value for money that best suits him.

d) Innovation**:** To offer this choice to consumers, and to produce better, companies must be innovative – from product design to production techniques to the services offered.

e) Stronger in the face of global competition: Competition within the EU helps European companies to be more competitive in the rest of the world and to withstand international competition.

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13 Paisant, G., Droit de la consommation, ed. Themis droit, PUF, Paris, 2019

14 Commission European, act for the Consumers. Why is competition policy important for consumers? [https://ec.europa.eu/competition-policy/consumers/why-competition-policy-important-consumers_fr], Accessed 20 June 2021

There is no doubt that these goods are recognized as competition only to the extent that it is regulated to be exercised in a fair and untrue manner, in particular employing company agreements. In its circumstances, as was noted before the appearance of the first laws specially devoted to the protection of consumers at the beginning of the 1970s, this protection is a natural matter for competition law.[15]

Consumer law, concerning competition law, then presents itself as a right called upon to regulate the function of consumption[16] or, from a more legal point of view, as the set of rules applicable to relations between consumers. and professionals[17]. However, this view cannot be accepted, since it presupposes, among other things, the apprehension of almost all common law of contracts and therefore a disproportionate enlargement of consumer law.[18]

In general, it has been shown that the rules which aim to develop competition must be regarded as serving the interests of consumers, in that they provide them in principle with the lowest price and the best value for money[19]. More specifically, it has emerged that certain provisions concern both competition law and consumer law. These are the rules applicable to fraud and counterfeiting, the regulation of various forms of sale such as the prohibition of the so-called "snowball" sale, the rules on pricing, the obligation to inform on prices and conditions of sale, etc.[20]

As mentioned above, the final beneficiaries of competition are consumers of goods and/or services, which require special protection by establishing protective regulations and effective mechanisms that would balance the interests of both parties: on the one hand consumers, as vulnerable parties, and on the other hand professionals, strong parties to compete loyally in the market to create a competitive offer to end consumers. From this perspective, it is interesting to establish from a scientific point of view, the general interest of competition law as the lowest common denominator of the particular interests of consumers.

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15 Hémard, J., Droit de la concurrence et de la protection de certains consommateurs Gaz. Pal. 1971, 2, doctr. 575

16 Cas, G., et al., Traité de droit de la consommation, PUF, 1986, p.78.

17 Calais-Auloy, J., et al., Droit de la consommation, 5e éd., Dalloz, 2000, p.145.

18 Py, P., Droit du tourisme, Dalloz 15 Novembre 1996, p.216

19 Hémard, J., Droit de la concurrence et protection des consommateurs, Gaz. Pal. 1971, 2, doctr. 575, p.19

20 Oppetit, B., L'expérience française de codification en matière commerciale, D. 1990, chr. 6, note 21, p.88

According to the French author, J.J. Rousseau's,[21] general interest can be treated as a paradox. Such a notion poses, moreover, a problem of definition, because the terms of interest and generally seem to be incompatible, which continue to lead to the delimitation of competition law, which promotes a general object and the consumer's right covering a personal, individual purpose, unrelated to professional activity. Respectively, the interest of an individual means what is profitable, advantageous to him. Each one subjectively defines who is interested in him, depending on his tastes, desires, the social and financial situation. There are as many interests as there are individuals. The interstellar is therefore presumed to belong to the sphere of the subjective, the particular.[22] However, there is a possibility to give a meaning to the notion of general interest, by researching the realization of individual interest from the perspective of the ultimate goal of competition law, to offer products and services at a price, competitive quality on the market, whose final beneficiaries are individuals, individuals.

Therefore, these two parallels of the general interest and the individual interest find a point of consensus since several individual interests of different individuals coincide and respectively create a demand for common interest by guts, style, color for the subsequent generation of offers of interest. general competition from the market.

3. LIABILITY FOR DAMAGE CAUSED IN THE EVENT OF UNFAIR COMPETITION

According to art.77 of the Competition Law of the Republic of Moldova, "the commission of acts of unfair competition prohibited in art.15-19 of this law is sanctioned by the Competition Council with a fine of up to 0.5% of the total turnover achieved by the undertaking concerned in the year preceding the sanction. The damage caused as a result of the actions found as unfair competition is to be repaired, following the provisions of the Civil Code, by the company that caused it".[23]

According to the respective norm, it results that the Moldovan legislator offers the possibility to the person prejudiced by the actions of unfair competition of a professional to address to the Competition Council to prohibit and sanction the author of the unfair competition act, in the perspective of addressing in court to

[21] Rousseau, J.J., Les Integrales de Philo, Du contrat social, Livres I a IV, notes et commentaires de J.F. Braunstein, Nathan, Paris, 2002, p.177

[22] op.cit., p.177

[23] Competition law of the Republic of Moldova no. 183/2012. Official Gazette No.193-197/2012

repair the damage following the provisions of the Code of Civil Procedure and the Civil Code, the action being called "action in unfair competition".

Even if, as mentioned above, the final beneficiary of competition is the consumer as an individual, it must be borne in mind that a precondition for action in unfair competition is that the act giving rise to liability be an act of competition, an act committed in a competition report. This means that the parties must be traders, address the same customers or their field of activity be identical or similar. In this sense, according to art.80 paragraph (5) of the Competition Law of the Republic of Moldova "The right to the action in unfair competition belongs to natural and legal persons practicing entrepreneurial activity, provided that there is a relationship between them and the perpetrator competition, ie to exercise an identical or similar kind of activity ". The existence of this rule is restrictive, offering limited consumer protection in the case of counterfeit products, which can cause injury due to unfair competition through dishonest actions, being deprived of the quality and safety of products, including compensation for damage caused. According to European judicial practice, anyone can claim compensation for the damage suffered, where there is a causal relationship between the damage suffered and an agreement or practice prohibited under EU competition rules[24].

The Moldovan legislator establishes the general rule of liability for unfair competition actions stipulating that: the court will oblige the person committing an unfair competition action to cease the action or to remove the consequences, to return the confidential documents illegally appropriated from their rightful holder and, after case, to pay compensation for the damages caused, according to the legislation in force[25].

In a narrow sense, the injury consists in the removal or loss of customers and, consequently, in the decrease of sales and, implicitly, of the turnover[26], although in a broad sense the damage caused by an unfair competitive act may directly affect the economic interests of consumers. cases the burden of proof is on the plaintiff, and the assessment and reparation are determined at the discretion of the trial court[27].

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[24] Case C-360/09 Pfleiderer, Rep., [2011], p.I-5161, par. 28; Case C-199/11 European Community / Otis NV and others, [2012], par. 43

[25] Competition law of the Republic of Moldova no. 183/2012. Official Gazette No.193-197/2012

[26] Castraveţ, D., Damage - an essential condition of tortious civil liability in matters of unfair competition, "National Law Review", 2016, no.11, p.58

[27] Plotnic, O., et al., Conceptions actuelles en matière des droits intellectuels en cumul avec la concurrence déloyale, Droit, humanité et environnement, Mélanges en l'honneur de Stéphane Doumbé-Billé, 1re édition Larcier (France), 2020, p.249-262

The exact calculation of the damage caused by the illicit deeds is, together with the demonstration of the causal link between it and the tort deed, one of the most difficult steps in the cases concerning the compensation of the victims of the anticompetitive deeds. Accurate calculation of damages is, of course, a common problem in any case of tortious civil liability. The lack of legal criteria for assessing the damage further complicates the activity of the competent court leaving room for inaccuracy and ambiguity.[28]

At the European Union level, unfair competition is governed by 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.[29] The directive defines commercial practices prohibited in the European Union (EU). The Directive also protects the economic interests of consumers before, during, and after a commercial transaction. Unfair commercial practices covered by Directive 2005/29 / EC are practices which: do not comply with the requirements of professional diligence and are likely to significantly distort the economic behavior of the average consumer.

Compensation in competition matters is also the subject 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 in the event of infringements of the competition laws of the Member States. and the European Union.[30]

The imperative nature of Directive 2014/104 / EU is based on its basic purpose that, whether a natural person, including consumers and businesses, or a public authority - any person has the right to bring an action for damages before national courts. This was caused by an infringement of the competition rules. And according to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for the damage suffered if there is a causal relationship between that damage and an infringement of competition law.

The European Commission issued in 2013, after a long period of study and analysis, a guideline regarding the assessment by the parties to an action in claims for damages caused by anti-competitive acts and by the competent courts, of the

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28 op.cit., p.250

29 Council Directive 2005/29 / EC on unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450 / EEC, Directive 97/7 / EC, 98/27 / EC and 2002/65 / EC [2005] OJ L 149/22

30 Council Directive 2014/104 / EU on certain rules governing actions for damages under national law in the event of infringements of the competition laws of the Member States and of the European Union [2014] OJ JO L 349

amount of these damages. These are the "Commission Communication on the quantification of damages in actions for damages alleging infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union" and the "Practical Guide to the quantification of damages in actions for damages based on infringements of Articles 101 and 102 TFEU".[31]

The role of the practical guide is to provide information that can be used in national legal practices and rules, not to replace them. Although it does not have binding force, it is a very useful working tool, of 70 pages full of concrete aspects and even examples of calculating such damages, a very good synthesis of the literature and practical cases so far pending before the courts in Europe and the USA. The quantification of injury in competition law cases is significantly limited, by its very nature, in terms of the degree of certainty and accuracy that can be expected.[32]

The application of interest is an essential component in awarding compensation. As the Court has pointed out, full compensation for the damage suffered must include reparation for the adverse effects which have elapsed in the time since the damage caused by the infringement. These effects are monetary depreciation and the fact that the injured party did not have the opportunity to dispose of the capital.[33]

4. THE POSITIVE EFFECTS OF THE COVID-19 PANDEMIC ON CONSUMERS IN THE COMPETITIVE FIELD.

The COVID-19 pandemic has fundamentally changed the world as we know it. People live differently, buy differently, and in many ways think differently. Supply chains have been put to the test. Consumers around the world see products and brands from a new perspective.

The virus is transforming the consumer goods industry in real-time, rapidly accelerating long-term underlying trends in just a matter of weeks. Our research indicates that the new habits that are forming now will last beyond this crisis,

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31 Article 101 and 102 (12) TFEU (Lisbon) related to the Practical guide on quantifying damages in actions for damages based on the violation

32 Castraveț, D., Prejudice - essential condition of tortious civil liability in matters of unfair competition, Journal "Revista Național de Drept", 2016, no.11, p.58

33 Case C-271/91, Marshall Rec., [1993], par.31; Case C-295/04 - C-298/04, Manfredi Rec., [2006], par. 97

permanently changing what we value, how and where we shop, and how we live and work.[34]

Even as this crisis continues to evolve, by exploring the changes that are happening now, we can take a look at what consumer goods companies should be doing today to prepare for the next day.

It must be recognized that COVID-19 is a health and economic crisis that has a lasting impact on the attitudes, behaviors, and purchasing habits of consumers. Consumer Staples companies can adapt to these changes by taking steps to respond, redefine and renew themselves to be even better positioned for the future.

One of the positive points linked to this epidemic is that brands are now even more determined to interest their customers. Each uses its charms to gain the favor of customers and keep it. This involves, for example, various purchase offers with free delivery wherever you are. Other tips such as the flawless availability of customer service or the enormous savings achievable on a purchase are used by companies. Just by comparing the offers, you realize the number of possibilities available to allow you to save. Obviously, production has also increased in several food areas.

The positive impact of the current health crisis is such that the time saved in transactions is considerably reduced since everything takes place on the internet. Tips and tricks are indicated by many brands to allow each other to spend this time in the best way. Some products have seen a significant reduction in their kilo price so that everyone can have access to them and go through confinement in optimal conditions.[35]

The other positive point is that promotions and discounts abound on the internet. Since traveling to a physical establishment is now difficult and risky, companies have adapted. Those who have an online platform to allow their customers to make purchases online are the ones with the most advantages. They offer promotions that are more frequent, more interesting, and that extend over longer periods.

Discounts on all products can be observed, as well as the multiplicity of tempting offers. Coupon codes are multiplying to allow you to shop for food and other products even with a limited budget. The promo code, therefore, allows you to

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[34] Coronavirus consumer behavior research [https://www.accenture.com/ca-fr/insights/consumer-goods-services/coronavirus-consumer-behavior-research], Accessed 20.06.2021

[35] Comment les modes de consumation ont evolues depuis la crise sanitaire du Covid-19 [https://www.latribune.fr/supplement/comment-les-modes-de-consommation-ont-evolues-depuis-la-crise-sanitaire-covid-19-848256.html], Accessed 20.06.2021

make significant savings. Sometimes, these good deals can even be combined for the greatest pleasure of consumers. So now is the perfect time to go to all your favorite brand sites to take advantage of these benefits with a promo code.[36]

Respectively, the trends of competition law have adapted to the requirements of consumers during the pandemic due to the possibility of using commercial practices that have contributed significantly to the development of the digital market, by offering the consumer to choose remotely and optimize time, although demand has decreased significantly concerning supply, especially in the sectors of public catering, clothing, etc.

5. CONCLUSION

In conclusion, we can mention that the right of consumers to be protected in terms of unfair competition requires the extension of current legislation to consumer economic protection to include consumers as subjects with the right to claim for illegal competition. This objective requires extending consumer access to justice to recover damages: legislation must strike a balance between the general interest of professionals, as competitors, and the individual interest of consumers, as individuals.

The Covid-19 pandemic took the entire planet by surprise in 2020. Almost all sectors of the economy were blocked, they aimed to improve the public health situation. From this perspective, we want to conclude that the general interest of a professional must be oriented to the individual interest of each consumer regardless of product group or type of service, regardless of the period, including overcoming the COVID 19 Pandemic which in 2021has already become normality for the market economy.

Respectively, an essential role to balance the professional's goal of making a profit and the consumer's interest in obtaining a competitive and quality product belongs to the state by eliminating illegal competition, namely by coherent regulation of the competitive environment and consumer rights. The economic growth of a state is dependent on the well-being of society as a whole and of the consumer individually. The Moldovan legislature needs to review competition law concerning European judicial practice and to provide a wider field of redress for damage caused as a result of an act of unfair competition, namely by giving anyone the right to claim damages suffered.

[36] op.cit.

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