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and Comparative Competition
Law Issues

Possibilities and Limits of Competition Law: Global Trends, Regional Perspective

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FOREWORD

International Jean Monnet Centre of Excellence Conference of EU and Comparative Competition Law Issues Conference "Possibilities and Limits of Competition Law: Global Trends, Regional Perspective "

December 2024

With great pride and enthusiasm, I introduce the proceedings of this esteemed conference on South and East European and EU Competition Law. As one of the cornerstones of the European Union's legal framework, competition law plays a pivotal role in fostering market efficiency, ensuring consumer protection, and promoting innovation across industries. The complexities and nuances of this ever-evolving field demand rigorous analysis, informed debate, and thoughtful scholarship—precisely the qualities this conference has exemplified.

The proceedings collected here represent a rich tapestry of perspectives from leading academics, practitioners, policymakers, and industry stakeholders from South and East Europe (and beyond). Together, they delve into the pressing issues shaping EU Competition Law's current and future landscape, from the challenges posed by digital markets and artificial intelligence to the intersections of sustainability and antitrust policy. These papers reflect the breadth of expertise within the field and underscore the critical importance of collaboration in addressing the multifaceted legal and economic questions that lie ahead.

At a time when rapid technological advancements and global market integration continue to test the adaptability of competition law, this conference has provided a vital forum for discussing innovative approaches, sharing insights, and charting the path forward. I hope that the ideas and solutions in these proceedings will inspire further research, inform policy development, and contribute to advancing a fair and competitive internal market for all.

I extend my deepest gratitude to the contributors and participants who made this conference a resounding success. May these proceedings serve as both a valuable resource and a testament to the vibrant intellectual community dedicated to advancing the principles and practice of EU Competition Law.

Sincerely

Dubravka Akšamović

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Original scientific paper

PUBLIC AND PRIVATE ENFORCEMENT OF BID-RIGGING CARTELS IN THE EU: DEBARMENT AND COMPENSATION CHALLENGES

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Abstract

Bid-rigging, a form of cartel agreement where competitors collude to manipulate the outcome of tenders, poses significant threats to fair competition and public finances. Despite intensified global and EU-level efforts to combat bid rigging, public procurement remains vulnerable to such practices, underscoring the need for ongoing research and regulatory refinement to address collusion effectively. This paper examines both public and private enforcement mechanisms targeting bid-rigging cartels in the EU, with an emphasis on sanctions - specifically the challenges of debarment mechanisms and compensation for damages arising from these practices. The paper provides an overview of bid-rigging strategies, an analysis of debarment mechanisms (specifically bidder exclusion and director disqualification), and addresses selected private enforcement issues, exploring both the potential victims of bid rigging and the barriers to obtaining compensation. Through this analysis, the paper offers insights into strengthening enforcement measures to promote fair competition and protect public resources.

Key words: *bid rigging, collusion in public procurement, debarment, bidder exclusion, director disqualification, antitrust damages, victims of bid rigging, barriers in pursuing compensation*

1. INTRODUCTION

Bid rigging (or collusive tendering) is an illegal business practice. It is a specific type of cartel agreement in which undertakings that are supposed to compete in a bidding process instead collude to manipulate its outcome. Bid-rigging is present in both private and public tenders. However, certain aspects of the public procurement[1] process - such as the lucrative nature of government projects and the predictability and transparency of regulatory requirements - render it particularly vulnerable to anticompetitive practices.[2] Its impact on competition and public funds is significant.[3] According to data published by the OECD, governments spend approximately 12% of their GDP on public procurement.[4] Eliminating bid rigging could, by some estimates, reduce procurement prices by 20% to 60%[5] which would translate into potential savings amounting to millions or even billions of euros.[6]

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1 Public procurement is of key importance for a Member State's economic development. OECD, *Collusion and Corruption in Public Procurement: Key Findings, Summary and Notes*, OECD Roundtables on Competition Policy Papers, no. 108 (Paris: OECD Publishing, 2010), 10, https://doi.org/10.1787/ef957f70-en.

2 The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly demonstrated in economic literature. See: Albert Sanchez-Graells, "Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement," in *Integrity and Efficiency in Sustainable Public Contracts*, ed. G. Racca and C. Yukins (Brussels: Bruylant, 2014), 3; Public procurement is especially prone to bid-rigging schemes because it makes communication among rivals easier and increases market transparency. Additionally, public procurement often involves large, high-value projects (in sectors such as energy, construction, infrastructure, healthcare and pharmaceuticals, waste management, and environmental services) with a limited number of competitors, while the sheer quantity of contracts creates monitoring difficulties; all of these factors encourage collusive behaviors. OECD, *Collusion and Corruption in Public Procurement,* 10.

3 Collusion damages competition by reducing quality of products and services, waste public funds, impacting infrastructure and services, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. OECD, *Collusion and Corruption in Public Procurement.*10.

4 According to the OECD, public procurement spending as a share of GDP averages around 12% across OECD countries, although recent figures suggest a slightly higher percentage in certain EU nations, particularly due to pandemic recovery funds. Specifically, OECD-EU countries showed public procurement spending increasing from 13.7% of GDP in 2019 to 14.8% by 2021, largely boosted by the EU's Recovery and Resilience Facility aimed at economic recovery and resilience enhancement. OECD, *Government at a Glance 2023* (Paris: OECD Publishing, 2023), 120, https://doi.org/10.1787/3d5c5d31-en.

5 OECD, *Competition Policy in Eastern Europe and Central Asia: Focus on Bid Rigging in Public Procurement*, OECD Newsletter no. 17 (July 2021), 8..; European Commission, *Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Ground*, 2021/C 91/01, C/2021/1631, OJ C 91 (March 18, 2021): 1–28.. point 1.1.; OECD, *Director Disqualification and Bidder Exclusion in Competition Enforcement*, OECD Roundtables on Competition Policy Papers, no. 291 (Paris: OECD Publishing, 2022), 5–6, https://doi.org/10.1787/fe39ea1a-en.

6 European Commission, *Notice on Tools to Fight Collusion in Public Procurement, point. 1.1.*

To minimize damages arising from bid rigging, authorities have intensified their focus on fighting this practice. In the last ten years leading global regulators such as the OECD[7], the World Bank[8], and the EU[9] and governments around the world have delivered a large number of policy and legislative instruments in order to raise awareness of this illegal practice, ease detection, and provide adequate sanctions. Beyond these legislative measures, combating bid rigging has become a central focus of competition authorities. Their efforts in detecting and sanctioning bid rigging are reflected in enforcement statistics, showing a rise in the number of decisions against bid rigging.[10]

In the EU specifically, both public and private enforcement rules have been established to detect, deter, and remedy bid rigging. At the center of the public enforcement mechanism are the principles of integrity, competitiveness, and transparency in public procurement. Additionally, competition law plays a pivotal role in public enforcement, providing a comprehensive framework for prosecuting and

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7 OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009), https://legalinstruments.oecd.org/public/doc/284/284.en.pdf; OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (2012), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396; OECD, *Fighting Bid Rigging in Public Procurement: Report on Implementing the OECD Recommendation* (2016); OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, OECD/LEGAL/0396 (2023), https://legalinstruments.oecd.org/public/doc/284/284.en.pdf; OECD, "Managing Risks in the Public Procurement of Goods, Services and Infrastructure," *OECD Public Governance Policy Papers*, no. 33 (2023), OECD Publishing, Paris, https://doi.org/10.1787/45667d2f-en; OECD, *Integrating Responsible Business Conduct in Public Procurement* (Paris: OECD Publishing, 2020), https://doi.org/10.1787/02682b01-en; OECD, "Professionalising the Public Procurement Workforce: A Review of Current Initiatives and Challenges," *OECD Public Governance Policy Papers*, no. 26 (2023), OECD Publishing, Paris, https://doi.org/10.1787/e2eda150-en.

8 The World Bank Group, *Fraud and Corruption Awareness Handbook*, https://documents1.worldbank.org/curated/en/100851468321288111/pdf/575040WP0Box351Corruption1Awareness.pdf.

9 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, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 65–242*;* European Commission, *Notice on Tools to Fight Collusion in Public Procurement;* European Commission, *Communication from the Commission: Guidance on the Participation of Third-Country Bidders and Goods in the EU Procurement Market*, 2019/C 271/02*;* OLAF (European Anti-Fraud Office), *Fraud in Public Procurement - A Collection of Warning Signs and Best Practices*, manual (2017); OLAF (European Anti-Fraud Office), *Identifying and Reducing Corruption in Public Procurement in the EU*, study (2013).

10 According to the analysis provided in scholarly research, between year 2015 and 2021, competition agencies in 33 European jurisdictions witnessed a 7% increase in decisions against cartels, reaching 184 cases (OECD, 2023). In 2021 alone, 39 of these decisions involved bid rigging. See: Carlotta Carbone, Francesco Calderoni, and Maria Jofre, "Bid-Rigging in Public Procurement: Cartel Strategies and Bidding Patterns," *Crime, Law and Social Change* 82 (2024): 249–281; According to Global antitrust enforcement report, for the third year running, bid rigging was the most commonly enforced type of cartel conduct in 2023. In year 2023, 42% of all cartel decisions related to bid-rigging cartels. A&O Sherman, *Global Antitrust Enforcement Report*, available at: https://www.aoshearman.com/en/insights/global-antitrust-enforcement-report.

sanctioning anti-competitive conduct. Meanwhile, the private enforcement mechanism focuses on redress for victims who have been injured by anti-competitive practices in public procurement procedures.

Bid rigging is regulated *ex-ante* and *ex-post*. *Ex-ante* regulation, grounded in public procurement rules[11], is aimed at preventing bid rigging before it occurs, by introducing requirements of transparency, competition, and equal treatment, all of which make collusion between bidders much more difficult.[12] When collusion is detected during the tendering procedure, a public authority has the possibility of excluding wrongdoers from tender procedures for a certain period of time.[13] This debarment serves as a punishment and a deterrent, as companies are discouraged from engaging in collusive behavior because, as a consequence, they may lose access to high-value public contracts. Many times, however, public authorities fail to recognize the collusion between bidders and tenders were rigged. Where such a situation occurs, the competition rules trigger national or EU-wide *ex-post* enforcement mechanism, as bid rigging is an agreement in violation of Article 101 TFEU. When Article 101 TFEU has been breached, the relevant competition authority (the EU Commission or a competent NCA) may impose severe fines. In addition, national legislation may provide for possible criminal sanctions.[14] As we can see, sanctions for collusion in public procurement vary widely, ranging from fines and imprisonment to more specialized penalties such as debarment from future public procurement procedures.[15] Further, injured parties who suffered harm because tenders are rigged can also seek redress through civil liability, by claiming antitrust damages before national courts.

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11 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, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 243–374.

12 See e.g. recitals 1 and 45 of the Directive 2014/24/EU.

13 Article 57 (4) (d) Directive 2014/24/EU. For more on debarment see: Erling Hjelmeng and Tina Søreide, "Debarment in Public Procurement: Rationales and Realization," in *Integrity and Efficiency in Sustainable Public Contracts*, ed. G. M. Racca and C. Yukins (Brussels: Bruylant, 2014), University of Oslo Faculty of Law Research Paper No. 2014-32, https://ssrn.com/abstract=2462868. For a critical economic analysis see: Emmanuelle Auriol and Tina Søreide, "An Economic Analysis of Debarment," *International Review of Law and Economics* 50 (2017): 36–49.

14 For a short multijurisdictional overview on criminal sanctions see: OECD, *Criminalisation of Cartels and Bid Rigging Conspiracies – Summaries of Contributions*, 9 June 2020, DAF/COMP/WP3/WD(2020)22, available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)22/en/pdf#:~:text=Bid%20rigging%20can%20be%20sanctioned,authority%20can%20file%20a%20complaint

15 OECD, *Collusion and Corruption in Public Procurement,* 13.

Despite awareness of the consequences that colluding companies face, bid rigging persists worldwide, affecting every country and economy. No nation is immune to this global issue, which adapts to local peculiarities and remains a crucial topic of discussion.

The purpose of this paper is to examine the complexities of public and private enforcement mechanisms related to bid-rigging cartels in the EU, focusing on sanctions for this illegal practice and challenges to achieving effective redress. After this introductory part, which is the first part of the paper, the second part will discuss bid rigging as a specific form of cartel behavior, analyzing the characteristics of bid rigging strategies. The third part of the paper will provide a critical insight into debarment mechanisms, specifically bidder exclusion and director disqualification, as sanctions that can be imposed on undertakings that rigged the bidding process, in addition to fines imposed by competition authorities. The fourth part of the paper will address selected private enforcement issues, with particular attention to identifying potential victims of bid-rigging and exploring the barriers that inhibit public authorities and other parties from pursuing compensation for damages arising from these practices. The fifth part of the paper will conclude.

2. UNDERSTANDING BID-RIGGING CARTELS: KEY CHARACTERISTICS AND COMMON STRATEGIES

According to one of the many definitions[16], bid rigging is a collusive agreement and a serious form of anti-competitive behavior where competing firms illegally conspire to manipulate the outcome of a bidding process, often by deciding in advance which firm will win. This manipulation usually results in higher prices

[16] According to another definition bid rigging belongs to the group of private restriction to competition and is always present when the bidders agree among themselves to offer higher prices or lower quality of goods and services, or to allocate the public procurement among themselves thus preventing, restricting or distorting competition during the awarding process. Sofia Competition Forum, UNCTAD, and CPC, *Guidelines for Fighting Bid Rigging in Public Procurement*, No. 570/2010, 9, https://unctad.org/system/files/non-official-document/ccpb_SCF_Bid-rigging%20Guidelines_en.pdf, 9.; Whish and Bailey describe collusive tendering between actual or potential competitors as: "a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender." Richard Whish and David Bailey, *Competition Law*, 9th ed. (Oxford: Oxford University Press, 2018), 547.; Bid-rigging usually involves competitors collaborating in some way to restrict competition in response to a tender, regardless of whether the tender is issued by a public authority or a private entity. It is universally viewed as one of the most serious cartel-type offences alongside price-fixing, output restrictions and market allocation, and is often a combination of these practices.; See: Fiona Carlin and Joost Haans, "Bid-Rigging Demystified," *In-House Perspective* 2, no. 1 (January 2006): 11–18, 11.; Bid rigging is a collusive agreement among competing firms aimed at artificially distorting a bidding process so that adjudication prices are higher and/or the quality of the product/service supplied is lower.; See: Alberto Heimler, *Cartels in Public Procurement: A Reassessment* (November 20, 2023), 1, https://ssrn.com/abstract=4638354.

or lower quality goods and services, undermining fair competition and impacting public and private procurement.[17]

Most commonly, bid rigging occurs between direct competitors who agree on prices or market share. For that reason, bid rigging is usually classified as a hard-core cartel agreement.[18] However, in practice, bid rigging can also occur between vertically integrated undertakings[19] or in the context of intra-group coordination[20].[21]

Further, although there is no doubt that bid rigging is a type of cartel, there are some differences compared to typical (price-fixing and market-sharing) forms of cartels. First, when it comes to market scope, typical cartels usually affect entire markets or industries, influencing the overall supply, pricing, and availability of goods or services over time (which can make them more difficult to detect as they are spread out), while bid-rigging cartels focus specifically on public procurement, targeting individual bids or tenders rather than broader commercial activities (which can make them easier to detect by examining patterns in specific tenders).[22] Second, typical cartels tend to be unstable, as members have a strong incentive to cheat on agreed prices and quantities, while this is not the case with bid-rigging cartels as collusion occurs in structured, transparent procurement processes, making it more challenging for participants to cheat without detection.[23]

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17 David Bailey and Laura Elizabeth John, eds., *Bellamy & Child: European Union Law of Competition*, 8th ed. (Oxford: Oxford University Press, 2018), 390.

18 Carlin and Haans, "Bid-Rigging Demystified," 11.

19 Which is usually the case in bidding consortia or joint bidding.

20 For instance, when a corporate group owns multiple competing brands and decides that only one will bid on a tender. If multiple brands from the group do bid, each must act independently; any exchange of information, coordination on pricing or terms would amount to unlawful collusion. Carlin and Haans, "Bid-Rigging Demystified," 12.

21 E.g. the French NCA imposed fines totaling €4.3 million on subsidiaries of the Air Liquide Group for anticompetitive practices in the hospital medical gas sector. In that case, the NCA found that two subsidiaries of Air Liquide had engaged in market-sharing and price-fixing agreements between 1994 to 1996 while bidding to become suppliers of medical gases to public hospitals and private healthcare establishments. The NCA noted that, while it was not illegal for the subsidiaries of the same group to agree on a sole bidder, it is illegal for the subsidiaries to coordinate the terms and price of their respective offers and present themselves as two independent and competing companies on the market (it made no difference that those who had organised the tenders knew of the corporate links existing between the bidders). Medical gases for use in hospitals: the Conseil de la concurrence sanctions practices by two subsidiaries of the Air Liquide Group; https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/20th-january-2003-medical-gases-use-hospitals-conseil-de-la-concurrence

22 Typical cartels are often difficult to detect due to their secretive nature and widespread impact across the market, bid-rigging, however, can sometimes be easier to detect because it involves specific, identifiable bid patterns in isolated tenders, allowing authorities to spot signs of collusion through procurement monitoring.

23 Alberto Heimler, "Cartel Enforcement in Public Procurement," *Journal of Competition Law & Economics* 8, no. 4 (2012): 1–14, https://doi.org/10.1093/joclec/nhs028, 2.

Furthermore, while typical cartels usually involve only a select number of key market players and occur in markets where the product is homogeneous and where there are relatively a small number of market participants, bid-rigging cartels may commonly encompass all market participants within the sector. For example, in the *Ticino* case, all road surfacing companies in the region colluded on tenders to the respective state bodies[24], and in the Netherlands, one of the largest cartels ever prosecuted involved the whole construction industry in the Netherlands.[25].

It is noteworthy to state that bid-rigging is, in some cases, combined with other cartel activities. For instance, in the *Pre-insulated Pipes* cartel case, bid-rigging occurred alongside price-fixing and market-sharing.[26] Similarly, in the *Retail Food Packaging* cartel case, companies restricted competition through price-fixing, customer allocation, market-sharing, the exchange of sensitive price information, and bid-rigging. [27] Additionally, in the *Elevators and Escalators* cartel case, companies not only rigged bids for procurement contracts but also fixed prices, allocated projects, shared markets, and exchanged commercially sensitive and confidential information.[28]

Some of the most common bidding strategies or bidding patterns are:

a. **Cover bidding**. Also known as complementary, courtesy, token, or symbolic bidding, this strategy typically involves competitors who submit bids that are either higher than the designated winner's bid, known to be too high to be accepted, or contain terms unacceptable to the purchaser. [29] When a bidder submits a cover bid rather than declining to submit a bid, it prevents the party seeking tenders from sourcing a competitive alternative. This approach not only restricts genuinely competitive bidders from entering tender procedure but also gives the impression that there is active competition, misleading the party issuing the tender about the true level of market interest and pricing.[30] In the *Car Glass* cartel case, the EU Commission addressed the practice of cover pricing, where cartel members submitted bids that appeared competitive but were deliberately inflated,

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24 Kai Huschelrath et al., "The Deterrent Effect of Antitrust Sanctions: Evidence from Switzerland," *Antitrust Bulletin* 56, no. 2 (Summer 2011): 427.

25 Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 7.

26 Pre-Insulated Pipes (Case AT.37956), European Commission decision of 21 October 1998; Bailey and John, *Bellamy & Child*, 391.

27 Retail Food Packaging (Case AT.39605), European Commission decision of 24 June 2015; Bailey and John, *Bellamy & Child*, 391.

28 Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 6.

29 OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Bailey and John, *Bellamy & Child*, 392.

30 Bailey and John, *Bellamy & Child*, 392.

ensuring that the designated cartel member secured the contract by setting all other bids higher. [31] Some other notable cases of cover bidding are *Elevators and Escalators* cartel case[32] and *Building and Construction Industry* cartel case in the Netherlands[33]. Cover bidding may be (and usually is) followed by monetary payments among the colluding parties.[34] In the *International Removal Services* cartel case, the EU Commission found that cartel members coordinated by submitting cover quotes and offering financial compensation for unsuccessful bids or for abstaining from bidding entirely.[35]

b. **Bid rotation**. A form of bid rigging where a group of bidders take turns being the winning bidder, ensuring that each participating company wins at least one bid over time. The rotation may be based on different criteria such as size of the project, size of each participant, geographic location of projects, or simply a chronological order and it is often combined with cover bidding.[36] Bid rotation can be difficult to detect, as it creates an impression of dynamic competition between competing firms: bids are often submitted by large number of bidders, who often submit unequal bids. The cases of bid rigging where undertakings involved strategy of bid rotation are e.g. *Italian Raw Tobacco* cartel case[37] and the *French Roadworks* cartel case[38].

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31 Case COMP/39.125 – Car Glass, Commission Decision of 12 November 2008, OJ 2009 C 173/13; Whish and Bailey, *Competition Law*, 548

32 In this EU case, major elevator and escalator manufacturers, including Otis, KONE, Schindler, and ThyssenKrupp, coordinated bids in multiple tenders across Belgium, Germany, Luxembourg, and the Netherlands. The companies engaged in cover bidding by submitting artificially high bids to ensure a preselected company won the tender. Case COMP/E-1/38.823 - Elevators and Escalators [2007]

33 This was one of the largest cartels in the Netherlands, involving many construction companies. These firms engaged in cover bidding by submitting bids that appeared competitive but were actually part of a prearranged agreement on who would win the tenders. Case IV/31.572 and 32.571 - Building and construction industry in the Netherlands, OJ L 92, 04/04/1992, p. 1–55.

34 OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Bailey and John, *Bellamy & Child*, 392.

35 Commission Decision of 11 March 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services); Bailey and John, *Bellamy & Child*, 548;

36 OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Whish and Bailey, *Competition Law*, 547.

37 The Commission found that Italian tobacco processors colluded on allocating contracts for the purchase of raw tobacco through bid rotation and other collusive practices. European Commission Decision of 20 October 2005 relating to a proceeding under Article 81 of the EC Treaty (COMP/C.38.281/B.2 - Raw Tobacco Italy), OJ L 353, 13.12.2005, p. 45–64

38 Companies involved in roadworks in France allocated projects and used bid rotation to ensure that each participant won specific contracts. French Competition Authority Decision 07-D-15 of 10 May 2007 on practices implemented in the public roadworks sector in Île-de-France

c. **Bid suppression**. A bidding strategy that occurs when one or more bidders agree not to submit a bid or withdraw previously submitted bid or submit bids that are incomplete or deliberately flawed to appear non-competitive.[39] This approach allows the designated winning bidder to offer a price significantly above the market value, avoiding true competition. When bidders withdraw, the tendering process may need to restart, or the buyer may proceed with a higher-priced bid, ultimately inflating costs for goods and services. In *Pre-insulated Pipes* cartel case companies supplying pre-insulated pipes in several EU countries used bid suppression (certain companies refrained from bidding), among other tactics, allowing pre-designated firms to win contracts without competition[40], and in *British Construction* cartel case firms involved in numerous public and private sector contracts were found to refrain from bidding to ensure predetermined winners, which resulted in fines against 103 construction firms for bid-rigging practices [41].

d. **Market allocation**. A bidding strategy in which competitors divide the market by agreeing not to compete for specific customers or within designated geographic areas. They may assign certain clients or customer categories to different firms, ensuring that competitors may not bid or will submit only cover bids for contracts involving those clients.[42] In 2008, the Romanian NCA fined a pharmaceutical producer and three distributors for a market-sharing cartel in which, within an auction within the Diabetic National Program, each distributor offered different products of the same manufacturer, so that they did not compete against each other in the auction.[43]

e. Bidding consortia. Joint bidding is a specific form of bidding agreement that, unlike other bid-rigging strategies, is not necessarily prohibited. Common in practice, many consortia agreements enhance competition by allowing firms to pool their resources and knowledge for a single contract.[44] When assessing whether joint bidding is prohibited, we can consider three elements that are important in this evaluation: whether the undertakings are direct competitors, whether they

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39 OECD, *Guidelines for Fighting Bid Rigging*, 2009, 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Whish and Bailey, *Competition Law*, 547.

40 European Commission Decision of 21 October 1998 (IV/35.691/E-4 – Pre-insulated Pipes), OJ L 24, 30.1.1999, p. 1–23

41 UK Office of Fair Trading Decision of 2009 (Construction Cartel), Case CE/4327-04

42 Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 4.

43 Ibid., 5.; G. Harapcea, "The Romanian Competition Council Fines a Pharmaceutical Producer and Three Distributors for Participation in a Market-Sharing Cartel Active on the Insulin Market (Eli Lilly Export, A&A Medical, Mediplus Exim and Relad Pharma)," *e-Competitions*, 12 March 2008, no. 19850.

44 Danish Competition Authority, *Joint Bidding Under Competition Law: Guidelines* (2018), https://en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf.

could have bid independently, and whether it was possible to bid for lots of the contracts. First, as long as the participants in bidding process are not competitors as regards the concrete contract, consortium agreement will normally not be problematic under competition rules.[45] Then, practice to bid jointly may be anti-competitive if it restricts competition between parties who could have submitted separate bids, conversely, it generally does not restrict competition when the parties are genuinely unable to tender individually.[46] Consortia or other cooperative arrangements between competitors will usually be unobjectionable where the participants do not have the capacity to execute an order individually or, by combining their resources, are able to make a more competitive offer.[47] In the *Ski Taxi* case, the Norwegian NCA observed that while disclosing the joint nature of the bid to the tendering authority might suggest no intent to collude, such disclosure alone does not rule out bid rigging. A key factor to examine is whether bidders are actual or potential competitors and whether the joint bid lacks a legitimate collaborative purpose.[48] By contrast, in a decision by the French NCA, it was noted that while the lack of economic or technical necessity to bid jointly may give raise to a presumption of anti-competitive intent, it does not constitute proof, of the existence of an anti-competitive agreement.[49] In another case, the French NCA issued a decision regarding the formation of interest groups in tender bid process. The French NCA emphasized that joint bidding can be pro-competitive when members of interest groups complement each other in ways that they cover different specialties, provide access to different technologies, facilitate access to raw materials or the necessary workforce, and even spread costs for equipment rental.[50] Lastly, competition authorities will also assess whether it was possible to bid for lots of the contracts. For example, in the *Skive and Omegns' Transportation Association* case, the Danish NCA found that a consortium's joint bid for municipal snow removal and salting services restricted competition. The Danish NCA

45 Ibid., 5.

46 Bailey and John, *Bellamy & Child*, 394.

47 Collaboration between two or more companies that jointly pursue larger contracts that they might otherwise be unable to compete for. The French Competition Council (Conseil de la Concurrence), for instance, takes the view that the absence of economic and technical necessity for competitors to bid jointly may give rise to a presumption, but does not constitute proof, of the existence of an anti-competitive agreement (Decisions du Conseil de la Concurrence, Nos 04-D-20 and 04-D-50).

48 Case E-3/16, Ski Taxi SA, Follo Taxi SA, and Ski Follo Taxidrift AS v Norwegian Government, Judgment of 22 December 2016, EFTA Court; Bailey and John, *Bellamy & Child*, 395.

49 Decisions du Conseil de la Concurrence 04-D-50 of the 03 November 2004 on practices implemented in tenders organised by the Intercommunal Sanitation Union of the Valley of the Lakes Valley (88); Carlin and Haans, "Bid-Rigging Demystified," 12.

50 Decisions du Conseil de la Concurrence 05-D-21 of the 17 May 2005 on practices in the funeral provision sector; Bailey and John, *Bellamy & Child*, 395.

determined that individual bids for separate routes were feasible, leading to its conclusion that the consortium agreement was anti-competitive.[51] On the other side in *Consortium ERC 900* case, the EU Commission found that, consortium agreement was lawful because it has established that the financial costs and staffing requirements associated to developing and manufacturing of the system were so high that realistically it was not possible to carry out that project individually by parties to the consortium agreement. [52]

As demonstrated by the patterns and strategies described above, bid rigging is a pervasive issue impacting economies worldwide, adapting to local contexts and procurement processes. Detecting and prosecuting these practices poses significant challenges due to complex factual backgrounds, undocumented oral agreements, and often minimal tender documentation.[53] Recognized as one of the 'most serious' infringements under competition law, bid-rigging incurs some of the highest levels of sanctions, designed not only to have a punitive effect but also to serve as a deterrent and safeguard the integrity of public procurement systems.

3. PUBLIC ENFORCEMENT CHALLENGES: DEBARMENT AS A SANCTION IN BID-RIGGING CARTELS

Before examining debarment as a specific sanction for bid-rigging cartels, a brief overview of other types of sanctions will be provided. Various sanctions can be imposed on offenders, with monetary fines being the most common, and representing a key sanction within the framework of competition law enforcement. When calculating fines competition authorities apply the same methodology as in any other cartel case. [54] Fines imposed for bid-rigging cartels are high. For example, in *Optical Disc Drives* cartel case the EU Commission imposed fines totaling 116 million EUR on eight companies involved in bid-rigging[55], in the building and construction industry in the Netherlands the EU Commission imposed 22.5 million EUR fine on the association of trade associations[56], in elevators and es-

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51 Decision of the Competition Council of 30 April 2014, Skive og Omegns Vognmandsforenings tilbudskoordienring (cited from: Danish Competition Authority, *Joint Bidding Under Competition Law*, 2018., 14)

52 Commission decision of 27 July 1990, Case IV/32.688 – Konsortium ERC 900.

53 Carlin and Haans, "Bid-Rigging Demystified," 13.

54 Fines for competition law infringement in EU is up to 10% of annual turnover of each company. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance) OJ C 210, 1.9.2006, p. 2–5.

55 Optical Disc Drives (Case AT.39639), European Commission decision of 21 October 2015; Bailey, D., & John, L. E. (Eds.). (2018). *Bailey and John, Bellamy & Child,* 391.

56 Case T-29/92, SPO and Others v Commission [1995] ECR II-289; Whish and Bailey, *Competition Law*, 548.

calators the EU Commission imposed fines of EUR 992 million EUR on four undertakings[57], in *Car Glass* cartel case the EU Commission imposed fines of 1.3 billion EUR, which was at the time the largest set of fines for one decision in the history of Article 101. [58] When it comes to national NCAs, the amount of fines is also significant. French NCA e.g. fined 14 companies with almost 10 million EUR for having shared almost all public markets for the restoration of historic monuments[59], and the UK NCA imposed 129.5 million £ in fines on construction firms engaging in illegal and anti-competitive bid rigging activities on at least 199 tenders. [60] These are just a few examples, illustrating the severity of financial penalties for bid-rigging offenses.

Additionally, to the financial penalties, in many EU countries[61], bid-rigging is a separate criminal offence authorizing the imprisonment of individuals for bid rigging in jail term varying from two to six years. Other criminal laws do not address bid rigging as such but do penalize criminal behavior often associated with bid rigging, such as fraud, bribery or corruption.[62]

Moreover, some authors argue that a comprehensive legal framework should include not only regulatory, civil, and criminal sanctions but also reputational penalties.[63] In this regard, some authorities may compel companies found guilty of anti-competitive conduct to publicly acknowledge their misconduct, which can also be viewed as a type of sanction, adding another layer of deterrence.[64]

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57 Case COMP/E-1/38.823 – Elevators and Escalators [2007] OJ C75/19; Whish and Bailey, *Competition Law*, 548; Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 6.

58 Case COMP/39.125 – Car Glass, Commission Decision of 12 November 2008, OJ 2009 C 173/13; Whish and Bailey, *Competition Law*, 548

59 Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 8.; M. Pujdak and A. Dhaliwal, "The French Competition Authority Fines 14 Companies €9,803,590 for Having Shared Almost All Public Markets for the Restoration of Historic Monuments," *e-Competitions*, 26 January 2011, no. 35150.

60 Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 7.

61 Austria, Belgium, Germany, Hungary, Italy, Poland, Spain. Carlin and Haans, "Bid-Rigging Demystified," 15.

62 Ibid.

63 „On average, firms lose 2.3% of their market values when an antitrust investigation is exposed." Stijn van den Broek, Ron G. M. Kemp, Willem F. C. Verschoor, and Anne-Claire de Vries, "Reputational Penalties to Firms in Antitrust Investigations," *Journal of Competition Law & Economics* 8, no. 2 (June 2012): 231–258, https://doi.org/10.1093/joclec/nhs008; see also: Franco Mariuzzo, Peter L. Ormosi, and Zherou Majied, "Fines and Reputational Sanctions: The Case of Cartels," *International Journal of Industrial Organization* 69 (2020): 102584, https://doi.org/10.1016/j.ijindorg.2020.102584.

64 The French NCA, in addition to imposing fines, required the companies condemning collusion in the public works sector to fund advertisements detailing the decision in two publications given the seriousness of the offences and the need to draw the attention of the relevant public authorities and their electorate to the importance of being vigilant to detect bid-rigging. (Decision No 05-D-26 of 9 June 2005); Alain Ronzano, "Consortium: The French Competition Authority Sanctions a Consortium of

In EU public enforcement, additional sanctions include bidder exclusion and director disqualification. Both sanctions aim at suspending from public procurement procedures, for a set period, either an individual or a company involved in anti-competitive conduct. Director disqualification removes an individual from any managerial role across companies, usually within a particular jurisdiction, while bidder exclusion typically prevents a company from participating in specific bids or markets, often under a particular contracting authority. And while director disqualification is applied mainly to hard-core cartels or abuse of dominance, bidder exclusion is associated with bid rigging in public procurement.[65]

These two types of debarment sanctions have different features and application in different jurisdictions, but they share several aspects of commonalities, such as they are particularly effective in attaining objective of general and specific deterrence[66] and may be valuable as complements to other forms of detection and deterrence[67]. However, although these types of debarment can be highly effective, their application presents several practical challenges, including questions about the objectives pursued, the scope (such as which individuals or companies should be subject to debarment, its duration, and the applicable markets), the required standard of proof, and potential unintended consequences.[68]

3.1. Bidder exclusion

Bidder exclusion is a sanction that enables contracting authorities or other competent bodies to exclude companies engaged in cartel activity from participating in public procurement processes. Besides punishing cartel participants, the purpose of this sanction is to preserve the integrity of the bidding process, particularly in public procurement contracts. The regulatory framework governing bidder exclusion varies across jurisdictions: in some countries, it is established under competition laws, while in others, it is prescribed exclusively under public procurement laws.[69] However, in most jurisdictions, bidder exclusion operates as a sanction un-

Undertakings for Several Anticompetitive Behaviors Such as Market Sharing and Exchanges of Information (Travaux publics dans la Meuse)," *Concurrences* 3, no. 2005 (June 9, 2005): Art. no. 63221.

65 OECD, *Director Disqualification and Bidder Exclusion*, 6.

66 Ibid., 7.

67 Director disqualification can serve as a remedy for anticompetitive conduct, even in cases where the evidence may not meet the strict criteria required in criminal cases. On the other hand, targeted bidder exclusion can effectively maintain the integrity of tenders, helping to restore public trust in fair administration and the responsible use of resources in public procurement. Ibid.

68 Ibid.

69 So for example, in Bulgaria, Croatia, Denmark, Estonia, Finland, Hungary, etc., bidders exclusion is contained in public procurement legislation, while for example, in Germany, Portugal or Czech Republic, this sanction is prescribed in the Competition act. Ibid. 53- 67.

der public procurement laws rather than competition laws and is therefore subject to the competence of different authorities.[70]

At the EU level, bidder exclusion is regulated by public procurement law, as defined in the Public Procurement Directive[71], particularly Article 57, which outlines the criteria for excluding bidders.[72] The recently enacted Notice on tools to fight collusion in public procurement and guidance on exclusion grounds further clarifies the application of this sanction.[73]

The aforementioned article states that contracting authority shall or may exclude from bidding process economic operators that have entered into agreements with other economic operators aimed at distorting competition. Similar provision is incorporated in competition acts or public procurement laws of Member States. However, there are significant differences in the regulation of bidder exclusion in different Member States, those differences exist in relation to rules on mandatory and voluntary exclusion, authorities entitled to exclude economic operator from bidding process, duration of exclusion, and in relation to some other issues that will be elaborated further in the text.

So, regarding the first issue, it should be emphasized that bidder exclusion can be mandatory (or automatic) and voluntary (in which case the decision on the exclusion is on the competent authority). In the EU criteria for exclusion, both mandatory and voluntary exclusion, are listed in article 57 of the Public Procurement Directive. Paragraph 1 of Article 57 precisely defines criteria for mandatory exclusion. It requires contracting authorities to exclude any economic operator convicted by final judgment for serious offenses, including involvement in a criminal organization, corruption, fraud, terrorism-related offenses, money laundering, child labor, or human trafficking. This mandatory exclusion also extends to individuals in decision-making, supervisory, or representative roles within the operator. These

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70 Ibid., 29.

71 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 Text with EEA relevance *OJ L 94, 28.3.2014, p. 65–242;* The 2004 EU procurement rules (art 45(2)(c) and (d) of Directive 2004/18) already contained provisions that would allow contracting authorities or entities to disqualify infringers of competition law, given that breaches of competition law should always be considered instances of grave professional misbehaviour. Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 17.

72 Before the adoption of the 2014 Public Procurement Directives, collusive practices in public procurement were primarily addressed under competition law, with national competition authorities investigating and sanctioning anti-competitive agreements under Article 101 of the TFEU. After 2014, bidder exclusion became explicitly regulated under public procurement law at the EU level, with Article 57 of the Public Procurement Directive establishing clear criteria for exclusion, implemented by contracting authorities. European Commission, *Notice on Tools to Fight Collusion in Public Procurement*

73 European Commission, *Notice on Tools to Fight Collusion in Public Procurement*

exclusions are compulsory and aim to uphold integrity in procurement by preventing participation from operators involved in serious criminal activities. Voluntary exclusion, on the other hand, is prescribed by Paragraph 1 of Article 57, stating that contracting authorities may exclude economic operators if they demonstrate bankruptcy, insolvency, or other factors that raise concerns about the operator's integrity, such as grave professional misconduct or misleading information provided in the tender process. Furthermore, contracting authorities may also exclude operators suspected of engaging in agreements with competitors aimed at distorting competition. This provision helps prevent collusion by allowing authorities to act on plausible indications of anti-competitive behavior, thereby safeguarding fair competition. Provisions on voluntary exclusion were the subject of preliminary ruling in a recent case *Infraestruturas*.[74] In its judgment, the Court of Justice clarified the scope of discretion conferred by the Public Procurement Directive on contracting authorities regarding facultative grounds for exclusion. The EU legislature intended for contracting authorities alone to assess whether to exclude candidates during the tender selection stage, ensuring that contracting authorities across all Member States have the discretion to exclude operators considered unreliable.[75] The Court emphasized that Member States may either mandate the application of facultative exclusion grounds or allow contracting authorities to choose whether to apply them.[76] The Court further ruled that the exclusion grounds apply not only to the current tender procedure but also to previous conduct in past procedures.[77] The Court concluded that contracting authorities are responsible for assessing operators' integrity and reliability, observing the principle of proportionality, and providing specific justifications for exclusion decisions.[78]

When it comes to the second issue on determining which authority is competent to impose bidder exclusion, practices differ significantly across jurisdictions. Competence depends on the legal basis of the exclusion (public procurement or competition law) and the procedural framework in the country.[79] In most ju-

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74 On 21 December 2023, the Court of Justice delivered its judgment in case Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias (C-66/22). The case originated in a request for a preliminary ruling from the Portuguese Supreme Administrative Court and concerns the interpretation of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU on public procurement and Article 80(1) of Directive 2014/25

75 Paras 55. – 57. of the judgement in the case C-66/22

76 Para 58. of the judgement in the case C-66/22

77 Paras 67. – 69. of the judgement in the case C-66/22

78 David Drabkin and Christopher Yukins, Debarment: EU-U.S. Comparative Assessment, Stockholm, April 2024: https://publicprocurementinternational.com/wp-content/uploads/2024/04/David-Drabkin-Chris-Yukins-vFinal.pdf , p. 5.

79 Ibid. 29.

risdictions, bidder exclusion is handled by contracting authorities under public procurement laws. For example, in countries such as Austria, Bulgaria, Denmark, Estonia, Germany, Croatia, and Italy, the contracting authority has the power to impose such sanctions directly.[80] In contrast, some jurisdictions involve competition authorities in the exclusion process when the violation relates to competition law. For instance, in Czech Republic and Portugal, the competition authority can initiate the exclusion process, which is then implemented by the contracting authority.[81] In other jurisdictions, the court plays a central role in issuing debarment orders while the competition authority or the public procurement authority, will monitor its implementation.[82] In Hungary, for example, only a judicial body can impose a bidder exclusion sanction.[83] Same situation is with debarment period (duration of exclusion) which is in most countries between 3 and 5 years (e.g. in Austria, Czech Republic, Denmark, Croatia, Estonia, EU, Finland, Germany, Hungary).[84] In Slovenia and Norway debarment period is not specified[85], while in some countries it is shorter, from one to 3 years (it is the case in Portugal, Turkey, US)[86].

The rule on voluntary exclusion related to infringement of competition rules and encompassed in point (d) of Paragraph 4 of Article 57 of the Public Procurement Directive has identically or similarly been adopted in most Member States.[87] It did not, however, escape criticism for being imprecise and overly vague. The main criticism relates to the fact that legal standard for the exclusion, which is "sufficiently plausible indications" is not precise enough and that it leaves to much discretion to contract authority to decide on exclusion. We must agree that this criticism is justified. But this is not the only flaw related to bidder exclusion, as its application as a sanction for engaging in cartel activity raises numerous concerns. One of the biggest challenges relates to the risks of negative consequences on the market particularly in small countries where there is a small number of competitors. Exclusion from one or more economic operators from the market may lead to decreased competition particularly if the market is oligopolistic. Further, it is worth considering how bidders' exclusion will impact on the incentives of firms

80 Ibid., 53-67.

81 Ibid.

82 Ibid., 29.

83 Ibid., 53-67.

84 This is the case for Austria, Czech Republic, Denmark, Croatia, Estonia, EU, Finland, Germany, Hungary etc.

85 This is the case for Slovenia and Norway

86 This is the case for Portugal, Turkey, US

87 OECD, *Director Disqualification and Bidder Exclusion*, 53- 67

or individuals to participate in leniency program.[88] Last, since in large numbers of Member States the decision on the exclusion is on the contracting authority, the question is, are contracting authorities granted with too much power and who is going to control abuse of their powers?

All the above-mentioned challenges have been subject of discussions on the EU and global level. To provide guidance to contracting authorities when and how to apply exclusions some clarifications have been provided in EU and OECD policy papers. So, for example the EU Commission have provided detailed explanation of the notion of "sufficiently plausible indications" as a criterion for bidders exclusion.[89] According to the explanation provided in point 5.4. of the Notice on tools to fight collusion in public procurement and on guidance how to apply to related exclusion ground, sufficiently plausible indication exist when a tenderer has already concluded a subcontracting contract with another tenderer in relation to same public tender, or when a tenderer has pre-ordered the material needed to perform specific contract prior, or when it is established that tenders have been submitted by the same business representative, etc.[90]

The EU Commission and the OECD also invest huge efforts in easing detection of bid rigging cartels and raising awareness about bid-rigging strategies by publishing red-flags guidelines[91], by encouraging reporting of bid rigging suspicion and by supporting development of supplementary sanctions such as for example rules on directors disqualification.

3.2 Director disqualification

Director disqualification as a sanction for competition law infringement has been implemented relatively recently. According to data provided by OECD, 23 jurisdictions worldwide prescribe this sanction for competition law infringement. However, only around 10 jurisdictions provide for it specifically in their competition laws.[92] In those jurisdictions where director disqualification is not prescribed in competition law, it is, as in case of bidder exclusion, prescribed in public procurement laws or companies' acts.

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88 Ibid., 35.

89 European Commission, *Notice on Tools to Fight Collusion in Public Procurement, point* 5.4.

90 Ibid.

91 See for example: European Commission, OLAF, *Fraud in Public Procurement: A Collection of Red Flags and Best Practices*, 2021, https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021_en.pdf; OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, 2016.

92 OECD, *Director Disqualification and Bidder Exclusion*, 9.

Director disqualification enables competition authority, court or other competent authority to bring an order by which companies' director, former director, shadow director or any other individual who is exercising analogous functions in practice is requested not to act as a director.[93] This sanction is generally considered to be a very effective one because it is targeted directly against natural person who is responsible for the infringement. It prevents directors to shield behind a company and it results in personal liability of those responsible for companies' decisions and for wrongdoings. The effectiveness of this sanction rests on the fact that director disqualification hits an individual's reputation, career, and deprives individuals of their livelihood.[94]

Although director disqualification is generally regarded as an effective sanction for competition law infringements, it raises several issues worth discussing, such as which authority should impose the sanction, the appropriate duration of the disqualification, the criteria for disqualification, the standard and burden of proof required, and the specific challenges to consider when implementing this sanction.

In relation to the issue of competent authority for imposing sanctions and disqualification period, it is noticeable that different countries have adopted different solutions. In some jurisdictions, such as Australia, Hungary, and Israel, the decision to impose this sanction is on court or other judicial body. On the other side, in Poland, Japan, the UK or the US, competition authority is entitled to bring the decision on director disqualification.

When it comes to the disqualification period, in many countries' disqualification can be imposed for a period not longer than five years. So, for example, disqualification period in Germany is three years, in Ireland is up to five years, in Norway is up to five years, and in Sweden is from three to 10 years[95]. However, there are some jurisdictions where the disqualification period is much longer. This is the case for the UK where disqualification period is up to 15 years, or in US where disqualification period can be imposed for unlimited time[96].

Since elaborated sanction can evidently have serious consequences for sanctioned individuals, it is important that criteria for disqualification are clear and precise.

Further, because many cartels are global cartels involving multinational corporations it is important that those criteria are globally standardized and universally

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93 By shadow director, it is normally meant any individual who is taking strategic decisions at the firm, even if she does not hold the relevant function title. OECD, *Director Disqualification and Bidder Exclusion*, 15.

94 Ibid., 9.

95 Ibid., 45- 52.

96 Ibid., 51.

recognized. However, the research conducted showed that this is not the case. For example, EU Commission as well as large number of EU countries neither impose nor acknowledge director disqualification as a sanction for the infringement of competition rules. Such situation diminishes overall importance and the effect of this sanction as an effective tool to fight large multinational bid-rigging cartels. On the other side, some countries, such as the UK or the US, use this sanction frequently and have elaborated rules on criteria for disqualification. An example of a jurisdiction where criteria for disqualification are clear and precise is UK.

In the UK Guidance on Competition Disqualification Orders[97] it is said that director disqualification is a mandatory sanction for breach of the competition rules. So according to the Guidance, the UK's Competition and Market Authority must request from the court directors disqualification when a company is engaged in competition law infringement and when the director is "*unfit to be concerned in the management of a company*"[98]. Under Article 2.10 of the Guidance, director's conduct can render them unfit for company management if they contributed to the competition law breach, had reasonable grounds to suspect a breach was occurring and took no steps to prevent it, or were unaware of the breach but ought to have known about it.[99] From above it is obvious that the decision of the court as to whether the director should be disqualified or not is assessed in light of all fact of each case. The UK's Authority has been rather strict in applying this sanction. Since its introduction, the UK's Authority has expanded the scope for director disqualification orders to cover all competition law infringements, prohibited agreements and abuses of dominance, although these sanctions have primarily targeted severe cartel cases. Between 2016 and 2022, the CMA issued 25 notable disqualification decisions, including the first order in December 2016 against Mr. Daniel Aston, a director involved in price-fixing for online posters (5 years). In 2020, further disqualifications were imposed on Mr. Amit Patel for arrangements in the nortriptyline supply (5 years) and on directors involved in price-fixing in Berkshire's real estate sector (up to 6.5 years). In 2021, the CMA secured disqualification undertakings against former directors of FP McCann Ltd. for participation in a pre-cast concrete cartel, with disqualification terms ranging from 11 to 12 years.[100] Furthermore, research conducted by professor Whelan, focused on *ex-*

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97 UK Competition and Market Authority, *Guidance on Competition Disqualification Orders*, February 6, 2019, https://assets.publishing.service.gov.uk/media/5f3d3ca9d3bf7f1b164fe1a4/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf

98 Ibid.

99 Ibid. Article 2.10.

100 Competition and Markets Authority (CMA), *Annual Report and Accounts 2021/22*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097032/Annual_Report_CE.pdf; OECD, *Director Disqualification and Bidder Exclusion*, 14.

post analysis of the impact of directors disqualification in the UK, showed that it is an effective deterrent measure.[101] Therefore, it seems that this sanction is worth considering as one of the sanctions for the competition law infringement in those countries, which so far did not regulated it in national jurisdictions. UK model of regulation can serve as good example of regulation.

In close relation to addressed issue of criteria for director disqualification are the issues of burden of proof and standard of proof. When it comes to burden of proof, it is normally the duty of the competition authority or other competent authority to prove the liability of directors involved in anti-competitive conduct. On the other hand, in the court case the burden of proof is on the director who must show (or prove) that criterion for disqualification is not met. A more complex question is the question of standard proof. The main dilemma is should director's liability be proved "beyond any reasonable doubt" or the standard of proof should be "balance of probabilities".[102] With regarding to that, we can find opposing opinions of legal scholars. While some argue that director's liability should be established "beyond any reasonable doubt", the others argue that such standard would make director disqualification less attractive as a sanction since director's liability will be difficult to prove.[103]

Lastly, to provide an objective insight in analyzed sanction, it remains to reflect on challenges of director disqualification order. It should be said that director disqualification is not a miracle sanction. It should be viewed as a necessary regulatory measure aimed at suppressing cartel activity but also as a measure that would increase the accountability of companies' directors. In that sense, as with some of the downsides of these sanctions we should mention following. First, it may have no effect outside the jurisdiction in which it was imposed. Second, proving individual liability may be costly and burdensome and it may jeopardize investigation against company, if the investigation against a company and individual is conducted in parallel[104], as this could dissuade individuals from coming forward with information and evidence. Last, it is questionable whether and how it will be enforced against individuals who have retired or who resigned their position in the company and moved to some other company.

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101 Ibid., 27.

102 OECD, *Director Disqualification and Bidder Exclusion*, 17.

103 See on that: A. Khan, "Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?" *World Competition* 35, no. 1 (2012): 77–122.; see also: OECD, *Director Disqualification and Bidder Exclusion*, 17.

104 OECD, *Director Disqualification and Bidder Exclusion*, 23

4. PRIVATE ENFORCEMENT CHALLENGES: POTENTIAL VICTIMS AND BARRIERS TO INITIATING DAMAGES CLAIMS

While aforementioned sanctions in the event of an infringement may "punish" the wrongdoers, they do not address the harm caused by such practices. Bid rigging practices cause harm to public authorities, individuals and the society as a whole. To address these concerns, injured parties must seek redress through civil liability, by claiming antitrust damages before the competent national courts.

The importance of private enforcement should not be underestimated. Recent OECD studies have shown that bid-rigging cartels achieve higher levels of overcharging than non-bid-rigging cartels.[105] It leads to significant price increases for public purchasers compared to normal market conditions.[106] This overcharging of rigged goods and services is a direct loss of taxpayers' money and a blow to public resources that could have been more wisely and efficiently allocated. It goes without saying that the more public financial resources are overspent on rigged public tenders, less there is for any other government activity including its core functions. In addition, this leads to larger budget deficits and greater reliance on borrowing by governments that might negatively influence their financial stability.[107] By claiming damages, public authorities can effectively recover the overcharges, thereby restoring taxpayer funds and deterring future bid-rigging.[108]

The legal basis for antitrust damages claims is provided by national laws of Member States transposing into their national legislation the Antitrust Damages Directive.[109] The Antitrust Damages Directive grants the right to compensation to any person who has suffered damage caused by the anticompetitive practices including public authorities, regardless of whether or not there has been a prior finding of an infringement by a competition authority.[110]

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105 More on the topic see Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, Discussion Paper no. 12-050 (ZEW, 2012), 12, http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf.

106 European Commission, *Notice on Tools to Fight Collusion in Public Procurement*, point 1.1.

107 Loc.cit.

108 Penelope Giosa, "The Case for Reforming the Rules on Contracting Authority Damages Claims for Bid Rigging in the EU," *Public Procurement Law Review* 27, no. 6 (December 2018): 235–250, https://ssrn.com/abstract=3576966.

109 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 Text with EEA relevance, OJ L 349, 5.12.2014, p. 1–19.

110 See recital 13 of the Directive 2014/104/EU.

The Antitrust Damages Directive and consequently national legislation as well, brings forward a set of tailor-made rules for antitrust damages redress, facilitating the role of the claimant in the proceeding while maintaining the integrity of public enforcement mechanism. Regardless of the existence of these rules, it appears that in some jurisdictions, bid rigging victims do not use this right as often as they could and should.[111]

Laborde's study on cartel damages in Europe from 2021 shows that claimants from public sector cumulatively initiated a total of 42% of the cartel related damages claims across Member States.[112] However, the majority of this cases was based of only a few cartel decisions and was limited to just a few jurisdictions. Most cases were initiated in Germany and France following the rail[113], truck[114] and road signalization cartels[115]. On the other side of the spectrum are states such as Croatia with no reported antitrust damages cases following bid rigging.[116] At the same time, it is undisputed that there is a clear moral imperative to ensure that public money is spent as efficiently and effectively as possible. For that to happen, public finance management systems must ensure transparency and accountability.[117] In terms of the latter, it can be argued that claiming damages suffered through bid

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111 It should be noted that there is no comprehensive study on private enforcement efforts stemming from bid rigging. Some countries report the existence of such cases, Catalonia observes the lack of such cases in their jurisdiction. See, Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations Due to Anti-Competitive Practices*, February 2023, ES 22/2019, 4–6, https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20230208_es_22_2019_reclamacio_danys_eng.pdf.

112 Publicly owned companies (20% of the cases), local authorities (19%), and central governments (3%), See Jean-François Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.), Concurrences N°3-2021, para 22.

113 Annual Report On Competition Policy Developments In Germany 2013, prepared for OECD, DAF/COMP/AR(2014)25, p. 6.

114 EU Commission Decision in Case AT.39824 — Trucks.

115 Nathalie Jalabert-Doury, Public tender - Fines: The French Competition Authority fines a cartel in the road signs sector (Road signs cartel), 22 December 2010, Concurrences N° 1-2011, Art. N° 34026, pp. 86-87.

116 For instance, Croatia does not have a single bid rigging damages claim before its courts. The reason is likely linked to public competition law underenforcement in relation to bid rigging. In Croatia to date there is only one bid rigging infringement decision by the Croatian Competition Agency in case *CCA vs. Agro-Vir d.o.o. et al*, Class: UP/I 034-03/17-01/021. Reg.no. 580-09/84-2022-082 of 28 April 2022. Similarly, the autonomous region of Catalonia observes the lack of such cases in their jurisdiction. See, Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 4-6.

117 How to ensure efficient and effective public spending, by OMFIF editors / 5 December 2023, available at https://www.omfif.org/2023/12/how-to-ensure-efficient-and-effective-public-spending/ (accessed 24/09/2024).

rigging is not only a right of the state but rather an obligation stemming from good administration principle.[118]

The vital importance of pursuing damages from bid rigging has been recently recognised by the Catalan Competition Authority who in 2023 issued an invitation to public administration bodies to engage in claims for damage caused by bid rigging and offered a set of recommendations that might facilitate this activity.[119]

While issues pertaining to the relatively low involvement of the state may be many, and will be addressed later, it is certainly worth mentioning that, unlike other types of anticompetitive behavior, damages claim from bid rigging are unlikely to be pursued in a stand-alone setting, although this is not excluded as a possibility. We believe it is unlikely for the state body to initiate a stand-alone procedure because of the heavy legal and evidentiary burden in the absence of an infringement decision by the NCA. In addition, it is possible that state body even if suspicious of bid rigging, is not sure that collusion between bidders took place and let alone that it had been directly harmed by it. Therefore, it is more likely for sate bodies to initiate proceedings for damages only once the relevant competition authority reaches an infringement decision, by which the state body itself becomes aware of the infringement and the damage it had suffered as a result. Certainly, this indicates the existence of a link between public and private enforcement of bid rigging practices. The increase of bid rigging decisions by competition authorities across jurisdictions thus might have a beneficial impact on private enforcement against these practices. The good news is that a recent study shows that in 2023 for the third consecutive year, bid-rigging was the most frequently enforced type of cartel behavior by national competition agencies.[120]

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118 „Public entities have several important reasons to pursue damages claims against cartels, including redressing harm to taxpayers, restoring public resources, deterring future anticompetitive practices, and promoting long-term benefits like more competitive tenders, lower prices, and higher quality services, all of which enhance social welfare." Carmen Garcia, Juan Luis Jiménez, and José Manuel Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages: Challenges and Obstacles," in *Competition Policy in Eastern Europe and Central Asia: Advocacy of Competition*, OECD-GVH Regional Centre for Competition in Budapest (Hungary), Review no. 23 (January 2023), 44.; Assimakis Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Oxford: Hart Publishing, 2008), 19.
On different aspects of good administration see: *Good Administration in European Countries*, OM OFFENTLIG SEKTOR, 2023, https://www.eupan.eu/wp-content/uploads/2023/04/Annex-1.-Good-administration-in-European-countries.pdf

119 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 4-6

120 Significant fines were issued in the UK, Germany, Austria and France. See: A&O Sherman, *Global Antitrust Enforcement Report*

Even though there is a beneficial correlation between public enforcement and subsequent private actions for damages, it is not the primary driving force behind such claims, nor is it the sole factor determining their success. In the following paragraphs, we first present the list of possible victims of bid rigging cartels to emphasize the magnitude of damage and present the main challenges each category of victims faces. We then proceed with identifying possible deterring reasons on the part of the state for initiating damages actions and put forward some recommendations.

4.1. Identifying Victims of Bid Rigging

The *direct victim* of bid rigging is obviously the state in any of its organizational units (i.e. any public authority, body or organization tendering the rigged public procurement). The state may suffer overcharges, reduced quality of goods or services, and possibly supply chain disruptions.[121] Out of all the presented damage, the overcharge is the likeliest damage to be claimed by the state, as the reduction of quality and disruption of supply chain is very difficult to prove and quantify. In addition, state bodies might suffer loss of profit from the decrease of sales, because the actual damage from overcharge has been passed on purchasers increasing the price of rigged goods or services.[122]

The state as a claimant who is the direct victim of bid rigging faces the same challenges as any other direct victim of anticompetitive behavior. Therefore, the determination of damage, its quantification and to a lesser degree the causation between the damage and the harm suffered, may be the most challenging issues to prove before the national courts.

An illustrative example is a Belgium case in which, albeit by application of general tort rules, the Commercial Court in Brussels dismissed the claim by the EU Commission[123] against the members of the escalator cartel. The EU Commission itself found that the members of the cartel divided the market by allocating tenders and maintenance contracts [124] and initiated proceedings for damages following its own infringement decision. The Commercial Court in Brussels found that the EU Commission insufficiently proved damage and the causal link. Even though this is

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121 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 13.

122 Loc.cit.

123 Europese Commissie/Otis e.a. (A.R. A/08/06816) (24-11-2024) reported in 2021 ICC Compendium on Antitrust damages, p. 113-114.

124 European Commission decision of 21 February 2007 in Case COMP/E-138.823 PO/Elevators and Escalators.

not the final say because the appeal is still pending[125], it is interesting to consider the arguments of the Commercial Court. When it comes to causation the Court emphasized "it is in principle sufficient that there is a condition *sine qua non* link between the ground for liability and the damages".[126] However, the EU Commission's infringement decision that was relied upon did not prove that the cartel caused the overcharge. It was merely established this was the aim of the cartel, but failed to prove this aim was actually achieved. The Commercial court concluded that when it comes to bid rigging, under normal circumstances, an effect on price cannot be assumed.[127]

As mentioned, the case was decided by application of general tort rules, as the time of procedure precedes the application of the national legislation implementing the Antitrust Damages Directive. However, this is not decisive for the outcome reached, as causation is not harmonized by the Antitrust Damages Directive but rather it is left to the competence of the Member States [128] with a very limited interpretative scope so far offered by the CJEU.[129] The Belgian example is thus only one of possible interpretations and application of a causation standard across Member States.

On the other side, the state as a direct victim is in a better position to prove damages than other cartel victims, because the asymmetry of information generally characterizing cartel damages, are not as strong in these cases. Namely, the public authority who suffered damages as a result of a rigged public tender is in possession of all the bids placed by the participants of the rigged public procurement which subsequently may be used as evidence in antitrust damages proceedings. In addition, it has been observed that members of a bid rigging cartel are less likely to make use of the leniency program[130] due to its interaction with anticorruption rules. As long as leniency immunity does not cover the corruption offence it is less likely that members of a bid rigging cartels will make a leniency application.[131] While this negatively influences the number of infringement decisions,

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125 Lewis Crofts and Niki Boussemaere, "EU Institutions' Elevator – Cartel Damages Resumes in Belgian Appeal Court," *mLex*, March 4, 2024, https://interleges.com/wp-content/uploads/2024/03/MLex_EU-institutions-elevator-cartel-damages-battle-resumes-in-Belgian-appeal-court.pdf

126 2021 ICC Compendium, op.cit. p. 114.

127 Loc.cit.

128 See recital 11 of the Directive 2014/104/EU,

129 Fora a detailed account on causation in antitrust damages claims see: Claudio Lombardi, *Causation in Competition Law Damages Actions* (Global Competition Law and Economics Policy) (Cambridge: Cambridge University Press, 2020).

130 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 43

131 Juan Luis Jiménez, Manuel Ojeda-Cabral, and José Manuel Ordoñez de Haro, "Who Blows the Whistle on Cartels? Finding the Leniency Applicant at the European Commission," *Review of Industrial*

where such decisions are reached in the ordinary procedure, it is much easier for the victims to obtain evidence by application of general disclosure rules provided by the Antitrust Damages Directive (as opposed to leniency statements which are blacklisted for disclosure).[132]

Besides the state as a direct victim of bid rigging, there are even more *indirect* victims of bid rigging. These are all the people to whom the overcharge or decreased quality has been passed on by the state. An illustrative factual example of the magnitude of possible indirect victims of a bid rigging cartel is the recent CJEU case *Kilpailuja kuluttajavirasto*.[133] The case involved a rigged public tender for the award of a contract for the construction of a high-voltage transmission line in Finland. In this case it was observed that cartel could have "harmful economic repercussions downstream, in particular in the form of higher electricity distribution tariffs".[134] In other words, indirect victims are all the costumers of the members of the cartel that had to pay higher prices for electricity due to the cartel.[135] For indirect victims it is even more difficult to prove causation. In fact, the more distant the victim is to the infringer, the more difficult it is to prove causation, particularly when an unbroken chain of events leading to the damage is required. In addition, indirect victims have the burden of calculating the amount of damage passed-on to them by the state which is never a straightforward calculation.

In addition to direct and indirect victims of bid rigging, the CJEU recognised other, even more remote categories of victims. The first one relates to *umbrella victims*, i.e. victims of umbrella pricing. This situation occurs where undertakings

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Organization (October 2022): 17, https://ssrn.com/abstract=4503090.

132 Article (6) of the Directive 2014/104/EU.

133 Case C-450/19 - *Kilpailu- ja kuluttajavirasto*, Judgement of of 14 January 2021, EU:C:2021:10.

134 Ibid., para 36.

135 Far from being just a factual illustration of the spillover effect of a rigged public tender, the ruling in the *Kilpailuja kuluttajavirasto* case is relevant as it gives an interpretation on the moment when a bid rigging cartel ends. The court specified that in cases of a single bidding collusion, the violation ends with the conclusion of the contract, i.e., determination of the essential details of the contract such as price. According to the CJEU it is up to the national court to determine when these essential details were finalized. While this moment is crucial for public enforcement as this is the moment when time limits tarts to run, it is not affecting directly time limits in private enforcement, as they are safeguarded by the Article 10 of the Directive 2014/104/EU according to which the limitation periods starts to run cumulatively when the infringement of competition law has ceased (*Kilapailuja kuluttajavirasto* judgement) and the claimant knows, or can reasonably be expected to know the about the infringement of competition law; the existence of harm to it; and the identity of the infringer. Usually this is the moment when the final infringement decision is made. For a short comment of the case see: Patrik Albrecht, "When Is Participation in a Bid-Rigging Cartel Deemed to Have Ceased to Exist?" *Kluwer Competition Law Blog*, February 26, 2021, https://competitionlawblog.kluwercompetitionlaw.com/2021/02/26/when-is-participation-in-a-bid-rigging-cartel-deemed-to-have-ceased-to-exist/

that are not members of a cartel raise their prices to align them with the inflated prices set by the cartel.[136] As a consequence even their customers pay a price that is higher than it would have been in the absence of a cartel. The right of umbrella victims to claim antitrust damages against the members of the cartel dates back to the *Kone* case[137] in which the CJEU essentially concluded that national legislation, which categorically excludes any civil liability of cartel members for damages resulting from umbrella pricing, is incompatible with EU law.[138] In the context of bid rigging, a recent study shows that umbrella damage is not negligible as "structural estimation reveals that, per contract, damages due to non-cartel firms bidding higher are at least 35 percent of damages caused by the cartel".[139] However, these claimants face a very heavy evidentiary burden in relation to the existence of damage and causation as demonstrated by the 2024 judgement of Court of Appeal of the Hague in relation to umbrella claims against Kone.[140] Court of Appeal of the Hague recognised that umbrella damages might not be *a priori* excluded, however in order to hold Kone liable for damages, the umbrella claimant must as a minimum provide concrete indications of umbrella pricing such as "examples where the assignors changed supplier after price increases by the addressees or demonstrate that price trends of parties that were not addressed in the decision, where related to price increases by the addressees. General economic theory without concrete indicia is, however, insufficient according to the Court".[141]

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136 In the context of competition law, it is widely accepted that umbrella pricing represents a legitimate business strategy as market participants are entitled to adapt intelligently to the prevailing market conditions (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-*73 Coöperatieve Vereniging 'Suiker Unie' UA and others v. Commission* ECLI:EU:C:1975:174.) In consequence, the adoption of such a pricing policy by undertakings not party to a cartel does not constitute a violation of EU competition rules and, therefore, no liability for compensation for the resulting loss may be imposed upon them. In such a case, compensation may only be required from cartel members, as it is the cartel activity that enables third parties to impose higher prices.

137 Case C-557/12 *Kone AG and others v. ÖBB- Infrastruktur* AG, EU:C:2014:1317.

138 For a detailed analysis of Kone case, see Vlatka Butorac Malnar, "The Kone Case: A Missed Opportunity to Put the Standard of Causation Under the Umbrella of the EU," in *EU Competition and State Aid Rules: Public and Private Enforcement*, edited by Vesna Tomljenović et al., Series Europeisation and Globalisation (3) (Berlin Heidelberg: Springer Verlag, 2017), 175–195.

139 El Hadi Caoui, The Journal of Law and Economics Volume 65, Number 2, May 2022., 239. See also: John Asker, El Hadi Caoui, Vikram Kumar, and Enrico De Magistris, "Bid Rigging and Umbrella Damages," *Competition Policy International's Antitrust Chronicle* (October 2023), 6.

140 Judgement of the Court of Appeal of the Hague from 23 January 2024, case no. 200.304.621 and 200.304.673.

141 Jeroen Kortmann, Nima Lorje, and Frederike de Meulemeester, "Court of Appeal of The Hague Rules on Liability for Antitrust Follow-On Damages Claims in the Elevator Sector," *Stibbe*, February 29, 2024, https://www.stibbe.com/publications-and-insights/court-of-appeal-of-the-hague-rules-on-liability-for-antitrust-follow-on

Another interesting category of victims related to a bid rigging cartel, originates from the 2019 judgement of the CJEU in the case *Otis II*.[142] In that case the court recognized the right to compensation to the Province of Upper Austria for damages suffered in its capacity of a public subsidies' provider. The victim was again the state, however this time, relationship of the state to the cartelists was neither direct or indirect. Action for damages was initiated by the Province of Upper Austria claiming that it suffered harm caused by the escalator cartel, in the context of its budget allocations. Province of Upper Austria was giving out promotional loans for financing building projects. It claimed that the installation costs of lifts paid by beneficiaries of those loans that were included in the overall building costs increased due to the escalator cartel. As a result, the Province of Upper Austria had to provide larger loans. It claimed that in the absence of a cartel, it would have provided smaller loans. The difference between the two could have been invested more profitably. However, under Austrian law, such a loss does not present a sufficient connection with the purpose of the legal rule prohibiting cartel agreements and the objective pursued by Article 101 TFEU and as a consequence, it could not give rise to compensation.[143] The CJEU disagreed with such an interpretation and building on its previous case law and full effectiveness of Article 101 TFEU, confirmed that compensation for losses may also be claimed under these circumstances.[144] However, yet again, the CJEU extended the right to compensation, while falling short of specifying elements that must be met in order to establish causation and other requirements for compensation before national courts. Although it is an expected ruling, it might lead to divergent application of EU competition law by Member States.[145]

Finally, among the bid rigging victims are the unsuccessful bidders as well. These are the undertakings that did not win the public contracts because the public tenders were rigged. The challenge for this category of victims is how to prove that they would have won the contract without the cartel. Particularly challenging is proving counterfactual, especially as there may be other criteria besides the cost (such as social, environmental, quality and other tendering criteria), influencing the outcome of a public procurement procedure. It has been observed in the literature that such a victim could be successful in proving damage only if in the

142 Case C-435/18, *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others*, Judgment of the Court of 12 December 2019, EU:C:2019:1069.

143 Ibid. para 14-15.

144 Ibid, para 35.

145 Sílvia Bessa Venda, "Otis II: Light at the End of the Tunnel for Damages Indirectly Caused by Competition Law Infringements," *UPL Law Review: Revista de Direito da ULP* 13, no. 1: 161.

absence of cartelists' bids, his bid would have remained the only valid bid in the tender.[146]

4.2. Barriers Inhibiting the State in Pursuing Damages in Bid-Rigging Cases

Despite recent positive trends in enforcement statistics, reflecting an increase in decisions against bid-rigging practices, private enforcement in the domain of public procurement in the EU operates at a slow pace.[147] Research has identified numerous reasons why private enforcement by procurement entities is underutilized.

Since 2004, the EU Commission has invested in promoting private enforcement of competition law in order to increase incentives for seeking compensations.[148] Prior to the adoption of the Antitrust Damages Directive, the EU Commission conducted Impact Assessment[149] and issued Green and White Paper[150] in which it identified common difficulties victims of competition law infringements face when seeking compensation.[151] While the Antitrust Damages Directive introduced measures to address these issues and increase civil antitrust claims, some argue that the Antitrust Damages Directive does not provide an adequate framework for encouraging public authorities to pursue private enforcement. A key criticism is that it offers no significant advantages over existing national tort laws

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146 Marsela Maci, "Private Enforcement in Bid-Rigging Cases in the European Union," *European Competition Journal* 8 (2012): 211, 219–220.

147 In some countries however, the deterrent effect of private enforcement is significant. E.g. „In Japan, many private antitrust lawsuits have actually been brought by public entities, such as local governments and government agencies, who frequently seek to recover damages suffered from bid-rigging cartels." OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Relationship Between Public and Private Antitrust Enforcement*, Working Party No. 3 on Co-operation and Enforcement, June 2015, DAF/COMP/WP3(2015)14, 9–10.; "It's not widely recognized that the public sector has consistently sought damages for losses caused by cartels, which raises concerns because any financial damage or dysfunction within the public sector inevitably impacts the broader well-being of society." Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages" 43.

148 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 6.

149 Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013)

150 Commission, Green Paper - Damages Actions for Breach of the EC antitrust rules, COM (2005)672 final; Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008)165 fina

151 These include, among others, difficulty of accessing the evidence, unclear rules on the passing-on defence, calculating damages and the rules concerning the costs of actions. Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), 15; Commission, White Paper on Damages Actions for Breach of the EC antitrust rules (2008), para. 2.

or competition law for public authorities, thus limiting its practical relevance in public procurement.[152]

Private enforcement actions involving bid-rigging cartels are less common than those targeting other hard-core cartels, such as price-fixing and market-sharing.[153] This section will provide for a bid-rigging-specific reasons why private enforcement by procurement entities is underutilized. It will also offer suggestions for addressing these issues.

a. **Establishing harm.** Although the Antitrust Damages Directive established the right to 'full compensation' for harm caused by EU competition law violations and introduced a rebuttable presumption that cartels cause harm, plaintiffs still encounter significant challenges in proving and quantifying damages in bid-rigging cases, as discussed in detail in the previous section.[154] The contracting authorities' difficulty in specifying and quantifying the financial harm is one of the reasons why private enforcement is limited in bid-rigging cases.[155] Determining damages is one of the highly complex, yet crucial aspect of the process, as bid riggers carefully conceal their actions, making it difficult to establish a clear causal link between bid rigging and financial loss and quantifying the overcharge or loss of quality resulting from anti-competitive practices.[156]

To address the challenge of specifying and quantifying financial harm, several potential solutions can be considered. Contracting authorities could opt for statutory or pre-established damages instead of actual damages. This simplifies the process by providing a predefined amount of compensation without requiring a detailed calculation of losses.[157] Another solution is the use of liquidated damages clauses in public contracts. These clauses allow for a pre-agreed lump sum to be paid in the event of a breach, relieving public bodies of the burden of proving their loss.[158]

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152 Enhancing contracting authorities' ability to seek damages was not among the Directive's objectives. On shortcomings and challenges arising under the Directive see: Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

153 Maci, "Private Enforcement in Bid-Rigging Cases," 212.

154 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 7.

155 Penelope Giosa, "Damages Claims for Bid Rigging: How to Make Them More Popular in the EU," *CCP Research Bulletin* 37 (2019): 4–6, 6.

156 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

157 Such a solution already applies in the domain of intellectual property, where judicial authorities are enabled in certain cases, award damages as a lump sum. This is typically based on factors like the amount of royalties or fees that would have been due if the infringer had obtained authorization to use the intellectual property right in question. Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

158 This practice is particularly common in Germany, where courts have upheld the legality of these clauses, awarding public bodies damages based on pre-agreed amounts. See more in: Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

The amount of damages can also be introduced to the tendering procedure documentation.[159] Furthermore, some jurisdictions went so far as to expand the courts' powers to allow them to estimate the amount of damages, following the principle that judicial actions must remain effective. This principle ensures that seeking damages should not be made practically impossible or excessively difficult. Consequently, a court cannot refuse to award some form of damages solely because the claimant is unable to precisely quantify the actual harm suffered.[160] Finally, national courts may request the competition authority to assist in the proceedings.[161] Involvement of national competition agencies in the proceedings might be very beneficial. They can play a significant role by acting as *amicus curiae* and provide the guidance to the courts in the quantification of damages, or by determining the damage suffered by the public administration body already at the stage of public enforcement.[162] Regarding the latter, most antitrust damages claims, as has been previously stated, are follow-on actions, so it is clear that these decisions play a significant role in the outcome of such claims. Therefore, it could also prove useful that competition authorities' decisions support the compensation process by including at least relevant data and information about the infringement and the affected parties, which would provide potential claimants with valuable insights into damages that could support their legal actions.[163]

b. **Costs of litigation.** Legal costs and cost shifting (loser pays principle embedded in the Antitrust Damages Directive and embraced in almost all Member States as a general rule[164]) are determinant factors of whether harmed contracting authorities will

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159 It is interesting in Korea; in order to discourage cartel conduct, procurement agencies require bidders to submit a statement signed by each bidder that they have not and will not engage in any communication with other bidders including a warning of the possibility of sanctions and of related damage claims for bid rigging. The statement also includes a predetermined amount of damages, which generally says that "once bid-rigging among bidders is established, a bidder agrees to compensate 10% of the amount of the contract for damages caused by bid-rigging to the procurement agency unless a specific and fixed amount of damages is proved and verified." OECD, *Relationship Between Public and Private Antitrust Enforcement*, 17.

160 Ibid.

161 Ibid. The Damages Directive allows national competition authorities, if deemed appropriate, to assist in determining the amount of damages when requested by a national court.

162 Claim for damages caused…, op.cit. p. 47-48.

163 Furthermore, when competition authorities determine that a public administration has been harmed by a sanctioned behavior, they could notify the administration of the infringement decision, encouraging that way the affected administration to seek damages. Susanna Grau and Pau Mirapleix, "Boosting Antitrust Damage Claims by Catalan Public Administration," in *Competition Policy in Eastern Europe and Central Asia: Advocacy of Competition*, OECD-GVH Regional Centre for Competition in Budapest (Hungary), Review no. 23 (January 2024): 38.

164 In all Member States "loser pays" is the general rule, except in Lithuania where each party undertakes its own costs. C. Hodges, S. Vogenauer, and M. Tulibacka, "The Oxford Study on Costs and Funding

pursue legal action.[165] High litigation costs, uncertainty around the outcome, and the time-consuming nature of legal proceedings can discourage them from taking action, especially since these costs and resources are ultimately borne by the public budget and taxpayers. [166] This burden is particularly heavy for Member States with smaller procurement agencies, which often lack the necessary enforcement resources.

To address this obstacle, it has been suggested that a competition damages litigation fund be established, funded by contributions from contracting authorities and supervised by a government body responsible for auditing public sector accounts (e.g., the Auditor General).[167] Such a fund would cover litigation costs, helping to alleviate the financial pressure on public entities. Procedural costs can often cause public entities to withdraw from or avoid initiating claims due to concerns over high expenses or low success rates. In cases where success is more likely, providing public financial support would enable these entities to pursue claims more effectively. [168]

c. **Public officials and their role in the process.** When it comes to procurement public officials there are several challenges that can be associated with their roles. First, as identified, procurement officials often lack the "industry-specific knowledge" needed to monitor and detect anti-competitive behavior, which results in difficulty in assessing whether a tender requires formal antitrust investigation.[169] In addition, the public bodies who initiate proceedings do not benefit from the recovered damages, nor do the reporting officials receive career benefits.[170] Quite to the contrary, public officers are generally evaluated on the ground of successful bidding process and not the number of identified bidding rings.[171]

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of Civil Litigation - Introduction," in *The Costs and Funding of Civil Litigation: A Comparative Perspective*, ed. C. Hodges, S. Vogenauer, and M. Tulibacka (London: Bloomsbury Publishing, 2010), 17.

165 M. De Sousa e Alvim, "The New Directive on Antitrust Damages - A Giant Step Forward?" *European Competition Law Review* 36 (2015): 247.

166 Hodges, Vogenauer, and Tulibacka, "The Oxford Study on Costs and Funding," 4.; Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; It is interesting that some are of the opinion that "the state is in a favourable position as a litigant in damages actions, (op.a. especially due to the fact that) the costs are borne by the public budget". Maci, "Private Enforcement in Bid-Rigging Cases," 225.

167 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

168 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

169 There are several reasons why authorities encounter increasing challenges in uncovering bid-rigging in public tenders. Bid-riggers use more sophisticated methods to hide their activities, and effective detection depends on close cooperation between procurement bodies and competition authorities, alongside proper training for officials. Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 43. – 44; Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; International Competition Network, *Anti-Cartel Enforcement Manual: Chapter on Relationships Between Competition Agencies and Public Procurement Bodies*, April 2015, 15.

170 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

171 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

To overcome these challenges, proposed solutions are directed to strengthen the capacity of procurement officials. First, enhanced detection techniques, such as advanced data analytics and cross-border cooperation between competition authorities, could facilitate earlier identification of bid-rigging schemes.[172] Given that procurement officials often lack expertise in various specific industries needed to prepare high-quality tender specifications or evaluate offers, it is crucial to involve external experts at key stages of the procurement process. [173] Another key solution is to create appropriate incentives for public officials to pursue damages claims, such as shielding officials from reputational risks or political repercussions. To further support public bodies in pursuing damages claims, it is essential to strengthen guidance from competition authorities or establish specialized public consultancies to assist in preparing claims. Public bodies, unlike other victims of cartels, are well-positioned to quantify the economic harm caused by bid-rigging, as they hold key documents such as cost estimates and contract values, which are critical in calculating overcharges.[174] Public officials should be provided with clearer incentives, ensuring that their efforts in identifying and reporting bid-rigging are recognized and rewarded. Aligning these incentives would also help address the principal-agent problem, giving officials a direct stake in the successful recovery of damages, similar to the interest seen in private companies.[175]

d. **Damaging relationships with tenderers.** Another detected reason why contracting authorities are reluctant to pursue an action against businesses engaged in bid-rigging practices is the concern that the initiation of litigation against colluding economic operators may spoil their cooperative relationship with bidding companies. This issue is particularly pronounced in smaller markets, where only a few operators often meet the tender requirements. If these economic operators are excluded, there is a risk that no bidders will remain, creating challenges for the state, which still relies on these operators to provide procured services. It can eventually lead the state to accept partial compensation through settlements rather

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172 OECD. *Algorithms and Collusion - Background Note by the Secretariat*. DAF/COMP(2017)4. https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf; OECD. *The Role of Competition Authorities in Promoting Competition*. DAF/COMP(2007)34. https://www.oecd-ilibrary.org/docserver/8ed0c-7ba-en.pdf?expires=1730575201&id=id&accname=guest&checksum=99230BA35DFA7A71C1B-CB9E38CA8D267

173 However, this should be done with caution, as the inclusion of external advisors can introduce risks, such as conflicts of interest, competition law violations, or breaches of public procurement law through discriminatory requirements; OLAF, *Fraud in Public Procurement - A Collection of Red Flags and Best Practices* (November 2017), 11.

174 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

175 Ibid., 44.

than pursuing full damages.[176] Furthermore, for the same reason, there may be limited political interest in pursuing such claims.[177]

A potential solution is the assignment of claims to third parties with both an interest in pursuing legal action or the expertise to handle cases more efficiently than public procurement bodies. These could include special courts, institutions like audit or procurement oversight agencies, private agents such as law firms or taxpayer associations, and even competitors who lost bids due to bid manipulation. This practice is already in place in Germany, where claims can be assigned to third-party funders or special purpose vehicles (SPVs)."[178]

e. **Limited availability of collective redress mechanism.** Limited availability of collective redress mechanisms, which in many Member States, are primarily available only to consumers, is also seen as an obstacle to the effective damages claim system. According to the OECD, when it comes to cartels, collective actions or other mechanisms allowing multiple small claims to be aggregated can be an important element in seeking cartel induced damages.[179] The damage caused by competition law infringements is often dispersed among many potential claimants. In these cases, the individual damage suffered by each claimant may be too small to justify the cost of a lawsuit, leaving many smaller claims unaddressed. Without such mechanisms, recovery of damages is often limited to plaintiffs with substantial claims or the financial means to pursue lengthy litigation.[180]

While collective redress mechanisms exist in some Member States, the EU Directive on representative actions[181] is limited to consumers and does not extend to public procurement or competition law cases where victims are public entities, other undertakings, or non-consumer victims. Expanding the scope of such mechanisms to cover public procurement entities and antitrust violations could facilitate access to justice for these claimants, including smaller entities.

f. **Prevalence of settlements.** Another significant reason (while minding that this aspect is not viewed negatively) for the underutilization of damages claims in bid-rigging cases is the prevalence of settlements. Settlements are common across

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176 Giosa, "Damages Claims for Bid Rigging," 6.

177 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 7; Penelope-Alexia Giosa, op.cit.

178 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

179 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 19.

180 Ibid.

181 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, OJ L 409 (December 4, 2020): 1–27.

the Member States as a response to antitrust infringements and are particularly favored in public procurement.[182] Public authorities often encourage bidders to settle claims rather than pursue litigation, knowing that these companies will bid for future public contracts. This preference for settlements is also reinforced by the Antitrust Damages Directive, which promotes out-of-court resolutions, including mediation, arbitration, and conciliation, as efficient methods for compensating victims of competition law violations. [183]

5. CONCLUSION

Bid-rigging in public procurement causes substantial financial losses for the public sector, undermining the integrity and competitiveness of public procurement processes. Public and private enforcement mechanisms in competition law serve as two primary avenues in addressing this issue. Public enforcement plays a crucial punitive role by imposing sanctions in line with the severity of infringements, complemented by debarment mechanisms like bidder exclusion and director disqualification. These measures aim not only to punish anti-competitive behavior but also to maintain the integrity of future procurement processes by restricting access to high-value contracts for wrongdoers. Private enforcement, meanwhile, is essential in compensating public entities for the harm caused by collusive practices, thereby restoring essential funds to public budgets and reinforcing the punitive and deterrent effects of fines on cartels. However, despite the encompassing framework, private enforcement remains underutilized across many EU jurisdictions. Barriers specific to bid-rigging cases limit its full impact. Yet, when effectively pursued, private enforcement provides valuable compensation and can amplify the overall deterrent effect of competition law enforcement. Encouraging private damages claims by public entities requires more than regulatory incentives, it necessitates a coordinated effort among stakeholders dedicated to safeguarding competitive markets. Addressing procedural and evidentiary obstacles, ensuring adequate resources and guidance, and leveraging debarment alongside traditional sanctions are vital to building a comprehensive enforcement strategy. Through such a committed, collaborative approach, enforcement of competition law in bid-rigging cases can better achieve its goals of punishment, deterrence and compensation, ultimately strengthening public procurement systems and contributing to overall social welfare.

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182 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

183 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; OECD, *Relationship Between Public and Private Antitrust Enforcement*, 32. – 33.

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Review article

PRIVATE (NON-)ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA

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Abstract

Slovakia transposed the Damages Directive (2014/104) in the simplest way – copying its provision into separate law and repealing previous provisions tackling possibility of the private enforcement of competition law, including collective rights of consumers or their association. The Damages Directive was popularly presented as a "fresh start" for public enforcement of competition law in the EU Member States and to solve some interplays regarding access to file and protection of leniency submissions. Nevertheless, the Damages Directive left several loopholes in private enforcement since it covers merely "some" provisions on damages claims.

The paper will investigate level of private claims arising from the violation of competition rules in Slovakia, reasons for such a level and provides some avenues for further incentives to enforce competition rules outside the administrative procedure at the Slovak NCA.

First, preliminary observation regarding stand-alone actions can show to us certain unwillingness of Slovak courts to provide a civil remedy in cases of alleged violation of the competition rules. The Supreme Court of the Slovak Republic in the cases involving dispute between a health insurance company and hospitals refused to provide an injunction without prior decision of the competition authority. This decision was based on the argument that courts are bound by the decision of competition authority in terms of administrative offence punished by that authority. Thus, the paper will provide an answer to the question, whether this position of the Supreme Court, in fact, limited the possibility of success of stand-alone actions.

Second, from the analysis of the investigation activity of the Slovak NCA, it is apparent that in the recent years it focuses almost purely on investigation of bid rigging cartels. In this context, the paper will assess whether the decision of the competition authority provide enough information for possible follow-on action. Indeed, in bid rigging cases, such assessment will be easier, comparing to abuse of dominance. Nevertheless, the paper will try to estimate possible overall damages caused by anti-competitive behaviour identified by the Slovak NCA. In this context, it must be noted, that in Slovakia, it is better to call enforcement of competition rules through means of civil law "public-private" enforcement rather that "private" enforcement because action can be filed by public authority (or in some cases more precisely the Slovak Republic as state represented by a public authority) harmed by bid rigging, rather than individuals.

The paper reviewed the recent decisions of the AMO if they can serve as a basis for follow-on action, based on four criteria: (1) if they are final, (2) if the described behaviour caused a rele-

vant harm, (3) if the injured party contributed intentionally or negligently into infringement, and (4) if it is possible to find a liable person with assets enough to cover damages. The analysis showed that only a small fraction of the decision of the AMO passed through this scrutiny.

Finally, the paper suggests non-exhaustive list of suggestions that can improve possibilities of private damages claims in competition matters: the rebuttable presumption that anti-competitive behaviour raised prices by 10 %, involvement of the "victims" as a third parties, including damages consideration in the settlement procedure, solving private-law aspects of competition law enforcement by private-law measures. Although the first suggestion requires the statutory change, the remaining can be achieved also via a new practice of the AMO and contracting authorities. Better involvement of the "victims" of competition infringements is, moreover, consistent with similar policies in criminal proceedings.

***Key words**: competition law, EU law, Slovak law, private enforcement of competition law, bid rigging, stand-alone actions*

1. INTRODUCTION

Directive 2014/104/EU (hereinafter "Damages Directive")[1] was not only a tool of a legal harmonization of incoherent EU-wide framework for damages claim for violation of competition rules. It was also a momentum for establishing such rules clearly in those jurisdictions of the EU which had not adopted specific competition-related rules for civil claims. The legal as well as political purpose of the Damages Directive was multi-fold: protecting effectiveness of public enforcement (e.g., rules on protection of leniency submissions), harmonizing standards for the scope of damages claims and thus streamlining the legal effectiveness of such claims and also a strong statement for injured parties harmed by anti-competitive behaviour that there is a robust EU framework for protection of their rights and the European Commission has been actively promoting damages actions.[2]

After 10 years of the existence of the Damages Directive, the piece of European legislation could not have showed its full potential due to prohibition of retroactivity required by Article 22 of the Damages Directive. Therefore, the Damages Directive fully applies to "new infringements", i.e., infringements committed in the period after the transposition of the Damages Directive. However, some cases involving the private enforcement of competition law have also emerged in Slovakia, although there is still no 'high-profile' successful case on claims arising from competition violation. Indeed, the level and intensity of private enforcement

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

[2] P. L. Parcu, G. Monti, and M. Botta, 'Introduction' in P. L. Parcu, G. Monti, M. Botta (eds.), Private Enforcement of EU Competition Law. The Impact of the Damages Directive, (Cheltenham, Northampton: Edward Elgar Publishing, 2018), pp. 1–14 pp. 2–7.

is highly interconnected with the public enforcement of competition which has been hardly vigorous in recent years in Slovakia[3] (except from 2023).

The paper briefly reviews the legislative framework of the private enforcement of competition rules. Based on the case law of the Supreme Court of the Slovak Republic it shows limited avenues for stand-alone actions. Then, it assesses the possibilities of the follow-on action based on the current decision-making activity of the Antimonopoly Office of the Slovak Republic [Protimoponolný úrad Slovenskej republiky] (Slovak NCA) (hereinafter "AMO"), i.e., if the decisions of the AMO provide a solid basis for such claims in the future. Finally, the paper suggests avenues for strengthening the enforcement potential of activities of the AMO vis-à-vis private enforcement.

2. LEGAL FRAMEWORK OF PRIVATE ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA

2.1. Pre-Damages-Directive era

The legal framework for the private enforcement of competition law was established long before the transposition of the Damages Directive. The provisions on "the disputes on prohibited competition" were introduced in the first competition act [Act on Protection of Economic Competition – APEC(1991)] in then-time Czechoslovakia after the Velvet Revolution.[4] Every person suffered by prohibited competition was entitled to require infringer to refrain from behaviour (*actio negatoria*), to remedy the harmful situation (*action restitutoria*) and to provide an adequate compensation, to make good the damage and to deliver the unjust economic benefit.[5] From the procedural point of view, a proto-model of opt-in actions was established for *action negatoria* and *action restitutoria* by allowing single proceeding launched by the first of the plaintiffs and the remaining claimants were allowed as intervenients.[6] The second competition act [APEC(1994])[7] followed the principles and the structure of the provision on private enforcement emanated from APEC(1991) but it shrunk their scope: consumers only were allowed to file and action and *actio negatoria* and *action restitutoria* were covered by this provision.[8]

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3 O. Blažo, 'Proper, transparent and just prioritization policy as a challenge for national competition authorities and prioritization of the Slovak NCA' (2020) 13 *Yearbook of Antitrust and Regulatory Studies* 117–44.

4 Zákon č. 63/1991 Zb. o ochrane hospodárskej súťaže.

5 § 17(1) APEC(1991).

6 § 17(2) APEC(1991).

7 Zákon Národnej rady Slovenskej republiky č. 188/1994 Z. z. o ochrane hospodárskej súťaže.

8 § 17(1) APEC(1994).

On the other hand, it allowed the bodies representing the interests of consumers as plaintiffs in these proceedings.[9] The damages claims and reclaiming unjust benefits were not included in the APEC(1994) and possible claimants could rely on general rules included in the Commercial Code (1991), in particular § 757 thereof. [10] The substantive limb of that provision corresponding to Article 17(1) APEC (1994) was kept in the third competition act [APEC(2001)][11] but the procedural limb of joined actions corresponding to Article 17(2) APEC(1994) was dropped[12] and thus merely general rules of civil court proceedings could be employed. Moreover, this provision was reformed twice. First, in 2014, the original wording of § 42 APEC(2001) was replaced by a provision containing several specific rules for claims against successful leniency applicants.[13] Secondly, § 42 was completely repealed in 2016 by act transposing the Damages Directive (hereinafter "Damages Act").[14] The fourth and current generation of the competition act [APEC(2021)][15] does not contain any provision on damages claims in competition matters, except a general competence of the AMO to cooperate with courts in damages claims and possibility of considering paid damages within the calculation of fine imposed by the AMO for a competition violation.

2.2. Transposition of the Damages Directive in Slovakia

The Damages Act contains an almost literal transposition of the Damages Directive. In the transposition of Article 9(1) Damages Directive, the Slovak legislation

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9 § 17(1) APEC(1994).

10 Zákon č. 513/1991 Zb. Obchodný zákonník.

11 Zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov.

12 § 42 APEC(2001).

13 An undertaking benefiting from immunity was partially exempted from joint and several liability of the members of a cartel, i.e.
- it shall not be liable to pay damages if the damage can be compensated by other participants in the same anti-competitive agreement;
- it is excluded from the obligation to settle with the other participants in the agreement restricting competition who have paid for the damage;
- if the damage cannot be compensated by the other parties to the same agreement restricting competition, a successful immunity applicant shall be liable only up to the amount of the damage caused to its own direct or indirect customers or suppliers.

14 In full: zákon č. 350/2016 Z. z. o niektorých pravidlách uplatňovania nárokov na náhradu škody spôsobenej porušením práva hospodárskej súťaže a ktorým sa mení a dopĺňa zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov v znení neskorších predpisov.

15 Zákon č. 187/2021 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení niektorých zákonov.

goes further than a minimum standard required by EU law. The Damages Directive requires only that the competition infringement established by a final decision of the competent competition authority or court "is deemed to be irrefutably established "but the Slovak law establishes that the court deciding on damages is bound by the decision of the AMO or the final decision of the administrative court reviewing the decision of the AMO in that part of the decision which establishes the existence of violation of competition law.[16] There is no doubt, that this provision was deemed as strengthening of the position of claimants that were harmed by the infringement of competition law once established by the AMO and, in case of judicial review, also confirmed by the administrative court. It must be noted, that in Slovakia the transposition of Article 9(2) Damages Directive went beyond the minimal requirement stipulated by EU law and the decision adopted in the other Member States shall be "presumed to be evidence of an infringement of competition law, unless the contrary is proved in legal proceedings for damages."[17] Table 1 summarizes the differences between the Slovak transposition of the Damages Directive and the requirements of the Damages Directive. Notwithstanding the intention of the legislative body to provide more solid grounds for damages actions in competition matters, the practice of the courts showed that the consequence can be opposite (see subchapter 3.1)

Table 1: Transposition of Article 9 Damages Directive in Slovakia

Damages Directive, Article 9	Slovak Damages Act, § 4
Decision of the Slovak NCA or reviewing court	
infringement is deemed to be irrefutably established	binding for the court
Decision of the NCA or review court from other Member State	
at least prima facie evidence and may be assessed along with any other evidence	is a rebuttable evidence

For the purposes of this paper, it is not necessary to go into the details of all the provisions of the Damages Act because it contains, with the abovementioned exemption, a literal transposition of the Damages Directive. Nevertheless, it is interesting to mention, that the Slovak legislation has acknowledged specific character of the civil disputes in the competition matters and only one of the first-instance court and one regional court for appeals was designated to handle cases "stemming from economic competition":[18] originally the District Court Bratislava II

16 §4(1) Damages Act.

17 §4(2) Damages Act.

18 § 27 Civil Dispute Code (2015) (Zákon č. 160/2015 Z. z. Civilný sporový poriadok).

(hereinafter "DCBa2")[19] and later the Metropolitan Court Bratislava III[20] as the first instance court for the whole territory of Slovakia and the Regional Court in Bratislava (hereinafter "RCBa") as the appellate court.[21] Nevertheless, due to the ambiguous wording of the competence of the designated court, some district courts have not found cases presented to them as arising from competition, e.g. the District Court Trnava did not hesitate to decide on possible private enforcement of state aid.[22]

3. CONDITIONS FOR PRIVATE CLAIMS DUE TO COMPETITION LAW VIOLATIONS IN SLOVAKIA

The legislative framework in Slovakia is prepared to accommodate both, stand-alone actions and follow-on actions. The interplay between administrative enforcement by the AMO and court enforcement of competition law via private litigation is underpinned by provisions [23]allowing the AMO act as an *amicus curiae* in competition matters similarly to the competence of the European Commission under Article 15 of Regulation No 1/2003.[24] The conditions for private claims shall be evaluated separately for stand-alone actions and follow-on actions due to different situation: in follow-on actions, plaintiffs can rely of evidence collected by a competition authority and conclusions made by that authority, while within stand-alone actions plaintiffs shall collect evidence of anti-competitive behaviour themselves and in the same time they are risking that a competition authority will not confirm their claims regarding the very existence of an anti-competitive behaviour.

3.1. Stand-alone actions

While prior to the Damages Directive transposition the individual jurisdiction of the EU Member States provided different approaches to the position of competition infringement decisions in civil claims proceedings, the Damages Directive established minimal standards for the effects of decisions of competition authorities.

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19 Okresný súd Bratislava II.

20 Mestský súd Bratislava III.

21 For more details see O. Blažo, 'Institutional Challenges for Private Enforcement of Competition Law in Central and Eastern European Member States of the EU' (2017) 10 *Yearbook of Antitrust and Regulatory Studies* 31–47.

22 Judgment of the District Court Trnava of 14 September 2018, case No 39C/30/2017, ECLI:SK:2117221806

23 § 94 Civil Dispute Code (2015).

24 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 [2003] OJ L 1/1.

The mainstream discussion on effects of the decisions of competition authorities is obviously addressed to follow-on actions, in particular the scope of binding effects of decision of administrative authority or other court and feasibility of such a binding effect with the principles of judicial independence and constitutional safeguards.[25] Conversely, in Slovakia, court proceeding rules have contained provisions requiring the courts to acknowledge the binding effect of decision of the other bodies, including administrative agencies, for decades. From its very beginning, Civil Court Code (1963)[26] contained provision stipulating that "The court shall be bound by the decision of the competent authorities that a crime, misdemeanour or offence has been committed and by whom, as well as by the decision on personal status."[27] Although the provision was several times amended and also its wording was adjusted to the changing legal framework, its rationale remained unchanged. Similar wording was included into the current court proceeding regulation: "… the court is bound by the decision of the competent authorities that a criminal offence, misdemeanour or other administrative offence punishable under a special regulation has been committed and by whom (…)".[28] Thus, the extreme and literal interpretation of these provisions became fatal for stand-alone actions as showed the *Union saga.*[29] This case consisting of a series of actions was handled by the all judicial instances of Slovakia, including the Constitutional Court of the Slovak Republic (hereinafter "CC"). The aim of this paper is not to review the substance of the case or whether the claims had merit, and purely the procedural arguments of the courts will be under the scrutiny. The *Union saga* is a typical example of a purely stand-alone action because the AMO made no enforcement action in the case and adopted neither infringement decision nor non-infringement decision.

3.1.1. The beginning of the *Union saga*

The case started in 2013 when Union (Union zdravotná poisťovňa, a.s.) – private health insurance company came into the dispute with several hospitals. Union relied on argument that these hospitals had been members of the Association of State Hospitals and they had agreed under the auspices of that association not to

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25 M. S. Ferro, 'Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions' (2020) 3 *Market and Competition Law Review* 51–80 at 76–77.

26 Zákon č. 99/1963 Zb. Občiansky súdny poriadok.

27 § 131(1) Civil Court Code (1963).

28 § 193(1) Civil Dispute Code (2015)

29 R. Macko, 'Stand-alone žaloby na Slovensku v ohrození. Doktrinálny disent k rozsudku Najvyššieho súdu SR z 24. 6. 2020, sp. zn. 3 Obdo 108/2019' (2022) *Antitrust - Revue soutěžního práva* 80–84.

continue in cooperation with Union.[30] Union filed several actions against the individual hospitals requesting preliminary injunction, claiming nullity of the termination of contracts between Union and hospitals as well as damages due to higher costs caused to the health insurance company. Some of this claims of Union were withdrawn by the plaintiff and the request for preliminary injunction was rejected due to procedural reasons linked to necessity of judicial protection and therefore these limbs of the proceeding will not be further analysed in this paper because they are not relevant for the analysis of the private enforcement of competition law. Therefore that part of the claims which was consecutively rejected by the DCBa2, the RCBa, the Supreme Court of the Slovak Republic (hereinafter "SC") and the CC will be followed within the dispute *Union zdravotná poisťovňa, a.s./ Detská fakultná nemocnica s poliklinikou Banská Bystrica*. For simplicity of further text, the remaining disputes will be omitted, notwithstanding whether they were terminated by the decision of the DCBa2 or the RCBa, because the arguments used by the DCBa2 and the RCBa are the same in those cases.

3.1.2. The *Union saga* and the first-instance proceeding (DCBa2)

The DCBa2 rejected all the claims of *Union* by judgment rendered on 6 September 2017,[31] i.e. after almost four-year court proceeding (from the text of the judgment it is apparent that the hearing of the case was held on the day where also the judgment was delivered). From the reasoning of the judgment, it is not possible to identify that the court called witnesses or conducted other forms of investigation and apparently only examined documents, including the minutes of

[30] Based on the fact described by the court in its judgment, Union relied on following description of facts: On 26.06.2013, a meeting of all the major healthcare providers associated with the Association of State Hospitals was held. From the media reports, the plaintiff found out that the subject of the meeting was supposed to be the joint action of the hospitals in the matter of amending their contracts with the plaintiff. Shortly after the meeting, on 26 June, 27 June and 28 June, the plaintiff received termination notices from 16 health care providers. In the case of three other providers, the agreed term of the healthcare contracts was due to expire on 30 September 2013. As a result, the contracts of almost all healthcare providers associated with the Association of State Hospitals were due to expire on 30.09.2013. In addition to the common timing, all terminations have a common termination reason. From the information publicly available to the applicant, it appears that the meeting of the providers was motivated by an offer made by the state insurance company (Všeobecná zdravotná poisťovňa, a. s. -VšZP). The media information publicly presented by the director of the VšZP showed that the essence of the offer of VšZP was to increase the price for certain health care services on condition that other health insurance companies would also increase their contractual prices in that way. These conclusions flow also from articles published in newspaper: Hospodárske noviny of 28.06.2013 and Pravda of 03.07.2013. The plaintiff saw it this joint action agreement restricting competition as well as abuse of dominant position (e.g., judgment of DCBa2 of 06. 09. 2017, case 26CbHs/4/2013, par. 7-9).

[31] Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, ECLI:SK:OSBA2:2017: 1213230629.3.

the Association of State Hospitals meeting with the director of VšZP. Therefore, it seems that the court decided based on the documents available already in 2013 after almost four years lingering. The court found no evidence of an anti-competitive behaviour in the documents presented and also pointed out that the plaintiff had not presented any decision of the AMO on issue, even though the AMO had been notified by the plaintiff.

The reasoning of the first-instance court was based on the provision of § 193 and § 194 of Civil Dispute Code (2015). The court found that the decision on the existence of claimed anti-competition behaviour falls either into the competence of the AMO or the competence of the European Commission. Furthermore, citing § 193(1) Civil Dispute Code (2015) the court found that in competition-related cases it is bound by the decisions of abovementioned authorities[32] and thus the court has no competence to decide on matters of public enforcement of competition law.[33] The court also rejected application of § 194(1) Civil Dispute Code (2015)[34] suggested by the plaintiff for the cases of inaction of a public body or for cases when a public authority decides to take no action.[35] The reason for non-applicability of § 194(1) relies on the argument that it is applicable outside of the scope of § 193(1) Civil Dispute Code (2015) only. Hence the AMO has the power to decide on violation of APEC, i.e. on the existence of competition offence and on the person who committed that offence, court found that is stripped from the competence to decide on the existence of competition violation and concluded that "[i]f a court in a civil proceeding nevertheless concludes on its own that the defendant has committed an anticompetitive behaviour (similar to concluding on its own that a defendant has committed a criminal offence), it would violate one of the fundamental principles of a democratic state governed by the rule of law, according to which public authorities can only do what they are allowed to do."[36] Finally, the court concluded that the plaintiff produced no evidence of the existence of anti-competitive behaviour and therefore the claims are unfounded when it described decisions of competition authorities as the only admissible evidence of anti-competitive behaviour: "During the proceedings, the plaintiff did not submit or point to any evidence which would show that the defendant was in any way sanctioned for the behaviour which the plaintiff identified as anti-competitive, nor the plaintiff proved to the court that the competition authority (the Antimo-

32 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 53.

33 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 48.

34 The court itself may assess the question within the competence of an authority other than authority under § 193, but the court may not decide on merits of it.

35 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 56.

36 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 57.

nopoly Office of the Slovak Republic, the Commission) by its decision identified such a behaviour as unlawful. The applicant did not even provide the court with factual allegations of the existence of such a decision."[37]

3.1.3. The *Union saga* and the second-instance proceeding (RCBa)

The plaintiff appealed the first-instance judgment. The RCBa as the appellate court fully confirmed the first-instance decision and also confirmed the soundness of its reasoning.[38] The RCBa fully followed the arguments of the DCBa2 and correctly refused the plaintiff's argument on the application of the Damages Act as well as the Damages Directive due to *ratione temporis.* However, the arguments on the principle of effectiveness and equivalence of EU law raised by the plaintiff remained unaddressed. However, the RCBa found a space for the courts to decide on competition matters in the cases when damages are not involved, i.e. in cases of nullity of contracts because the AMO has no competence to decide that a contract is null and void.[39] Similarly to the DCBa2, the RCBa concluded that "the question of the existence of an anti-competitive behaviour (administrative offence) is not a preliminary question for the court, since the Antimonopoly Office of the Slovak Republic is competent to decide on it."

It must be noted that both the first-instance court and the second-instance court found that are not competent to decide on the existence of anti-competitive behaviour but neither of the courts found it necessary to stay the proceeding under § 162(1)(a) Civil Dispute Code (2015), i.e. the decision depends on the question which the court is not allowed to solve.

3.14. The *Union saga* and the extraordinary appeal (SC)

Slovak legislation allows parties to a civil proceeding to file an extraordinary appeal (dovolanie) arguing one of the errors exhaustively stipulated by the Civil Dispute Code (2015). The applicant *inter alia* referred to the necessity of euro-conform interpretation of § 193 and 194 Civil Dispute Code (2015) and to follow the principle of full compensation for competition harm, as it was confirmed by the Court of Justice in *Courage/Crehan, Leclerc/Commission, BRT/SABAM, Master Foods/HB Ice Cream, Delimitis/Hennineger Bräu, Manfredi/Lloyd Adriatico Assicurazioni, Pfeiderer.* The plaintiff also claimed that the courts violated Article 6 of Regulation

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37 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 58.

38 Judgment of RCBa of 13 June 2019, case No 1Cob/27/2018, ECLI:SK:KSBA:2019:1213230629.3, par. 23.

39 Judgment of RCBa of 13 June 2019, case No 1Cob/27/2018, par. 33.

1/2003. Neither of these arguments were addressed by the SC and the SC fully rejected the extraordinary appeal by the judgment of 24 June 2020.[40] From the reasoning of the judgment it is apparent that the SC did not consider preliminary reference to the Court of Justice on the question if Article 6 of Regulation 1/2003 prevents application of national law as it was employed by the DCBa2 and RCBa. The SC fully followed the arguments of the lower courts finding that "that in a proceeding for compensation for damage caused by an infringement of competition law, the jurisdiction to resolve existence of the infringement of competition law as the basis for the claim as preliminary question within the meaning of § 193 CSP in conjunction with § 194(1) CSP, as well as in the light of the rules of European law, does not exist."[41]

3.15. The *Union saga* and the constitutional complaint (CC)

After almost seven years of judicial proceeding at general courts, the actions by *Union* became more a form of a strategic litigation than a true attempt to claim damages (the requested damages were EUR 8,051.00, only). The order of the CC of 2 December 2021 was the final blow for stand-alone actions in Slovakia.[42] The CC rejected the constitutional complaint by *Union* due to lack of its competence because it did not find any prima facie violation of the Constitution of the Slovak Republic or international treaties or violation of complainant's rights stemming from the constitution. The CC followed the opinions of the courts, that decision of the existence of violation of competition rules is an exclusive competence of the AMO and other competition authorities.[43] On the one hand, the CC confirmed the direct effect of the EU law, including Articles 101 and 102 TFEU, duty of national courts to enforce the norms of the EU competition law and safeguard their full effect, as well as the principles of effectiveness and equivalence, citing the historic case law of the Court of Justice.[44] The CC also quoted Articles 5 and 6 of Regulation 1/2003 and the competence of competition authorities and courts described as follows: "(…) the competence to ensure the protection of individuals' rights in the field of competition is entrusted both to the competition authority (…) and to the courts. In the conditions of the Slovak Republic, this protection is established in a way that the *antimonopoly authority has the competence to decide on the infringement of competitive law* by a specific behaviour (it is an activity prohibited also by Article 101 and Article 102 of the Treaty on the Functioning of the

40 Judgment of SC of 24 June 2020, case No 3Obdo/108/2019, ECLI:SK:NSSR:2020:1213230629.2.

41 Judgment of SC of 24 June 2020, case No 3Obdo/108/2019, par. 51.

42 Order of CC of 2 December 2021, case No II. ÚS 564/2021.

43 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 14.

44 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 15.

European Union) *and the courts provide protection subsequently in the form of deciding on a claim for compensation for damages caused by an anti-competitive act that has already been found unlawful by a competent competition authority* that is professionally and technically equipped to make such an assessment." (emphasis added).[45] Furthermore, the CC found no violation of the right to judicial protection: "From the point of view of the effectiveness of the protection provided in the field of competition, the injured party is entitled to claim and obtain compensation in the form of a private law action, *provided that the existence of the prohibited conduct has been declared by the antitrust authority*." (emphasis added). [46] Summing up, the CC effectively removed the possibility for stand-alone actions in the Slovak legal order by stressing, that it is possible to claim damages in competition matters only after decision of the competition authority. Misleadingly, the CC compared the situation in competition law with claims for damages in the cases of harm caused by unlawful decision or action of public bodies in which a previous annulment of such a decision of public authority is required.[47] The situation is not comparable, because there is a presumption of validity of decisions of public bodies unless they are duly annulled or repealed, but there cannot be a presumption of non-existence of anti-competitive behaviour of undertakings. The CC also supported its conclusion by argument of the protection of the presumption of innocence suggesting that in stand-alone actions "(…) it would be possible to hold an alleged violator of public (competition) law norms, who has not been found guilty of a certain infringement by a final decision of the competent public authority (the competition authority), liable under private law for a behaviour which it is presumed that it has not committed, until the competition authority, by its final authoritative decision, declares to the contrary."[48]

3.1.6. The *Union saga* and ways forward

Thus, after more than eight years of judicial disputes, the Slovak court have not acknowledged the possibility of stand-alone claim for damages relying on jurisdictional limits stipulated by § 193 and § 194 of the Civil Dispute Code (2015). Even though the *Union saga* dealt with the pre-Damages Directive infringement, it can be little changed in the course of the Slovak courts based on the Damages Directive. Although § 4 of the Damages Act is the *lex specialis* to the Civil Disputes Code,[49] it repeats that the court is bound by the decision of the AMO. Further-

45 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

46 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

47 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

48 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 14 .

49 § 22 Damages Act.

more, the explanatory memorandum attached to the proposal of that provision is not amicable for limiting consequences of judicial decisions in *Union saga* as well: "The aim of this norm is to prevent the court from deciding on an infringement of competition law, which constitutes the most important legal condition for the subsequent decision on a claim for damages."

Indeed, the call for consistency of public and private enforcement of competition law shall be addressed within the judicial proceeding stemming from damages claims. However, complete outlawing stand-alone actions went rather too far in securing the legitimate goal. Moreover, the courts in their reasoning omitted several legal aspects of Slovak and EU law.

Firstly, the courts do not distinguish between violation of competition rules as such with its civil, administrative and penal consequences and infringement of competition rules as administrative offence enforced by competition authorities. Even the CC when quoting provisions of Regulation 1/2003 simply omitted Article 1 of that regulation, more precisely paragraph 1[50] and 2[51] thereof. Based on Regulation 1/2003, the prohibition of anti-competitive behaviour exists notwithstanding the existence of a decision declaring infringement of Article 101 or 102 TFEU.

Second, the courts do not elaborate the duty of courts to stand proceeding if it is necessary to wait for the decision of the competent authority under § 162 in conjunction with § 193 and § 194 of the Civil Disputes Code (2015). The Regional Court in Trenčín when deciding on claims of the organization of collective management of authors' rights stand proceeding until the final decision of the AMO.[52] In this case the court found the decision of the AMO relevant for the legality and level of the fees charged by the abovementioned organization since the defendant claimed that the level of the fees is a consequence of abuse of dominant position. In its finding of 20 April 2023 the CC avoided to provide the answer to the argument that refusal to stand proceeding and to wait for the decision of the AMO constitutes a violation of the right for a fair trial.[53] In the line of the limited competence of the CC, it refer this question to the SC which had to decide on the extraordinary appeal again due to annulment of its prior decision by the CC.

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50 "Agreements, decisions and concerted practices caught by Article [101](1) of the Treaty which do not satisfy the conditions of Article [101](3) of the Treaty shall be prohibited, no prior decision to that effect being required."

51 "The abuse of a dominant position referred to in Article [102] of the Treaty shall be prohibited, no prior decision to that effect being required."

52 Judgment of the Regional Court in Trenčín of 31 January 2024, case No 19Co/154/2019, ECLI:SK:KSTN:2024:3116204463.3, par. 18-21.

53 Finding of the CC of 20 April 2023, case No I. ÚS 116/2023, par. 33-36.

Third, the courts omitted the possibility of preliminary reference to the Court of Justice of the EU to clarify the interpretation of Articles 1 and 6 of Regulation 1/2003 and to test their approach to stand-alone actions.

Fortunately, the reasoning order of the CC in case No II. ÚS 564/2021 is not legally binding, but, on the other hand, it explicitly rejected arguments of violation of the right for a fair trial based on de facto refusal of admissibility of stand-alone actions. Within such a strict interpretation of procedural rules, the path followed by the Regional Court in Trenčín may provide a solution to the consistency of public and private enforcement of competition law.

Nevertheless, even abovementioned solution does not address situation similar to that identified by the Court of Justice in C-792/22 *Energotehnica.* Similarly, the persons harmed by an anti-competitive behaviour do not have standing at administrative proceeding at the AMO and thus they cannot procedurally influence the decision of the AMO (they are not addressees and they cannot appeal the decision). Therefore, the final decision of the AMO which is binding to the court in the damages proceeding is "*fait accompli*" for prospective harmed parties.

3.2. Follow-up claims

The transposition of the Damages Directive hardly led to a vigorous private enforcement dispute, at least not visibly (out-of-court settlements cannot be caught by a public survey). By the time of writing this paper, there is no publicly known successful follow-on claim arising from antitrust decision in Slovakia.[54] Nevertheless, several unsuccessful cases can be found.

In *DAMIJO KOMPLET/ Východoslovenská vodárenská spoločnosť* the District Court Svidník from 2004 to 2017.[55] The applicant claimed damages due to refusal to supply water by Východoslovenská vodárenská spoločnosť, a.s., relying on the decision of the AMO of 2004. The court rejected the claims due to insufficient evidence of existence of harm and existence of a causal link (inter alia, argument, that the applicant should not have entered to contract with its customers when it has to be aware that it had not secured supplies of water).).

In the case of refusal to supply fuel, the SC rejected the claims of the applicant based on the following argument, that the claim is not covered by the concept of unfair competition, and thus it is not possible to claim damages under civil (com-

[54] In Slovakia, all final decisions of the courts shall be published.

[55] Judgment of the District Court Svidník of 17 March 2017, Case No 1Cb/230/2004, ECLI:SK:OSSK:2017:8604114180.27

mercial) law because the plaintiff and defendant were not "in competition" but in a contractual relationship: "There was a contractual relationship between the plaintiff and the defendant, from which it cannot be inferred that there was competition in a particular market in order to outcompete competitors and to gain a more advantageous position and greater material benefit in the business. The failure to conclude the sales contracts cannot be regarded as unlawful conduct and an abuse of competition, since the conditions for the fulfilment of the conditions of competition between the complainant and the respondent were not met. The fact that the respondent was fined by the Antimonopoly Office of the Slovak Republic for abuse of its dominant position does not establish that there was a competitive relationship between the complainant and the respondent, an act in competition."[56] The arguments of the SC was "reinforced" within the extraordinary review process by the SC and published in the collection of case law of the SC: "The behaviour, which the Antimonopoly Office in its final decision qualified as abuse of dominant position on the relevant market in the form of discrimination pursuant to § 7(5)(c) of Act No.188/1994 Coll. on the Protection of Competition as amended, may also constitute unfair competition pursuant to § 44(1) of the Commercial Code only if the person who violated the above obligation and the person against whom it was violated are in a position of mutual competitors."[57]

The court, but also the applicant apparently amalgamated the concepts of unfair competition and violation of competition rules, and the court required fulfilment of the conditions unfair competition also for damages stemming from violation of APEC.

Since this case law is quite outdated, it is hard to imagine that in the present time any court will refuse to accept claims for damages stemming from competition infringement confirmed by the AMO. Therefore, we will focus on cases not older than 10 years for the purposes of further analysis.

The following conditions for successful follow-on actions seem to be essential:

1) existing final decisions of a competition authority, i.e., a basis for legal claims for damages;
2) existing damage caused by anti-competitive behaviour;
3) existing "victim" of anti-competitive behaviour;
4) existing undertaking that infringed competition rules.

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[56] Judgment of the SC of 21 October 2008, case No 4 Obo 194/2007.

[57] Judgment of the SC of 20 February 2008, case No: 1 Obdo V 19/2007, https://www.nsud.sk/data/files/510_stanoviska_rozhodnutia_7_2010.pdf.

If all of these above-mentioned conditions are not fulfilled cumulatively, there is no basis (no starting point) for a successful claims in follow-actions and it is not necessary no analyse further incentives or disincentives in the procedural structure of Slovak civil law.

3.2.1. Existence of final decisions

For damages claims, it is necessary to find a decision of a competition authority on which claimants can rely. The decision must meet several formal and material criteria.

1) the decision shall be final, i.e., it cannot be appealed or under the judicial review.

2) the decision shall contain at least description of possible damage caused by anti-competitive behaviour.

Notwithstanding the quality and the content of the decisions of the AMO, the number of cases successfully closed on the level of the AMO (i.e. they were not appealed or the Council of the AMO confirmed the decision). Table 2 shows that in the sphere of cartels the AMO issues at least some decision but in the area abuse of dominant position and vertical agreements are only few enforcement decisions. The figures may be, however, misleading in the sense that the AMO performed only few enforcement actions in the area of abuse of dominant position and vertical agreement. It must be noted that apart from the number of the decisions mentioned in Table 2, the AMO also rendered several decisions on accepting commitments. On the one hand, accepting can be seen as an effective measure to solve the situation on the market, on the other hand, it is not possible to base a claim for damages on a such decision because commitment decision does not state the existence of an infringement of law. As the quantitative analysis showed that after 2004 almost all reviewable decisions of the AMO were actually appealed within the judicial review (88 %).[58] Furthermore, the majority of the cases are closed after a lengthy judicial battle and finally 70 % cases were upheld by the courts[59] but the length of the judicial review (comparing to the length of the proceeding of the AMO)[60] remains the substantial hindering factor of the effectiveness of the competition law in Slovakia. Further private enforcement of competition law

[58] O. Blažo, 'Slovakia Report' in B. Rodger, O. Brook, M. Bernatt, F. Marcos, A. Outhuijse (eds.), Judicial Review of Competition Law Enforcement in the EU Member States and the UK, (Alphen aan den Rijn: Kluwer Law International, 2024), pp. 739–88 p. 755.

[59] Blažo, 'Slovakia Report', p. 760.

[60] O. Blažo, 'More Than a Decade of the Slovak Settlement Regime in Antitrust Matters: From European Inspirations to National Inventions' (2023) 16 *Yearbook of Antitrust and Regulatory Studies* 9–56.

is also narrowed by the scope of the enforcement actions by the AMO. Almost all cartel decisions in the recent decade cover single bid rigging case (or very few interconnected public procurements). Therefore, usually there is a single injured party – contracting authority, i.e. private body. Furthermore, since all bid rigging cartels are considered hardcore cartels – restrictions by object – the AMO provides limited identification of actual harm caused by bid rigging (apart from statements on the effects of bid rigging in general).

Table 2: Number of infringement cases closed by the AMO

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Cartels	2	4	3	4	1	1	3	1	1	1	1
Abuse	0	0	0	0	1	1	0	0	0	1	1
Vertical agreements	1	0	0	0	1	1	0	0	0	0	0

3.2.2. Existing "damage" or harm

The identification of undertakings that infringed competition law and the confirmation of the existence of violation of competition law are essential for the follow-on actions. The applicant cannot directly base their damages claims solely on the content of the decision of the AMO (because this aspect is not binding for the court and at the same time the AMO is not empowered to decide on damage), nevertheless, the description of possible harm provided by the competition authority is relevant for estimation if the decision can serve as a basis for follow-on claims. In the majority of cases, the AMO has not provided any precise theory of harm relying on *quasi-per se* prohibition of hard-core cartels. Moreover, it is possible to identify several situations that constitute a competition infringement on the one hand, but on the other hand, the facts suggest that the cartel caused no harm or a very small harm that can be requested by the means of civil law. The following examples of situations when damages claims can be difficult or impossible can be identified in the decisions of the AMO:

a) public procurement procedure cancelled: the contracting authority cannot request damages because by cancelling the public procurement procedure effectively avoided the harm;[61]

b) members of the cartel excluded from the procurement procedure: the existence of bid rigging did not cause any pecuniary or non-pecuniary harm because the agreement among the undertaking did not influence the outcome of the public procurement procedure;

[61] Case 0016/OKT/2022, decision of the AMO No 2023/DOH/POK/1/3.

c) members of the cartel were not successful: similarly to the previous alternative, the bids by the members of the cartel did not influence the price of the awarded contract;

d) agreement on limiting of lowering price: the members of the cartel agreed that they limit lowering prices under the recommended price of the cars; it will be extremely hard to estimate how much the distributors of cars decrease the price under the lever of the price recommended by the producer or wholesale distributor;

e) price "generated" by cartel is lower that estimated value of the procurement: again, in theory it is possible to claim that the price is higher than competitive, but on the other hand, it will be extremely hard for the contracting authority to prove that it suffered damage because the price should have been much lower that it estimated with a due diligence;[62]

f) harm is extremely low: in the case of *IT Distributors*, the members of the cartel agree to charge one euro per invoice; the amount of harm and damages but due to a short period or non-enforcement of the agreement, the individual harm caused to individuals was few euro only, if any.

3.2.3. Existence of a "victim"

As it was mentioned in the previous subchapter, the majority of the cartel cases were involving a single bid rigging situation or interconnected bid rigging cases. Thus, in such situations, a contracting authority may appear as a harmed party.

However, sometimes manipulation with tender can create a maze of liability relations as can be shown on *MAHRLO et al.* case.[63] In the tender in issue, the vocational secondary school hired a self-employed expert on public procurement. However, this expert manipulated tender by selecting tenderers and providing exchange information among them. The expert was fined as a member of the cartel together with the rest of "conspirators". Due to Slovak law, if injured party substantially contributed to own harm, the damages can be reduced and even also rejected. Such an approach in competition cases is undoubtedly in the line with *Courage/Crehan* case law.[64] In this particular case, contribution of the contracting authority is apparent since the cartel was co-organized by person acting on behalf of contracting authority (at least vicarious liability). The "real" injured party are

62 Case No 0002/OKT/2020, decision of the AMO No 2023/DOH/POK/1/27.

63 Decision of the Antimonopoly Office No 0016/OKT/2013, Decision of the Council of the Antimonopoly Office No 2015/KH/R/2/005.

64 Case C-453/99 Courage/Crehan [2011] ECLI:EU:C:2001:465, operative part.

students at that school as well as people of the region because students were provided with the required training equipment with the possible consequences of the lower level of their skills obtained during their vocational training. Moreover, all the members of the cartel were small enterprises that ceases their activities during procedure (or transferred them to other legal person) and therefore final fines were ridiculous (in some cases EUR 500.00 and less).

In the context of public authorities that were a "victim" of bid rigging, AG Kokott in Otis introduced her thoughts of possible compensation of "political" harm, i.e., harm caused to the general public due to a cartel that caused non-compliance of public body with the obligation to ensure general welfare.[65] Thus, political harm means a loss of benefits of the general public in public welfare due to lack of funding, as these funds were drained from public budgets due to anti-competitive behaviour.

Of course, the application of this type of damage has at least two pitfalls: the calculation of the damage and the identification of a recipient of damages. In relation to the calculation of the damage is J. Kokott relatively inconclusive and dodging, in the case of a possible plaintiff and the recipient of damages seems to be inspired by US legal order: "However, in such cases, it is possible to consider having a representative of the public interest demand compensation for the harm sustained and making the injuring party pay the compensation into a fund that benefits the general public."[66] Such a model is then resembling the *parens patriae* actions in the United States based on the principles of common law.[67] Nevertheless, such an approach of not confirmed neither in Slovak law not in the EU law in general notwithstanding that some jurisdiction allow *actio popularis* on behalf of general public.[68]

In other cases, the contracting authority (or its agent) was not directly involved into bid rigging but by its actions can (a) either facilitate creation of a cartel or (b) by its negligence and failure of the duty to act with a professional care contributed to harmful outcome public procurement procedure.

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65 Case C-435/18 *Otis and Others*, [2019] ECLI:EU:C:2019:651, Opinion of AG Kokott, par. 127-130.

66 Case C-435/18 *Otis and Others*, [2019] ECLI:EU:C:2019:651, Opinion of AG Kokott, par. 130.

67 S. B. Farmer, 'More lessons from the laboratories: Cy pres distributions in parens patriae antitrust actions brought by state attorneys general' (1999) 68 *Fordham Law Review* 361–405; E. L. . Fisch, 'The Cy Pres Doctrine and Changing Philosophies' (1953) 51 *The Michigan Law Review* 375–88.

68 L. Rossi and M. S. Ferro, 'Private Enforcement of Competition Law in Portugal (II): Actio Popularis - Facts, Fictions and Dreams' (2013) 13 *Competition nad Regulation* 35–87; M. S. Ferro, 'The System for EU Antitrust Enforcement is Misguided and Unfair—Let's Change it' (2020) 11 *Journal of European Competition Law & Practice* 413–17.

In *SPIE Elektrovod et al.* case, the contracting authority requested company *SPIE Elektrovod* to prepare calculation of the estimated value of the contract.[69] Obviously, such a situation is not prohibited, but the consortium led by *SPIE Elektrovod* actually won the bid and the question, whether pervious contacts with the contracting authority might have helped *SPIE Elektrovod* to win the bid or not, may be subject to further investigation or a form of a defence of possible damages claims.

In *AGROSERVIS et al.* case, the AMO analysed procurement procedure launched by several agri-food companies (public procurement was mandatory due to the EU funding). The AMO identified, that *ISA projekta* company was preparing procurement documentation and had "knowledge that bids should be submitted by tenderers designated by the undertaking AGROSERVIS and also that the bids submitted by the bidders *AGROSERVIS* and *Alžbeta Tóthová M E T E O R* are essentially identical."[70] In the same time *EXATA GROUP* prepared all procurement procedures but it was not treated as a member of the cartel due to its link with winner of all public procurement in issue (*AGROSERVIS*) because it was, in fact, a parent company of all contracting authorities involved in case. It is obvious that contracting authorities, that were subsidiaries to the company which contributed to the existence of bid rigging cartel, can hardly successfully claim damages due to anti-competitive behaviour which, at least indirectly, existed because of their very activities.

The judgement of the Regional Court in Trenčín[71] (and previous judgment of the District Court Trenčín[72]) confirmed strict liability of contracting authorities if they fail to detect existence of bid rigging. In several cases was the bid rigging so obvious from the procurement documentation that it was not necessary to perform an inspection of the premises of the undertaking in issue or the inspection did not bring additional evidence. Such a negligence or lack of professional care led to case handled by the abovementioned courts in *The Slovak Republic/STM POWER*. The Slovak Republic (represented by the Ministry of Economy) successfully claimed damages from *STM POWER* company due to violation of the duty to avoid anti-competitive behaviour in the public procurement procedure which entailed to fining decision of the AMO and the refusal to cover the purchase by the EU funds. Therefore, the *Slovak Republic/STM POWER* case covered a spe-

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69 Decision of the AMO of 11 September 2023, No 2023/DOH/POK/1/27, par. 63

70 Decision of the AMO of 11 September 2023, No 2023/DOH/POK/1/27, par. 229

71 Judgment of the Regional Court in Trenčín of 29 June 2022, case No 8Cob/70/2021, ECLI:SK:KSTN:2022:3116212914.2.

72 Judgment of the District Court Trenčín of 8 January 2021, case No 36Cb/211/2016, CLI:SK:OS TN:2021:3116212914.13.

cific form of damages caused by anti-competitive behaviour stemming from harm caused to the state's budget. At the same time, it confirms the possibility of liability of a contracting authority that had not avoided or prevented bid rigging. This approach can also narrow the avenue for damages requested by a contracting authority of the case of its contribution to bid rigging, at least by its own negligence.

3.2.4. Existing undertaking that infringed competition rules

The possible enforceability of damages stemming from anticompetitive behaviour is also determined by the character of cases handled by the AMO and the fact that the majority of the undertakings in issue are small and medium enterprises. Such companies can easily cease their activity, and owners can start a fresh activities with a fresh company.

The Central Register of Outstanding Receivables of the State[73] show, that in cases 0010/OKT/2021, 0026/OKT/2014, 0027/OKT/2017, 0019/OKT/2013, 0016/OKT/2013 the undertakings simply did not pay the fines.

Table 3: Unpaid due fines (based on the registry of outstanding recievables of the state)

Case No	Fine Final Average	Fine Final Total	Unpaid due fines (based on the registry of outstanding recievables of the state)
0002/OKT/2020	1,791,275.00	7,165,100.00	AlterEnergo, a.s.,: 1 792 500,00
0010/OKT/2021	10,985.33	32,956.00	BECO, spol. s r.o.: 8 000,00 EUR WR system, s.r.o.: 19 835,00 EUR
0026/OKT/2014	85,693.00	257,079.00	VUMAT SK, s.r.o.: 165 341,00 EUR B.C.D., spol. s r.o.: 28 176,00 EUR
0027/OKT/2017	153,773.00	307,546.00	PINGUIN, s.r.o.: 153 773,00 EUR HORADSTAV, s.r.o.: 153 773,00 EUR
0019/OKT/2013	97,740.30	390,961.20	J.P.-STAV spol. s r.o., v konkurze: 158 783,00 EUR
0016/OKT/2013	10,105.50	101,055.00	IBANK-CCC, spol.s r.o.: 216.00 EUR

Sources: Annual reports of the AMO, decisions of the AMO, Central Register of Outstanding Receivables of the State (https://crps.pohladavkystatu.sk/en)

If we look at the figures of the companies that did not pay the fines, there are not cases of inability to pay stricto sensu. The following examples provide insight to the strategies of firm caught for an infringement of competition law.

[73] https://crps.pohladavkystatu.sk/en

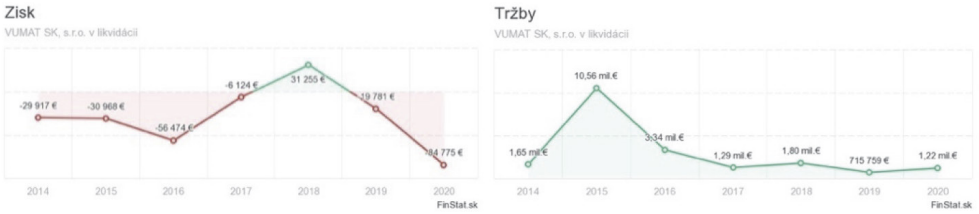
In 0010/OKT/2021 BECO, spol. s r.o., and WR system, s.r.o., simply ceased their activities and they did not even submit a financial report for 2021 and onwards (BECO, spol. s r.o., changed its statutory name and declared bankruptcy in 2023.

Figure 1: Total revenues of BECO, spol. s r.o., and WR system, s.r.o.

Source: Finstat.sk

In 0026/OKT/2014 is the scenario of avoiding of payment of the fine much more apparent. The company VUMAT SK, s.r.o. has generated a loss permanently even in the case of the turnover around EUR 1 million (in one year EUR 10 millions) and B.C. D., s.r.o. ceased its activity after the AMOs investigation. It must be noted that the artificial decrease of the turnover of the company does not influence the ability to pay of the company, but also the possible level of the fine due to 10 % cap. From the public data, it is possible to identify the continuation of activities of one the owners of VUMAT SK, s.r.o. in other companies with increasing revenues (after decreasing activities of VUMAT SK, s.r.o.)

Figure 2: Profit and turnover of VUMAT SK, s.r.o.



Source: Finstat.sk

Figure 3: Profit and turnover of B.C. D., s.r.o.

Source: Finstat.sk

Figure 4: Turnover of the companies of the director of VUMAT SK, s.r.o.

Source: Finstat.sk

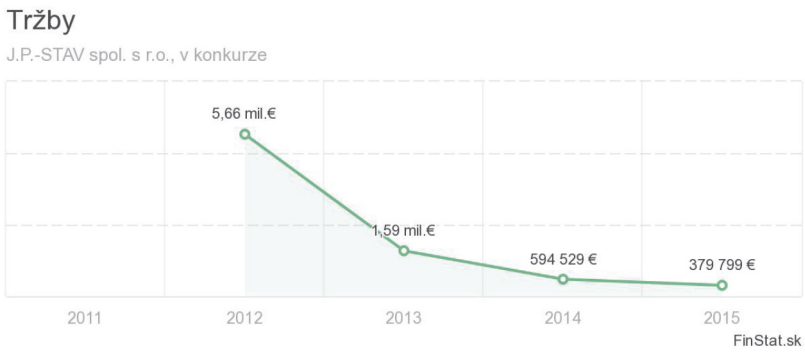
The situation of undertakings in cartel in case No 0027/OKT/2017 was similar. HORADSTAV, s.r.o., submitted its last financial report for 2011[74] and PINGUIN, s.r.o., has been in the liquidation procedure. However, similarly to the previous case, the director of PINGUIN, s.r.o., continues in its entrepreneurial activities within the companies BARDTERM, s.r.o., BARDBYT, s.r.o.

Figure 5: Turnover of PINGUIN, s.r.o. , BARDTERM, s.r.o., BARDBYT, s.r.o.

Source: Finstat.sk

And finally, J.P.-STAV spol. s r. o., in case No 0019/OKT/2013 ceased its activities after investigation of the NCA and in 2014 launched bankruptcy procedures

Figure 6: Turnover J.P.-STAV spol. s r. o.,



Summing up, smaller companies in cartel cases successfully employed a strategy of avoiding payment of the fine. This consequence demonstrated ineffectiveness of

[74] https://www.registeruz.sk/cruz-public/domain/accountingentity/show/643823

the enforcement activities of the PMÚ focusing on small bid rigging cases covering only single procurement case. It is quite easy, for the owner or director of a small firm, to transfer its activities to another company. It is not always easy to consider these new companies of the owner or the director to be part of a single economic unit within the common understanding of the competition law, although the definition of "undertaking" is quite broad. The scope of the application of the concept of single economic unit is limited by the time of infringement and the time of imposition of fine, not for the establishment of a separate undertaking.

Thus the problem of this form of undermining of the enforcement of the competition law lies outside of the traditional boundaries of the competition law and its concepts. If companies (and undertakings) liable for infringement of competition law cannot be linked to a single economic unit through application of competition law, the concept of an "ultimate beneficiary owner" (UBO) may be useful to solve (at least partially) escape routes from liability to pay the fine for violation of competition. In filling this enforcement gaps, the Slovak legislator cannot rely on the EU models since it is full responsibility to bring to effectiveness application of the EU law (including competition law).

Although the previous analysis dealt with impossibility of enforcement of fines, the same approach is applicable to the possibility to retrieve damages from such undertaking, i.e. if an undertaking escapes from the payment of the fine, a fortiori it subsequently probably escapes the civil liability as well.

3.2.5. Summary

Summarizing all factors that can narrow avenues for using certain a decision of the AMO as a successful basis for follow-on damages actions, Table 4 shows that very few decisions are suitable for follow-on actions, based on these criteria. Indeed, criteria based on a possibly limited scope of the relevant extent of damages does not automatically mean that follow-on actions are not possible at all. It is apparent from public information that there is very little activity regarding claims arising from the AMO's infringement decisions. However, the claims stemming from the European Commission's decision in *Truck Cartel* may revive civil claims in competition matters.

Table 4: Decisions suitable for follow-on actions

a	b	c	d	e	f	g	h	i	j	k	l
Year	Case number	DD	Fine imposed by final decision (in euro)		Jud. rev.	Limited damage			CA		Und. dis.
			Average	Total		PP can.	No win	Dam. quest.	Inv.	Neg.	
Cartels											
2024	0002/OKT/2020	No	1,791,275	7,165,100				Yes			
2023	0016/OKT/2022	Yes	2,963	8,890		Yes					
2022	0010/OKT/2021	Yes	10,985	32,956						Yes	Yes
2021	0009/OKT/2017	Yes	190,739	1,144,435	Yes						
2020	0022/OKT/2016	No	39,230	117,690						Yes	
2020	0021/OKT/2019	No	107,777	431,095					Yes		
2020	0012/OKT/2016	No	373,863	6,729,539	Yes						
2019	0035/OKT/2015	No	140,609	281,218							
2018	0027/OKT/2017	No	153,773	307,546						Yes	Yes
2017	0020/OKT/2013	No	64,327	128,653	Yes						
2017	0003/OKT/2015	No	596,470	2,982,351	Yes						
2017	0028/OKT/2014	No	23,396	210,565	Yes						
2017	0050/ODOS/2007	No	132,770	132,770	Yes						
2016	0026/OKT/2014	No	85,693	257,079						Yes	
2016	0011/OKT/2015	No	33,857	67,713						Yes	
2016	0016/OKT/2013	No	10,106	101,055					Yes		Yes
2015	0029/OKT/2014	No	308,186	616,371				Yes			
2015	0030/OKT/2014	No	51,191	153,573						Yes	
2015	0010/OKT/2013	No	411,277	2,056,382				Yes			
2015	0019/OKT/2013	No	97,740	390,961						Yes	
2014	0016/ODOS/2011	No	1,420	1,419							
2014	0064/ODOS/2008	No	3,183,427	3,183,427							
Abuse of dominant position											
2023	0011/OZDPaVD/2020	Yes	57,939	57,939	Yes						
2022	0006/OZDPaVD/2020	Yes	1,181,849	1,181,849	Yes						
2019	0013/OZDP/2012	No	2,990,651	2,990,651							
2018	0012/OZDPaVD/2017	Yes	127,000	127,000							
Vertical agreements											
2019	0001/OZDPaVD/2019	Yes	20,632	20,632							
2018	0014/OZDPaVD/2015	No	?	?	Yes						
2014	0018/OZDPaVD/2014	No	2,182,241	2,182,241				Yes			

Legend: a: year when the decision became effective on the level of the AMO, b: number of administrative case, c: infringement falls into the *ratione temporis* of the Damages Directive, d, e: fine imposed in administrative proceeding (average/total), f: the decision is currently under judicial review (or the final judicial decision has not been published yet), g: public procurement procedure was cancelled, h: none of the members of the cartel was successful; i: Limited possibility to identify a damage; j: possibility of involvement of contracting authority or its agent in bid rigging; k: possible

negligence of contracting authority (apparent indicia of bid rigging); l: undertaking disappeared, ceased activity or bankrupted.

Source: Author's own elaboration, based on data extracted from Annual reports of the AMO, decisions of the AMO, database of judgments published by the Ministry of Justice of the Slovak Republic

4. POSSIBLE WAYS FORWARD

In the short-term horizon, it is hard to expect speeding-up the judicial review procedures. The enforcement intensity and focus thereof are, of course, in the hands of the AMO. Based on apparent disconnection between public and private enforcement of the competition rules a non-exhaustive catalogue of measures together with their advantages and disadvantages can be suggested:

1) **The rebuttable presumption that anti-competitive behaviour raised prices by 10 %:** the presumption can be established by law and due to achieve flexibility its precise amount can be adjusted by the decree of the AMO.
   a. advantages: significant simplification of damages claims.
   b. disadvantages: the presumption can lead to undue benefits of the claimants in the form of excessive damages and thus creating a form of punitive damages.

2) **Involvement of the "victims" as a third parties**: the approach similar to criminal law in Slovakia where victims of the investigated and prosecuted crime have procedural rights in the criminal proceeding, including claim directly damages, call witnesses, submit their observation; effective application of this approach established in criminal law would require amendment of current legislation, however, in a certain form, the aim can be achieved by increasing application of the provisions of the third parties in the current APEC; moreover, the AMO can have a duty (or shall within the ambit of the current legislation) pro-actively search for potential injured party and call them to present their opinions and proposals within ongoing administrative proceeding, including estimation of harm:
   a. advantages**:** involvement of possible injured parties can strengthen the case and raise the interest of these injured parties;
   b. disadvantages**:** the communication with the other parties can prolong the administrative case and can raise tensions on the protection of business secrets and other information from file during the administrative proceeding.

3) **Including damages consideration in the settlement procedure:** again, similar approach to criminal law, i.e. the undertaking can settle with the "State"

(i.e. settle the fine) only if it settles with injured parties (victims); complete settlement with the "victims" or at least admitting the civil liability and a promise to cover damages could be a condition of administrative settlement regarding the fine:

a. advantages: comprehensive public-private settlement and reducing number of speculative settlements (hybrid, second-instance settlements);
b. disadvantages: frustrating the benefits of the settlement procedure by involving elements of uncertainty and by prolonging the settlement procedure.

4) **Solving private-law aspects of competition law enforcement by private-law measures:** this approach is the most flexible and does not create any impediments to the administrative proceedings; the possibility of ensuring compensation of harm caused by anti-competitive behaviour can be covered by contractual clauses which can be, in particular, forced in the contracts arising from public procurement, for example:

a. termination of contract in the case of bid rigging or other anti-competitive behaviour;
b. compensation for any withdrawn public funds, including the EU funds, in the case of bid rigging,
c. contractual fine, i.e. lump sum damages for the cases of any competition law infringement.

5. CONCLUSIONS

Although it is hard to identify any legislative obstacles which impede effective private enforcement of competition law, successful cases on private enforcement of competition law confirmed by a judicial authority are still missing in Slovakia. Moreover, provisions that were deemed to facilitate private enforcement (binding effects of the decisions of the AMO) became inf fact their main obstacles as interpreted by Slovak courts, including the Constitutional Court of the Slovak Republic. Thus, the case law froze the possibility of stand-alone action until it will be overridden due to violation of the EU law.

The sphere of follow-on actions, decisions of the AMO was not taken into consideration because it will be unreasonable to analyse older decisions due to possible lapsing of limitation periods. Nevertheless, also in the context of follow-on actions the courts were reluctant to accept a possibility to award damages based on the arguments stemming from the decision of the AMO.

The paper reviewed recent AMO decisions to see if they can serve as a basis for follow-on action, based on four criteria: (1) if they are final, (2) if the described behaviour caused a relevant harm, (3) if the injured party contributed intentionally or negligently to the infringement, and (4) if it is possible to find a liable person with assets sufficient to cover damages. The analysis showed that only a small fraction of the decision of the AMO passed through this scrutiny.

Finally, the paper suggests a non-exhaustive list of suggestions that can improve possibilities of private damages claims in competition matters: the rebuttable presumption that anti-competitive behaviour raised prices by 10 %, involvement of the "victims" as a third parties, including damages consideration in the settlement procedure, solving private-law aspects of competition law enforcement by private-law measures. Although the first suggestion requires statutory change, the remaining can also be achieved via a new practice of the AMO and contracting authorities. Better involvement of the "victims" of competition infringements is consistent with similar policies in criminal proceedings.

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Preliminary communication

CONSORTIA BIDDING IN THE SEE REGION: WHEN DOES COOPERATION BECOME COLLUSION?

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Abstract

Over the past two decades, the Southeast European (SEE) region has faced persistent challenges in closing the economic development gap with more advanced parts of Europe. To achieve progress in this regard, this region must foster greater cooperation among market participants and promote the execution of large-scale projects while simultaneously ensuring the preservation of competitive market conditions. Since many large-scale projects are executed through public procurements, the legal frameworks and regulatory practices governing consortia bidding may play a pivotal role in shaping the competitive landscape. In this broader context, this paper analyses the competition law enforcement in the SEE region, identifying notable disparities and highlighting variations in national practices and regulatory capacities. Based on the legal and economic analysis, the paper emphasizes the necessity for national competition authorities across the SEE region to adopt the rule of reason approach (i.e., consider the efficiency argument) when assessing consortia bidding. That is crucial since it appears nearly impossible to distinguish pro-competitive cooperation from anti-competitive collusion without conducting an in-depth economic analysis of the effects that a given consortium bidding may have on competition.

Key words: *consortia bidding, joint bidding, public procurements, bid rigging, collusion.*

"*What we see depends mainly on what we look for*."
John Lubbock (1834–1913)

1. INTRODUCTION

Consortia (or consortium) bidding is a situation where multiple economic entities, often from different sectors or industries, cooperate to submit a single joint bid within a private or public procurement procedure.[1] This form of cooperation

[1] In U.S. antitrust literature, consortia bidding is commonly referred to as joint bidding; Hoffman, E.; Marsden, J. R.; Saidi, R., *Are Joint Bidding and Competitive Common Value Auction Markets Compat-*

typically occurs through a consortium, where the bidding entities (or consortium partners) jointly participate in the procurement.[2] Alternatively, it may also appear in the form of subcontracting, where one bidding entity agrees, prior to the bid, to delegate one or more tasks to another party if the contract is awarded.[3]

Regardless of its form, consortia bidding commonly occurs in large-scale public procurements that require diverse expertise and considerable financial resources. Moreover, many consortia biddings include consortia members from different regions or countries. Due to these and other specificities of consortia biddings, it could be extremely challenging to assess their impact on competition. On one side of the spectrum, by pooling their resources, consortia members may become significantly more competitive and thus meet the set requirements more efficiently. On the other side of the spectrum, collusion between consortia members may harm competition and lead to considerable economic inefficiencies. Thus, it is essential for each legal system to identify the various categories of consortia bidding and to establish effective mechanisms for distinguishing among them.

This distinction is increasingly significant in the South and East European (SEE) region.[4] Namely, the SEE region has been recording a rise in large-scale infrastructural projects and other public and joint venture investments, requiring the cooperation of numerous legal entities from different countries for successful implementation. In this context, depending on a particular legal regulation, consortia bidding may significantly strengthen competition and contribute to the further economic development of the region, or it could distort competition and prevent many significant projects from being executed. Having that in mind, the primary

ible? – Some Evidence from Offshore Oil Auctions, Journal of Environmental Economics and Management, Vol. 20, Issue 2, 1991, pp. 99–112.

2 Additionally, a distinction can be made between temporary and structural consortia. Temporary consortia refer to ad hoc cooperation agreements that dissolve if another firm submits the lowest bid. In contrast, structural consortia involve longer-term agreements or joint ventures, often covering multiple tenders and reflecting a more enduring collaborative arrangement between the participating entities; Bouckaert, J.; Geert, M., *Joint bidding and horizontal subcontracting*, International Journal of Industrial Organization, Vol. 76, Article 102727, 2021, pp. 2–3.

3 In general, subcontracting can be arranged either before the submission of a joint bid or after the contract has been awarded. Typically, only in the former case subcontracting may be qualified as consortia bidding, and under certain conditions, it may raise concerns regarding bid rigging; See: Marion, J., *Sourcing from the enemy: Horizontal subcontracting in highway procurement*, Journal of Industrial Economics, Vol. 63, Issue 1, 2015, pp. 100–128.

4 In this paper, the SEE region is defined as a group of countries that includes the former Yugoslav states (Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Montenegro, and North Macedonia), Albania, Bulgaria, and Romania, due to their geographical, historical, and political interconnectedness.

goal of this paper is to analyze and clarify the existing legal and regulatory framework governing consortia bidding in the SEE region.[5]

To achieve that objective, the paper first analyses the economics of consortia bidding, focusing on social costs and benefits associated with the cooperation between legal entities when submitting a joint bid (Part 2). It then explores the legal definitions of consortia bidding across various European competition law systems, primarily focusing on the European Commission's approach to this issue (Part 3). Subsequently, the paper identifies and addresses key competition law concerns associated with consortia bidding in the SEE region (Part 4) and concludes with final remarks (Part 5).

2. CONSORTIA BIDDING ECONOMICS IN A NUTSHELL

In economics, the auction theory explains in detail how individuals or entities behave when bidding in auctions,[6] and joint bidding is a specific aspect of it, as the practice when two or more bidders cooperate to place a single bid. In general, findings within this theory emphasize the main potential benefits and potential costs of joint bidding, while every single case has to be analyzed separately.

On the one hand, the primary benefits of joint bidding include risk sharing, resource pooling, and the reduction of barriers to entry, all of which may enhance the competitiveness of market participants and foster market competition. On the other hand, joint bidding generates substantial coordination costs, exacerbates information asymmetry, and heightens regulatory and legal expenses due to the risk of collusion among market participants and potential harm to competition.

In the first place, joint bidding enables market participants to share the financial, operational, and technical risk associated with project implementation,[7] thereby reducing the burden on any single market participant, which is particularly important for large-scale and complex projects. Namely, the substantial risk inherent in such large projects often renders them infeasible for a single market participant

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5 The central focus of this paper is on competition law and policy. However, one should also recognise the broader impact the rule of law and anticorruption policies may have on consortia bidding and competition; See: Estache, A.; Iimi, A., *Joint Bidding, Governance and Public Procurement Costs: A Case of Road Projects*, Annals of Public and Cooperative Economics, Vol. 80, Issue 3, 2009, pp. 424–425.

6 Milgrom., P., *Putting Auction Theory to Work*, Cambridge University Press, Cambridge, 2004, pp. 2–26; Menezes, M.F.; Monteiro, K.P., *An Introduction to Auction Theory*, Oxford University Press, New York, 2007, pp.71–115.

7 Albano, G. L.; Spagnolo, G.; Zanza, M., *Regulating Joint Bidding in Public Procurement*, Journal of Competition Law & Economics, Vol. 5, Issue 2, 2009, pp. 348–350,

to undertake independently.[8] Thus, joint bidding may be essential for executing many high-stakes projects. Secondly, joint bidding allows market participants to consolidate their material, financial, and human resources to submit a bid and execute the project, which would be less effective or infeasible if pursued independently. Finally, as a result of these and other advantages, joint bidding lowers barriers to entry, enabling relatively smaller market participants to participate in large-scale projects and contribute to their successful execution.[9] In other words, all these benefits of joint (or consortia) bidding may substantially enhance market participants' competitiveness and strengthen market competition.

However, at the same time, cooperation between market participants when submitting a bid and executing the project may lead to numerous adverse economic consequences. The most significant ones are increased costs associated with the participants' coordination and inefficiencies arising from issues of information asymmetry, such as principal-agent problems, moral hazards, adverse selections, and others.[10] In addition, this coordination among numerous market participants may increase dispute settlement costs and regulatory expenses. On top of that, even when undertakings can bid independently, they are strongly incentivised to opt for cooperative behaviours such as colluding on bid prices, terms, or strategies, resulting in undermined competition and heightened profits for the colluding parties.[11] This is the primary reason why legislators and regulators must allocate substantial human and material resources to investigate and prosecute such practices. Simply put, any cooperation among market participants incurs operational costs, and certain types of cooperation, i.e., collaboration, can further inflict con-

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8 This risk includes, but is not limited to the risk of failure; See: Watson, J., *Modelling the Relationship between Networking and Firm Performance*, Journal of Business Venturing, Vol. 22 No. 6, 2007, p. 854; Shen, J.; Pretorius, F.; Li, X., *Does Joint Bidding Reduce Competition? Evidence from Hong Kong Land Auctions*, The Journal of Real Estate Finance and Economics. Vol. 58, 2019, p. 113.

9 Albano, G. L., *et al., op. cit.,* pp. 354–356; Woldesenbet, K.; Worthington, I., *Public Procurement and Small Businesses: Estranged or Engaged*? Journal of Small Business Management, Vol. 57 No. 4, 2019, pp. 1665–1666.

10 Lewis, G.; Bajari, P., *Moral hazard, incentive contracts, and risk: evidence from procurement*, Review of Economic Studies, Vol. 81, Issue 3, 2014, pp. 1201–1228; Chernomaz, K., *On the Effects of Joint Bidding in Independent Private Value Auctions: An Experimental Study*, Games and Economic Behavior, Vol. 76, Issue 2, 2012, pp. 705–706; Iimi, A. (*Anti-)Competitive effect of joint bidding: evidence from ODA procurement auctions*, Journal of the Japanese and International Economies, Vol. 18, Issue 3, 2004, pp. 417–419.

11 Christopher, T., *Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law*, Journal of European Competition Law & Practice, Vol. 6, Issue 9, 2015, 630–631; Estache, A.; Iimi, A., *Joint Bidding, Governance and Public Procurement Costs: A Case of Road Projects*, Annals of Public and Cooperative Economics, Vol. 80, Issue 3, 2009, pp. 396–397.

siderable harm to competition.[12] Thus, the potential costs of joint bidding are highly case-specific.[13]

Table 1: Potential Benefits and Costs of Consortia Bidding

Consortia Bidding (joint bidding)	
Potential benefits (PB)	*Potential costs (PC)*
Risk sharing	Coordination costs
Resource pooling	Information asymmetry costs
Eliminating barriers to entry	Dispute settlement and regulatory costs
Strengthening competition	*Harming competition*

Source: The author

Table 1 summarises the potential costs and benefits of joint or consortia bidding and the resulting consequences. Moreover, each benefit and cost could be further analysed and subcategorised for a more detailed examination. However, even this general preview is sufficient to distinguish two different groups of market participants' behaviours when submitting a joint bid. The first group consists of market participants who could submit a bid independently (on a stand-alone basis), and the second group consists of those who could not. Within the first group, there is a high probability that potential costs will outweigh potential benefits since market participants are efficient enough to compete and bid independently. Only exceptionally, cooperation between independent market participants could generate more significant potential benefits compared to the costs.

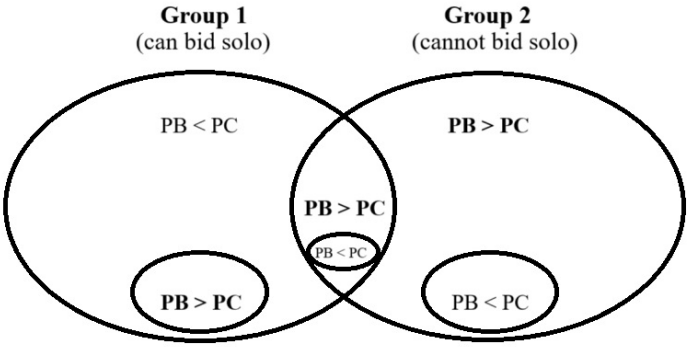
In contrast, participants within the second group are incapable of solo bidding, which increases the likelihood that their cooperation will result in higher potential benefits than the costs. Only in exceptional cases, participants in this group may engage in collusion, resulting in higher costs than benefits. Finally, those two groups may partially overlap, i.e., in some specific cases, market participants who can bid independently may establish cooperation with those who cannot. In that case, there is also a higher probability that the benefits of cooperation will

[12] According to some estimates, collusion between auction participants, on average, increases prices and causes damages to up to 23% of the total volume of commerce; Froeb, L.M.; Shor, M., *Auction, Evidence and Antitrust*, in: Harkrider, J. (ed.), The Use of Econometrics in Antitrust, Chicago, 2002, pp. 233–234.

[13] Similarly, the net-effect of joint bidding on conservation auctions' cost efficiency is ambiguous and it depends on specific circumstances of the case: See: Calel, R., *Improving Cost-Efficiency of Conservation Auctions with Joint Bidding*, Journal of Environmental Economics and Policy, Vol.1, Issue 2, 2012, pp.128–129.

outweigh the costs, primarily due to the reduction of barriers to entry, except in the case of collusion. Figure 1 presents these two groups of market participants (potential bidders) and the possible outcomes of their behaviour.

Figure 1: Two Groups of Consortia Members, Potential Benefits (PB), and Potential Costs (PC) of Consortia Bidding



Source: The author

Although it is not possible to determine the exact potential costs and benefits for these two groups due to the varying types of cooperation and participants, i.e. highly case-specific costs and benefits, Figure 1 provides a general illustration of these types and their possible outcomes.

Based on this general observation, one may conclude that the likelihood of cooperation yielding benefits that outweigh the costs is highest when market participants are unable to bid individually (on a stand-alone basis). On the contrary, when they can submit individual bids, there is a higher probability that the costs of joint bidding will outweigh the benefits. However, one should be aware of the exceptions to those rules, particularly in the case of cooperation between two different types of market participants, i.e. when those who can bid individually cooperate with those who cannot.

In general, this delineation between the rules and exceptions may be equalised with the distinction between cooperation and collusion. In economic terms, a joint bid can be classified as cooperation when the benefits exceed the costs and strengthen market competition; conversely, when the costs outweigh the benefits and undermine competition, the joint bid may be qualified as collusion. In this context, the analysis of the different types of market participants and their behaviours could provide a solid foundation for evaluating and potentially reformulating legal rules that differentiate between desirable cooperation and undesirable collusion associated with joint bidding. However, in the first place, it is essential

to briefly explain and clarify the conventional legal approaches to joint (consortia) bidding and the relevant legal definitions.

3. LEGAL DEFINITION AND EUROPEAN COMMISSION'S APPROACH TO CONSORTIA BIDDING

Traditionally, competition authorities in the United States and Europe did not define the meaning of joint or consortia bidding, and they have primarily relied on two main criteria when evaluating those biddings.[14] The first criterion referred to the "no-solo-bidding test", or the ability of market participants to bid independently. Namely, when failing this test, market participants lowered the number of competitors by submitting a joint bid and thus reduced competition in the market, which has been argued by the United States Congress when prohibiting consortia bidding arrangements between oil companies for offshore oil leases.[15] Similarly, European competition authorities have been using the ability to bid independently as the main criterion to assess joint bidding, including the recent decision of the competition authority in Norway, upheld by the Supreme Court in 2017.[16] In addition, as the second and subsidiary criterion, national competition authorities have been using offsetting efficiencies.[17] Even if market participants fail the non-solo bidding test, competition authorities may approve the joint bidding if it establishes that joint bidding generates sufficient offsetting efficiencies or benefits that can outweigh potential anti-competitive effects, such as cost savings, improved quality and innovation, etc. For instance, the Italian competition authority has recently approved the joint bidding by the two competing pharmaceutical companies that could have submitted bids independently due to sufficient offsetting efficiencies.[18] Similarly, the Danish competition authority initially found that a consortium agreement and the established cooperation between the two road marking companies infringed Article 101 TFEU and the equivalent Danish competition law provision since the companies could have bid independently. However, in the second instance, the Danish High Court emphasised that an assessment of consortia bidding under competition law has to be based on a realistic

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14 Bouckaert, J.; Geert, M., *op. cit.,* pp. 1–2.

15 Hendricks K., Porter, H., *Joint bidding in federal OCS auctions*, American Economic Review, Vol. 82, No.2, 1992, pp. 506–5011.

16 Judgment of the Court of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v. The Norwegian Government, represented by the Competition Authority*, OJ C 133/5, 27.4.2017; Sanchez Graells, A., *Ski Taxi: Joint Bidding in Procurement as Price-Fixing?*, Journal of European Competition Law and Practice, Vol. 9, Issue 3, 2018, pp. 161–163.

17 Bouckaert, J.; Geert, M., *op. cit*., p. 2.

18 Richards, M., Italy *Drops Pharma Bidding Probe*, Global Competition Review, 2019, https://bit.ly/2FfXToU, last access 02.10.2024.

assessment of market conditions (considering the offsetting efficiencies) and ruled on the legality of the consortium bidding.[19]

In addition to the established case law, the European Commission (EC), for the first time, provided a formal definition of consortia bidding in the 2023 Guidelines on the applicability of Article 101 TFEU.[20] Namely, the Guidelines broadly define consortium bidding as "a situation where two or more parties cooperate to submit a joint bid in a public or private procurement competition".[21] In addition to this definition, the Guidelines clarify that consortia bidding is not illegal *per se*, i.e., it does not automatically infringe Article 101 TFEU.[22] To establish whether joint bidding infringes Article 101 TFEU, the Guidelines suggest a rule of reason approach where anti-competitive risks should be weighed against potential efficiency gains.[23] In this context, the Guidelines emphasise several relevant criteria, including the necessity, consortia members' market power, and the scope of the cooperation agreement.[24] In accordance with these criteria, a consortium should be necessary to achieve efficiencies, and a joint bid may be seen as anti-competitive if each consortium member could have submitted a bid individually. In addition, the impact of joint bidding on competition may depend on the market power of the consortium members, i.e., if the members are significant players in the market, their cooperation may considerably reduce competition by lowering the number of independent bids. Moreover, the scope of cooperation and the exchange of information between parties should be limited to what is necessary for achieving the project objectives, i.e. extending the cooperation to encompass activities such as price-fixing or market-sharing beyond unavoidable level would most probably constitute an infringement of Article 101 TFEU.[25]

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19 The Danish Maritime and Commercial High Court judgement in the *LKF/Eurostar* case, dated August 27, 2018, was appealed by the Danish Competition Authority to the Supreme Court. In 2019, the Supreme Court ruled that the consortium's cooperation violated the Competition Act. However, this ruling did not challenge the lower court's adoption of the rule of reason approach; See: Kjær-Hansen, E.; Alsing, J., *Danish Court: Consortium Agreement and Joint Bidding Permissible under Competition Law*, Journal of European Competition Law & Practice, Vol. 10, Issue 4, 2019, pp. 241–245.

20 EC Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [2023] OJ C 259; These Guidelines have replaced the previous EC Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [2011], which addressed the issue of consortia bidding only in para. 237, specifying undisputed situation, i.e. that consortia members who are not competitors and cannot bid individually would not restrict competition within the meaning of Article 101(1) TFEU.

21 *Ibid*., para. 347.

22 *Ibid*., para. 352, 356, and 358.

23 *Ibid*., para. 356.

24 *Ibid*., para. 356.

25 *Ibid*., para. 357 (d); Even in the case of a consortium agreement concluded between competitors that falls under Article 101 TFEU, the Guidelines explicitly indicate that such agreement may fulfil the

In defining consortia bidding, the Guidelines also provide a formal definition of bid rigging and make an effort to clearly distinguish between the two concepts. For this purpose, bid rigging is defined as "[…] one of the most serious restrictions of competition, constituting a restriction by object, and may take various forms, such as agreeing the content of each party's tenders […] to influence the outcome of the award procedure […]."[26] Moreover, under the Guideline's provisions, bid rigging is "[…] a form of cartel that consists in the manipulation of a tender procedure for the award of a contract".[27] However, despite these definitions, the Guidelines acknowledge that "[…] in some cases, the distinction between bid rigging and legitimate forms of joint bidding is not straightforward […]".[28] This is especially relevant in (cross-)subcontracting, where the distinction between anti-competitive behaviour and legitimate cooperation can be nuanced.[29] This complexity particularly underscores the need for a thorough analysis on a case-by-case basis, i.e., the rule of reason approach to ensure that the joint activity's purpose, necessity, and potential efficiency gains are carefully considered. Therefore, although the Guidelines define both consortia bidding and bid rigging, the boundary between legitimate collaboration and illegal collusion remains exceptionally thin. This ambiguity necessitates careful scrutiny, as even minor differences in intent or execution can transform lawful joint bidding into anti-competitive collusion.

This approach aligns with the underlying economics of consortia bidding. As previously explained, consortia bidding can involve diverse types of market participants and behaviours, each presenting unique costs and benefits. For participants capable of submitting independent bids, the probability that anti-competitive risks or inefficiencies will outweigh the potential benefits is higher due to the diminished necessity for cooperation. In such cases, the likelihood of collusion becomes more significant, as the joint bidding may serve primarily to reduce competition rather than to achieve efficiencies. Conversely, for participants who lack the resources or capacity to bid independently, the probability that pro-competitive benefits, such as pooled resources or expertise, will outweigh potential inefficiencies is greater. In these cases, consortium bidding may enable participation that would otherwise be unfeasible, fostering competition rather than stifling it. In any event, both of these scenarios are susceptible to exceptions, confirming that the rule of reason

conditions set out in Article 101(3), thereby qualifying for exemption from the prohibition; See: Petr, M., *Joint Tendering in the European Economic Area*, International and Comparative Law Review, Vol. 20, No. 1, 2020, p. 218; Puksas, A.; Moisejevas, R.; Petkuvienė, R., *Competition Law Implications for Joint Bidding During Public Procurement*, Studia Iuridica Lublinensia, Vol. 33, Issue 2, 2024, p. 323.

[26] *Ibid*., para. 349.

[27] *Ibid*. para. 348.

[28] *Ibid*., para. 349.

[29] *Ibid*.

approach remains essential for distinguishing between cooperation and collusion on a case-by-case basis.

4. CONSORTIA BIDDING PUZZLE IN THE SEE REGION

The issue of consortia bidding is particularly pertinent in the SEE region.[30] Over the past decades, this region has faced persistent challenges in closing the economic development gap with more advanced parts of Europe. To achieve progress in this regard, the SEE region must foster greater cooperation among market participants and promote the execution of large-scale projects while simultaneously ensuring the preservation of competitive market conditions. Since many of these large-scale projects must be executed through public or private procurement procedures, the legal and regulatory framework governing consortia bidding becomes particularly significant. Namely, the manner in which consortia bidding is defined and regulated plays a crucial role in determining the success of such projects, influencing both their execution and the preservation of competitive market dynamics in the region.

In general, the SEE countries, including the EU member states like Bulgaria, Croatia, Romania, and Slovenia, as well as candidates or aspiring members like Serbia and North Macedonia, have aligned their national competition laws with EU competition rules under Articles 101 (1) and 101 (3) of TFEU.[31] Thus, consortia bidding can fall under these provisions if they restrict competition by object or effect. In addition, if a consortium generates efficiencies and consumer benefits or meets other specific criteria, it may qualify for exemptions under certain conditions. However, variations in enforcing competition law across the SEE region are noticeable, reflecting differing national practices and administrative capacities.

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30 As already noted, the SEE region is defined as a group of countries that includes the former Yugoslav states (Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Montenegro, and North Macedonia), Albania, Bulgaria, and Romania, due to their geographical, historical, and political interconnectedness.

31 See: for Albania: Law No. 9121 on the Protection of Competition (Ligji nr. 9121 për Mbrojtjen e Konkurencës), Off. Gazette No. 6 of 2003, amended by Law No. 27/2016, art. 4 and 7; for Bosnia and Herzegovina: Competition Act (Zakon o konkurenciji), Off. Gazette of BH No. 48/05, art. 4 and 5; for Bulgaria: Law on the Protection of Competition (Закон за защита на конкуренцията), State Gazette No. 102 of 1998, art. 15 and 21; for Croatia: Competition Act (Zakon o zaštiti tržišnog natjecanja), Off. Gazette No. 148/2005, 76/2007, 79/2009, 80/2013, 30/2014, 117/2018, art. 8 and 9; for Montenegro: Law on Protection of Competition (Zakon o zaštiti konkurencije), Off. Gazette No. 36/2012, art. 8 and 9; for North Macedonia: Law on Protection of Competition (Закон за заштита на конкуренцијата), Off. Gazette No. 145/2010, art. 11 and 12; for Romania: Law No. 21/1996 on Competition (Legea concurenței nr. 21/1996), Off. Gazette No. 15/1996, art. 5 and 6; Serbia: Law on Protection of Competition (Закон о заштити конкуренције), Off. Gazette No. 51/2009, 95/2013, art. 10 and 11; and for Slovenia: Prevention of Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence, ZPOmK-1), Off. Gazette No. 36/2008, art. 6 and 9.

In this regard, although Bulgaria, Croatia, Romania, and Slovenia are all EU member states, their approaches to consortia bidding exhibit slight variations. Namely, only the Romanian competition authority has issued a specific Guide referring to joint bidding and competition law enforcement.[32] This Guide, in subsection 3.2., explicitly states that competitors who could have submitted bids independently can submit a joint bid since that may enable them to combine different comparative advantages and bid more efficiently. However, in such cases, the Guide places the burden of proof on the consortia members, requiring them to demonstrate that the pro-competitive efficiencies resulting from consortia bidding outweigh any potential restrictions on competition.[33] In contrast, other EU member states within the SEE region apply provisions on restrictive agreements without the issuance of specific guidelines. While certain states, such as Croatia, have developed guidance on public procurements,[34] these documents do not explicitly address the issue of joint or consortia bidding. In any event, with the issuance of the EC Guidelines on the applicability of Article 101 TFEU, it is anticipated that all EU member states within the SEE region will adopt a rule of reason approach, assessing consortia bidding on a case-by-case basis to distinguish between legitimate cooperation and collusion. In this context, EU competition case law will remain highly pertinent in evaluating the pro-competitive benefits of joint bidding as well as any potential inefficiencies.

Similarly, the majority of non-EU member states within the SEE region lack specific guidelines on consortia bidding and primarily rely on general provisions regulating restrictive agreements. A notable exception in this regard is the Serbian competition authority, which has issued the Opinion on the applicability of competition law in the context of joint bidding.[35] According to this opinion, "[…] consortia agreements in public procurement procedures shall not be considered restrictive […] where such agreements are concluded between undertakings: 1. that are not competitors […], [or] 2. that are considered affiliated undertakings

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32 Romania Consiliul Concurenței, Guide on compliance with competition rules in the case of participation in the form of association in a public procurement procedure (Ro: Ghid privind respectarea regulilor de concurență în situația participării sub formă de asociere la o procedură de achiziție publică), 31.01.2017.

33 *Ibid*., pp. 13–14.

34 The Croatian Competition Agency Rulebook on Implementing the Simplified Public Procurement Procedure (Cro. Pravilnik o provođenju postupka jednostavne nabave), 14.12.2018.

35 Commission for Protection of Competition of the Republic of Serbia, Opinion on the Application of Article 10 of the Law on Protection of Competition to Certain Forms of Cooperation between Undertakings in Public Procurement Procedures (Srb: Примена члана 10. Закона о заштити конкуренције на одређене облике сарадње између учесника на тржишту у поступцима јавних набавки), 25.03.2021.

[…].[36] Additionally, even consortium agreements concluded between close competitors are not considered restrictive if they cumulatively fulfil four preconditions. Namely, competitors should not be able to bid independently nor "participate in the public procurement procedure by presenting a separate joint bid".[37] Moreover, the exchange of business-sensitive information between the competitors should be limited to public procurement procedure purposes, and the consortia agreement should not contain any non-compete provisions that restrict or prevent competition in other public procurements.[38] According to this opinion, if a consortia agreement satisfies all of these preconditions, it is not deemed restrictive.

Moreover, the Opinion specifies that consortia agreements will not be considered restrictive even if one of the parties to that agreement can bid independently, while the other undertakings "join to acquire the necessary references and know-how".[39] Finally, the Opinion clarifies that all other consortia agreements that do not meet the listed conditions are restrictive and that parties to the said agreements can file a request for an individual exemption from the prohibition under Article 12 of the Law on Protection of Competition (national equivalent to Article 101(3) TFEU).[40]

Interestingly, the Serbian competition authority recently had the opportunity to apply and evaluate the opinion in the *Commission vs. Miteco-Kneževac et al.* case.[41] In this case, a consortium of five companies submitted a joint bid to provide services for the permanent disposal of hazardous waste as part of a public procurement organized by the Serbian Ministry of Environmental Protection. Among the relevant facts of the case, the five companies engaged a certified laboratory to fulfil all of the prescribed preconditions required under the public procurement procedure. However, upon the investigation,[42] the Serbian competition authority con-

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36 *Ibid*., p. 1.

37 *Ibid*.

38 *Ibid*.

39 An additional precondition for the application of this exception is that "the said parties to the agreement, namely those who join the agreement, cannot participate in the procurement procedure by presenting a joint bid" (*Ibid.).*

40 *Ibid*.

41 Commission for Protection of Competition of the Republic of Serbia, Decision 4/0-01-30/2022-06, 13.07.2022.

42 Interestingly, in this case, the Serbian competition authority conducted a dawn raid. For a detailed discussion of the legal framework governing dawn raids in Serbia, see: Begović B., Ilić, N., *Nenajavljeni uvidaj i (ne)srazmera između ovlašćenja i obaveza Komisije za zaštitu konkurencije*, Pravni zapisi, Vol. 3, No. 1, 2022, pp. 54–75; Begović B., Ilić, N., *Dawn Raids and (Dis)Proportionality between the Powers and Obligations of the Commission for Protection of Competition*, Focus on Competition, 2022, pp. 32–46.

cluded that "[…] there was a possibility that individual members of the bidding consortium could have formed a smaller group, while the remaining members, in cooperation with an authorized laboratory, could have constituted another group, thereby submitting a competitive offer ".[43] As a result, the competition authority deemed the consortium agreement to be restrictive, and all members of the bidding consortium were fined.

Despite the decision being rendered more than a year after the issuance of the opinion, the Serbian competition authority made no reference to the opinion, nor did it assess whether the preconditions outlined in the opinion had been fulfilled. Essentially, the competition authority concluded that the bidding consortium constituted a restrictive agreement by the object (without conducting a detailed analysis of the consortium's effects on competition), and this conclusion has been primarily based on the possibility that some consortium members could have engaged another certified laboratory and submitted independent bid. Moreover, the competition authority did not offer any explanation regarding the possibility of consortium members submitting independent bids, as such a possibility always exists – whether through engaging external companies and resources or by expanding and improving their capacities over time. Finally, the competition authority did not take into account the potential efficiencies associated with consortium bidding, which may manifest as lower prices, enhanced quality, or faster delivery of the services encompassed by the bidding process.[44] In other words, in this case, the competition authority concluded that the cooperation constituted collusion or bid rigging, without clearly distinguishing between the two concepts.

5. CONCLUDING REMARKS

Consortia bidding undoubtedly constitutes a significant business practice that can facilitate the execution of high-stake projects while generating considerable economic efficiencies. Therefore, consortia bidding may be particularly pertinent to the SEE region and its economic development. However, to fully harness the potential of consortia bidding, the SEE countries should effectively distinguish between consortia bidding and bid rigging, thereby differentiating pro-competitive cooperation from anti-competitive collusion, and implement a harmonized, if not unified, approach to consortia bidding under national competition laws.

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[43] *Ibid*., p. 3.

[44] These potential offsetting efficiencies are explicitly highlighted in the EC Guidelines and implicitly acknowledged in the Romanian Guide. However, in contrast, the decision of the Serbian competition authority makes no mention of the concept of "efficiency," either explicitly or implicitly; See *ibid*., pp. 1–41.

Based on the conducted analysis, and considering the economics of consortia bidding, it is clear that the net effects of consortia bidding are highly contingent on the specific circumstances of each case. Generally, when consortium members are not capable of submitting individual bids, there is a greater likelihood that the consortia bidding will yield positive or pro-competitive outcomes. Conversely, this likelihood significantly diminishes when consortium members can submit solo bids. Nevertheless, significant exceptions to these general expectations may exist in both scenarios. Therefore, the net effects of consortia bidding on competition should be carefully weighed on a case-by-case basis, relying upon in-depth economic analysis. The most advanced competition law systems, including those of the US and the EU, have progressively evolved and incorporated the rule of reason approach to consortia bidding, enabling consortia members to rely upon efficiency defence. This approach aligns with the insights derived from economic (auction) theory, ensuring a more nuanced and economically grounded evaluation of such practices. However, in the SEE region, significant disparities in the enforcement of competition law persist, highlighting variations in national practices and administrative capacities.

The emerging trend of national competition authorities within the SEE region to issue specific guidelines or opinions on consortia bidding could lead to a slippery slope, where inconsistent or overly prescriptive regulations may undermine legal certainty and distort competition across the region. This trend is particularly concerning when some national competition authorities take the path of least resistance by classifying consortia agreements as collusion or violations by object without conducting a thorough economic analysis first. Such an approach risks oversimplifying complex collaborative arrangements between market participants and may lead to unjustified legal outcomes that stifle legitimate competitive behaviour.

Therefore, it would be prudent and advisable for national competition authorities in the SEE region to adopt the rule of reason approach, remaining open-minded and focused on conducting rigorous economic analyses of both the pro-competitive and anti-competitive effects of consortia bidding (in compliance with the EC guidelines).

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8. Law on Protection of Competition (Srb. Закон о заштити конкуренције), Official Gazette No. 51/2009, 95/2013.
9. Prevention of Restriction of Competition Act (Slo. Zakon o preprečevanju omejevanja konkurence, ZPOmK-1), Official Gazette No. 36/2008, art. 6 and 9.

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CERTAIN ASPECTS OF BID RIGGING IN BOSNIA AND HERZEGOVINA

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Abstract

The public procurement system aims to model the efficient and rational use of budgetary funds to meet public sector needs. Before the adoption of the Public Procurement Law of 2014, which aligns closely with EU acquis, public procurement in Bosnia and Herzegovina was regulated at four levels of government, resulting in a highly complex system. One key principle guaranteed by the Public Procurement Law is fair and active competition, which intersects with the Law on Competition in Bosnia and Herzegovina. The Law on Competition regulates the rules, measures, and methods for protecting market competition and outlines the jurisdiction and operations of the Competition Council, which is responsible for promoting and safeguarding market competition. This law further ensures the application of fair and active competition principles. This paper addresses the regulation of bid-rigging in Bosnia and Herzegovina's public procurement process and investigates whether contracting authorities have encountered bidder behaviors that could indicate bid-rigging, in the context of competition law. To achieve this, the paper is structured into three parts: The first part provides theoretical insights essential for understanding the issue, including international approaches to combating bid-rigging. The second part outlines the regulatory framework for bid-rigging in public procurement within Bosnia and Herzegovina and highlights the significance of public procurement in the country. The third part presents the findings from the research conducted. Based on these findings, the paper offers recommendations for improving the public procurement system in Bosnia and Herzegovina, aiming to eliminate or reduce opportunities for bid-rigging.

Key words: *bid rigging, public procurement, competition law, Bosnia and Herzegovina*

1. INTRODUCTION

Public procurement involves the process by which public authorities, such as government departments or local authorities, acquire work, goods, or services from businesses. When this process is transparent, fair, and based on competition rules, it ensures efficiency and economy in the use of public funds. Public procurement is a critical instrument for developing a market economy. By conducting public procurement, the state directly engages in the market, influencing economic flows broadly. It is crucial for the state to demonstrate adherence to the fundamental principles of the market economy and effectively implement its legally mandated role of ensuring free and fair market competition.

However, bid rigging poses a significant threat to the integrity of this process. Bid rigging refers to illegal activities aimed at manipulating the public procurement process to favor a specific bidder or group of bidders, thereby distorting competition in the public procurement market.

This paper explores bid rigging in public procurement in Bosnia and Herzegovina, examining various aspects of the issue and providing recommendations for improving the public procurement process. Bosnia and Herzegovina, a developing country transitioning from a command economy to a market economy, faces numerous challenges, including meeting EU membership criteria. The Public Procurement Law of 2004 introduced a harmonized procurement system in Bosnia and Herzegovina. However, this law had several shortcomings that led to potential abuses and corruption, including inadequate fines, irregularities in implementation, and insufficient capacity of oversight bodies such as the Public Procurement Agency, the Procurement Review Body, and the Court of Bosnia and Herzegovina.

In response to these issues and the need for further alignment with EU acquis, a new Public Procurement Law was adopted in 2014. While this updated law improved upon the initial 2004 legislation, it still requires amendments after a decade of implementation. Effective public procurement procedures should be transparent, efficient, and based on active and fair competition, which can be achieved by adhering to the provisions of the Law on Competition. The Competition Council is responsible for addressing competition violations, including bid rigging, by conducting investigations, determining legal violations, and imposing fines on involved business entities.

This paper focuses on analyzing the regulatory framework for bid rigging in Bosnia and Herzegovina, identifying legal and institutional prerequisites for combating this unacceptable behavior. Detecting bid rigging is challenging for authorities, and various theoretical and practical methods have been developed to address it. Contracting authorities play a crucial role in identifying patterns of behavior that

may indicate bid rigging. The aim of this paper is to investigate whether contracting authorities in Bosnia and Herzegovina have encountered behaviors among bidders that suggest bid rigging, in the context of competition law. To achieve this, the paper is structured into three parts: a theoretical overview, an examination of the regulatory framework for bid rigging in public procurement in Bosnia and Herzegovina, and an analysis of research findings.

2. GENERAL NOTES ON BID RIGGING IN PUBLIC PROCUREMENT

Public procurement is a significant form of public expenditure aimed at acquiring works, goods, or services for the procuring entity.[1] According to the OECD, public procurement involves the deliberate purchase of goods, services, and works by governments and state-owned enterprises. Given that public procurement involves substantial taxpayer funds, governments are expected to manage these processes efficiently and uphold high standards of conduct to ensure quality service delivery and protect public interest.[2] The effectiveness of public procurement is measured against the 3E principles: economy, efficiency, and effectiveness. Recently, a fourth E—ethics—has been added to emphasize the importance of integrity in procurement practices. Effective public procurement brings numerous benefits, including economic[3], social[4], and environmental[5] advantages.

The importance of purposeful public procurement becomes even more evident during periods of strict public budget constraints and financial crises. It necessitates a well-organized procurement system, which is a focus of international organizations such as the Organization for Economic Cooperation and Development, the World Trade Organization, and the European Union. These organizations advocate for well-structured public procurement systems and competition protec-

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1 Curtis, F.; Maines, P., *Closed competitive bidding*, Omega, Vol. 1, No. 5, 1973, pp. 613–619; Rodríguez, M. J. G. *et al., Collusion detection in public procurement auctions with machine learning algorithms*, Automation in Construction, Vol. 133, 2022, p. 1.

2 OECD, Public procurement, [https://www.oecd.org/gov/public-procurement/], Accessed 20 May 2024.

3 Becker, J.; Niemann, M.; Halsbenning, S., *Contribution to growth: European public procurement delivering economic benefits for citizens and businesses policy: Department for economic, scientific and quality of life policies*, Directorate-General for Internal Policies, 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU(2018)631048_EN.pdf], Accessed 20 May 2024.

4 Caimi, V.; Sansonetti, S., *The social impact of public procurement - Can the EU do more?*, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, 2023.

5 Lundberg, S. *et. al., Using public procurement to implement environmental policy: an empirical analysis*, Environmental Economics and Policy Studies, Vol. 17, 2015, pp. 487–520, [https://link.springer.com/article/10.1007/s10018-015-0102-9], Accessed 20 May 2024.

tion regimes as essential for fostering economic prosperity and social well-being. One crucial aspect of ensuring adherence to the 4E principle is achieving active and fair competition in the public procurement process. This involves encouraging competition among bidders in the relevant public procurement market.

However, bid rigging—an illegal form of coordination among business entities (bidders)—poses a serious threat to competition. Bid rigging, often referred to as cartels, involves coordination among participants to manipulate the bidding process.[6] This collusion aims to eliminate competition, leading to higher prices for public procurement items than would result from a fairly competitive process. As a result, the cost burden falls on budget funds or taxpayers' assets.

The literature identifies two primary models of illegal behavior that violate competition in the public procurement process:[7]

1. Collusion between the contracting authority and one or more bidders occurs when they work together to manipulate the tender process. This typically involves creating tender conditions and criteria that favor certain bidders, reducing or excluding competition. The result is often an unfair advantage for the colluding bidder(s), undermining the integrity of the procurement process.
2. Mutual agreements among bidders occur when bidders coordinate their actions in the procurement process to ensure a particular outcome. This behavior is a form of cartel, where bidders collaborate to control the results, often limiting competition and undermining the fairness of the process.

Bid rigging can manifest in various forms, including:[8]

1. Cover bidding: Bidders agree to submit offers that are either higher than the pre-agreed winning bid, unreasonably high, or include conditions that are known to be unacceptable, creating a false appearance of competition.
2. Bid suppression: Bidders agree not to submit a bid or to withdraw an already submitted bid, allowing a predetermined bidder to win the contract.
3. Bid rotation: Participants agree to take turns winning contracts. They continue to participate in the bidding process but rotate the winning bid among themselves.
4. Market allocation: Bidders divide the market among themselves, agreeing to avoid competing for specific contracts or areas.

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6 Coleman, M., *Bid rigging*, Global Dictionary of Competition Law, Concurrences, Art. N° 12291, [https://www.concurrences.com/en/dictionary/bid-rigging], Accessed 20 May 2024.

7 Danković Stepanović, S., *Protection of competition in public procurement procedures*, Iustinianus Primus Law Review, Vol. 5, No. 1, 2014, p. 5.

8 Commission for the Protection of Competition, *Instructions for the discovery of "fixed" offers in relation to the public procurement procedure*, Republic of Serbia, Commission for the Protection of Competition, Belgrade, 2022, p. 5.

Bid rigging in public procurement leads to several negative effects:[9]

1. Unrealistic price increases: When competitive bids are eliminated, prices are artificially inflated, leading to higher costs for consumers and significant financial losses for both the government and taxpayers. For example, research by Robert Clark, Decio Coviello, and Art Shneyerovy highlighted substantial cost increases in Canadian public procurement due to bid rigging.[10]
2. Reduction in innovation: Bid rigging hinders innovation by discouraging businesses from investing in research and development. With less competition, companies have fewer incentives to create new or improved products, leading to stagnation in technological progress and a limited range and quality of offerings.
3. Slowed economic growth: The absence of competition and barriers for new bidders slow down economic growth. Manipulative practices by established players discourage new entrants from participating in public procurement.
4. Negative impacts on public projects: Bid rigging leads to inflated prices and wasteful spending of public funds. It also compromises the quality and efficiency of public projects, resulting in suboptimal outcomes.

Due to the significant negative effects of bid rigging across both developed and developing countries, it receives considerable attention and is often subject to both criminal and competition law regulations. For instance, in 37 Organization for Economic Cooperation and Development jurisdictions, bid rigging is classified as a criminal offense. Additionally, competition legislation in many countries prohibits collusion and cartel behavior. In the European Union, bid rigging is prohibited under Article 101 of the Treaty on the Functioning of the European Union, which aims to maintain the integrity of the internal market. In the United States, bid rigging is considered a *per se* violation of the Sherman Act (1890). China addresses bid rigging through Article 16 of the Anti-Monopoly Law of the People's Republic of China, while India regulates it under Section 3(1) of the Competition Act, 2002. In Japan, bid rigging is covered by Article 3 of the Antimonopoly Act.

Empirical studies demonstrate that the quality of legal regulation in public procurement significantly affects competition and contract profitability. Effective legal frameworks can mitigate the risk of bid rigging and enhance budget efficiency.[11]

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9 FasterCapital, *Bid Rigging: A Common Tactic in Price Fixing Schemes*, 2024, [https://fastercapital.com/topics/the-negative-impact-of-bid-rigging-on-competition-and-consumers.html], Accessed 22 May 2024.

10 Clark, R.; Coviello, D.; Shneyerov, A., *Bid rigging and entry deterrence in public procurement: evidence from an investigation into collusion and corruption in Quebec*, The Journal of Law, Economics, and Organization, Vol. 34, No. 3, 2018, pp. 301–363.

11 Kamil, B.; Tas, O., *Effect of public procurement regulation on competition and cost-effectiveness*, European University Institute Robert Schuman Centre for Advanced Studies, Fiesole, 2019.

The numerous adverse consequences of bid rigging drive competition authorities to intensify their efforts in detecting and sanctioning such practices. According to Organization for Economic Cooperation and Development data, there has been an increase in cartel decisions globally. In 2021, 39 decisions involved bid rigging, where bidders collude to maximize profits during auctions.[12] Competition authorities in CompStat jurisdictions issued a total of 182 cartel decisions related to bid rigging in 2021, accounting for 34% of all cartel decisions in the CompStat database[13] for that year (537). On average, there were 2.5 bid rigging cases per jurisdiction. The Asia-Pacific region recorded the highest number of bid rigging decisions (63%), while the Middle East and Africa had the lowest (16%). The Americas accounted for 40%, and Europe for 21% of bid rigging decisions.[14]

Detecting bid rigging agreements poses a significant challenge due to their secretive and sophisticated nature. Such agreements often involve coordinated strategies that are difficult to uncover. Moreover, the public procurement process is highly formal and transparent, with contracting authorities frequently using consistent procurement patterns, which can make the process predictable and facilitate bid rigging.[15] The literature highlights various methods for detecting collusion, with differing levels of success. Screening methods[16] involve identifying suspicious pat-

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12 OECD, *OECD Competition trends 2023, OECD CompStats Database [Data set],* Organisation for economic cooperation and development, 2023, [https://www.oecd.org/competition/oecd-competitiontrends.htm.], Accessed 8 February 2024.

13 The OECD CompStats database is the result of an initiative launched in 2018. The database compiles general statistics relating to competition agencies, including data on enforcement, resources and information on advocacy initiatives. The data is collected annually and currently covers the period from 2015 to 2021. Data are generally presented at an aggregate level, combining data from individual jurisdictions. Data at the aggregate level includes analysis (i) for all participating jurisdictions ("All Jurisdictions"), (ii) a comparison between OECD and non-OECD jurisdictions, and (iii) by geographic region (Americas, Asia-Pacific, Europe and the Middle East and Africa). OECD, *OECD Competition Trends 2023*, [https://www.oecd-ilibrary.org/docserver/bcd8f8f8-en.pdf?expires=1715156487&id=id&accname=guest&checksum=2B15B6C217C74CE9DDD5289DB5599D7B], Accessed 8 May 2024.

14 OECD, *OECD Competition Trends 2023*, [https://www.oecd-ilibrary.org/docserver/bcd8f8f8-en.pdf?expires=1715156487&id=id&accname=guest&checksum=2B15B6C217C74CE9DDD5289DB5599D7B], Accessed 8 May 2024.

15 Anderson, E. J.; Cau, T.D.H., Implicit collusion and individual market power in electricity markets, European Journal of Operational Research, Vol. 211, No. 2, 2011, pp. 403-414; Ishii, R., *Favor exchange in collusion: empirical study of repeated procurement auctions in Japan*, International Journal of Industrial Organization, Vol. 27, No. 2, 2009, pp. 137-144.

16 The screening method can refer to: analysis of bids submitted to identify irregularities or anomalies, such as extremely low or high prices, unusually low variability among bids, or inconsistencies with expected costs; analysis of cost structures in order to detect irregularities in costs and margins, which could indicate price collusion; monitoring the participation of business entities in tenders in order to identify unusual patterns of behavior, such as the frequent participation of the same business entities in public procurement procedures or avoidance for certain projects; analysis of geographic and temporal

terns or anomalies in procurement processes that may suggest collusion or cartel behavior. Notably, the use of artificial intelligence in detecting bid rigging is gaining attention. Machine learning, a branch of artificial intelligence, can analyze auction data to identify patterns and anomalies, even with sparse information (e.g., bid values and winning bidders).[17]

In summary, effective prevention and combatting of bid rigging require several key measures: implementing robust legal solutions that classify bid rigging as a criminal offense, strengthening institutional capacity for enforcement, and providing continuous education and training for both public procurement authorities and business entities involved in procurement.

3. BID RIGGING IN THE LEGISLATION OF BOSNIA AND HERZEGOVINA

The Public Procurement Law of Bosnia and Herzegovina, enacted in 2004,[18] marked the first comprehensive attempt at regulating public procurement at the state level. This legislation was part of Bosnia and Herzegovina's effort to align with EU acquis, establishing a decentralized procurement system that defined the rights, duties, responsibilities, and procedures for participants in public procurement, as well as the oversight institutions responsible for monitoring and enforcing the law.

However, after ten years of implementation, the need for further alignment with EU standards and recommendations from the European Commission prompted the adoption of a new Public Procurement Law in 2014.[19] This updated law continued to regulate public procurement procedures and introduced improvements to enhance the system's effectiveness. In addition to the Public Procurement Law, the legal framework for public procurement in Bosnia and Herzegovina includes various sub-legal acts (by-laws) issued by the Council of Ministers and the Public Procurement Agency of Bosnia and Herzegovina.

The 2014 Public Procurement Law establishes rules for public procurement procedures and outlines the rights, duties, responsibilities, and legal protections for

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patterns in order to determine irregularities in the distribution of jobs or unusual patterns of cooperation among bidders.

17 Rodríguez, M. J. G., *et al., op. cit.,* note 1.; *p. 2.*

18 The Law on Public Procurement of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 49/2004.

19 The Law on Public Procurement of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 39/2014, 59/2022.

participants. It also defines the roles of the Public Procurement Agency of Bosnia and Herzegovina and the Office for Review of Complaints (Appeals) of Bosnia and Herzegovina, which are independent institutions tasked with overseeing the law's implementation.

Article 3 of the Public Procurement Law mandates that contracting authorities ensure transparency, equal treatment, and non-discrimination in the procurement process to promote fair and active competition and efficient use of public funds. While the Public Procurement Law does not explicitly address bid rigging, Article 52, paragraph 12 stipulates that bidders must submit their bids without disrupting market competition through prohibited agreements with other bidders. The Competition Council of Bosnia and Herzegovina is responsible for protecting market competition. If there are grounds to suspect that market competition is being undermined, a request for investigation can be submitted by any affected party, including businesses, chambers of commerce, employer associations, consumer groups, or executive authorities. This provision grants the Competition Council jurisdiction over competition issues in public procurement processes. However, bid rigging itself is not listed as an actionable offense under administrative fines within the Public Procurement Law. Furthermore, in Article 116 the Public Procurement Law provides for administrative fines foresees misdemeanor penalties for contracting authorities, but bid rigging is not listed as an action punishable by administrative fine (misdemeanor penalty).

As previously mentioned, some countries treat bid rigging in public procurement as a criminal offense. In Bosnia and Herzegovina, criminal legislation varies across different jurisdictions. The Criminal Code of Bosnia and Herzegovina[20] and the Criminal Code of the Federation of Bosnia and Herzegovina[21] do not address bid rigging directly. However, the Criminal Code of Republic of Srpska[22] and the Criminal Code of the Brčko District[23] categorize bid rigging under the broader framework of "abuse in public procurement procedures." This inconsistency complicates efforts to combat bid rigging and highlights the need for legal harmonization.

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20 Criminal Law of Bosnia and Herzegovina, Official Gazette of BiH, No. 3/2003, 32/2003 - corrected, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/2021, 31/2023, 47/2023.

21 Criminal Law of the Federation of Bosnia and Herzegovina, Official Gazette of FBiH, No. 36/2003, 21/2004 - corrected, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017, 31/2023.

22 Criminal Code of the Republic of Srpska, Official Gazette of RS, No. 64/2017, 104/2018 - decision US, 15/2021, 89/2021, 73/2023 and Official Gazette of BiH, No. 9/2024 - US BiH decision.

23 Criminal Law of the Brčko District of Bosnia and Herzegovina, Official Gazette of the Brčko District of Bosnia and Herzegovina, No. 19/2020 - revised text, 3/2024, 14/2024.

Modern competition law in Bosnia and Herzegovina began with the Law on Competition 2001, which aimed to align with EU regulations.[24] The Law on Competition 2005[25], which replaced the earlier version, provides rules, measures, and procedures for protecting market competition. It outlines the scope and operation of the Competition Council, the authority responsible for enforcing competition law. Article 4 of the Law on Competition, which is largely aligned with Article 101 of the Treaty on the Functioning of the European Union, addresses prohibited agreements or cartels.

Article 48 of the Law on Competition addresses cartels, or prohibited agreements, as serious violations. It stipulates that an economic entity or natural person involved in such violations may face fines of up to 10% of the total annual revenue (income) from the year preceding the violation. Specifically, the law penalizes those who conclude or participate in prohibited agreements that restrict, limit, or prevent market competition, as outlined in Article 4 of the Law on Competition.

The Competition Council is the primary enforcement body for market competition in Bosnia and Herzegovina, with its jurisdiction and enforcement powers defined by the Law on Competition. The Competition Council is responsible for initiating and conducting proceedings related to prohibited agreements and for imposing fines. Decisions made by the Competition Council can be appealed to the Court of Bosnia and Herzegovina, which serves as the second-instance authority.

Table 1 presents the number of decisions issued by the Competition Council in competition law cases involving prohibited agreements (cartels) from 2012 to 2022. On average, the Competition Council resolved 6.8 cases per year during this period. This number reflects the Competition Council 's performance given its available human, material, and financial resources. However, the Annual Reports of the Competition Council do not specify how many of these cases were related to bid rigging.

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[24] Imamović-Čizmić, K.; Kovačević-Bajtal, E.; Ramić, L., *Competition law in Bosnia and Herzegovina, How ready are we for the challenges of modern times?*, Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, Special Issue - Market Law (In A Pandemic Time): Challenges and Reforms, 2021, p. 183, [https://doi.org/10.25234/eclic/18820], Accessed 8 May 2024.

[25] Law on Competition, Official Gazette of BiH, No. 48/2005, 76/2007, 80/2009.

Table 1: Number of Decisions by the Competition Council in Cases of Prohibited Agreements (Cartels) from 2012-2022[26]

Year	*Prohibited agreements*
2012	10
2013	6
2014	13
2015	7[27]
2016	5[28]
2017	5[29]
2018	5[30]
2019	-
2020	4[31]

[26] The data was taken from research conducted by the author while writing a chapter in the book."Competition Law and Policy in the Western Balkan Countries" Jasminka Pecotic Kaufman, Gentjan Skara, Alexandrm Svetlicinii (eds), Which is under review.

[27] The Competition Council Annual Report 2015 states that in 2015 43 cases were received, final decisions were made for 31 cases. Of the total number of cases received, 16 related to the area of restrictive agreements and abuse of a dominant position, and 7 final decisions were adopted at the meetings of the CC.

[28] The Competition Council (2016) Annual Report 2016 states that in 2016, 34 cases were received, 19 related to prohibited agreements and abuse of a dominant position, and at the sessions, the Council of Competition made 5 final decisions related to prohibited agreements and abuse of a dominant position and one related to determination of individual prohibited agreements. exemptions.

[29] The Competition Council Annual Report 2017 states: "Of the 41 cases received, 14 relate to prohibited agreements and abuse of a dominant position. The Council of Competition adopted 6 final decisions, namely: 2 decisions suspending the procedures for establishing a prohibited agreement, 1 decision dismissed the request for establishing prohibited agreement, 1 decision rejecting the request for establishing a prohibited agreement and 1 decision rejecting the request for establishing an individual exemption from prohibited agreements. The Council of Competition adopted 1 decision rejecting the request for establishing abuse of a dominant position."

[30] The Competition Council Annual Report 2018 states: "Out of a total of 49 cases received, 14 refer to prohibited competitive activities, namely: 3 cases refer to prohibited agreements and 11 to abuse of a dominant position. The Council of Competition made 6 final decisions: 1 request to establish a prohibited agreement is rejected as unfounded, 1 request to establish a prohibited agreement was dismissed due to lack of jurisdiction, 1 request to establish abuse of a dominant position was dismissed as unfounded, one request was dismissed due to lack of jurisdiction, and 2 proceedings to determine a prohibited agreement were suspended due to withdrawal of the parties."

[31] The Competition Council Annual Report 2020 states: "Out of a total of 35 cases received in the field of competition in 2020, 16 cases related to prohibited competitive activities, namely: 3 cases related to the area of prohibited agreements and 10 to abuse of a dominant position and another three cases related to prohibited agreements and abuse of a dominant position. At the sessions, the Council of Competition adopted 8 final decisions: 1 request to determine a prohibited agreement was suspended, and 3 requests to determine abuse of a dominant position were suspended, and one request related to

2021	6
2022	2[32]

To enhance the understanding of the importance of effectively regulating the phenomenon of bid rigging, a comparative analysis may be conducted with the legal framework of the Republic of Croatia. Like Bosnia and Herzegovina, Croatia was a federal unit of the former Socialist Federal Republic of Yugoslavia and shares a common legal heritage in the field of competition law, as well as the legacy of implementing public procurement systems.

The Public Procurement Act of the Republic of Croatia[33], enacted in 2016 and aligned with the acquis communautaire of the European Union, serves as the fundamental legal framework for regulating public procurement procedures. Its entry into force on January 1, 2017, marked a significant step toward the harmonization of Croatian legislation with EU directives, including Directive 2014/24/EU and Directive 2014/25/EU. The purpose of these provisions is to ensure transparency, equality, and competitiveness in procurement processes.The Act underwent amendments in 2022[34], which further enhanced its application, particularly in the areas of digitalization of procedures and strengthening transparency controls. In addition to defining procurement procedures and the thresholds for their application, the Act explicitly stipulates the rights and obligations of contracting authorities and bidders, standards for the evaluation of bids, and sanctions for potential irregularities, including measures against corruption and anti-competitive practices such as bid rigging. Through these measures, the Public Procurement Act seeks to ensure the efficient use of public funds, enhance confidence in procurement processes, and facilitate equitable access to markets for all economic operators. Its adaptation to contemporary challenges and obligations under EU law underscores its significance in fostering market competition and strengthen-

both prohibited competitive activities was suspended. 2 requests to determine the abuse of a dominant position were rejected, and one decision was made that confirms the abuse of a dominant position. The remaining 8 cases are in the process of being resolved."

32 The Competition Council Annual Report 2022 states: "Out of a total of 31 cases received in the field of competition in 2021, 11 cases related to prohibited competitive activities, namely: 7 cases related to the area of prohibited agreements and 4 to abuse of a dominant position, of which one case was closed on both grounds. At the sessions, the Council of Competition adopted 5 final decisions: two requests for the determination of prohibited agreements were rejected, one request for the determination of a dominant position was rejected, the existence of abuse of a dominant position was determined in two cases, in one case it was determined that there was no abuse of a dominant position while in in one case the party waived the request. The remaining cases are in the process of being resolved."

33 The Public Procurement Act (Official Gazette No. 120/2016) - PPA 2016

34 The Act on Amendments to the Public Procurement Act (Official Gazette No. 114/2022)

ing the economic stability of the Republic of Croatia. The Act does not explicitly regulate bid rigging, but Article 254, paragraph 4 provides that the contracting authority may exclude an economic operator from the procedure if there are sufficient indications to conclude that the operator has entered into an agreement with other economic operators aimed at distorting market competition. In this case, as in Bosnia and Herzegovina, cooperation between the institutions responsible for the enforcement of competition law and public procurement law is foreseen. The Criminal Code of the Republic of Croatia[35] prescribes criminal offenses related to bid rigging in public procurement. Article 254 specifically provides the following:*(1) Anyone who submits a bid in a public procurement procedure based on a prohibited agreement between economic operators aimed at ensuring the contracting authority accepts a specific bid shall be punished by imprisonment for a term of six months to five years* . Regarding the regulation of bid rigging in competition law, it falls under prohibited agreements, which are regulated by Article 8 of the Competition Act,[36]the enforcement of which is the responsibility of the Croatian Competition Agency.

3.1. Share of Public Procurement in GDP and Value of Awarded Contracts

Public procurement constitutes a significant portion of economic activity. In the Organization for Economic Cooperation and Development member countries, it represents approximately 13% of Gross Domestic Product (GDP) and 29% of total government spending. The economic impact of bid rigging in such a large sector can be substantial. The Organization for Economic Cooperation and Development estimates that eliminating bid rigging can potentially reduce procurement prices by 20% or more[37]. Regarding the aim of this research and to underscore the importance of adhering to the general principles outlined in Article 3 of the Public Procurement Law of Bosnia and Herzegovina, and to raise awareness about the detrimental effects of bid rigging, it is essential to examine the share of public procurement in GDP, the value of awarded contracts, and the number of contracting authorities.

Public procurement accounts for 13% of GDP in the Organization for Economic Cooperation and Development countries.[38] In Bosnia and Herzegovina, the share

35 (Official Gazette No. 125/11, 144/12, 56/15, 61/18, 126/19)

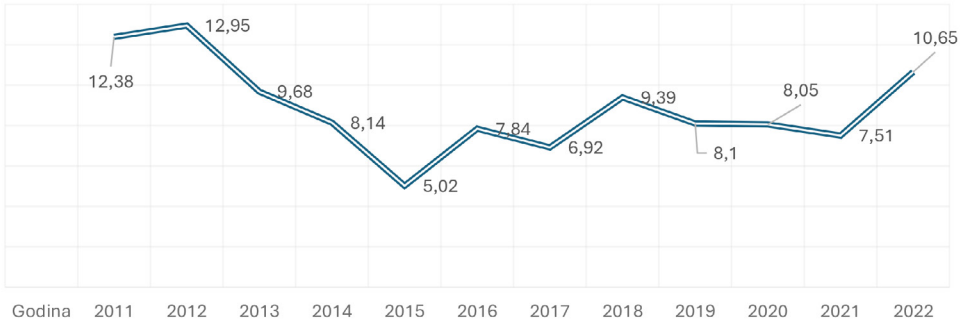
36 (Official Gazette No. 79/09, 80/13, 41/21, 153/23),

37 Imhof, D., *Detecting bid-rigging cartels with descriptive statistics*, Journal of Competition Law & Economics, Vol. 15, no. 4, p. 427.

38 OECD, *Public procurement performance: A framework for measuring efficiency, compliance and strategic goals*, 2023, [https://www.oecd-ilibrary.org/docserver/0dde73f4-en.pdf?expires=1715166788&id=id&accna

of public procurement in nominal GDP for 2022 was 10.65%, reflecting an increase from 7.51% in 2021.[39] According to reports from the Public Procurement Agency of Bosnia and Herzegovina, the highest recorded share in the past 13 years was 12.95% in 2012 (Figure 1). For comparative purposes, the Republic of Croatia reported a public procurement share of 20.59% of GDP for 2022, which represents a 28.21% increase from 16.06% in 2021.[40]

Figure 1: Percentage Share of Public Procurement in GDP from 2011 to 2022



Source: Public Procurement Agency of Bosnia and Herzegovina

The intricate state structure of Bosnia and Herzegovina has led to many contracting authorities that must adhere to the Law on Public Procurement. In 2022, there were 2,948 contracting entities registered in the "E-procurement" information system, which are required to follow public procurement procedures. For comparison, in the same year, the Republic of Croatia had 1,509 contracting authorities.[41]

In Bosnia and Herzegovina, the total value of awarded contracts in public procurement procedures for 2022 was 4,410,241,494.50 BAM.[42] The number of awarded contracts reached 216,039, marking the highest number recorded to date according to the statistics from the Public Procurement Agency of Bosnia and Herzegovina (Figure 2). In contrast, the total value of public procurement in Croatia

me=guest&checksum=732064914B7A594EE38181FEF2D0A209], Accessed 8 May 2024.

39 B&H Public Procurement Agency, *Annual report on concluded contracts in public procurement procedures in 2022*, 2023. [https://www.javnenabavke.gov.ba/bs-Latn-BA/reports?page=1&rows=9&searchByTaxonomyValueIds=37], Accessed 8 May 2024.

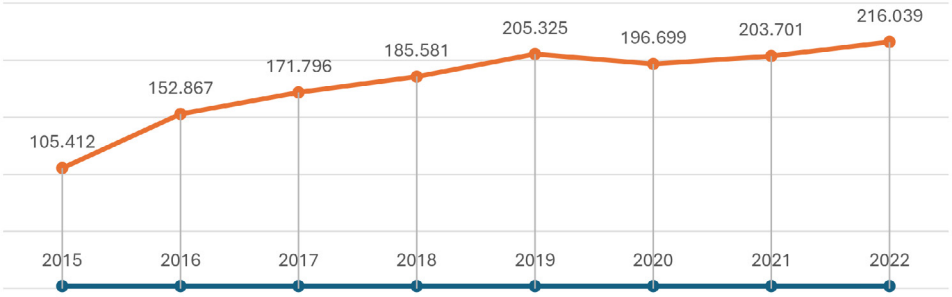
40 Directorate for Trade and Public Procurement Policy, *Statistical Report on Public Procurement in the Republic of Croatia for 2022*, 2023, p. 24, [http://www.javnanabava.hr/userdocsimages/userfiles/file/Statisti%C4%8Dka%20izvje%C5%A1%C4%87a/Godi%C5%A1nja/Statisticko_izvjesce_JN_2022.pdf], Accessed 8 May 2024.

41 *Ibid.*

42 B&H Public Procurement Agency, *op. cit.,* note 34, p. 21.

for 2022 was 75,046,541,904 HRK (excluding VAT), approximately equivalent to 19,494,241,348.00 BAM.

Figure 2: Number of Awarded Contracts through the Public Procurement System in Bosnia and Herzegovina



Source: Public Procurement Agency of Bosnia and Herzegovina

When considering the share of public procurement in GDP, the value of awarded contracts, and the number of procedures, an important question arises: Is the value paid for goods and services in public procurement reflective of the true market value, or could it be artificially inflated due to undetected bid rigging? Addressing this concern is crucial, as preventing, detecting, and sanctioning bid rigging can help narrow the gap between the paid value and the actual market value of awarded contracts, benefiting taxpayers, the state, and overall economic well-being. A fundamental aspect of preventing bid rigging is educating both contracting authorities—of which Bosnia and Herzegovina has a significant number—and bidders. Awareness and understanding of what constitutes bid rigging and how to recognize it are essential. Contracting authorities and bidders should be encouraged to report any suspicious behaviors or signs of bid rigging to the relevant institutions. These institutions are then responsible for investigating, identifying any violations of the law, and imposing sanctions. Effective law enforcement and the imposition of appropriate penalties act as deterrents against bid rigging. By ensuring that these practices are addressed promptly and efficiently, the integrity of the public procurement process can be maintained, ensuring that contracts are awarded at fair market prices.

4. RESULTS OF THE RESEARCH

Bosnia and Herzegovina lack a long-standing tradition in public procurement, as it is a relatively new system requiring ongoing education. Additionally, the high number of contracting authorities that issue tenders and carry out numerous public procurement procedures raises concerns about the prevalence of bid rigging,

which might be more widespread than the cases currently addressed under Article 4 of the Law on Competition. This assumption is based on the notion that both contracting authorities and economic entities (potential bidders) may not be sufficiently educated to recognize, and report bid rigging. To address this issue, a survey was conducted among contracting authorities in the Federation of Bosnia and Herzegovina. The survey targeted ministries of the Federation Government, ministries from the ten cantons, and budget beneficiaries in the Sarajevo Canton, Zenica-Doboj Canton, Tuzla Canton, and Herzegovina-Neretva Canton.

The purpose of the survey was to assess the level of awareness among contracting authorities about bid rigging and whether they have encountered such practices. The survey was anonymous and included 26 questions, designed to gather information about the respondents' backgrounds, their experience in public procurement, and their knowledge of bid rigging. The questions were formulated based on indicators of suspicious behavior and the Organization for Economic Cooperation and Development Recommendations on Fighting Bid Rigging in Public Procurement.

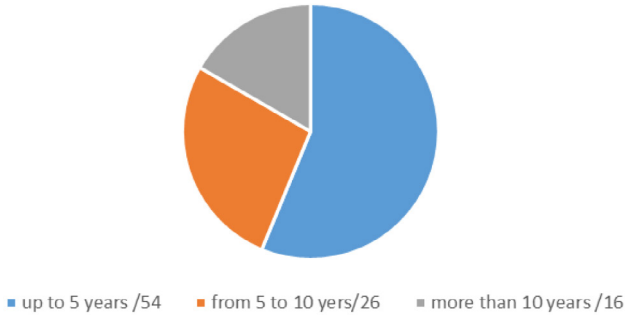
In the first part of the survey, respondents provided personal data. Out of 97 participants[43], 58 were female and 39 were male. The age distribution was as follows: 12 respondents were under 34 years old, 45 were between 35 and 44 years old, 30 were between 45 and 54 years old, and 12 were over 54 years old. Regarding educational background, 5 respondents had secondary education, 61 had higher education (college or university), 24 had completed postgraduate studies, and 8 had completed doctoral studies.

The second part of the survey focused on respondents' experience in public procurement, their awareness of bid rigging, and their understanding of the powers of the Competition Council. The first question in the second part of the survey was, "How many years have you been working in public procurement?" This question aimed to assess the respondents' experience in the field. Years of experience in public procurement can significantly impact the ability to recognize bid rigging for several reasons. Firstly, extensive experience provides a deep understanding of the public procurement process, including legal regulations, procedures, and standards. This knowledge helps in identifying irregularities or anomalies in bids that may indicate bid rigging. Additionally, long-term experience fosters the development of analytical skills crucial for reviewing bids in detail and detecting anomalies. With years of experience, individuals in public procurement roles also

[43] The total number of surveys received through the Forms application is 99, with not all respondents providing answers to all questions. Considering that the number of responses to individual questions varies between 94 and 99, this does not significantly affect the research results and conclusions.

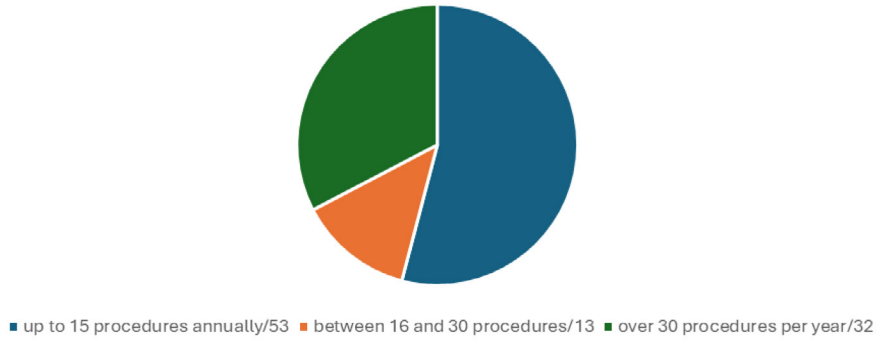
gain a better grasp of market dynamics and the pricing of goods and services. This deeper understanding enables them to evaluate the realism of bids more accurately and recognize unusually low or high prices that could signal irregularities. Among the survey respondents, 54 reported having 5 years of experience, 26 had between 5 and 10 years, and 18 had more than 10 years of experience (Figure 3).

Figure 3: Years of experience in public procurement



The next question in the survey was, "What is the average number of public procurement procedures carried out by your institution during one budget year?" The number of public procurement procedures conducted by an employee or contracting authority each year can influence their ability to recognize bid rigging. A higher volume of procedures can enhance their familiarity with common practices, deepen their understanding of the market, and help develop analytical skills. It can also increase their awareness of potential risks. However, a greater number of procedures can also create more opportunities for bid rigging to occur. The responses were as follows: 53 respondents indicated that their institutions conduct up to 15 procedures annually; 13 respondents reported that their institutions handle between 16 and 30 procedures; 32 respondents stated that their institutions manage over 30 procedures per year (Figure 4).

Figure 4: Number of public procurement procedures



Understanding the concept of bid rigging is crucial for effectively detecting irregularities in public procurement procedures. Familiarity with bid rigging allows employees to recognize typical patterns of behavior, such as unusually low prices, the withdrawal of bids by the same bidders, identical errors in multiple bids, or inconsistencies in documentation. Employees who are educated about bid rigging can implement appropriate protective measures to prevent or detect such irregularities. These measures might include thorough bid verification, the use of data analysis tools, or collaboration with law enforcement authorities. Being aware of bid rigging also enables quicker responses to suspicious situations or irregularities observed during the public procurement process. To gauge the respondents' awareness, the survey asked: "Are you familiar with the concept of bid rigging in public procurement procedures?" Out of 99 respondents, 57 answered "yes," while 41 answered "no". (Figure 5)

Figure 5: Familiarity with bid rigging in public procurement procedures

Understanding various forms of bid rigging is essential for the effective implementation of public procurement procedures. Familiarity with these forms enables individuals to recognize irregularities, apply appropriate checks, prevent misconduct, respond effectively to suspicious situations, and continuously improve practices to maintain high standards of integrity. In line with this, the survey asked respondents: "Do you know what forms of bid rigging exist in the public procurement process?" Out of 99 respondents, 33 answered "yes," indicating familiarity with the forms of bid rigging, while 66 answered "no," showing a lack of knowledge about the different forms of bid rigging. (Figure 6).

Figure 6: Familiarity with forms of bid rigging in public procurement procedures

The central part of the survey comprised questions designed based on indicators of "suspicious" behavior that may signal the presence of bid rigging in public procurement. These behaviors serve as signals to contracting authorities to report potential issues to the Competition Council.[44]

Table 2: Frequency of Behaviors Indicative of Bid Rigging in Public Procurement (percentage of the total number of responses to a specific question)

Indicators of behavior of participants in bid rigging:	%
1. The same bidder always makes the lowest bid.	51.042
2. Certain bidders participate only in specific geographical areas.	44.898
3. A bidder who regularly participates in public procurement procedures does not submit the bid they expect to submit.	50.00
4. A bidder who regularly participates in public procurement procedures unexpectedly and suddenly withdraws their bid.	22.34
5. Certain bidders always submit bids but never win.	36.735
6. Two or more market participants submit a joint bid even though at least one of them could submit an independent bid.	14.433
7. The winner unexpectedly hires a subcontractor who is one of those who did not win.	13.402
8. Bidders have identical technical errors (typing errors, etc.) in bids submitted by different companies.	14.583
9. Documentation from different bidders was submitted from the same computer or IP address.	5.155

[44] The questions are made based on OECD Recommendation on Fighting Bid Rigging in Public Procurement: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396

10. Offers from different bidders contain a significant number of identical cost sheets or identical computation errors.	10.309
11. Sudden or identical price increases by bidders that cannot be explained by rising costs.	23.958
12. Bid prices remain the same over an extended period.	38.144
13. Big difference in the price of the winning bidder and other bidders.	56.701
14. Significantly reduced price offered by a new bidder or a bidder who rarely participates in public procurement procedures.	38.144
15. Bidders make statements indicating that some companies do not sell in certain areas or to certain consumers.	12.766
16. Bidders make statements that a certain area or consumers belong to another provider.	10.309
17. Use of the same terminology by different bidders when explaining their bids	12.371

According to the data from the table, contracting authorities most frequently encountered the following patterns of behavior related to bid rigging in public procurement procedures:

- Large differences in prices between the winning bidder and other bidders:
- The same bidder consistently offers the lowest bid.
- Certain bidders participate only in specific geographical areas.
- Significantly reduced prices offered by new bidders or bidders who rarely participate in public procurement procedures.
- Regular bidders not submitting bids they are expected to.

The Public Procurement Law allows for the initiation of proceedings before the Competition Council of Bosnia and Herzegovina if there are grounds to suspect a violation of market competition in a public procurement process. Such requests can be submitted by any business or natural person with a legal or economic interest, chambers of commerce, associations of employers or entrepreneurs, consumer associations, and executive authorities.

Given this, it is crucial for contracting authorities to understand that if certain indicators of suspicious bidder behavior are observed, they should report these to the Competition Council. Additionally, they should be aware of the Competition Council's powers in addressing bid rigging.

Two questions were posed in the survey to assess awareness of these issues. On first question "Are you aware of the competencies (powers) of the Competition Council regarding bid rigging in public procurement?" 35 respondents answered "Yes" and 61 respondents answered "No". On second question "Do you have

information that some (one) of the bidders in tenders of the institution where you work have been involved in proceedings before the Competition Council due to suspected bid rigging or violation of Article 4 of the Law on Competition?" 2 respondents answered "Yes" and 95 respondents answered "No".

These responses highlight a need for increased awareness and education regarding the roles and powers of the Competition Council, as well as the procedures for reporting suspected bid rigging.

5. CONCLUDING REMARKS

Based on the results of the research, several key conclusions and recommendations emerge for enhancing the public procurement system in Bosnia and Herzegovina, particularly concerning the prevention of bid rigging:

Bid rigging represents a severe issue that compromises the integrity of the public procurement process. The empirical data highlights the need for greater vigilance in recognizing and preventing such practices. To address this, it is crucial to strengthen the capacities and responsibilities of oversight and enforcement bodies, including the Public Procurement Agency, the Office for Review of Complaints, and the Competition Council of Bosnia and Herzegovina. Enhancing their effectiveness will be key to combating corruption and abuse in the public procurement sector.

Although the Public Procurement Law of 2014 introduced significant advancements, practical experience indicates the need for further amendments to ensure greater transparency, efficiency, and effectiveness in procurement procedures. It is essential to align legislation with international best practices and standards and to strengthen mechanisms for monitoring and addressing irregularities.

The survey results underscore the value of educating and raising awareness among contracting authorities and bidders about the detrimental effects of bid rigging and the importance of adhering to fair competition principles. Mandatory training and seminars for all public procurement participants can play a critical role in recognizing and preventing manipulative practices.

Engaging in international cooperation and exchanging information on best practices and successful anti-bid rigging models can provide significant benefits. Lessons from other countries demonstrate that eliminating bid rigging can lead to substantial savings and improved outcomes in public procurement.

In conclusion, the research indicates that a multifaceted approach—combining legal reforms, enhanced institutional capacities, targeted education, and international collaboration—is essential for effectively combating bid rigging. Implementing these recommendations can foster a more transparent, efficient, and equitable public procurement system in Bosnia and Herzegovina.

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Original scientific paper

MODERN-DAY SOLUTIONS FOR MODERN-DAY GLOBALISATION: PROPOSALS FOR CURBING IMPORTED ANTI-COMPETITIVE BEHAVIOUR

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Abstract

Cross-border conduct, such as cross-border cartels, export cartels, and abuse of dominance by multinational corporations, undertaken by firms in developed economies, can affect the economies of developing countries. This paper argues that such anti-competitive behaviour can only be curbed through the cooperation of the competition agencies of developing countries. Through looking at the harms of such conduct and assessing past and possible future solutions, this paper finds that creating a global competition law is not the only solution to this problem, but rather that plurilateral (or regional) and bilateral cooperation can be equally effective. Further, it finds that regional cooperation is not only effective in its own right, but also as tool to eventually reach an effective form of multilateral cooperation. Accordingly, it makes suggestions pertaining to international law instruments that can be used to limit cross-border anti-competitive conduct, the content of regional and bilateral agreements, and the role of international organizations in soft cooperation.

Key words: *competition law, export cartels, cross-border cartels, abuse of dominance, international cooperation*

1. INTRODUCTION

Markets in developing countries are not only affected by domestic anti-competitive behaviour, but also by cross-border practices, including those undertaken by firms in developed economies. These include cross-border cartels, export cartels, and abuse of dominant position by global service providers, including technology giants. Given increased globalization, including that of services, the harms of this behaviour may be easily imported into the markets of developing economies, threatening their economic development. This paper argues that one of the main ways to combat this is through cooperation between the competition agencies of developing economies. To do so, the paper first goes through different types of cross-border conduct, identifying the harms of such anti-competitive behaviour. It

then looks into the different forms of international cooperation, discussing the attempts that have previously been made and assessing the strengths and weaknesses of different approaches. Accordingly, the third section of the paper makes some suggestions as to viable options for cooperation going forward.

2. TYPES OF CROSS-BORDER ANTI-COMPETITIVE CONDUCT

Strategic trade theory lays out that the intervention of governments in free trade can provide opportunities for certain sectors to expand, thereby increasing national income.[1] This is one reason states work together through platforms such as the World Trade Organization (WTO) to deal with tariff and non-tariff barriers. However, free trade could also be impeded by private actions of undertakings – namely anti-competitive conduct. This conduct includes export cartels, cross-border cartels, and abuse of dominance by multinational corporations. The states most affected by such conduct are often developing countries. Firstly, their economies are more fragile, and hence more easily affected by the harms associated with anti-competitive conduct. These include, *inter alia*, higher prices, decreased quality, decreased customer choice, and, in some cases, decreased employment opportunities. Secondly, as developed countries may be home to the cartelists or the multi-national corporations, any benefit incurred from anti-competitive behaviour would be captured by these countries. As hosts, however, developing countries would be subject to the harms associated with anti-competitive behaviour in an exclusive manner. This imbalance makes it important for developing countries to aim to address such behaviour. Accordingly, the remainder of this section provides a summary of the nature and the types and harms of "imported" anti-competitive behaviour (cross-border and export cartels, as well as abuse of dominance by multinational corporations) before delving into the ways that this behaviour can be curbed.

Cross-border cartels describe cartels that originate in one state and impact other states (while possibly effecting the state of origin as well). Cross-border or international cartels can lead to significant price mark ups. A survey of around 2,000 estimated overcharges, resulting from cartels, shows that while the median overcharge for national cartels is 18.2%, that of international cartels is 25.1%.[2] Moreover, international cartels showed more "episodes" of increase, or phases for which the price effects differed. While most domestic cartels created one episode, the 1,042 international cartelized markets in the study had an average of 4.3 episodes, in-

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1 Becker, F., *The Case of Export Cartel Exemptions: Between Competition and Protectionism*, Journal of Competition Law and Economics, Vol. 3, No. 1, pp. 97-126, p. 98

2 Connor, J.M., *Price-Fixing Overcharges: Revised 2nd Edition*, SSRN, 2014, p. 53

dicating that international cartels are more likely to reform once they have fallen apart.[3] Accordingly, cross-border cartels can be more harmful than domestic cartels, as well as more difficult to prosecute.

Even more difficult to uncover are export cartels, which are cartels which concern export markets, or the markets of target states, and which may include agreements or arrangements regarding: setting an export price, dividing export markets, exclusivity in exporting, fixing resale prices of foreign distributors or sales quotas, or, having associations refuse the export of non-members.[4]

Similar to cross-border cartels, the practices of dominant undertakings can span over multiple states. This is especially true given increased globalization and the growth of large technology companies. Such companies are often based in developed countries and reach a global scale. Any abuse of their position, whether exploitative or exclusionary, would easily affect all geographic markets in which they operate. At the very least, it would prevent local players from rising, thereby reducing consumer choice and possibly deteriorating the quality of the incumbent's existing services.

Such practices may be easier to prove than cartel activity (for example, by relying on the effects of the abuse on the target market as evidence). However, a competition authority may still face difficulties in building a strong case if it is unable to have a multinational undertaking cooperate in meetings or in providing evidence.

The common factor between these types of conduct is that 1) the jurisdiction in which they originate may not be the most harmed by the cartel (in the case of cross-border cartels or cross-border abuse of dominance) or may not at all be directly harmed by the cartel (in the case of export cartels), making it 2) difficult to ascertain which competition authority (or authorities) are best suited to prosecute the case. The upcoming section explores the question of cross-border jurisdiction.

3. CROSS-BORDER JURISDICTION

The examples of the United States (US) and the European Union (EU) are used to explore this point. These two examples are used given the different approaches of these two jurisdictions and given the relatively large size of their economies.[5]

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3 *ibid.*, p. 37

4 Becker, F., *op. cit.*, note 1, p. 100

5 World Trade Organization, *World Trade Statistics 2023*, 2023 [https://www.wto.org/english/res_e/statis_e/statistics2023_e.htm#:~:text=In%202023%2C%20world%20trade%20in,trajectory%2C%20increasing%20by%209%25.], accessed 1 December 2024

The US, on one hand, provides an explicit exemption for export cartels. In 1918, the US Congress passed the Webb-Pomerene Export Trade Act of 1918 (WPA), explicitly exempting export cartels from the prohibition laid out in Section 1 of the Sherman Act. The main motive behind the WPA were concerns that US companies were, on the global scale, disadvantaged by not being able to cooperate and face foreign cartels.[6] Under similar conditions, and a few decades later, the Export Trading Company Act of 1982 (ETC) was passed. The ETC created the certification-provision, which allowed exporting undertakings to apply for a certificate setting limits to their antitrust liability before engaging in export. Holders of the certificate are largely immune from public enforcement and would only be subject to single, rather than treble, damages in the case of private damage claims. In the same year, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) passed, encouraging US companies to engage in export collusion as long as any impact on the US market would be incidental and insubstantial.[7] To date, the US employs an explicitly exemption of export cartels.

The EU, on the other hand, provides an implicit exemption for export cartels. In order to understand this exemption, the following paragraphs explore the EU approach towards jurisdiction (including over agreements concluded outside of the EU but implemented in the Union) and the general public international law principles governing antitrust jurisdiction.

In 2006, the EU Commission began investigating a cartel between 6 undertakings spanning over 6 jurisdictions, including the EU, relating to Liquid Crystal Display (LCD) screens. In its 2010 report, the Commission explored the question of jurisdiction: can an agreement between undertakings be investigated by the EU if the agreement took place outside of the EU but was implemented in it?[8] The Commission cited the territoriality principle, which was explored in detail by the General Court (GC) in the *Woodpulp* case (1988).[9] In that case, the GC clarified that the "territory" in question in the one in which the anti-competitive conduct is implemented – if it referred to the territory in which the agreement was concluded, undertakings could easily circumvent the prohibition laid out in Article 101 TFEU. The test for jurisdiction hence is one of implementation: EU jurisdiction is established if the conduct is implemented in the EU. The GC soon

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6 Becker, F., *op. cit.*, note 1, p. 102

7 *ibid.*, p. 104

8 European Commission, Commission Decision relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (COMP/39.309 – LCD – Liquid Crystal Displays), 2010, p. 62

9 Joined cases T-89, 104, 114, 116, 117 and 125 to 129/85 A. Ahlström Osakeyhtiö and others v Commission of the European Communities [1988] ECR 988-05193

added another layer to the test in its 1999 *Gencor* decision, the qualified effects test.[10] The case established that the EU Commission can intervene under the principles of public international law when it is foreseeable that a proposed transaction would have an immediate and substantial effect on the EU. The case also established that fulfilling either the implementation or the effects test would grant jurisdiction – the test is not cumulative. This was demonstrated in the 2017 case of *Intel*.[11] That decision also clarifies that both limbs of the test pursue the same objective: establishing that the agreement was implemented in the EU or that it was sufficiently *probable* that the agreement would affect the EU.[12] This is done by considering the conduct in question as a whole. Accordingly, the criteria of the effects test laid out in *Gencor*, that the effects are immediate and substantial, are fulfilled if the conduct is, for instance, part of an overall strategy to foreclose competition, including in the EU.[13] Notably, if the threshold for the effect test was any higher – if it required that the effects of the agreement concluded abroad must actually materialize in the EU – there would be an "artificial fragmentation of comprehensive anti-competitive conduct" as agreement concluded outside of the EU would not be subject to the "by object" analysis.[14]

Accordingly, EU case law established that the EU Commission has jurisdiction to investigate anti-competitive agreements, such as export cartels, if they may possibly have an effect on the European market. However, Article 101 TFEU clearly states that anti-competitive agreements must affect the internal market in order to be considered illegal. Hence, an implicit exemption exists: the EU Commission would not have any jurisdiction over a pure export cartel (including one that is concluded in the EU) which has absolutely no likelihood of effects on the EU market.

Some commentators argue that both the US and the EU exemptions do not hold. The main premise of this argument is that by purely applying the territoriality test, a cartel would be under the jurisdiction of the competition authority of the state in which it was concluded.[15] In that sense, the effects principle is not a limit to jurisdiction, but a means to expand it. Under that argument, an export cartel that is concluded on US or EU territory is within the jurisdiction of the US/EU, as the territoriality requirement is fulfilled through the conclusion of the agreement on US/EU territory. However, while this argument suggests a theoretical mode of

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10 Case T-102/96 Gencor Ltd v Commission of the European Communities [1999] ECR II-00753

11 Case C-413/14 P Intel Corp. v European Commission [2017], paras. 40-65

12 *ibid.*, para. 51

13 *ibid.*

14 *ibid.*, para. 57

15 Becker, F., *op. cit.*, note 1, p. 107

application of the doctrine, in the case of the EU, the courts have already come to a conclusion on how to apply the principle. As mentioned above, in the case of *Woodpulp*, the court established that the "territory" is where the implementation or effects of the conduct takes place. So, the courts may be hesitant to consider the territory in question to be the territory in which the agreement takes place, as that has been understood to be immaterial. In the case of the US, the explicit exemptions provided in statute make it unlikely that the US antitrust authorities would pursue conduct with no impact on the US economy, or even impact that is only incidental and unsubstantial. The bar is evidently a bit lower in the EU, as any foreseeable effects on the internal market would suffice.

Accordingly, as a matter of legal jurisdiction, the US and EU would currently not pursue anti-competitive conduct, including that concluded on their territory, unless a level of impact on their economy is met. The next question then becomes, even if such jurisdictions had these powers, *should* they exercise them? The following paragraphs present three reasons as to why cross-border conduct, including export cartel agreements, would not effectively by curbed if investigated solely by the developed jurisdictions on the territory of which the conduct is concluded.

Firstly, even if jurisdictions such as the US and EU were to expand their jurisdiction vis-à-vis conduct occurring on their territory and affecting other jurisdictions, this might be at odds with the principle of comity. In the context of competition law, the principle can be used as a principle of recognition, i.e. to assert jurisdiction over anti-competitive conduct in another jurisdiction, or as a principle of restraint, meaning that it can be used to abstain from intervening to avoid interfering in the interests of a foreign jurisdiction.[16] In other words, the principle provides "an option to exercise deference" so that competition authorities do not duplicate investigations and conclude with opposing decisions.[17] While the principle does not pose an obligation on a jurisdiction to pursue certain conduct, utilizing it as a principle of recognition may result in antitrust laws of one state being used to address conduct in another, despite that state employing different antitrust laws. In the case of export cartels, for instance, if the EU were to apply its own competition laws to an export cartel which hypothetically only affected a third jurisdiction, which also employed a competition law, conduct which would otherwise be addressed by the third jurisdiction's law would be assessed under foreign legislation. This may not always be appropriate; states, ideally, draft and enforce laws customized to their own economies, and applying foreign competition legislation may result in contradicting outcomes.

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16 Martínez, A.R., *Too Much, Too Many: The Principle of International Comity in Digital Markets*, accessed 2 December 2024

17 *ibid.*

The second reason is similar. An investigation by, following the above example, the EU Commission into conduct only impacting a third jurisdiction would not be coherent, as the EU Commission may not understand the nature of the market in question. The real impact of the cartel would be taking place in an economy and environment which is unfamiliar to that authority.[18] While in most jurisdictions, it would suffice to have evidence of the occurrence of the cartel without having to prove its effects (on the target market), it would still be difficult for the investigating agency to ascertain specific facts, such as for instance, the market share of the exporters in the target market (for the purpose of de minimis requirements). Moreover, the regulating state may be unaware of certain industrial policies that may affect that market, promulgated by the target state. In that sense, "any protection of competition in a foreign market is necessarily incomplete" and may almost risk infringing the fundamental principle of non-intervention into another state's economic decisions.[19]

Thirdly, such intervention by the EU Commission, hypothetically, may cause a rivalry between competition authorities. This point was raised in the UK Competition and Markets' Authority (CMA)'s report (2021) on the acquisition of Giphy by Facebook (Meta).[20] In that case, third party commentators argued that UK intervention is an overreach of jurisdiction, since both parties to the transaction were US entities with no presence in the UK, and that this makes the UK "merger policemen".[21] While the CMA's jurisdiction was established in that case, such a reputation for an established authority may harm the newer competition agency (the agency in the developing, target market). In the example above, if the agency in the host country finds that there is no export cartel but the agency in the target market does prove the cartel, the cartelists are more likely to challenge the sanction imposed by the latter or ignore it altogether. Accordingly, the agency in the developing jurisdiction will have wasted resources in investigating the infringement. It would also have lost out on a potential fine. Notably, in the case of *Facebook/Giphy*, the Australian and Austrian authorities also investigated the acquisition. There is no evidence of any cooperation between the three authorities in the investigation, and they all arrived at different conclusions.[22]

To conclude, an investigation into cross-border conduct originating in a developed country by the competition authority in that country may result in an outcome that is harmful for the target country. This is because the competition agency in

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18 Becker, F., *op. cit.*, note 1, p. 114

19 *ibid.*

20 CMA, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Final Report, 2021, p. 48

21 *ibid.*, Appendix H

22 Spiegel, Y., *The Facebook-Giphy Merger*, SSRN, 2024, p. 5

the host country would be applying its own rules to a third state; it would not have sufficient expertise to investigate conduct in that state; and, it may arrive at an outcome that is harmful for the target state. For that reason, this paper explores an alternative solution: cooperation between competition authorities. The forms of cooperation are addressed in turn in the following section.

4. PAST AND CURRENT MODELS OF INTERNATIONAL COOPERATION

This section explores the three types of competition agency cooperation, denoted as: the multilateral, or global, approach; the plurilateral (regional) approach; and the bilateral approach. It then turns to the role of international organizations in enhancing soft cooperation.

4.1. The multilateral approach

It is often argued that the ideal form of cooperation, for the purpose of the enforcement of competition law and hence, although perhaps indirectly, the curbing of imported anti-competitive behaviour, is the creation of a global competition law.[23] Notably, this has been attempted multiple times in past century.

As early as 1927, the League of Nations discussed a global attempt at controlling restrictive business practices.[24] Later, a more concrete endeavour was taken by the United Nations Conference on Trade and Development (UNCTAD) through Chapter V of the Havana Charter in 1948.[25] The Chapter dealt with conduct such as price-fixing and market allocation.[26] It also explicitly mandated that members would "co-operate with the organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control …".[27] Indeed, the Charter set up a system where signatories could consult one another, through the International Trade Organization (ITO), regarding suspected anti-

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23 Becker, F., *op. cit.*, note 1

24 Ham, A.D.; *International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, Common Market Law Review, Vol. 30, 1993, pp. 571-597, p. 572

25 Choi, Y.S.; Hienemann, A., *Competition and Trade: The Rise of Competition Law in Trade Agreements and Its Implications for the World Trading System*, World Competition, Vol. 43, No. 4, 2020, pp. 521-542, p. 526

26 Matsushita, M., *International Cooperation in the Enforcement of Competition Policy*, Washington University Global Studies Law Review, Vol. 1, No. 463, 2002, pp. 463-475. p. 464

27 Article 46, para. 1, Havana Charter for an International Trade Organization, E/Conf. 2/78, 1948

competitive conduct, with the aim of reaching a mutually satisfactory resolution.[28] Alternatively, a member state, or a private entity within its jurisdiction, could file a complaint at the ITO, which the ITO would investigate.[29] The ITO would then recommend remedial action for the member state from which the conduct originated, which the latter would have to report that it had followed.[30] Compliance with these recommendations was not a legal obligation, but, members would be under political pressure to comply, as they would otherwise have to explain their reasons for not doing so.[31] Finally, the Charter also provided a paragraph, Article 53, focused on practices in certain service fields, such as telecommunications, transportation, insurance, and banking. It offered a similar mechanism for remedial solutions, but it did not explicitly list prohibited practices in these fields, nor did it require member states to address them in national laws.

However, the Havana Charter was soon abandoned, and accordingly so were its competition provisions.[32] Had it succeeded, the Charter would have created a global investigatory body concerned with applying anti-trust provisions. It would have ensured a form of cooperation between member states that would have enabled this body to address cross-border activities. As will be demonstrated later in this paper, these types of evidence-gathering powers are crucial for the strengthening of competition enforcement in developing countries, although it may not require a transnational organisation.

A similar, yet softer, attempt was undertaken by the UNCTAD again in 1980, when its General Assembly accepted a "set of multilaterally agreed principles and rules for the control of restrictive business practices".[33] The code is non-binding, although it does contain valuable provisions regarding offering technical assistance to developing countries (the importance of such support is discussed in more detail in Section 3.2).

Other UN organizations also undertook similar attempts: in 1953, the UN Economic and Social Council (ECOSOC) submitted "Draft Articles of Agreement", largely mimicking Chapter V.[34] Some minor differences included slightly more proscriptive prohibitions, as well as an exemption for government-mandated con-

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28 *ibid.*, Article 47

29 *ibid.*, Articles 46, 48

30 *ibid.*, Article 48

31 Nakagawa, J., *Harmonization of Competition Law*, in: Nakagawa, J. (ed.), International Harmonization of Economic Regulation, 2011, pp. 188-214, p. 191

32 Matsushita, M., *op. cit.*, note 29, p. 464

33 Ham, A.D, *op. cit.*, note 27, p. 572

34 Nakagawa, J., *op. cit.*, note 34, p. 192

duct. Moreover, similar to the Havana Charter, the ECOSOC Draft created an independent organization responsible for the execution of the agreement.[35] However, the ECOSOC draft failed to come to fruition, as the US did not ratify it. As one of the articles of the draft stipulated that it must be accepted by countries accounting for at least 65% of the world's imports and exports, and as the US was, at the time, the largest importer and exporter, the draft faced the same fate as the Havana Charter.[36]

Around the time, during the Ninth Session of the Contracting Parties of the GATT in 1954, discussions took place regarding adding provisions to the GATT addressing the regulation of restrictive business practices. This was also abandoned at the time, following the sentiment resulting from the abandonment of the ECOSOC Draft that such provisions are premature. However, in 1958, the members of the GATT decided to establish a Group of Experts on Restrictive Business Practices. Notably, the majority of the Group was opposed to the creation of a super-national body tasked with enforcing a sort of global competition law, given the jurisdictional issues this organization would have vis-à-vis national authorities. GATT discussions of the topic came to a close soon after, precisely in the Seventeenth Session in 1960.[37]

Later attempts were made by the "Munich group of competition law experts" who created a Draft International Antitrust Code in 1993.[38] The Draft created an International Antitrust Authority as well as an International Antitrust Panel, which would review the decisions of the former if challenged. The Draft was clear on substance and would have direct effect, meaning that it could be invoked by private parties before national courts. The proposal would be that the code would be Annexed to a plurilateral treaty under the WTO, and that it would only apply to those who signed it. Notably, scholars at the time made proposals that the global law should outlaw export cartels, further suggesting that member states could exempt three industries from such ban.[39] Again, the code failed to take any formal form, mainly due the opposition by the United States, both regarding the substantive and procedural elements of the code.[40]

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35 *ibid.*

36 *ibid.*, 193

37 *Ibid.*, 194

38 Hoekman, B., *Competition Policy and the Global Trading System: A Developing-Country Perspective*, World Bank Policy Research Working Paper, No. 1735, 1997, p. 2

39 Scherer, F.M., *Competition Policies for an Integrated World Economy*, Brookings Institution, Washington D.C., 1995

40 Gifford, D.J., *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, Minnesota Journal of International Law, Vol. 6, No. 1, 1997, p. 5

The most recent major attempt at a global approach towards competition law, and the final one to be addressed in this section, was that made at the 2001 WTO Doha Round. Members of the WTO discussed the "Singapore Issues", which included competition policy and its interaction with trade. A working group on the topic was created, but most Singapore Issues were abandoned following the Cancun Ministerial Conference in 2003.[41] The working group has been inactive since 2004.[42]

Evidently, it is difficult to draft a globally applicable, enforceable competition code.[43] Differences in industrial policy and legal tradition would it make it very difficult for countries to agree on the substance of such a code. Indeed, it would be difficult for countries of different legal systems and political ideologies to agree on one identical form of competition law, especially if it were to have direct effect. In fact, it is largely contended that there is no "one size fits all" competition regime, and that each jurisdiction should draft and enforce its competition laws in a way that is appropriate for its legal regime and economic goals.[44] On the procedural side, the creation of a global antitrust authority is also difficult, given questions of jurisdiction, the extent to which its decisions would be binding, and because "nations differ widely in their willingness to trust officials to make socially responsible choices through regulation, as opposed to market mechanisms".[45] Moreover, while attempts have halted in the past few years, it is difficult to envision that they would be any more successful in the present day; current debates in antitrust and trade policy highlight increased divergence and protectionism, which would make it even more complicated to arrive at a multilateral agreement in the next few years.

For instance, the 2019 *Siemens/Alstom* merger decision highlights the tensions that may exist, perhaps in specific industries, resulting from the growth of global undertakings in local markets. The Commission blocked this merger, finding that it would have cut competition in the markets for signalling systems and very-high speed trains, depriving consumers (including train operators) of choice and increasing prices. In its decision, the Commission addressed the potential entry

41 Choi, Y.S., Hienemann, A., note 28, p. 527

42 Anderson, R. *et al.*, *Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection*, OECD Global Forum on Competition, 2019, p. 10

43 Gifford, D.J., *op. cit.*, note 43, p. 29

44 Gal, M.S.; Fox, E.M., *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, in: Gal M.S. *et al.* (eds), The Economic Characteristics of Developing Jurisdictions, Edward Elgar Publishing, 2015, p. 299

45 *ibid.*

of Chinese competitors into the European market, stating that they would not be present on the market in the foreseeable future.[46] This, however, was met by disagreement from France and Germany, which, a few days after the decision, jointly issued a statement on the importance of creating European Champions. In their manifesto, France and Germany made two main arguments relating to the substance of the EU merger control regime, namely that it should take into consideration 1) state aid received by foreign competitors in their home state, and 2) the need for European firms to compete on the global market rather than just the European market.[47] In other words, it would not be surprising if national competition regimes were to move towards more protectionist approaches, given the globalized nature of today's economy, and the appetite of some jurisdictions to growth their own local undertakings rather than face competition from abroad.

The following section explores a perhaps more palatable form of cooperation: the plurilateral approach.

4.2. The plurilateral approach: regional cooperation

Regional agreements addressing competition law may be more successful than multilateral agreements. If, as laid out in Section 2, one of the main goals of developing countries in cooperation is to shield their markets from the anti-competitive practices of more developed economies, then it would make sense for developing neighbours to work together, rather than expect the majority of jurisdictions to cooperate. Furthermore, neighbouring jurisdictions may have similar views regarding industrial policy and protectionism, perhaps due to similar natural resources or competitive advantages. This would make cooperation easier. Neighbouring countries may not necessarily have converging competition regimes – despite their geographic proximity, they could still have different legal traditions as well as divergent political or economic goals. It is however more likely that they will have many cultural and historical factors in common.

One example of this is the Arab region. Most Arab countries employ a mix of civil and Islamic (Sharia) law regimes, while some more heavily rely on the latter (such as Saudi Arabia). Accordingly, the influence of legal tradition on their competition regimes should be similar throughout the region, even if the substance of the procedural aspects of their competition laws is not identical.

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46 *Siemens/Alstom* (M.8677) Commission Decision 300/07 [2019] OJ 300/14, para. 1073

47 Liran P., *The Siemens/Alstom Merger Case: How European Merger Policy Respond to Global Competition*, Dublin Law and Politics Review, Vol. 1, No. 33, 2020, pp. 33-40

Perhaps accordingly, most Arab countries (the 22 members of the Arab League) currently employ a competition law regime. While in some cases, this may have been directly influenced by their cooperation with third jurisdictions, such as the EU for instance[48], it could also indirectly be attributed to the Sharia law obligation on individuals to trade fairly.[49] In fact, Sharia law aims to safeguard the freedom to compete, while prohibiting certain practices, such as artificially inflating prices or hoarding products.[50] In other words, the culture, as well as the legal regime in the Arab region, taken by example, is very similar, perhaps making cooperation on the competition front more feasible. Some scholars have found that having a similar and accepting culture or attitude towards competition does indeed play a role in promoting cooperation.[51]

To that end, the competition authorities of the Arab region have recently joined the Arab Competition Network (ACN), created jointly by the Arab League and the Egyptian Competition Authority in 2022.[52] The Network aims to enhance the capacity building of its individual members through workshops and training programs, focusing on different areas of competition enforcement and on advocacy.[53] Since its creation, the ACN has hosted over 30 workshops, training courses, conferences, and events. Technical teams across the different authorities have been created and have issued guidelines on enhancing the institutional structure and efficiency of the members' competition authorities.[54] Moreover, different international organizations, namely the Organization for Economic Cooperation and Development (OECD), the United Nations Economic and Social Commission for Western Asia (UN-ESCWA), and UNCTAD, have also played a role in enhancing soft cooperation between Arab states by establishing the Arab Competition Forum in 2020.[55] The Forum similarly provides a platform for Arab competition authorities to meet and exchange knowledge.

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48 Choi, Y.S., Hienemann, A., *op. cit.*, note 28, p. 524

49 Dabbah, M. M., *Competition Law and Policy in the Middle East*, Cambridge, 2009, 23

50 *ibid.*

51 Gerber, D., *Global Competition: Law, Markets, and Globalization*, Oxford, 2010

52 Saudi Press Agency, *Arab Competition Network Launched to Enhance Communication, Cooperation Regarding Competition Protection*, 2022 [https://www.spa.gov.sa/2338002], accessed 10 September 2024

53 Bremer, *Arab Competition Network Poised to Increase Inter-agency Cooperation*, 2023 [https://www.bremerlf.com/resources/arab-competition-network-poised-to-increase-inter-agency-cooperation], accessed 10 September 2024

54 Egyptian State Information Service, *ACN 3rd Conferences Kicks Off in KSA*, 2024 [https://www.sis.gov.eg/Story/191910/ACN-3rd-conference-kicks-off-in-KSA?lang=en-us], accessed 10 September 2024

55 OECD, *Arab Competition Forum* [https://www.oecd.org/en/networks/arab-competition-forum.html], accessed 10 September 2024

Such examples of soft cooperation can prove especially useful in regions with diverging experience, where older competition authorities may be able to share their expertise with younger authorities. Moreover, while a network such as the ACN did not create a common competition law or a multi-national authority or court, it could play a role not only in capacity building, but in providing the platform for future bilateral agreements between states to provide support on investigations, for instance. As will be discussed further in the next section, bilateral agreements can facilitate evidence gathering in the case of export cartels or other cross-border anti-competitive conduct. Such forms of cooperation would minimize the occurrence of cross-border or imported anti-competitive behaviour within such regions.

As will be discussed further below, this may however require amendments to national legislation, enabling member states to share information amongst one another, such as within the European Competition Network. For instance, Article 18 of Spain's Competition Act 15/2007 states that the National Competition Commission may exchange with "the National Competition Authorities of other Member States and use in evidence any matter of fact or of law, including confidential information, under the terms of Community law". Including such provisions in statute would give it legal standing. However, this may be easier to do within regional economic communities, which would be created through international treaties.

For example, the Common Market for Eastern and Southern Africa (COMESA) combines 21 member states in Africa and addresses competition matters through the Competition Regulations, promulgated in 2004, enforced by the COMESA Competition Commission (CCC). Article 8 of the Regulations clarifies that the CCC has the power to "monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalise undertakings" regarding trade between its member states.[56] It can summon persons to appear before it and give evidence and request documents needed for its investigations.[57] It can then remedy proven anti-competitive activity and penalize it, namely through: ordering its termination or nullification; issuing a cease and desist order; ordering payment of compensations to the parties harmed; or imposing fines.[58] Moreover, mergers above a certain threshold are notifiable to the CCC if both the acquiring firm and target firm or either of them operate in two or more of its member states.[59] The CCC then

[56] Article 8(1), COMESA Competition Regulations (2004), Official Gazette of the COMESA Vol. 17, No. 12, 20 November 2012

[57] *ibid.*, Article 8(2)

[58] *ibid.*, Article 8(3)

[59] *ibid.*, Article 23(3)

assesses whether the economic concentration is likely to substantially prevent or lessen competition, without the realization of efficiencies or without justifications relating to public interest grounds.[60] In other words, the CCC has the power to investigate anti-competitive conduct and assess economic transactions that may affect its member states. However, unlike the members of the European Competition Network, the laws of the members of the COMESA do not necessarily provide a mechanism to share confidential information with one another or with the CCC.[61] Finally, aside from acting as a multi-national competition authority, the CCC also plays a role in enhancing cooperation between the competition authorities of its members and providing them avenues for training and growth, as per its functions laid out in Article 7 of the Regulations.[62]

Both types of soft and more concrete cooperation can be useful for the capacity building of the member states involved. They can play an even more prominent role in making more permanent legal changes, through serving as platforms through which competition agencies, and the governments they belong to, can work together to lobby for the multilateral agreements that may be otherwise difficult to achieve. The previous section discussed the multiple attempts at forming a global competition law or authority. Arguably, if such attempts were to be made again, especially for the purpose of curbing practices such as export cartels, the governments of developing countries could benefit from working together through such networks to build a common argument and hence stand a strong front, as well as support their own national negotiation teams before participating in multilateral discussions. This can be seen from the experience of Mauritius and Zambia in utilizing their membership of the COMESA and the Southern Africa Development Community (SADC) to enhance their participation in WTO negotiations.

One study into this topic, although not specific to competition law negotiations, found that "many poor countries do not have the capacity to influence significantly the WTO negotiations or to implement the commitments agreed multilaterally".[63] However, the study found that participation in regional com-

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60 *ibid.*, Article 26(1)

61 Member states may still be able to share confidential information with the CCC or its member states through other means, such as through drafting written agreements with parties under investigation granting the authorities consent to do so. Naturally, undertakings may be unwilling to do so, except perhaps in the case of merger investigations.

62 These include: "(c) help[ing] Member States promote national competition laws and institutions, with the objective of the harmonization of those national laws with the regional regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market" and "(g) facilitate[ing] the exchange of relevant information and expertise".

63 Bilal, S.; Szepesi, S., *How Regional Economic Communities Can Facilitate Participation in the WTO: the Experience of Mauritius and Zambia*, in: Gallagher, P. *et al.* (eds), Managing the Challenges of WTO

munities can enable countries to access the two-stage policy process needed to participate in multi-national negotiations: 1) to identify strategic interests and be informed of the consequences associated with the different policy options, and 2) to identify their own negotiation strategy.[64] Membership in a regional network can help in these two aspects through offering capacity building programs, offering technical papers, disseminating information on the issues under discussion, as well as sharing the burden of engaging in WTO debates.[65] This is especially true in the cases of least developing countries (LDCs) with little experience and/or minimal resources for informing and training officials to participate in multi-national negotiations, as such assistance can be very hands-on and has included training on "trade negotiations, customs valuation and facilitation, [and] notifications".[66] Nevertheless, it is worth noting that regional cooperation is not only useful in the context of the Secretariat of the regional organization helping its member states, but in fact, some member states may be "better equipped and have more expertise and experience at the national level to deal with WTO matters".[67] In other words, the fact that the regional organization provides a platform for different governments to meet, and for the ones with more experience to provide assistance to their less experienced counterparts, is in itself a valuable feat. By the same token, soft cooperation through networks, such as the ACN, could also have significant impact in empowering the countries of the developing world in pushing for legal reforms that would protect their economies from imported anti-competitive conduct.

Accordingly, it is suggested that plurilateral cooperation, especially through regional integration, may be easier to carry out than multilateral cooperation, given the higher likelihood of neighbouring countries to having similar legal, political, and economic backgrounds, as well as having similar interests. Moreover, such regional cooperation could also eventually lead to multilateral cooperation, as the support of regional organizations to their member states, and of the member states to one another, can enable states to negotiate for treaties that would be beneficial for themselves and their neighbours. Such cooperation is also helpful for general capacity-building, especially as it pertains to enforcement. Perhaps more helpful for enforcement, however, is bilateral cooperation between member states or between their competition authorities, as discussed in the next section.

Participation, Cambridge, 2005, pp. 374-393

64 *ibid.*, p. 382

65 *ibid.*, p. 383

66 *ibid.*, p. 384

67 *ibid.*

4.3. Bilateral cooperation

Bilateral cooperation between governments, where it relates to competition law, takes multiple forms. It may be carried out through a free trade agreement (FTA), which could include a competition chapter that either mandates that both countries employ a competition law, or that they will both cooperate on competition matters, or both. For instance, the Korea-China FTA contains a chapter which includes competition provisions that follow EU competition law. This "neutral" model of a third jurisdiction, rather than that of one of the parties to the agreement, may have been chosen because both the competition regimes of both states were already heavily influenced by the EU regime.[68] Other trade agreements, such as those between the EU and various Mediterranean states, for instance, explicitly mandate that a competition law would eventually be adopted by the non-EU party.

Including such provisions in FTAs may be less critical today: most countries already employ a competition law regime. What may be more important to include are provisions explicitly mandating cooperation between the two governments on competition matters through both soft cooperation (such as knowledge-sharing and capacity building) as well as assistance in evidence gathering. This would resolve the issues discussed above in the section on jurisdiction. For instance, if an export cartel were to originate in the EU and was found to be outside of the jurisdiction of the EU Commission, the Commission would cooperate with the authorities in the target jurisdictions to aid them in gathering the evidence required to prove the infringement. This is especially useful in the case of cartels, as the evidence for them is often contained in meeting minutes, internal documents, or with the employees of the undertakings involved. Without the power or practical ability to conduct a dawn raid, request such information, or interview employees, it would be difficult for the authority in the target jurisdiction to prove the violation.

Alternatively, in the case of cross-border abuse of dominance, for instance, if one party to the agreement is investigating conduct of a multinational corporation that operates in both states, it would notify the other state. The two states would then be able to discuss theories of harm and build cases in their own respective jurisdictions. Moreover, provisions could also be added to ensure that states would notify one another if they are carrying out an investigation that may affect trade in either of the states, even if assistance is not required. Accordingly, such cooperation would save resources for competition authorities, as it would make investigations more efficient. Authorities would then also be more likely to reach similar outcomes, making remedies, for instance, more likely to succeed.

[68] Choi, Y.S., Hienemann, A., *op. cit.*, note 28, p. 533

Including avenues for this type of cooperation in FTAs would give such cooperation legal status. However, such forms of cooperation do not have to take the form of FTAs – they could take place through "softer" agency-to-agency agreements. While such agreements do not have the legal status of treaties, they could still be operable if they are provided for in national statute.[69] They also provide an additional benefit in that they are a viable option for competition agencies in jurisdictions where governments do not prioritize competition policy and hence do not have an appetite for entering into more formal competition-related agreements.

In other words, competition agencies could ensure the legality of evidence sharing by laying out in their competition laws that the evidence they gather is confidential unless it is requested by national judicial bodies (for instance) *and* the competition authorities of other states, provided that this is assessed on a case-by-case basis and that this would not harm the interests of the state providing assistance.

One example of this is the case of New Zealand. New Zealand's Commerce Act 1986 lays out in Section 99E that the relevant minister can, on behalf of the Government, enter into cooperation agreements with overseas regulators, while Section 99F adds that the Commerce Commission (NZCC) could also, following approval from the Minister, enter into a cooperation arrangement with an overseas regulator. While this is common in many competition statutes, Sections 99I and J present an interesting example of the content of such agreements, as it pertains to providing "compulsorily acquired information" – i.e. information gather from market players that is not necessarily available in the public domain – and providing investigative assistance. On the basis of a cooperation agreement, an overseas regulator can provide such information as well as investigative assistance to overseas regulators if this is likely to help the regulator carry out their mandate and if this will not prejudice New Zealand's international trade interests. In the case of the latter, the Commission would refer the issue to the Minister of Trade, who may review the request and subsequently allow the provision of information. Upon providing information, the Commission would have the power to impose conditions that would help ensure that the information stays confidential. Finally, the Commission is not allowed to provide information that would incriminate a person, except in specific circumstances. Section 99K of the Act states that the Commission is to notify the persons who the information concerns that their information has been shared, after it is shared, unless this would compromise the investigation.

[69] Noonan, C., *The Fundamental Forces Shaping International Competition Law*, Oxford, 2008, p. 50

These provisions are indeed used in a Memorandum of Understanding (MoU) between the NZCC and overseas competition agencies. For instance, a cooperation agreement between the Commerce Commission and the Competition Bureau of Canada, carried out in 2016, refers to the above-mentioned provisions, allowing both competition agencies to exchange otherwise confidential information (which "is not in the public domain, and which has been compulsorily-acquired by the NZCC as a result of, or in relation to … its search and notice powers") for the purposes of enhanced enforcement.[70, 71] Moreover, in 2020, the competition agencies of the UK, Australia, Canada, New Zealand, and the US signed an MoU creating an avenue for the sharing of confidential information, "recognising that their respective jurisdictions all have some form of information sharing legislation that allows for sharing of confidential information in certain circumstances".[72] Similar provisions can be found in a MoU between Australia and Japan in 2015, although the terms are slightly more vague and cover "significant information" provided on a "case-by-case" basis, as long as it is not information which relates to a leniency application.[73]

Other provisions that could be included in MoUs and which may enhance the enforcement efforts of national competition authorities may relate to the provision of non-confidential information, co-ordination of investigations, and positive and negative comity.

Providing non-confidential information should generally be in line with most competition regimes, but explicitly mentioning it in MoUs may help clarify the procedural aspects (such as timelines) relating to providing such information.

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70 Government of Canada, *Cooperation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance*, 2016 [https://competition-bureau.canada.ca/how-we-foster-competition/collaboration-and-partnerships/cooperation-instruments-international-partners/cooperation-arrangement-between-commissioner-competition-canada-and-new-zealand-commerce-commission#requests], accessed 10 August 2024

71 Notably, Sections 29 and 30 of the Canadian Competition Act, similar to New Zealand's Commerce Act, allow for this type of cooperation.

72 CMA, *Multilateral Mutual Assistance and Cooperation Framework Between the CMA, ACCC, CBC, NZCC, USDOJ, and USFTC*, 2020, para. 1.7 [https://www.gov.uk/government/publications/multilateral-mutual-assistance-and-cooperation-framework-between-the-cma-accc-cbc-nzcc-usdoj-and-usftc], accessed 15 August 2024

73 OECD, *Inventory of International Co-Operation Agreements between Competition Agencies (MoUs)*, 2022, p. 59 [https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/competition-and-international-co-operation/2022-inventory-of-international-cooperation-agreements-between-competition-agencies-MOUs.pdf/_jcr_content/renditions/original./2022-inventory-of-international-cooperation-agreements-between-competition-agencies-MOUs.pdf], accessed 10 August 2024

Provisions regarding the coordination of information would generally cover instances where competition authorities are investigating the same incident, laying out that the agencies can exchange views and (often non-confidential) information relating to the matter. They may also provide for an option or obligation for the parties to inform one another of investigations that may relate to any of their respective interests.

Provisions relating to comity are less commonly found in MoUs. Addressing comity in an MoU would make it less likely that the principle is contravened by states, as discussed earlier in this paper. An example of this can be found in Article VI(2) of the 2006 MoU between China and Korea: "Where one Participant informs the other that a specific enforcement activity by the second Participant may affect the first Participant's interests in the application of its competition and consumer laws, the second Participant will endeavor to provide timely notice of significant developments relating to those interests and an opportunity to provide input regarding any proposed penalty or remedy".[74] Similarly, Paragraph 7 of the 2014 MoU between Korea and Japan states that "If a Side believes that anti-competitive activities carried out in the country of the other Side adversely affect its important interests, that Side, taking into account the importance of avoiding conflicts resulting from its enforcement activities with regard to such anti-competitive activities and taking into account that the other Side may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the other Side initiate appropriate enforcement activities".[75]

Evidently, very significant forms of cooperation can take place through MoUs. Bilateral cooperation does not have to take the form of FTAs, which would be more costly, especially in terms of time, in order to negotiate between states.

Some commentators, however, would argue that bilateral agreements are costly irrespective of their form, as they take up staff resources and risk misuse of information.[76] However, the benefits associated with making investigations more efficient, through incurring evidence from abroad or coordinating in investigation efforts, as well as the broader benefits of curbing cross-border anti-competitive behaviour could potentially much outweigh any cost associated with entering into bilateral agreements. In fact, the data on MoUs shows that there is indeed an appetite for such agreements: Figure 1, prepared by the OECD, shows that co-operation

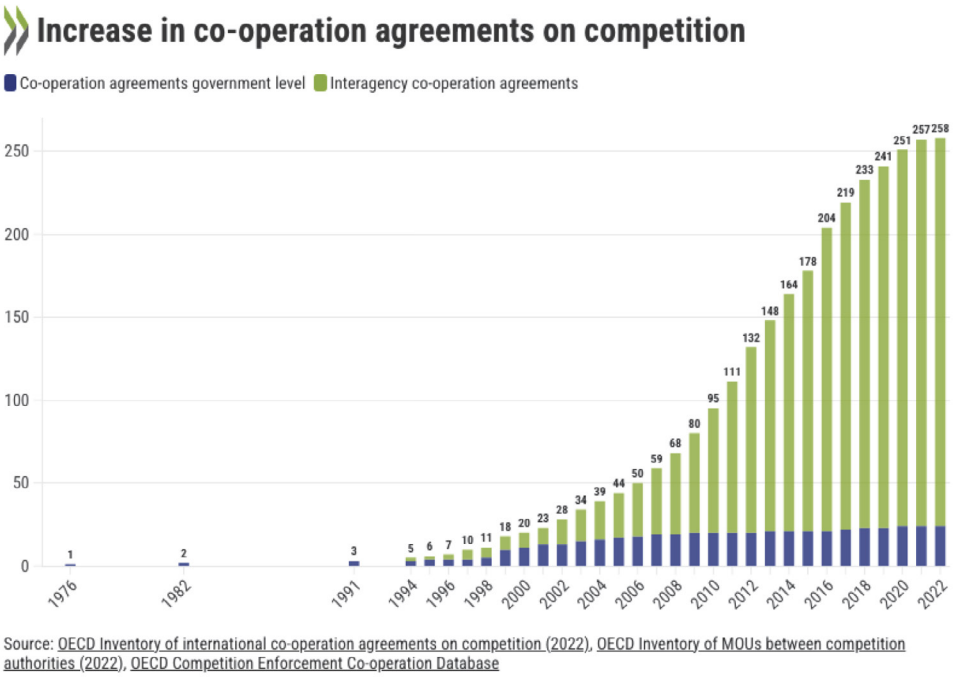
74 *ibid.*, p. 66

75 *ibid.*, p. 69

76 Noonan, C., *op. cit.*, note 72

agreements on the government level as well as interagency co-operation agreements have increased significantly from the 1990s to 2022.

Figure 1: Co-operation agreements on government and interagency level



Source: OECD, Increase in Co-Operation Agreements on Competition, 2022 [https://www.oecd.org/en/topics/sub-issues/competition-and-international-co-operation.html] accessed 30 August 2024

In conclusion, bilateral agreements can be a very powerful tool in aiding enforcement efforts of competition authorities, especially in cases that span across different jurisdictions, such as export cartels or cross-border anti-competitive behaviour. This form of cooperation may take place through inter-agency agreements, as well as this is provided for in national legislation. As mentioned previously, such inter-agency agreements may be facilitated through regional fora or regional treaties. Moreover, the efforts of international organizations in promoting soft forms of cooperation may also be helpful in this endeavour.

4.4. International organizations (soft forms of cooperation)

As mentioned various times throughout this paper, multiple international organizations (such as the International Competition Network, OECD, and UNCTAD) provide platforms through which officials of national competition agencies can meet and share expertise. Of significance are best practice guidelines, on

both substantive and procedural aspects. For instance, many of the provisions mentioned in the previous section on bilateral cooperation are recommended in the OECD's 2014 Recommendation Concerning International Cooperation on Competition Investigations and Proceedings.[77] Offering a compendium of best practices facilitates agency cooperation, and provides guidance for agencies, saving on resources and research efforts.

In that light, authorities from less represented areas should not only aim to utilize such material, but also to participate in the conferences and meetings that may affect the drafting of such guidance. Having the perspective of authorities with less resources or less experience is useful in ensuring that guidance published is indeed practical and useful for these agencies. However, as these authorities have less resources, international organizations should also encourage them to participate, as will be articulated in the following section on suggestions.

In summary, this section looked into the different forms of international cooperation for the aim of curbing cross-border anti-competitive practices. While it is often held that creating an international competition law with an international enforcing body is the ideal standard, it is evident that 1) plurilateral and bilateral cooperation should be considered important avenues for this endeavour, and 2) plurilateral cooperation, while useful in its own right, can eventually be used to encourage multilateral cooperation. The following section streamlines these observations into suggested solutions.

4.5. Suggested models of cooperation

As demonstrated above, creating a global competition law is a difficult task. Two solutions are proposed for this issue. Firstly, instead of attempting to create a competition law that covers all aspects relating to antitrust and merger control, a more viable option may be to attempt to create international legal instruments that target issues of international significance – i.e. export cartels and cross-border behaviour. For this endeavour, some scholars have suggested drawing inspiration from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Under this convention, signatories must make it illegal to ship hazardous wastes to any country which prohibits the import of hazardous waste.[78] In applying this to the competition context, states would outlaw export

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77 OECD, Recommendation of the Council Concerning International Cooperation on Competition Investigations and Proceedings, 2014 [https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408], accessed 20 August 2024

78 Fox, E., *Imagine: Pro-Poor(er) Competition Law*, OECD Global Forum on Competition, 2013, p. 13 [https://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Fox_Imagine_Pro-poor_

cartels that affect any state that prohibits cartels. This may be easier to agree on than a multinational competition law which thoroughly proscribes substantive and procedural aspects, especially given recent protectionist approaches.

However, as mentioned above, it is unlikely that most jurisdictions – especially those which exempt export cartels – would agree to cooperate on outlawing export cartels. For that reason, the second solution is that developing countries work together to and create a strong front for this cause. Through the sharing of expertise between national competition authorities and through the support of regional organizations, developing countries can 1) build a common argument for banning export cartels, 2) participate more effectively in multilateral negotiations.

In that sense, regional cooperation is important, as it provides states with a platform to support one another and exchange expertise. In some cases, regional cooperation can go further by creating a regional authority, concerned with cross-border competition conduct in the region.

Regional platforms can also create a basis for strong bilateral cooperation. As explained above, bilateral agreements, whether through free trade agreements (FTAs) or MoUs, although the latter may be easier to reach, can provide the legal basis needed by competition agencies to cooperate and limit cross-border practices. By agreeing to support each other on investigations, including through providing otherwise confidential information, competition agencies are more likely to be able to prosecute cartels and abuses of dominance originating from outside of their jurisdiction. However, this may require changes to national legislation, which developing countries should nevertheless consider given the benefits of saving on the human and financial resources associated with the investigation of cross-border activity, or, more generally, the benefits of avoiding the mark-ups associated with international cartels.

Finally, soft cooperation through international organizations can play a role in empowering the competition agencies of developing countries and in providing them with valuable technical material. However, these organizations should ensure that they are actively engaging with the perspective of developing countries in the process of drafting such material. One way to do this is by ensuring their participation in periodical meetings or conferences, perhaps by allowing online participation to meetings or by offering translation services. Another way this can be done is by diversifying the staff of the secretariat of these organizations, enabling employees of competition authorities of developing countries to join these organizations.

Competion.pdf], accessed 15 September 2024

5. CONCLUSION

The effects of anti-competitive conduct can be imported across borders. Those most susceptible to these effects are developing countries. Host states of such conduct often do not have the jurisdiction to investigate these practices, unless it impacts their economies. An investigation by the host state of such anti-competitive conduct may, in either case, by insufficient: the authority in question would not have the suitable legal tools or experience to investigate conduct impacting a foreign state. This paper hence argues that cooperation is the key to curbing the effects of cross-border conduct. However, multilateral cooperation, through a global competition law, has proven difficult – so other solutions should be considered. Targeted international agreements, similar to those found in other areas of law, should be attempted in the competition law sphere. Further, plurilateral (through FTAs or MoUs) and bilateral cooperation can be just as effective, while also being the way towards eventual multilateral cooperation. Finally, international organizations play an important role in capacity-building and in the representation of the perspectives of developing countries.

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PROCEDURAL FAIRNESS IN EU COMPETITION LAW: STRENGTHS AND (SOME) WEAKNESSES

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Abstract

The principle of fairness in EU competition law is examined, specifically with respect to enforcement actions of the EU Commission. Reference to the fundamental elements of fairness (such as transparency, impartiality, proportionality, and the right of defense) in made with reference to both EU legislation and case law. The analysis uncovers several strengths in the current framework and highlights critical weaknesses, including the limited judicial scrutiny of the EU Commission's complex economic assessments and the principle that post-investigation documents hold less evidentiary weight. It is suggested that current frameworks need refinement. Indications for further research is also specified.

Key words: *Competition, Competition Law, EU, CJEU, Judicial Review, Fairness*

JEL: K21, L4

1. INTRODUCTION: BACKGROUND, PURPOSE AND SCOPE, RESEARCH QUESTIONS AND METHODOLOGY

The principle of fairness governs the functioning of EU law in general[1] and that of EU competition law in particular, as regards both the administrative procedures carried out by the EU Commission and the judicial review performed by the CJEU thereon[2].

[1] The principle of fairness in EU administrative law is provided, among others, in art. 41 of the Charter of Fundamental Rights of the European Union ("Right to good administration") and in Council Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents, insofar as it guarantees individuals' access to documents, contributing to fairness in EU administrative procedures. On this issue, generally, see: Craig (2018); Schwarze (2006); Harlow (2002); Krunke and Nehl (2016); Hofmann, Rowe, and Türk (2011).

[2] See, in general: Craig and de Búrca (2020); Tridimas (2006); Wils (2008); Kerse and Khan (2012); Sauterand Siragusa (2013); Faull and Nikpay (2014); Hofmann, Rowe, and Türk (2011); Komninos (2006); Schmidt (2011).

The first, and main, part of this paper is devoted to briefly outlining how the principle of fairness is recognised in EU competition law with respect to the administrative procedures before the EU Commission. The way different issues are organised and dealt with is based on the classification of fundamental principles of fair procedures spelled out, at the international level, by the International Competition Network's (ICN) Framework for Competition Agency Procedures (fundamental principles of fair and effective procedures for competition authorities[3]) and the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement[4].

Based on the abovesaid analysis, I will also list some current applications of EU competition law that, in my view, *conflict* with the principles of fair procedures and provide some proposals for future improvement.

At the end, a brief set of conclusions will be provided.

2. THE "CRIMINAL NATURE" OF THE SANCTIONS IMPOSED BY COMPETITION AUTHORITIES AND THE CONSEQUENT "CRIMINAL NATURE" OF THE RELATED INVESTIGATORY PROCEDURE

It is worth recalling that the nature of the offence[5] and especially the severity of the sanction[6] make competition law assimilable to a criminal offence[7] pursuant to the *Engel* rule[8]. This is recognised in the ECHR *Menarini* case[9], in light of the consolidated ECHR case law which includes, among others, *Grande Stevens*[10].

It follows, without any doubt, the applicability of all the principles recognised in favour of the defendant in a criminal trial including the principle of presumption of innocence provided for in art. 6(2) of the European Convention on Human Rights, corresponding, in substance, to art. 47 of the Charter of Fundamental Rights of the European Union[11]. This principle is currently stated, in EU compe-

3 ICN (2019).

4 OECD (2020), which is the first multilateral instrument that provides governments with recommendations on due process standards for competition law.

5 ECHR, case 73053/01, Jussila.

6 ECHR, case 13057/87, Demicoli; ECHR, cases 7819/77 et all., Campbell and Fell.

7 The above said criteria apply severally; if no one is conclusive, they may also be assessed jointly: ECHR, case 12547/86, Bendenoun.

8 ECHR, cases 5100/71 et all., Engel.

9 ECHR, case 43509/08, Menarini.

10 ECHR, cases 18640/1 et all., Grande Stevens.

11 Bronckers and Vallery (2011); Wils (2010).

tition law, in art. 2 of Regulation 1/2003, under which "*in any national or Community proceedings […] the burden of proving an infringement […] shall rest on the party or the authority alleging the infringement*".

The extension of criminal trial protections to competition administrative procedures is crucial for the study of the principle of fairness because this cannot be limited to merely formal aspects (such as transparency, access to documents, *etc*.) but must also include substantive aspects related to the presumption of innocence. These include all dimensions of the right to defense and the right to a fair judicial review of the EU Commission's decision.

3. PRINCIPLES RELATING TO FAIRNESS AS REGARDS THE EU COMMISSION'S INDEPENDENCY, IMPARTIALITY AND PROFESSIONALITY. CONFLICTS OF INTEREST

After clarifying the above, the first area of EU competition law relevant to the principle of fairness is that relating to ensuring that enforcement is independent, impartial and professional[12]. These are consolidated principles in EU competition law and are highlighted in the CJEU case law[13].

Competition law enforcement, moreover, must conducted by accountable public bodies that enjoy independence, i.e. "*are free from political interference or pressure, and that interpret, apply and enforce competition law on the basis of relevant legal and economic arguments grounded in sound competition policy principles*"[14]. The CJEU stressed the same needs in cases such as *Pierre Fabre*[15], *Post Danmark*[16] and *FENIN*[17]. In order to perform this tasks, competition authorities and courts must "*give appropriate consideration to all relevant information and evidence that they obtain*"[18]. This principle gained express recognition in art. 41 of the EU Charter of Fundamental Rights, which provides the right to good administration, including consideration of all relevant information and evidence. More specifically, as regards EU competition law, Regulation 1/2003 provides the procedural framework for considering relevant evidence in investigations (artt. 18-21 and 27). In EU

12 OECD (2021), § 2.

13 CJEU, case C-95/04 P, British Airways (2007); GC, case T-201/04, Microsoft (2007). On these issues see: Whish and Bailey (2015); Lenaerts (2007); Gerber (1998).

14 OECD (2021), § 2.a. See: Monti (2007c); Wils (2004); Andreangeli (2010).

15 CJEU, case C-439/09, Pierre Fabre (2011).

16 CJEU, case C-209/10, Post Danmark (2012).

17 T-217/03, FENIN v. Commission

18 OECD (2021), § 2.b.

competition law, however, such principle was constantly affirmed since no later than Consten and *Grundig v. Commission*[19]**.**

A special attention is devoted, within the catalogues of fundamental principles of fair procedures, to the prevention of conflict of interests. In fact, it is provided that officials, including decision makers, must be objective and impartial and must not have "*material personal or financial conflicts of interest in the investigations and enforcement proceedings in which they participate or oversee*". This principle is so relevant that it is provided for in the Charter of Fundamental Rights of the European Union which, in art. 41, provides for the right to good administration, which includes impartiality in decision-making. Also the Commission's Best Practices for the Conduct of Antitrust Proceedings stress the importance of objectivity and impartiality, as does Regulation (EU) No 1024/2013 on conflicts of interest[20].

An efficient and affective identification and prevention or handling of such conflicts also requires a certain degree of proceduralisation and, therefore, the provision of *ad hoc* rules, policies, or guidelines[21]. Therefore a fair procedure requires also clear and transparent rules "*in order to prevent, identify and address any material conflicts of interest of competition authority and court officials*" involved in competition law enforcement[22].

4. PRINCIPLES RELATING TO FAIRNESS AS REGARDS PROCEDURE

The principle of fairness, as it pertains to the procedure before the EU Commission, is structured into several sub-principles. For the purposes of this presentation, I propose to classify these sub-principles into five categories.

4.1. Non-discrimination, proportionality and consistency across similar cases

The international principles of fairness may be organised in a first sub-principle which requires that competition law enforcement is non-discriminatory, propor-

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19 CJEU, case 56/64, Consten and Grundig (1966). See also CJEU, case C-413/14 P, Intel (2017) and GC, case T-79/12, Cisco (2013). In law literature see: Kerse and Khan (2017); Jones and Sufrin (2016); Venit (2010).

20 On the issue see: CJEU, case C-263/09 P, Schenker (2010); CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004); CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Whish and Bailey (2021); Faull and Nikpay (2014); Wils (2008).

21 ICN (2019), § g.

22 OECD (2021), § 2.c. In EU competition law see Korah (2007); Lianos (2021); Craigand De Búrca (2015).

tionate[23] and consistent across similar cases[24]. This principle can be examined from different perspectives. First of all, competition law enforcement must be carried out "*in a reasonable, consistent and non-discriminatory manner*", without prejudice, among others, to the nationalities and ownership of parties under investigation[25], as also required, in EU law, by art. 41 of the EU Charter of Fundamental Rights and art. 3 of Regulation 1/2003[26].

Investigations, moreover, must be tailored "*to the seriousness and nature of each case*" and avoid the imposition of unnecessary costs and burdens on parties and third parties or on the competition authority[27]. Art. 7 and 8 of Regulation 1/2003 outline proportionality requirements, ensuring investigations and remedies are appropriate to the nature of the case, thus expressly stating a principle that is widely recognised in EU competition law[28]. In fact, the progress of an investigation must be assessed at key stages, in order to decide whether to pursue or close the case[29]. Under EU competition law the framework for assessing whether to continue or terminate investigations, based on the evidence gathered, is outlined in art. 7 of Regulation 1/2003 and further developed in the Commission Notice on Antitrust Best Practices[30].

Rules and guidelines for procedural steps in competition law enforcement must be consistent with the above framework and provide, among others, "*requests for*

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23 Also with respect to the remedies imposed by the EU Commission: see art. 7, para 1, of Regulation 1/2003.

24 OECD (2021), § 3. In EU law this is recognised, in particular, in art. 21 of the EU Charter of Fundamental Rights and art. 9 of Regulation 1/2003, which requires consistency in the application of competition law across cases. See, in case law: CJEU, case C-501/06 P, GlaxoSmithKline (2009), with respect to the principle of non-discrimination in the context of competition law; CJEU, case C-12/03 P, Tetra Laval (2005), with specific reference to the need for proportionality and consistency in competition law enforcement; C-8/08, T-Mobile Netherlands BV v. Commission, where consistency in the application of rules regarding anti-competitive agreements is highlighted. See also: Jones and Sufrin (2016); Lianos (2021); Goyder, (2009).

25 OECD (2021), § 3.a. Under EU competition law see: Monti (2007c); Whish and Bailey (2015); Andreangeli (2010).

26 CJEU case law is consistent in the application of such principles: CJEU, case C-413/14 P, Intel (2017); CJEU, case C-501/06 P, GlaxoSmithKline (2009); GC, case T-168/01, GlaxoSmithKline (2006).

27 OECD (2021), § 3.b.

28 CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-413/14 P, Intel (2017); GC, case T-201/04, Microsoft (2007). See also: Jonesand Sufrin (2016); Wils (2014b); Goyder (2009).

29 OECD (2021), § 3.e.

30 The need to verify whether investigations should be pursued based on the evidence is dealt with since no later than the case CJEU, case 56/64, Consten and Grundig (1966). On this same issue see also, more recently: GC, case T-201/04, Microsoft (2007) and CJEU, case C-413/14 P, Intel (2017), where it is discussed how courts review decisions on whether investigations should be terminated or pursued further. See also: Kerse and Khan (2017); Jones and Sufrin (2016); Wils (2018b).

information, inspections and interviews and ensuring that these steps do not go beyond the scope of the investigation"[31]. Regulation 1/2003 is clear in this respect, especially under artt. 18-21 where it regulates procedural steps such as requests for information, inspections, and interviews. The Commission Notice on Best Practices in Antitrust Proceedings (2011) further details provisions ensuring that these measures are appropriate and do not exceed the limits necessary for the investigation[32].

Internal safeguards for procedural steps must be applied "*in order to ensure lawfulness, proportionality and consistency*"[33]. Cases like *Microsoft v. Commission*[34]**,** *Intel v. Commission* [35]and *European Night Services v. Commission*[36] also deal with these issues[37], as it does art. 19 of Regulation 1/2003.

Objective decision-making must be insured, "*through the thorough examination of facts and evidence, and the application of internal checks and balances for evaluations and decisions*"[38]. The relevance of this principle makes is worthy of being provided for in the EU Charter of Fundamental Rights, more precisely in art. 47, that states the right to a fair hearing, which encompasses the requirement for decisions to be based on objective assessments of facts and evidence. More specifically, in EU competition law, art. 7 of Regulation 1/2003 requires decisions to be made based on thorough and objective examinations of evidence[39].

4.2. Transparency and Predictability

In order to be fair, competition law enforcement must be transparent and predictable[40], as also stated in the Commission Notice on Antitrust Best Practices

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31 OECD (2021), § 3.c.

32 Needs emerged also in cases like CJEU, case C-583/13 P, Deutsche Bahn (2015); CJEU, case C-105/04 P, Nederlandse Federatieve Vereniging (2006); GC, case T-125/03, Akzo (2007). Law literature acknowledges the relevance of these issues: Kerse and Khan (2017); Wils (2007); Jones and Sufrin (2016).

33 OECD (2021), § 3.d.

34 GC, case T-201/04, Microsoft (2007).

35 CJEU, case C-413/14 P, Intel (2017).

36 GC, case T-374/94, European Night Services (1998).

37 See also: Monti (2017); Whish and Bailey (2015); Andreangeli (2010).

38 OECD (2021), § 3.f.

39 In the CJEU case law see: CJEU, case C-413/14 P, Intel (2017); CJEU, Joined Cases C-2/01 P et al., Bundesverband der Arzneimittel-Importeure (2004); GC, case T-201/04, Microsoft (2007) and CJEU, case C-501/06 P, GlaxoSmithKline (2009), which, in particular, stressed the importance of factual and legal objectivity in competition decisions. See also: Monti (2018); Wils (2017b); Lianos (2021).

40 OECD (2021), § 1.

(2011)[41]. This is particularly true after Regulation 1/2003 abolished the need for an explicit approval by the EU Commission to have an agreement exempted under art. 101, para 3, TFUE, and introduced, in art. 1, para 2, a system of self-assessment, under which undertakings are responsible for assessing whether their agreements comply with Article 101, para 3, TFEU[42]. If the application of antitrust law were not predictable, the self-assessment system would, in fact, be inapplicable. This is the reason, among others, of the publication by the EU Commission of "guidelines" on the application of EU competition law, *in particular* with reference to art. 101 TFEU[43].

An issue where transparency plays a role relates to the competition authorities' enforcement priorities, which must be promoted[44].

Fairness also requires that "*the legal framework and procedures of their competition authorities, as well as the applicable procedures and deadlines to lodge applications for court review of decisions*", are publicly available[45] - a right that is guaranteed, under EU competition law, by art. 31 of Regulation 1/2003 and further developed in

41 See also art. 27 of Regulation 1/2003. In case law see: CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); CJEU, case C-12/03 P, Tetra Laval (2005); GC, case T-201/04, Microsoft (2007). In law literature see: Wils (2012e); Gormsen (2017); Whish and Bailey (2015).

42 Goyder and Albors-Llorens (2003); Monti (2002); Forrester (2003); Venit (2003a); Wils (2001).

43 See: EU Commission (2022a); EU Commission (2022b); EU Commission (2011b); EU Commission (2009); EU Commission (2008); EU Commission (2006); EU Commission (2004a); EU Commission (2004b); EU Commission (1997).

44 OECD (2021), § 1.c. CJEU, case C-457/10 P, AstraZeneca (2012) addresses how the transparency of enforcement priorities can affect the outcome of cases. GC, case T-271/03, Deutsche Telekom (2008) discusses the need for the Commission to clearly communicate its enforcement priorities. Case C-8/08, T-Mobile Netherlands: Emphasizes the role of enforcement priorities in determining the scope and focus of investigations. See also: Whishand Bailey (2015); Gormsen (2018); Monti (2014). The EU Commission complies with this requirement, as regards anticompetitive agreements, in its Communication on Enforcement Priorities in Applying Article 82 EC (2009) and as regards abuses of dominant positions in its Communication on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [EU Commission (2009)]. A similar statement of priorities is also drafted with respect to merger control in the Commission Guidelines on the Assessment of Horizontal Mergers [EU Commission (2004a)] and of Non-Horizontal Mergers [EU Commission (2008)], in the Commission Notice on Restrictions Directly Related and Necessary to Concentrations [EU Commission (2005b)] and in the Commission Best Practices on the Conduct of EU Merger Control Proceedings [EU Commission (2004c)]. More generally, the Commission's Annual Reports outline the enforcement priorities for competition policy in a given year.

45 OECD (2021), § 1.a. See also ICN (2019), § c.*i*, with reference to the need that competition laws and regulations that apply to investigations and enforcement proceedings in each jurisdiction are publicly available. See also ICN (2019), § c.*iii* as to ensuring that procedural rules that apply to investigations and enforcement proceedings are publicly available.

the Commission Notice on Antitrust Best Practices[46]. Of course, such procedural rules must be effectively followed and respected by the competition authority, as highlighted by the ICN[47]. This principle is reinforced if the way investigations and enforcement are carried out is clarified or explained by way of publicly available guidance or other statements[48].

The principle of fairness requires not only the definition of rules but also *updating and improving* of these rules over time to the highest possible level. This is the reason why the OECD requires competition authorities to promote the implementation of international competition law enforcement transparency and procedural fairness best practices[49].

The facts, legal basis and sanctions relating to decisions, finally, must be published. This is required, *inter alia*, in order to make such information accessible to undertakings, document it, allow undertakings to verify its content and, if necessary, challenge it before the European courts (see *infra*, § 6). The information that need to be made public expressly includes "*decisions to settle cases, subject to the protection of confidential information*"[50], as provided in art. 30 of Regulation 1/2003, and further developed in the Commission Notice on Best Practices in Antitrust Proceedings[51].

4.3. Confidentiality

Investigations conducted by the EU Commission involve the processing of a large amount of confidential data and information, including, first and foremost, sensi-

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46 See also: C-331/08, Commission v. Alrosa; C-113/04 P, Technische Unie BV v. Commission; GC, case T-201/04, Microsoft (2007). In law literature: Jones and Sufrin (2016); Monti (2007d); Kerseand Khan (2017).

47 ICN (2019), § c.*iv*.

48 ICN (2019), § c.*v*. See art. 28 Regulation 1/2003 and Commission Notice on Antitrust Best Practices (2011). This is recognised in case law: CJEU, case C-269/90, Technische Universität München (1991); CJEU, case C-344/98, Masterfoods (2000); GC, case T-201/04, Microsoft (2007). See also: Gormsen (2012); Whish and Bailey (2015).

49 OECD (2021), § 1.d. In this respect, the EU Commission Communication on International Cooperation in Competition Cases (2012) highlights the importance of the alignment of enforcement practices with international standards and the ECN+ Directive (2019/1) encourages national competition authorities to adopt best practices and ensure procedural fairness in line with international standards. See, in EU case law: CJEU, case C-52/09, TeliaSonera (2011); CJEU, joined cases C-89/85 et all, Ahlström (Wood Pulp) (1993); GC, case T-135/09, Nexans (2012). See also: Fox (2010): 69-90; Wils (2018a); Monti (2021).

50 OECD (2021), § 1.b.

51 See CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); C-8/08, T-Mobile Netherlands; GC, case T-201/04, Microsoft (2007), which focuses on the necessity of publishing comprehensive details of the case, including sanctions, while protecting sensitive information. See also Kerseand Khan (2017); Jones and Sufrin (2016); Monti (2016b).

tive commercial data of the undertakings concerned. Such confidential information must be protected, while taking into consideration "*the rights of defence and other legal rights, and the public interest in transparent and effective competition law enforcement*"[52]. This requires ensuring that competition authorities "*appropriately protect against unlawful disclosure of confidential information in their possession*"[53]. Thus, professional secrecy obligations must be imposed on officials "*for information received in their official capacity*"[54]. In this respect, art. 28 of Regulation 1/2003 requires officials of both the European Commission and NCAs to maintain confidentiality of information obtained during investigations[55].

Rules, policies and guidance must be expressly defined with respect to the identification and treatment of confidential information and must be publicly available[56]. In EU competition law, e.g., the Commission's Best Practices for the Conduct of Antitrust Proceedings[57] provide transparency on how confidential information is handled and details on the public availability of rules for confidentiality is also stated in the Commission's Notice on Access to File in Competition Cases[58].

EU case law also addresses the issues of public access to files and confidentiality and discusses the need to balance them, e.g. in *Pfleiderer AG v Bundeskartel-*

52 OECD (2021), § 6. See ICN (2019), § f.*iii*, with reference to the need to consider both the interests of the persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an enforcement proceeding.

53 OECD (2021), § 6.a. See ICN (2019), § f.*ii*, with reference to the need to protect from unlawful disclosure all confidential information obtained or used during investigations and enforcement proceedings. Art. 28 of Regulation (EC) No 1/2003 provides for the protection of confidential information during investigations and mandates that information gathered in investigations must not be disclosed unless necessary for the investigation. Moreover, art. 41 of the Charter of Fundamental Rights of the European Union guarantees the right to good administration, including the right to have one's personal data protected. Case law is consistent in this same direction: CJEU, case C-550/07 P, Akzo (2010); *API v Commission* (C-514/07 P), with particular emphasis on the importance of balancing transparency and confidentiality during investigations; CJEU, case C-457/10 P, AstraZeneca (2012), where the disclosure of confidential information in the context of antitrust investigations is explored. See also: Kerse and Khan (2012); Wils (2016); Monti (2007a).

54 OECD (2021), § 2.e. In EU case law see CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-474/04, Pergan Hilfsstoffe (2007); GC, case T-110/07, Siemens (2011). See also: Kerse and Khan (2017); Jones and Sufrin (2016); Lianos (2021).

55 Directive 2019/1 (ECN+ Directive) emphasizes the professional secrecy obligations for officials involved in the enforcement of competition law.

56 ICN (2019), § f.*i*. See also: Wils (2008); Faull and Nikpay (2014); Lianos and Geradin (2013).

57 EU Commission (2011a).

58 EU Commission, Notice on Access to File in Competition Cases (OJ 2005 C 325/07).

lamt[59], *EnBW Energie Baden-Württemberg AG v Commission*[60] and *API v Commission*[61].

4.4. Investigative Process

The investigative process is a key issue that has a peculiar, and much relevant, impact on the way the fairness principle applies in EU competition law. This is the procedural phase in which the existence of the facts constituting the violation of competition law is ascertained and relevant evidence is collected. The investigative process, therefore, represents the step where the case is either built or closed negatively by the EU Commission. This is the reason why in cases like *Aalborg Portland v. Commission* the CJEU expressly emphasized procedural fairness in investigations[62].

In order to allow a full and effective right of defense (see *infra*, § 4), any undertaking that is subject of an investigation must be informed, as soon as practical and legally permissible, of that investigation, according to the status and specific needs (e.g., forensic considerations) of the investigation. This information must include the legal basis for the investigation and the conduct or action under investigation[63]. In EU competition law the process of investigation, particularly regarding the notification of parties, is disciplined in art. 18 of the Council Regulation (EC) No 1/2003, to be read along with art. 27 of the same regulation, which further lays down the right to be heard and the rights of defense.

After an undertaking has been informed that it is the subject of an investigation, or that has notified a merger or other transaction or conduct, it must be provided, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the investigation[64].

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59 CJEU, case C-360/09, Pfleiderer (2011).

60 CJEU, case C-365/12 P, EnBW Energie (2014) addressed the issue of the balance between public access to files and confidentiality.

61 *API v Commission* (C-514/07 P) explored the limits of disclosure in competition cases.

62 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004). See also: CJEU, case C-272/09 P, KME Germany (2011) and CJEU, case C-308/04 P, SGL Carbon (2006). In law literature see: Faull and Nikpay (2014); Wils (2012a); Lianos and Geradin (2013).

63 ICN (2019), § d.*i*.

64 ICN (2019), § d.*ii*. In EU competition law see art. 27 of Regulation (EC) No 1/2003, which ensures that enterprises are given the right to be heard, which includes an opportunity to engage in discussions on factual, legal, and economic issues before the Commission makes a decision. On this issue see: CJEU, case C-550/07 P, Akzo (2010); GC, case T-7/89, Hercules Chemicals (1991), which analysed how much access enterprises must have to the case file for meaningful engagement; *Prezes Urzędu*

Moreover, investigative requests must focus on information that is deemed potentially relevant to the competition issues under review as part of the investigation and provide reasonable time for undertakings to respond to requests during investigations, considering the needs to conduct informed investigations and avoid unnecessary delay[65]. Under EU competition law, in fact, the Commission is empowered to request information, provided it is deemed relevant to the case under art. 18(1) of Regulation (EC) No 1/2003[66].

It is true that adequate investigative and co-operation tools must be provided to competition authorities "*to conduct competition law enforcement effectively*"[67], especially as regards powers to investigate and carry out inspections and request information. This implies, however, the need to define **t**he limits of the Commission's investigative powers during dawn raids, the scope of the Commission's powers in obtaining information and the conditions under which information may be collected, which are discussed in EU case law[68].

4.5. Timing of investigations and enforcement proceedings

In implementation of the general principle of fairness it is also essential that competition law enforcement is timely[69], in order to allow competition authorities, parties and third parties "*reasonable time to prepare their actions and responses*"[70], a need that is provided under EU competition law by art. 27 of Regulation (EC) No 1/2003 and further specified in the Commission's Best Practices for the Conduct of Antitrust Proceedings also provide for a reasonable time frame to allow parties to prepare[71].

Komunikacji Elektronicznej v. Commission (C-522/08). See also: Jones and Sufrin (2019); Wils (2005); Odudu (2006).

65 ICN (2019), § d.*iii*.

66 On this issue see also: *Solvay SA v Commission* (T-30/91); *Cargill BV v Commission* (T-277/08); CJEU, case C-457/10 P, AstraZeneca (2012). See in law literature: Whish and Bailey (2021); Van Bael and Bellis (2010); Fiebig (2019).

67 OECD (2021), § 2.f.

68 CJEU, case C-583/13 P, Deutsche Bahn (2015); GC, case T-125/03, Akzo (2007); CJEU, case C-105/04 P, Nederlandse Federatieve Vereniging (2006). See also Wils (2007); Gippini Fournier (2005); Gerber (1998). See also: Ehlermann and Atanasiu (2007); Wils (2008).

69 OECD (2021), § 4. See how delays in investigations may impact on fairness in GC, case T-65/89, BPB (1992). See also GC, case T-462/12, Galp Energía (2015) and CJEU, case C-501/11 P, Schindler (2013), concerning excessive delays in decision-making. See also: Ehlermann and Atanasiu (2007); Wils (2008).

70 OECD (2021), § 4.c.

71 See: CJEU, case C-3/06 P, Groupe Danone (2007); CJEU, case C-360/09, Pfleiderer (2011); GC, case T-7/89, Hercules Chemicals (1991). See also: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008).

This requires that enforcement must be completed within a reasonable time, "*taking into account the nature and complexity of the case and the efficient use of the resources of the competition authority*"[72], as provided under art. 7 of Regulation (EC) No 1/2003.

In this respect, the OECD demands a certain level of transparency (on this principle see *supra*, § 3.2) and requires that statutory rules or competition authority guidelines are established and followed, or internal targets are settled, as appropriate, "*for the deadlines or length of procedural steps, taking into account the nature and the complexity of the case*"[73]. It ought to be noted that EU competition law does not explicitly provide for binding statutory deadlines for case completion, but procedural guidelines, such as the Commission's Best Practices for the Conduct of Antitrust Proceedings, establish internal targets[74].

Of course, a proper timing does not depend only on the way regulation is drafted or the Commission operates but is also depends on the way all parties involved in investigations and enforcement proceedings actually behave. This is why the OECD expressly encourages co-operation from parties "*to avoid delay, since party or third party choices or actions can affect investigative timing*"[75].

5. THE RIGHT OF DEFENSE

As it was highlighted above, the imposition of transparency obligations within EU competition proceedings is primarily functional to guarantee the right of defence in favour of the undertakings involved in the investigations. This is the reason why the OECD dedicates a specific paragraph to require that parties are notified in writing "*as soon as feasible and legally permissible that an investigation has been*

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72 OECD (2021), § 4.a. See also ICN (2019), § e, with reference to the need that investigations and aspects of enforcement proceedings must be concluded within a reasonable time period, "*taking into account the nature and complexity of the case*".

73 OECD (2021), § 4.b.

74 See: *Irish Sugar v Commission* (C-497/99 P), a case where delays impacted procedural fairness; GC, case T-201/04, Microsoft (2007); GC, case T-336/07, Telefónica (2012), where the issue whether procedural delays violated due process rights was explored. More in general see: Faull and Nikpay (2014); Jones & Sufrin (2019); Monti (2010).

75 OECD (2021), § 4.d. In EU competition law also Regulation (EC) No 1/2003 implicitly encourages cooperation between parties and competition authorities to ensure efficient investigation and avoid unnecessary delays. The Commission's Best Practices for the Conduct of Antitrust Proceedings also emphasize cooperation to simplify and make investigations more time efficient. The way cooperation between the parties and the authorities may determine procedural delays is dealt with CJEU, case C-280/08 P, Deutsche Telekom (2010) and GC, case T-286/09, Intel (2014) discussed the role of cooperation in timely decision-making. Procedural inefficiencies may also derive from lack of cooperation: *Solvay v Commission* (T-30/91). On these issues see also: Faull and Nikpay (2014); Van Bael and Bellis (2010); Monti (2010).

opened and of its legal basis and subject matter", to the extent that this does not undermine the effectiveness of the investigation[76]. In this respect, art. 18 of Regulation (EC) No 1/2003 requires the EU Commission to inform the undertakings concerned of any pending investigation and art. 27 specifies that the latter must be notified in writing about the initiation and basis of the investigation – unless early disclosure would undermine the investigation's effectiveness (for instance, in dawn raids under art. 20)[77].

After the above notice is provided, it is necessary that the undertakings concerned are informed, as soon as reasonably possible and appropriate during the competition law enforcement process, on "*the factual and legal basis, competition concerns, and the status of the investigation*"[78]. This represents a fundamental requirement to guarantee their right to defence and is embodied, in EU competition law, in art. 27 of Regulation (EC) No 1/2003, along with the exceptions provided in case early disclosure could harm the investigation[79].

In order to be able to defend themselves effectively, undertakings must be informed of the opportunities that must be given them to engage meaningfully in the competition law enforcement process[80], with due regard to the effectiveness of the investigation. In this respect, art. 27 of Regulation (EC) No 1/2003 expressly stated the right to be heard and provides that parties involved in competition investigations must have an opportunity to engage meaningfully. The Commission's Best Practices for the Conduct of Antitrust Proceedings, moreover, emphasize the importance of clear communication to ensure effective participation by undertakings[81]. Also CJEU case law is consistent in affirming this principle in cases like

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76 OECD (2021), § 5.a.

77 On the way such principle is recognised in case law see: GC, case T-7/89, Hercules Chemicals (1991); CJEU, case C-550/07 P, Akzo (2010); *Roquette Frères SA v Commission* (C-94/00). See also: Kerse and Khan (2012); Wils (2012a); Van Bael and Bellis (2010); Gerard (2020).

78 OECD (2021), § 5.b. See ICN (2019), § h.*i*, as to the need to provide persons subject to an enforcement proceeding "*timely notice of the alleged violations or claims against them*". See ICN (2019), § h.*ii*, with reference to the need that persons subject to a contested enforcement proceeding should be provided "*reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions*".

79 See the way this requirement is interpreted in case law, e.g.: *Cargill BV v Commission* (T-277/08); CJEU, case C-457/10 P, AstraZeneca (2012); GC, case T-201/04, Microsoft (2007). See also: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008).

80 OECD (2021), § 5.

81 See: Faull and Nikpay (2014); Wils (2008); Jones and Sufrin (2019).

Alrosa v Commission[82], *Aalborg Portland v Commission*[83] and *Microsoft v Commission*[84].

Fairness requires that throughout the entire procedure the fundamental principle of presumption of innocence is upheld, also because of the substantial "criminal nature" of competition proceedings as recognised by the ECHR (see *supra*, § 1). This involves, among others, that any public notice by the competition authority of the opening of investigations and the publication of allegations against parties must not be presented as a determination of the matter[85], as it is required by the framework drafted by Regulation (EC) No 1/2003 and the Commission's Best Practices[86].

The other side of the medal of the abovesaid guarantees is that of ensuring undertakings "*meaningful opportunities at key stages to discuss with the competition authority the investigation's facts, progress, and procedural steps, as well as relevant legal and economic reasoning*"[87]. In this respect, art. 27 of Regulation (EC) No 1/2003 and the Commission's Best Practices for the Conduct of Antitrust Proceedings regulate the right to discuss key issues with the Commission at different stages of the investigation[88], a right that is further developed in cases like *Groupe Danone v Commission*[89], *Intel Corp v Commission*[90] and *AstraZeneca AB v Commission*[91].

The right of undertakings to discuss key issues with the EU Commission during the procedure must be effective. Undertakings, therefore, must be offered "*the opportunity to present an adequate defence before a final decision is made*"[92], as it is

82 CJEU, case C-441/07 P, Alrosa (2010).

83 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004).

84 GC, case T-201/04, Microsoft (2007).

85 OECD (2021), § 5.c.

86 See CJEU, case C-280/08 P, Deutsche Telekom (2010); GC, case T-7/89, Hercules Chemicals (1991), where it is stated that public notices must not suggest liability before a final decision. See also: Kerse and Khan (2012); Monti (2010); Faull and Nikpay (2014).

87 OECD (2021), § 5.e.

88 See: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008); Gerard (2020); Forrester (2021).

89 CJEU, case C-3/06 P, Groupe Danone (2007).

90 GC, case T-286/09, Intel (2014).

91 CJEU, case C-457/10 P, AstraZeneca (2012).

92 OECD (2021), § 5.f. See ICN (2019), § h.*iii*, with reference to the need that persons subject to an administrative proceeding must be provided "*reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence*". Similarly, ICN (2019), § i.*iii* specifies the right conferred to enterprises to be provided a reasonable opportunity "*to present views regarding substantive and procedural issues via counsel in accordance with applicable law*", without preventing applicable law from requiring enterprises "*to provide direct evidence*".

stated in art. 27 of Regulation (EC) No 1/2003[93]. In this respect, parties must be informed of all allegations against them and granted access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information[94]. Moreover, parties must be provided a meaningful opportunity "*to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers*"[95].

Undertakings' applicable rights against self-incrimination must be respected[96], given the "criminal nature" of EU competition law (see *supra*, § 1), in compliance, within EU law, with the principle stated in general terms in art. 6 of the European Convention on Human Rights. This principle is reinforced, with specifical reference to EU competition law, by art. 19 of Regulation (EC) No 1/2003, which ensures that parties cannot be forced to admit guilt[97].

Further, the OECD expressly recognises the right of any undertaking to be represented by qualified legal counsel of its choosing, which must not be denied without due cause[98]. Privileged information exchanged with legal counsels must be protected, while taking into consideration "*the rights of defence and other legal rights, and the public interest in transparent and effective competition law enforcement*"[99]. This requires, in particular, "*developing, updating or strengthening policies regarding the handling of privileged communications between attorneys and clients and respect-*

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93 This does not limit the obligation, imposed on enterprises, to comply with investigative measures, such as providing documents or other evidence under artt. 18 and 20 of the same Regulation (EC) No 1/2003, as also highlighted in CJEU, case C-550/07 P, Akzo (2010) and GC, case T-201/04, Microsoft (2007). Relevant CJEU includes, e.g.: CJEU, case C-360/09, Pfleiderer (2011); CJEU, case C-365/12 P, EnBW Energie (2014); CJEU, case C-413/14 P, Intel (2017). See also: Kerse and Khan (2012); Faull and Nikpay (2014); Wils (2008).

94 OECD (2021), § 5.f.*i*. The right of access to file is covered, in EU competition law, in the Commission's Notice on Access to File in Competition Cases (OJ 2005 C 325/07).

95 OECD (2021), § 5.f.*ii*.

96 OECD (2021), § 5.g.

97 See the leading case on the right against self-incrimination in EU competition law CJEU, case C-374/87, Orkem (1989). See also GC, case T-135/94, Baustahlgewebe (1995) and GC, case T-112/98, Mannesmannröhren-Werke (2001). In law literature see: Wils (2003a); Faull and Nikpay (2014); Jones and Sufrin (2019).

98 ICN (2019), § i.*iii*. This fundamental right is also stated in general terms art. 6(3)(c) of the European Convention on Human Rights and, specifically with respect to EU competition law, in art. 27 of Regulation (EC) No 1/2003: See CJEU, case C-550/07 P, Akzo (2010); GC, case T-7/89, Hercules Chemicals (1991), specifically on the scope of the right to counsel in competition investigations; CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Jones and Sufrin (2019); Faull and Nikpay (2014); Wils (2017a).

99 OECD (2021), § 6.

ing applicable legal privileges"[100]. The protection of privileged communications between attorneys and clients is recognized under EU law and the CJEU has consistently upheld the principle of legal professional privilege since *AM & S Europe Ltd v Commission*[101], but has limited it to communications involving external legal counsel[102].

The OECD requires that the views of third parties with a legitimate interest in the case must be considered before a final decision is taken[103] and art. 27 of Regulation (EC) No 1/2003 allows third parties with a legitimate interest to participate in competition proceedings. This is also supported by the Commission's Best Practices, which encourage the involvement of third parties where relevant[104].

6. FORMAL REQUIREMENTS: DECISIONS IN WRITING

Under a formal point of view, the principle of fairness requires the widest possible use of written form, in order to ensure that the EU Commission's activities, initiatives, and decisions are documented and verifiable in both procedural and substantive aspects. This applies, firstly, to communications between the decision maker (e.g., competition authority or court, as applicable) and the parties and third parties, which must be "*in writing, or, if oral, recorded, to the extent possible, in written minutes that form part of the case file or record*"[105]. This is provided in art. 27 of Regulation 1/2003 and in the Commission Notice on Antitrust Best Practices, where the requirement for all significant communications to be documented in order to ensure transparency and fairness is reinforced[106].

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100 OECD (2021), § 6.b. See ICN (2019), § i.*iii*, with reference to the need to recognize applicable privileges in accordance with legal norms in each different jurisdiction governing legal privileges, "*including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice*". The provision of specific rules, policies, or guidelines on the treatment of privileged information is also encouraged.

101 CJEU, case 155/79, AM & S Europe (1982). See also CJEU, case C-97/08 P, Akzo (2009); GC, case T-30/89, Hilti (1991).

102 The legal and professional privilege, therefore, in EU competition law does not extend to in-house counsel: CJEU, case C-550/07 P, Akzo (2010); CJEU, case C-97/08 P, Akzo (2009). See also: Wils (2017a); Faull and Nikpay (2014); Jones and Sufrin (2019).

103 OECD (2021), § 5.h.

104 On this issue see: CJEU, case C-441/07 P, Alrosa (2010), with respect to the rights of third parties to submit observations during competition proceedings; CJEU, case C-360/09, Pfleiderer (2011); GC, Case T-873/16, Groupe Canal+ (2018), on third-party rights to intervene. See also: Kerse and Khan (2012); Faull and Nikpay (2014); Whish and Bailey (2021).

105 OECD (2021), § 3.g.

106 In case law see: CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-201/04, Microsoft (2007); GC, case T-474/04, Pergan Hilfsstoffe (2007). In law literature see: Kerse and Khan (2017); Andreangeli (2010); Wils (2012c).

The same requirement of written form also applies to any final decisions or orders in which competition authorities find a violation of, or imposes a prohibition, remedy, or sanction under applicable competition law, which must be issued in writing and, as the OECD states, must be based only on matters of record, and, as appropriate, must contain details about the findings of fact, conclusions of law and related sanctions[107]. In this respect, art. 296 of the TFEU requires, in general, that all decisions by the EU Commission are reasoned and made public, subject to confidentiality rules. This is specified, as regards EU competition law, by art. 30 of Regulation (EC) No 1/2003[108]. There is a consistent interpretation of this requirement in the CJEU case law, as it is showed by cases like *Cementbouw Handel & Industrie BV v Commission*[109], *Aalborg Portland v Commission*[110] and *Deutsche Telekom AG v Commission*[111].

Also commitments accepted by the competition authority to resolve competition concerns must be in writing. Subject to confidentiality rules and applicable legal exceptions, the commitments accepted by competition authorities must be made public and describe the basis for the competition concerns or make reference public materials in which those concerns are expressed or must provide a summary explanation of the commitments and the reasons for them[112], as under art. 9 of Regulation (EC) No 1/2003[113].

7. INDEPENDENT REVIEW

Procedural safeguards extend beyond the sanctioning procedure under the competence of the EU Commission and include the tight of undertakings to access an "*impartial review by an adjudicative body (i.e. court, tribunal, or appellate body) that is independent and separate from the competition authority, of decisions, includ-*

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107 OECD (2021), § 7.b. As the ICP puts it, final decisions or orders must "*set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions*" and all final decisions must be "*publicly available, subject to confidentiality rules and applicable legal exceptions*": ICN (2019), § j.*i*.

108 See: Kerse and Khan (2012); Faull and Nikpay (2014); Jones and Sufrin (2019).

109 CJEU, case C-201/00 P, Cementbouw Handel (2002).

110 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004).

111 CJEU, case C-280/08 P, Deutsche Telekom (2010).

112 ICN (2019), § j.*ii*.

113 See GC, case T-151/05, Telefónica and Telefónica de España (2012), where it addresses the need for clear explanations of commitments, and GC, case T-201/04, Microsoft (2007), as regards the transparency of commitments and their publication. See also: Monti (2007b); Faull and Nikpay (2014); Jones and Sufrin, *EU Competition Law: Text, Cases, and Materials* (2019).

ing intermediate compulsory procedural decisions"[114]. Such a right is provided for, in general terms, also in the Charter of Fundamental Rights of the European Union, which, in art. 47, guarantees the right to an effective remedy and a fair trial before an independent and impartial tribunal.

More in particular, undertakings have the right to seek judicial review of decisions made by the EU Commission before the General Court (as court of first instance) and the Court of Justice of the European Union (as the final appellate body). This ensures that any potential errors in both procedural and substantive aspects can be corrected by an independent judiciary[115]. In this respect, it is necessary that courts are enabled to examinate facts and evidence, along with the merits of competition law enforcement decisions[116].

In particular, courts have, in principle, the obligation to procedurally verify the facts forming the basis of the final decision and must exercise a "*strong, full and effective*" review of each case, to guarantee undertakings that "fullness" of protection required by art. 47 of the Charter of Fundamental Rights, art. 263 of the TFEU[117] and the ECHR in the *Menarini* and *Grande Stevens* cases[118]. The guarantee of "fullness of protection" by European courts is one of the weaknesses that will be addressed later in this work. Therefore, further considerations on this topic will be provided in the subsequent § 7.2.

Also in jurisdictional procedures the timing has a great relevance. Therefore, the review performed by the court must be "*completed in a reasonable time, taking into account the nature and complexity of the case*"[119], as it is required, in general terms, by art. 6 of the European Convention on Human Rights and art. 47 of the Char-

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114 OECD (2021), § 7. See ICN (2019), § k, where it states that a person must not be imposed a prohibition, remedy, or sanction in a contested enforcement proceeding for violation of applicable competition laws "*unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body)*".

115 CJEU, case C-413/14 P, Intel (2017); GC, Case T-612/17, Google Shopping (2021); CJEU, case C-550/07 P, Akzo (2010); GC, case T-64/89, BPB Industries and British Gypsum (1992); CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-272/09 P, KME Germany (2011); CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Gerard (2012); Lenaerts (2000a); Wils (2012b); Wils (2014a).

116 OECD (2021), § 7.a.

117 See CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-272/09 P, KME Germany (2011) and CJEU, case C-413/14 P, Intel (2017). See also: Wils (2014a); Faull and Nikpay (2014), Chapter 14; Monti (2016a).

118 See *supra*, § 1.

119 OECD (2021), § 7.c.

ter of Fundamental Rights, which also apply to judicial reviews of competition decisions[120].

8. EXISTING CRITICAL ISSUES AND PROPOSALS FOR FUTURE IMPROVEMENT

The aforementioned principles establish a framework that, in theory, safeguards fairness in EU competition law, encompassing both the investigative and decision-making phases before the EU Commission, as well as the judicial review by the CJEU. If one moves from theory to practice, however, this framework does not always adequately safeguard fairness.

In some cases, this occurs because the rules, while theoretically suited to achieving the intended objective and interpreted accordingly, are applied evasively or even disregarded, instead. In law literature, e.g., it is claimed that enforcement of competition law by the EU Commission sometimes evades fairness, especially in the investigatory phase[121]. Procedural fairness is occasionally disregarded in the context of economic assessments[122], also with respect to transparency and the right to be heard[123]. Flaws in the way EU competition framework is applied are imputed by some Authors to inconsistent economic assessments and a lack of due process in decision-making[124], other times to selective enforcement and lack of consistency in how rules are applied[125]. It is observed, further, that the discretionary powers granted to the EU Commission is capable to allowing an evasive application of rules meant to ensure fairness[126]. The Commission's broad discretion may at times compromise fairness, as it intermittently seems to happen in the Commission's handling of abuse of dominance cases, where economic justifications offered by dominant undertakings are not always adequately considered[127].

These problems were highlighted by the EU courts, which asserted how fairness had been occasionally compromised, e.g., by the Commission's inadequate eco-

120 See GC, case T-135/94, Baustahlgewebe (1995); CJEU, case C-280/08 P, Deutsche Telekom (2010); *L'Oréal SA v Commission* (C-536/11 P). See also: Faull and Nikpay (2014); Wils (2008); Jones and Sufrin (2019).

121 Geradin (2020); Desai and Green (2020).

122 Wils (2005).

123 Craig (2018); Ezrachi (2018).

124 Vesterdorf (2018).

125 Fox (2012).

126 Petit (2010); Jones and Sufrin (2019).

127 Bailey (2012).

nomic analysis[128], lack of consideration of the undertaking's arguments[129], violation of the voluntary nature of the commitments in a competition investigation[130], conduction of dawn raids in violation of the undertaking's procedural rights[131] and violation of the regulation on length of the proceedings and access to the Commission's file[132].

These are undoubtedly very relevant issues but cannot be addressed in this work, since they do not represent a normative or interpretative weakness, but rather the violation, in practice, of rules that are established and interpreted in a manner protective of fairness. As such, these cases do not fall within the scope of this work.

The cases of interest to be addressed here, on the other hand, are those in which it is the very current legal framework (more precisely: the interpretation of the current legal framework as reflected in the case law of the European courts) that may lead to violations of fairness in EU competition law. Specifically, two cases warrant further examination. The first case concerns the limited scrutiny of the merits of the case in judicial review, which may infringe the undertakings' right to a "*strong, full, and effective*" review of the decision, as mentioned in § 6 above. The second case relates to the reduced relevance of documents drawn up after the statement of objections, which also impairs undertakings' right to defense discussed above under § 4.

8.1. Limited scrutiny of the merit in jurisdictional review

The need to protect fairness in the application of EU competition law also necessitates an examination of the relationship between the EU Commission, as the executive body responsible for enforcing EU competition law, and the EU Courts, as the judicial authorities charged with reviewing the Commission's decisions. In particular, it is necessary to explore how such review is carried out.

Apart from the matter of fines imposed by the EU Commission, on which they have full merit review[133], under art. 263 TFEU EU Courts are entrusted with a review of

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128 GC, case T-286/09, Intel (2014).

129 CJEU, case C-413/14 P, Intel (2017).

130 CJEU, case C-441/07 P, Alrosa (2010).

131 case C-583/13 P, Deutsche Bahn (2015).

132 GC, joined cases T-25/95 et. All., Cimenteries CBR (2000).

133 The possibility of granting unlimited jurisdiction to the EU Courts with respect to "*penalties*", under art. 261 TFEU, has been introduced in EU competition law through art. 31 of Regulation 1/2003 and art. 16 of Regulation 139/2004 on the control of concentrations between undertakings. This includes the ability to review both the amount of the fine and the method used to calculate it: GC, case T-67/01, JFE Engineering (2004).

legality of the EU Commission's decisions[134]. EU legislation, however, do not specify the intensity of such a review[135] so that EU Courts have defined it through case law and developed different standards based on the specific nature of each assessment[136].

More in particular, when interpreting and applying the law, EU Courts exercise full control under art. 19 TFEU, whether the error of law is obvious or not[137] and regardless of whether this relates to procedural or substantive aspects of competition law[138].

As regards *facts*, EU Courts introduced a further distinctions. On the one hand, with respect to what one could define "*the Commission's substantive findings of fact*"[139], EU Courts established that the EU Commission has no discretion in determining whether a fact is correct. EU Courts, therefore, conduct a thorough and comprehensive review when verifying the correctness of facts[140], in order to assess "*whether the factual material on which the Commission's decision was based was accurate, reliable, consistent and complete, and whether this factual material was capable of substantiating the conclusions the Commission drew from it*"[141].

On the other hand, there are what the General Court defined, in *General Electric*, "*appraisals of an economic nature*"[142]. These consist of complex economic assessments involving value judgments that pertain not to law, but to science, technology, or economics. In these cases, since *Consten and Grundig*[143], in 1966, EU Courts only apply a "limited" (or "marginal") review on, based on the "manifest error standard"[144], which allows EU Courts to establish "*whether that evidence con-*

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134 Derenne (2010); Macgregor and Gecic (2012).

135 Reeves and Dodoot (2006); Bailey (2003); Forrester (2011); Gerard (2011); Rosch (2011); Jaeger (2011).

136 Castillo de la Torre (2009); Reeves and Dodoot (2006); Sibony and Barbier de la Serre (2007); Lenaerts (2007); Bailey (2010); Simon (2002).

137 GC, case T-41/96, Bayer (2000); CJEU, joined cases C-2/01 P et al., Bundesverband der Arzneimittel-Importeure (2004); CJEU, case 258/78, Nungesser (1982); CJEU, case 40/73, Suiker Unie (1975).

138 Geradin and Petit (2010).

139 GC, joined cases T-25/95 et. All., Cimenteries CBR (2000).

140 Castillo de la Torre (2009); Lasok (1983); Craig (2012). See also: GC, case T-66/01, Imperial Chemical Industries (2006); GC, joined cases T-68/89 et all., Società Italiana Vetro (1992).

141 AG Kokott Opinion in case C-413/06, Bertelsmann (2008); AG Tizzano Opinion in case C-12/03 P, Tetra Laval (2004).

142 GC, case T-210/01, General Electric (2005).

143 CJEU, case 56/64, Consten and Grundig (1966).

144 Nazzini (2012); Whish and Bailey (2015); Monti (2003); Venit (2010).
See also: GC, case T-168/01, GlaxoSmithKline (2006); CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004); CJEU, case 42/84, Remia (1985); CJEU, joined cases 142/84 et al., British-American

tains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it"[145] [146] but without, however, entering into the merits of the case in the sense of substituting their own assessment for that of the EU Commission.

The definition of what constitutes a "complex economic assessment"[147] is crucial for determining in which cases EU Courts apply the "manifest error standard" of review. It is not easy, however, to distinguish between issues in fact and economic assessments[148] and, within the latter, economic issues that are complex, and therefore warrant limited review, and those that are simple, subject to full review[149]. A similar problem arises in relation to the definition of what constitutes "complex technical appraisals"[150], for which EU Courts have gradually extended the same standard of *limited* judicial review. Such definitions, however, are needed because these definitions determine in which cases EU Courts have a limited power of review due to the recognized wider discretion granted to the EU Commission[151].

EU Courts, however, are not consistent in their interpretation of this concept; in fact, "*[c]ette notion d'appréciation économique complexe n'est pas définie ni dans les traités, ni de façon claire dans la jurisprudence communautaire*"[152]. While in cases like *Airtours plc v. Commission*[153], *Cisco Systems Inc. and Messagenet SpA v European Commission*[154] and *Intel*[155] the EU Courts demonstrated a more thorough examination of the facts presented by the EU Commission[156], in other cases, like *Alrosa*

Tobacco (1987); GC, case T-48/04, Qualcomm (2009); CJEU, case C-12/03 P, Tetra Laval (2005); T-201/04, Microsoft v. Commission (2007); CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-79/12, Cisco (2013); GC, case T-342/99, Airtours (2002).

145 CJEU, case C-12/03 P, Tetra Laval (2005); GC, case T-201/04, Microsoft (2007); CJEU, case 42/84, Remia (1985); CJEU, joined cases 142/84 et al., British-American Tobacco (1987).

146 CJEU, case C-12/03 P, Tetra Laval (2005).

147 Reeves and Dodoot (2006).

148 Geradin and Petit (2010).

149 Geradin and Petit (2010); Siragusa (2009); Bellamy (2011); Jaeger (2011); Wahl (2009); Forrester (2009); Siragusa (2010); Barbier de la Serre (2012).

150 GC, case T-201/04, Microsoft (2007). See also: Derenne (2010).

151 Jaeger (2011).

152 Vallindas (2009).

153 GC, case T-342/99, Airtours (2002).

154 GC, case T-79/12, Cisco (2013).

155 CJEU, case C-413/14 P, Intel (2017).

156 In that case the CJEU affirmed that EU Courts may re-examine all arguments, including those related to economic assessments, and did so with respect to the Intel's arguments regarding the AEC Test, which evaluates whether an equally efficient competitor could compete under the same conditions as the dominant firm: Vesterdorf (2018).

v. Commission[157] and *Intel v Commission* (before the General Court: this is the case dealt with by *Intel* before the CJEU mentioned above)[158] they showed a substantial degree of deference to the EU Commission in matters of economic assessment.

Regardless of the inconsistency in the application of this concept between the different decisions, the manifest error standard has been subject to criticism insofar as it grants the EU Commission excessive discretion and undermines the principle of fairness in competition law enforcement and the right of defense of the parties involved, which is guaranteed by art. 47 of the EU Charter of Fundamental Rights[159]. This criticism must be considered particularly relevant in cases where economic theory and methodology are pivotal to the decision, such as in merger control and abuse of dominance cases[160].

I claim, in this respect, that a more balanced approach in favour of the right of defense is needed, particularly in complex economic and technical assessments[161]. In this respect, I propose that the requirement of "complexity" should not be defined based on the subject matter or the objective difficulty of the investigations actually carried out by the Commission, as both of these criteria are too vague to define and, more importantly, appear unsuitable for rationally determining the degree of intensity of judicial review on EU Commission's decisions[162]. Moreover, there would be no reason for EU Courts to defer to the Commission's expertise in particular technical or economic controversies since EU Courts have the power, in each single case, "*to appoint experts, economic and otherwise*"[163].

Therefore, I propose adopting a functional criterion, which should be defined by addressing the question of which issues warrant granting the EU Commission a margin of discretion not subject to review, versus those on which it is necessary to allow EU Courts full review on the merits. In this perspective, I propose that "complexity" should only refer to cases where the EU Commission exercise value

157 CJEU, case C-441/07 P, Alrosa (2010).

158 GC, case T-286/09, Intel (2014).

159 Gippini-Fournier (2007); Ortiz Blanco (2010); Geradin (2018); Wils (2003b); Vesterdorf (2005). There is also a relevant part of scholars and practitioners who oppose the claim for a more rigorous scrutiny, see, e.g.: Motta (2006); Forrester (2006); Gerber (2013); Lenaerts (2000b).

160 Townley (2009); Basedow (2010); Geradin (2004); Bailey (2012); Vesterdorf (2011).

161 Jones and Sufrin (2016); Whish and Bailey (2015); Gerard (2017); Wils (2004); Monti (2003); Venit (2010); Lenaerts (2015); Eilmansberger (2006); Gippini Fournier (2005); Goyder (2009).

162 Forrester (2011); Jaeger (2011).

163 Forrester (2011).

judgments[164] to make economic policy choices[165]. In fact, the connection between limited jurisdictional review, the concept of "complexity" in economic assessments, and the extension of discretionary powers attributed to the Commission sometimes emerges in decisions such as *Remia BV and others v Commission*[166][167].

Such an interpretative evolution could be coupled with the establishment of an expert panel to advise the EU Courts on economic matters, which would enhance the Courts' capacity to engage with complex economic assessments without overstepping its judicial role[168]. Currently, EU Courts rely primarily on their own judges and the parties' expert submissions to interpret and assess the EU Commission's economic evidence. While this allows for a legal review, it may fall short in cases where deep economic expertise is required to fully understand the technicalities of the EU Commission's models or methodologies[169].

As a second-best proposal on this issue, EU Courts could exercise a review based on a proportionality test for complex economic and technical assessments similar to the test applied in relation to fines. This would ensure that the EU Commission's decisions are proportionate to the objectives pursued, not only in terms of sanctions but also in terms of the underlying economic analysis. This would allow EU Courts to engage in a more substantive review of whether the Commission's economic assessments are based on sound reasoning, while still respecting the EU Commission's expertise in competition matters.

Whatever the definition of "complexity" in economic and technical assessments, the rights of defense could be strengthened by granting parties greater access to the Commission's economic data and models, allowing them to challenge the Commission's findings more effectively before both the EU Commission and the EU Courts[170]. In fact, while the EU Commission does provide access to documents,

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164 Forwood (2009); Siragusa (2010).

165 As Jaeger (2011) put it (pp. 310 and 312): "*complex economic assessments should be understood as situations where the Commission has to make an economics-based choice of policy. It should only be in such situations that marginal review should be applied*".

166 CJEU, case 42/84, Remia (1985).

167 This discretion is grounded in the principle that the Commission is better positioned to assess complex economic realities, particularly when it comes to technical assessments requiring specialized economic expertise: Wils (2019); Wils (2005); Craig and de Búrca (2020); Röller and de la Mano (2006); Petit (2010); Hatzopoulos (2012).

168 Craig and de Búrca (2020); Röller (2016); David Bailey (2012).

169 See, e.g., CJEU, case C-413/14 P, Intel (2017), where the CJEU criticized the General Court in GC, case T-286/09, Intel (2014) for not sufficiently analysing the economic evidence related to the "as-efficient competitor" test.

170 Petit (2014); Bailey (2012); Lowe (2010); Venit (2003b).

there is limited transparency regarding the full details of the economic models or methodologies employed. Case law, in fact, appears to grant the parties access *only* to documents and not to models and methodologies[171]. Widening of the access rights would align with the principle of equality of arms and ensure that the review process is both procedurally fair and substantively robust.

8.2. Reduced relevance of documents drawn up after the statement of objections

The CJEU has established that documents created before the notification of the statement of objections by the EU Commission are highly relevant, as they tend to reflect the situation before an undertaking adapts its conduct in response to an investigation. Documents created after the procedure's initiation are not irrelevant but EU Commission and courts give post-notification documents less weight, as undertakings could be incentivized to shape such documentation to mitigate liability. In particular, the CJEU has held that while the Commission must review such evidence, it is free to attribute different levels of evidentiary weight to materials created during and after the procedure, depending on the context and credibility of the material[172].

My feeling, as a practitioner, is that this approach, while certainly acceptable in the abstract, can however sometimes determine scepticism towards *any* post-investigation documents.

On the one hand, in fact, the EU Commission and the EU Courts tend to put overemphasis on pre-investigation documents and, consequently, to unduly limit the ability of undertakings to present valid exculpatory evidence during the investigation. Under a behavioural point of view, the reduced value of post-investigation documents may induce undertakings to refrain from fully cooperating or disclosing information after an investigation has started, an attitude that could create a chilling effect on transparency and cooperation. Finally, as far as it is of most interest now, such principle potentially undermines the fairness of the procedure, particularly where exculpatory evidence emerges later in good faith, since it may deprive undertakings of a meaningful opportunity to defend themselves[173].

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171 CJEU, case C-194/99 P, Thyssen Stahl (2003).

172 CJEU, case C-194/99 P, Thyssen Stahl (2003); CJEU, joined cases C-238/99 P et all., Limburgse Vinyl Maatschappij (PVC II), (2002); GC, case T-112/07, Hitachi (2011); CJEU, case C-308/04 P, SGL Carbon (2006); case C-199/99 P, Corus (2003). See also: Wils (2012d); Bourgeois (2004); Monti (2016a); Van Bael (2017); Gippini-Fournier (2012).

173 In general a critical attitude with respect to this principle is shown in Jones and Sufrin (2016); Whish and Bailey (2015); Odudu (2014); Furse (2017).

I propose that a different standard of conduct be clearly defined depending on whether the documents in question relate to an objective analysis or mere subjective declarations. As an example: it appears evident that an email exchanged between the commercial agents of a undertaking justifying a given commercial conduct on the basis of an independent decision, taken solely on the basis of considerations of economic efficiency, must be considered to have very little value if sent after the EU Commission has contested the company for a concerted practice with a competitor. On the contrary, a report containing an analysis of the relevant market, the conditions of supply of a given good or service or the price level at a given moment does not seem to deserve less consideration just because it was drawn up after the opening of the proceeding, to the extent that it correctly processes objective data that can also be verified by the EU Commission itself[174].

9. CONCLUSIONS

The principle of fairness, rooted in the European Charter of Fundamental Rights and articulated in case law such as *Menarini* and *Grande Stevens*, ensures that defendants in competition proceedings are granted rights similar to those in criminal trials. The analysis demonstrated how the EU Commission's investigative processes, from information gathering to final decision-making, must be conducted in an impartial, transparent, and proportionate manner.

However, certain practical challenges, such as the limited scope of judicial review by the CJEU regarding the merits of complex economic assessments, were identified. Additionally, the differential treatment of documents created before and after an investigation poses challenges to fairness.

The current model of judicial review, which limits the CJEU's ability to engage in full merit review of complex economic assessments, requires further scrutiny and would benefit of limited reform. In particular, the role of economic expertise in judicial proceedings and the potential for establishing expert panels or economic

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In this perspective, one could make reference to the principle, in U.S. competition law, that less weight should be placed on the timing of document creation and more emphasis on the substance of the evidence, although they also take into account the possibility that later documents may be self-serving. See, in US law: Hovenkamp (2015); Elhauge (2004); Baker (2012); Baker (2007). In US case-law see: In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002) it was held that "*Courts look to the totality of the evidence, and even documents created after litigation has commenced can be probative if they shed light on the parties' intent and conduct*". See also *United States v. AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018) and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

174 In this sense see also: Albors-Llorens (2016); Whish and Bailey (2018); Petit (2014); Röller (2016); Geradin (2011).

advisory bodies could enhance the CJEU's capacity to assess complex cases more thoroughly.

Finally further study into the treatment of post-investigation documents is required. A distinction between objective analyses and self-serving statements could improve fairness in competition law proceedings in this respect.

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COMPETITION LAW AS A FUNDAMENTAL POLICY TOOL FOR A TRANSITION TOWARDS MORE SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE SOCIETIES

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Abstract

Competition law represents a pillar of the European Union's Internal Market and it is a fundamental part of the acquis communautaire that all the member States and Countries willing to join the Union shall implement in their legal system. According to the traditional economic thinking, which refers to the so-called Chicago School, competition law is directed at promoting economic efficiency of the marker, but it should not address other broader societal problems. However, the economic crisis before, and an increasing concentration rate on the market, especially in case technology and, more in general, digital gatekeepers are involved, put the neoclassical economics' assumptions into question. Indeed, other problems, such as rising indexes of income inequality and poverty – also in developed economies – together with the big challenge represented by climate change, urged a rethinking of all the traditional policies, by putting less attention on market and efficiency, and more focus on the society and on citizens' fundamental rights. Competition law, as well, did not fall outside this 'policy reshuffling', which aims at creating a sort of complementarity, or multi-tool level playing field, directed at improving our societies. A question may arise in this realm, having in mind the traditional conception of competition law: What is the role that this policy has to pursue? And, especially, why has it to deal with issues such as income Inequalities and environmental protection? At a first sight, linking competition law to these broad policy objectives may appear a mere academic exercise, but in reality it is not. The reason lies exactly in the economic reasons behind how income Inequalities can be addressed and how more sustainable products can be developed. The present paper shows how competition law can play a fundamental role in pursuing these two fundamental policy objectives of every democratic society, with particular reference to the European Union. It will also address, in light on the planned and expected enlargement of the EU.

***Key words**: Competition Law, Sustainability, Environment, European Union, Internal Market, Enlargement*

1. INTRODUCTION: WHY COMPETITION LAW MATTERS FOR SUSTAINABILITY

1.1. The EU Treaties system

Focusing the analysis on the European Union legal system, competition law, especially after the adoption of the so-called 'more economic approach' by the European Commission,[1] has often been portrayed and characterised as a self-standing subject, a sort of niche, where economic issues and evaluations were almost the only ones to be taken into account. In fact, the debate was focused on price-centric parameters, econometric tests, and a particular attention was given to economic efficiency and the so-called 'consumer welfare'. In particular, the latter expression was introduced in the U.S. through the publication of 'The Antitrust Paradox' by Robert Bork[2] and it soon was endorsed by the U.S. Supreme Court as lodestar of the antitrust legislation,[3] although no references were made to it in the preparatory works for the Sherman Act's enactment.[4] Notwithstanding a very active scholar debate, the consumer welfare's concept remained shrouded in a veil of uncertainty. However, its very strong economic and efficiency-centred connotation was undoubtable, at the point that some conducts which were previously deemed as *per se* violations were then evaluated according to a *rule of reason* approach based on efficiency evaluations.[5]

Competition law in the European Union was affected by the influence of this conception in the context of the 'renovation' process occurred in the first years of the current century. It is worth underlining that the European conception of competition rules and of the consumer welfare standard never went as far as it happened on the other side of the Atlantic Ocean, and for sure it had the merit of having reinforced certainty in the application of competition rules. Anyhow, under a more general viewpoint, it had the consequence of relegating competition provisions in a niche made by experts for experts, and where the importance of

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1 See, *inter alia*, Commissioner Mario Monti, *Competition for Consumers' Benefit*, speech delivered at the European Competition Day, Amsterdam, 22 October 2004, [https://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf], Accessed 30 September 2024.

2 Bork, R., *The Antitrust Paradox*, Free Press, New York, 1978.

3 U.S. Supreme Court, decision 11 June 1979, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), at 343.

4 Thorelli, H.B., *The federal antitrust policy: Origination of an American Tradition*, Allen & Unwin, London, 1954, p. 227.

5 See, *inter alia*, U.S. Supreme Court, decision 3 April 1911, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), at III C and IV B; Fox, E.M., *The Efficiency Paradox*, in Pitofsky, R. (Ed.), How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust, Oxford University Press, Oxford, 2008, p. 77.

this subject was not fully perceived outside its own specific field and the related community of scholars and practitioners.

This contributed to partially 'defuse' competition law vis-à-vis the existential transformation which are ongoing in our societies. Indeed, a 'soft touch' (or, maybe better, *laissez-faire*) approach to competition matters had the consequence of relegating this policy tool to the analysis of single transactions or conducts, but without a perspective view on the broader policy context of which competition rules are part (with a quite feeble link to the evolution that the markets and society were experiencing). This led, for instance (and it is well known history), to the approval of the acquisition of WhatsApp by Facebook,[6] with all the consequences that this brought, but also to a scarce awareness of the role that competition law can play with regard to sustainability.

The concept of sustainability – broadly intended – lies at the foundations of the whole European Union's structure. Indeed, Article 3, paragraph 3, of the Treaty on the European Union (hereinafter, TEU) establishes that the Internal Market *shall work for the sustainable development of Europe*. The same provision, in enucleating the well-known and fundamental concept of social market economy, makes reference, in the same sentence, to a *balanced economic growth*, to *social progress*, and to *a high level of protection and improvement of the quality of the environment*. In a single sentence, the TEU includes almost all the main dimensions of the concept of sustainability, *i.e.*, economic sustainability, social sustainability, and environmental sustainability. The last perspective that is worth mentioning is that of institutional sustainability, which can find its best expression in the reference to rule of law contained in Article 2 of the same TEU. These principles are echoed in various provisions of the Treaty on the Functioning of the European Union (hereinafter, TFEU) and of the Charter of Fundamental Rights of the European Union. In particular, Article 37 of the Charter establishes the right to environmental protection, in line with Article 11 TFEU. Article 9 TFEU states that in *defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion*.

Therefore, it is clear that the EU Treaties system establishes a space were all the forms of sustainability referred to above are recognised and protected. As a guarantee for the respect of these values lies the already mentioned institutional sustainability, which is immanent in the articulation of the same EU, under the already mentioned rule of law principle.

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6 European Commission, decision 3 October 2014, Case No COMP/M.7217 – *Facebook/Whatsapp*.

1.2. The Member States' constitutional foundations

Analogous considerations can be advanced with regard to the constitutional values recognised and protected at the Member States' level. For the sake of exemplifying, the reformed[7] Article 9 of the Italian Constitution provides that the Republic *shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals*.[8] More specifically, Article 41 (reformed altogether with Article 9) affirms that *private economic enterprise shall have the right to operate freely. It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity. The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes*. This provision is of particular interest as it provides an almost perfect and balanced synthesis among all the concepts of sustainability posed at the basis of the present work. In fact, by regulating how private economic activities must operate, it matches the need for a socially responsible business activity, sustainable in its operations also from an economic viewpoint, and careful with reference to the impact on the environment. This provision may be regarded as a lens for both understanding and legitimating the role of competition law in the field of sustainable practices. Indeed, Article 41 of the Italian Constitution's focus is on private economic activity, therefore understanding and representing the main role played by the market in our societies. It establishes in a very clear manner how these activities cannot be directed to the bare profit only, with disregard to other societal concerns, such as environmental protection or social inequalities. In a way, the *summa* contained in this Article (although the part regarding the environment was added in 2022) 'anticipated' – since the Italian Constitution entered into force in 1948 – what is now recognised as the common definition of sustainability, *i.e.*, the one proposed by the so-called Brundtland Report, where sustainable development is defined as the one which *meets the needs of the present without compromising the ability of future generations to meet their own needs*.[9] The same Report outlines the link between

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7 Legge Costituzionale of 11 February 2022, No. 1, in Gazzetta Ufficiale No. 44, of 22 February 2022, provided, by Art. 1, par. 1, for the insertion of two new sentences at the end of Article 9; Article 2, par. 1, letter a), for the amendment of Article 41, par. 2; and, by Article 2, par. 1, letter b), for the amendment of Article 41, par. 3.

8 Official English translation by the Italian Constitutional Court, available at [https://www.cortecostituzionale.it/documenti/download/pdf/The_Constitution_of_the_Italian_Republic.pdf], Accessed 30 September 2024.

9 Report of the World Commission on Environment and Development: Our Common Future, point 27, [https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf], Accessed 30 September 2024.

social and environmental issues as an obstacle to reach a sustainable development path.

In addition, sustainability – especially from the environmental standpoint – is formally recognised also in the French Constitution through the 'appendix' added in 2005, the *Charte de l'environnement*,[10] and in the German Constitution by means of Article 20a, introduced in 1994 (and amended in 2002 in order to include protection of animals in its scope), and where it is recalled the responsibility of the State towards future generations.

1.3. The role of Courts

If once upon a time the abovementioned rights appeared to be just 'law in the books', or however a declamation of good principles, this is not the case anymore, since Courts are starting to directly enforce them.

The active role of Courts in this field became particularly clear in April 2024 when the European Court of Human Rights issued a decision affirming that Switzerland failed to comply with its duties under the Convention with regard to climate change, and recognising the right of an association to bring a claim accordingly.[11] What is interesting is that, in absence of a specific right to protect the environment in the Convention, the Strasbourg Court configured environmental protection as deriving from the protected rights to private and family life and health.[12]

A similar approach was followed also by the Italian Constitutional Court prior to the 2022 reform mentioned above. Recently, the Italian *Consulta* proved to be aware of the importance of the rights contained in Articles 9 and 41 of the Italian Constitution through a decision issued in June 2024.[13] In particular, in this ruling, the Corte Costituzionale held that governmental measures requiring the continuation of production activities of strategic importance for the national economy or for safeguarding employment levels – despite the seizure of plants ordered by the judicial authorities due to the lack of the necessary safeguards towards health and environmental protection – are constitutionally legitimate only for the time strictly necessary to complete the indispensable environmental clean-up measures. This decision states a sort of milestone principle for the topic here at stake, as

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10 LOI constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (JORF n°0051 du 2 mars 2005 page 3697).

11 ECHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC]* - 53600/20, 9 April 2024.

12 Council of Europe, *Protecting the Environment using human rights law*, [https://www.coe.int/en/web/portal/human-rights-environment], Accessed 30 September 2024.

13 Corte Costituzionale, decision 7 May 2024, no. 105.

it clearly prioritises environmental and health protection over business interests (even if of national strategic interest), thus safeguarding also social sustainability by conceding a temporary (and this is the key aspect) prorogation aimed at, *inter alia*, safeguarding occupational levels during the period necessary to adequate the plant to the necessary environmental sustainability standards. This decision perfectly represents the direct role that the reformed Article 41 (in this case, but, generally, also 9) of the Italian Constitution can play, and it perfectly applies this provision in the context of the case at stake, as it strikes a balance between all the forms of sustainability that we have analysed.

In addition, it is worth reporting that also other European national Courts directly enforced rights related to (especially environmental) sustainability. In particular, the German Federal Climate Change Act was enacted in 2019,[14] in order to implement the obligations stemming from the Paris Treaty. However, in 21 March 2021 the German *Bundesverfassungsgericht* intervened with an order that deemed the Act unconstitutional with regard to the provisions governing climate targets and the annual amount of gas emissions allowed until 2030, since they did not specify how emissions would be reduced beyond 2030.[15] As a result, the Court ordered the German legislator to amend the Act with more precise provisions regarding the after-2030 period. The Act was amended in June 2021.[16]

In France, in October 2021 the *Tribunal Administratif de Paris* issued a decision where it stated that France must compensate the non-compliance with the carbon emission targets fixed for the 2015-2018 term.[17] The Court imposed a short term,

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[14] Federal Climate Change Act, 12 December 2019, published in OJ I S. 2513. The Act's English translation is available at [https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html], Accessed 30 September 2024.

[15] Bundesverfassungsgericht, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, pars. 1-270, available in English at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html], Accessed 30 September 2024. The relevant press release, No. 31/2021, 29 April 2021, *Constitutional complaints against the Federal Climate Change Act partially successful*, is available in English at [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html], Accessed 30 September 2024. See also Jahn, J., *Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision*, International Journal of Constitutional Law, 21, 3, 2023, pp. 859-883.

[16] White & Case LLP, *Reshaping Climate Change Law*, 14 July 2021, [https://www.whitecase.com/publications/alert/reshaping-climate-change-law], Accessed 30 September 2024; Dentons, *Parliament passes first law amending the German Federal Climate Protection Act*, 18 June 2021, [https://www.dentons.com/en/insights/articles/2021/june/18/first-draft-law-amending-the-german-federal-climate-protection-act], Accessed 30 September 2024.

[17] Tribunal Administratif de Paris, decision 14 October 2021, no. 1904967-1904968-1904972-1904976, available (in French) at [http://paris.tribunal-administratif.fr/content/download/184990/1788790/version/1/file/1904967BIS.pdf], Accessed 30 September 2024. See the relevant press release by the same Tribunal Administratif de Paris, *L'Affaire du Siècle: l'Etat devra réparer le préjudice écologique dont*

set on 31 December 2022, within which the French State must have compensated the carbon dioxide's excess. However, this order was not supported by means of *astreinte* measures, thus rendering its enforcement less effective.[18]

What reported above shows the growing and fundamental importance of sustainability – of every kind – issues in the contemporary social and legal context. Indeed, the respect of rights such as equality of opportunities, the respect of the environment, etc., represents a cornerstone of the social contract founding the structure of modern democracies.[19] The provisions, declarations and judicial decisions analysed above show how the link between sustainability and the market is indissoluble. Indeed, the market represents the place in which people and entrepreneurs exchange goods and services, and therefore is one of the main institutions where people interact in the society. This point, as already underlined, has been brilliantly synthetized by the Italian constitutional legislator in the drafting of the renewed Article 41 of the Italian Constitution. Therefore, competition provisions, and in particular Articles 101 and 102 TFEU (together with the corresponding rules at the Member States' level) cannot be relegated in a niche, since they represent the cornerstone of the regulation of market in a liberal system, as the TEU itself reminded. Hence, although not being (of course) the solution for every issue, competition provisions have to figuratively exit the sole rooms of econometric measurement and debate and walk in the society, in order to establish a level playing field, together with other policies (such as the proper environmental protection law, social-security provisions, taxation, etc.), so as to renew our societies along the lines of the social contract underlying them, which, in the end, is built upon our Constitutions. The call for this intervention is more than urgent, because data show that we are close to the system's limit point,[20] to the *collapse*, to call it in light of the seminal book published by Jared Diamond.[21] The environment is providing us with serious advice about the unsustainability of the current business and living models, and deforestation, fires, violent floods and the continuous regression of

il est responsable, 14 October 2021, [http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-Affaire-du-Siecle-l-Etat-devra-reparer-le-prejudice-ecologique-dont-il-est-responsable], Accessed 30 September 2024.

18 *Ibidem*.

19 Having particular regard to competition law, see Gal, M.S., *The Social Contract at the Basis of Competition Law. Should We Recalibrate Competition Law to Limit Inequality?*, in Gerard, D. and Lianos, I. (Eds.), Reconciling Efficiency and Equity: A Global Challenge for Competition Policy, Cambridge University Press, Cambridge, 2019, p. 88.

20 Giovannini, E., *L'utopia sostenibile*, Laterza, Bari, 2024, p. 11.

21 Diamond, J., *Collapse. How Societies Choose to Fail or Succeed*, Penguin, London, 2011.

glaciers are just some of the (very clear) signals the planet is sending to us.[22] Concurrently, the rising inequalities in society are putting into stress the conception of State that we had until now, returning to a system where the majority of wealth is concentrated in few hands and where the State's welfare system is not capable of providing the necessary levels of assistance to the less advantaged levels of the population (in Italy, for instance, a G7 Country, the absolute poverty rate is 9.8% of the individuals[23]). The question which emerges from this portrait is why did we get to this point? The answer is for sure more complex than what can be written in few lines, but for sure it can be summarised with 'lack of societal vision': Policies became too complex and referred to narrow sectors, without a higher coordination (only in words), and in this situation individual interests prevailed over the general well-being. How to get back? By returning to our societies' key values, and by constituting a coordinated policy net aimed at guiding the transition towards a more sustainable development model. Competition law must be part of this policy net. This paper will briefly analyse the role that competition law must play in all the forms of sustainability enucleated above, in order to provide an organic framework for the contribution of this policy to the sustainable transition.

2. COMPETITION LAW AND ENVIRONMENTAL SUSTAINABILITY

Until now, the most debated field regarding the sustainability implications of competition law is without doubt that of environmental sustainability.[24] The anal-

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22 It is worth considering that on 28 October 2019 the Plenary Session of the European Parliament declared climate emergency and urged the Commission to stick to the abovementioned 1.5 Celsius degree target, together with cutting emissions in the EU by 55% within 2030, in order to become climate neutral in 2050. See European Parliament, The European Parliament declares climate emergency, 29 October 2019, [https://www.europarl.europa.eu/news/en/press-room/20191121IPR67110/the-european-parliament-declares-climate-emergency], Accessed 30 September 2024. The text of the European Parliament's Plenary Session resolution, P9_TA(2019)0079, European Parliament resolution of 28 November on the 2019 UN Climate Change Conference in Madrid, Spain (COP 25) (2019/2712(RSP)), [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0079_EN.pdf], Accessed 30 September 2024.

23 ISTAT, *Resta stabile la povertà assoluta, la spesa media cresce ma meno dell'inflazione*, 25 March 2024, [https://www.istat.it/wp-content/uploads/2024/03/STAT_TODAY_POVERTA-ASSOLUTA_2023_25.03.24.pdf], Accessed 30 September 2024.

24 See, *inter alia*, Holmes, S., Middelschulte, D., Snoep, M. (Eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, Paris, 2021; Holmes, S., *Climate change, sustainability and competition law*, Journal of Antitrust Enforcement, 2020, 8, pp. 354-405; Holmes, S., *Climate change, sustainability and competition law in the UK*, European Competition Law Review, 2020, 41(8), pp. 384-399; Iacovides, M.C. and Vrettos, C., *Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*, Journal of Antitrust Enforcement, 2022, 10, 1, pp. 32-62; Monti, G. and Mulder, J., *Escaping the clutches of*

ysis has mainly regarded Article 101 TFEU, although it is clear that also Article 102 TFEU has a role to play in this context, especially in relation to social and economic sustainability, as it will be explained *infra*.

2.1. Article 101 TFEU

The scope of Article 101 TFEU in promoting sustainability is essential. Indeed, this provision establishes a prohibition with regard to agreements, concerted practices or decisions of associations among undertakings active on the market. The aim is, of course, that of preventing collusion among market operators, which will stifle competition. However, in some circumstances, cooperation among companies could be necessary. One of this fields is without doubt that of innovation, which is an essential characteristic of competition, and it can be also related to innovative products or technologies aimed at improving environmental performances (think at a cleaner engine, or at a less energy-consuming device). However, thus being immanent in competition, innovation requires huge investments and companies could be discouraged to embark in an uncertain (but maybe directed at introducing a more sustainable product) investment by bearing alone the whole risk. In fact, the success of this operation can lead to market domination based on the merits, but the contrary outcome may lead to exiting the market. This is the so-called 'first-mover disadvantage'.[25] Therefore, although not opening the door to hidden collusive practices, the competition law system should be provided with the necessary flexibility in order to accommodate the needs just expressed, as well.

A first flexibility path is represented by paragraph 3 of Article 101 TFEU, which provides for an exemption to the application of the prohibition contained in the first paragraph of the same Article in case certain conditions are met. However, the issue is how these conditions are interpreted and measured.

First, agreements aimed at promoting sustainability shall not amount to agreements which detrimentally distort competition (*hard-core* restrictions). Subsequently, the

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EU competition law. Pathways to Assess Private Sustainability Initiatives, European Law Review, 2017, 42(5), pp. 635-656; Monti, G., *Four Options for a Greener Competition Law*, Journal of European Competition Law & Practice, 2020, 11, 3-4, pp. 124-132; Kingston, S., *Greening EU Competition Law and Policy*, Cambridge University Press, Cambridge, 2011; Kloosterhuis, E. and Mulder, M., *Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants*, Journal of Competition Law & Economics, 2015, 11, 4, pp. 855-880; Majcher, K. and Robertson, V. H.S.E., *The Twin Transition to a Digital and Green Economy: Doctrinal Challenges for EU Competition Law*, February 2021, [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3778107_code3158787.pdf?abstractid=3778107&mirid=1], Accessed 30 September 2024.

[25] Holmes, S., *Climate change, sustainability, and competition law*, cit., p. 14; Piletta Massaro A., *Back to the Treaties: Towards a 'Sustainable' Competition Law*, Revija za Evropsko Pravo, 25, 2023, p. 20.

Treaty provision grants the analysed exemption if the concerned agreements are directed at improving goods' production or distribution or they deliver some sort of economic or technical progress. However, these agreements also need to deliver a 'fair share' of these improvements to consumers. In particular, as stated by the ECJ in *Consten and Grundig*, the benefits brought by the concerned agreement shall *compensate for the disadvantages which they cause in the field of competition*.[26]

More challenging, while assessing the merit of a single case, is the second and overarching positive condition, *i.e.*, the delivery of these benefit's fair share to consumers. According to the newly approved Commission Exemption Guidelines, *Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on the consumers in the relevant market is at least neutral*.[27] This does not amount to a full compensation, but to appreciable objective advantages, as it can be interpreted through the lines of the ECJ *Asnef-Equifax*[28] and *Mastercard*[29] judgements.

The new Commission Guidelines introduce three categories of possible benefits for consumers: The 'individual use value benefit', the 'individual non-use value benefits' and the 'collective benefits'. The first refers to *improved product quality or product variety resulting from qualitative efficiencies or take the form of a price decrease as a result of cost efficiencies*[30]. The second encompasses the appreciation of the consumers whilst consuming a sustainable product in comparison to a non-sustainable one, as it causes a less negative impact on others.[31] The last category of benefits occurs *irrespective of the consumers' individual appreciation of the product* and these benefits *accrue to a wider section of society than just consumers in the relevant market*.[32]

With reference to the aspect concerning the category of consumers who shall receive the fair share required by Article 101, paragraph 3, TFEU, the new Commission Guidelines specify that *the concept of 'consumers' encompasses all direct or indi-*

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26 Joined Cases 56 and 58/64, *Consten and Grundig*, ECLI:EU:C:1966:41, 30 July 1966, page 348.

27 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), point 569.

28 Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, 23 November 2006, par. 72, where the Court stresses that *the overall effect on consumers in the relevant markets must be favourable*.

29 Case C-382/12 P, *MasterCard Inc. at al. v. Commission*, ECLI:EU:C:2014:2201, 11 September 2014, par. 234.

30 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements from the Commission, cit., note 27, point 571.

31 *Ibidem*, points 575, 578.

32 *Ibidem*, point 582.

rect customers of the products covered by the agreement.[33] In this sense, it is important to follow the reasoning of the Commission's new Guidelines with reference to the so-called collective benefits. Here it is stated that *although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same*.[34] Moreover, *where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside the market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm they suffer*.[35] The analysed Guidelines' approach appears to be consistent with the praxis developed by the European judiciary.[36]

Having regard to the timeframe of materialisation of the concerned benefits, the new Guidelines suggest that *the fact that pass-on to consumers occurs with a certain time lag does not in itself exclude the application of Article 101(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on. In making this assessment, the value of future benefits must be appropriately discounted*.[37]

A second possibility of exemption is represented by the (revitalised) figure of sustainability agreements. In other words, the competent Authority can decide not to apply the prohibition in case certain circumstances occur. In particular, the urgency of sustainability issues led to the introduction of a specific section about 'sustainability agreements' in the abovementioned Guidelines published in 2023. This gives guidance on the assessment of this kind of agreements under article 101, paragraph 1, TFEU.

The agreements at stake may lead to the adoption of sustainability standards, which can also concretise in specific sustainability labels.[38] According to the Commission, sustainability standardisation agreements may lead to the development of new products or markets, to an increase in quality of the concerned products,

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33 *Ibidem*, point 569.

34 *Ibidem*, point 583.

35 *Ibidem*, point 584.

36 Case T-86/95, *Compagnie Générale Maritime v. Commission*, ECLI:EU:T:2002:50, 28 February 2002, par. 343; Case C-382/12 P, *MasterCard Inc. et al. v. Commission*, cit., note 29, par. 242.

37 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, cit., note 27, point 591.

38 *Ibidem*, points 538, 541.

or improve the distribution of products. Moreover, sustainability standards can increase the awareness of consumers on the sustainability of the products they purchase.[39]

The Guidelines establishes what is defined as a 'soft safe harbour', based upon six conditions:

1. Transparency, which means that *all interested competitors must be able to participate in the process leading to the selection of the standard*;[40]
2. No obligation to comply with the standard on undertakings not that are not willing to participate in it;[41]
3. Freedom to apply higher sustainability standards for companies participating in the standard setting, although binding requirements can be imposed on them in order to ensure compliance with such a standard.[42]
4. No exchange among the undertakings participating to the standard setting of sensitive information which are not necessary or proportionate for the purpose of the standard.[43]
5. Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured.[44]
6. Firms must comply with at least one of the following two conditions: *The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned*; *The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard*.[45] This last point is of particular importance, since it allows also firms having a significant market share on the market to pursue sustainability goals, but without harming consumers.

The non-compliance with one of these conditions does not lead to a presumption of anti-competitiveness of the concerned agreements, which will be normally assessed along the lines of Article 101, paragraph 1, TFEU.[46]

After the publication of the mentioned Guidelines, these two approaches represent the main instruments to grant an exemption to a sustainability-enhancing

39 *Ibidem*, point 545.
40 *Ibidem*, point 549.
41 *Ibidem*.
42 *Ibidem*.
43 *Ibidem*.
44 *Ibidem*.
45 *Ibidem*.
46 *Ibidem*, point 522.

agreement among companies. However, it is worth mentioning that the scholar debate highlighted also alternative residual roads, such as ancillary agreements[47] or public policy considerations,[48] to achieve sustainability goals by means of competition law.

However, the picture portrayed above just shows competition law as a 'shield' protecting agreements allegedly sustainability oriented from the application of competition provisions. But the medal is twofold, and competition law, in this field, may also play its original and more usual role, as a 'sword' prohibiting collusive agreements. Here the risk is represented by the so-called 'green washing'. By means of these practices, companies sustain to have the need to cooperate for developing a more sustainable product or service, but, in the end, this need could reveal to be not justified or however not necessary at the extent to which the concerned companies described it. It is in this exact context that competition law must be flexible enough to strike the right balance between what can be allowed and what cannot. A good example is provided by the *Car Emissions* case,[49] where certain car producers agreed not only on crucial aspects related to the development of greener engines, but also about on ancillary details, such as the size of AdBlue storages, which is something that should left to competition.[50]

2.2. Article 102 TFEU

Having regard to Article 102 TFEU, although less debated, it has for sure a role to play in the sustainable transition of the economy.[51] Whilst Article 101 TFEU is concerned about the economic power abusively exercised by a group of companies, Article 102 TFEU focuses on monopolisation conducts put in practice by a single company which is dominant in the relevant market.

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47 Defined by the Commission as *restrictions […] which do not constitute the primary object of the agreement, but are directly related to and necessary for the proper functioning of the objectives envisaged by agreement*. See European Commission, *Glossary of terms used in EU competition policy*, 2002, [https://op.europa.eu/it/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6], Accessed 30 September 2024.

48 Along these lines, competition Authorities and Courts have the possibility of adopting – at a certain extent – a sort of 'multi-value' approach while interpreting competition provisions. See Piletta Massaro, A., *Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale*, La Cittadinanza Europea Online, 2021, 0, pp. 115-140.

49 European Commission, decision 8 July 2021, case AT.40178, *Car Emissions*.

50 Holmes, S., *Cartels harming sustainability (and those that don't) in Europe*, in Nowag, J. (Ed.), Research Handbook on Sustainability and Competition Law, Edward Elgar, Cheltenham, 2024, pp. 339-341.

51 See, *inter alia*, Iacovides, M. and Mauboussin, V., *Unilateral conduct and sustainability in EU competition law*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 352 ff.

It is well known that the abuse of a dominant position can lead to the exclusion from the market (or the acquisition by the incumbent) of small and innovative firms, but it can also slow down the innovation path by releasing innovative technologies in a longer time-lapse. In fact, when it does not reach an excess (therefore turning into toxic, bearing in mind the inverted U-shape advanced by Aghion, Bloom, Blundell, Griffith and Howell, according to whom an increase in the competitive level may deliver more innovation, but an excess of competition may provide the opposite effect[52]), fierce competition among companies should lead to a continuous technological progress aimed at improving the rivals' products, with all the positive consequences for the society as a whole. Contrariwise, when a company is not subject to competitive pressure, it will be encouraged to slow down investments in innovation and release just restyled or refined products instead of brand-new innovative ones. Therefore, a proper application of Article 102 TFEU might for sure lead – although more indirectly – to positive outcomes in terms of sustainability. A practical example is represented by the *Google/EnelX* case decided by the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, AGCM),[53] where the Italian watchdog sustained that the exclusionary conduct put in place by Google and leading to the exclusion of EnelX's JuicePass app (which enabled users to manage the recharging process of their electric vehicles) from Android Auto brought a *vulnus* to the development of the electric cars market, since it deprived users of a valuable tool to make the recharging process of their cars easier.[54]

Finally, another fundamental aspect regarding the role of competition in this field represents a linking point between environmental sustainability here discussed, and social and economic sustainability. Indeed, a transition (or maybe, since its magnitude, a 'revolution') such as the environmental one, cannot be pursued by itself. In other words, it cannot be a transition which is 'affordable' only for the few, and exactly this one is a point where Article 101 and 102 TFEU have to play a role. Indeed, as it is well-known, innovative products are generally more expensive, because they imply huge investments in research and development. In particular, these products might be even more expensive in case they are produced by a group of companies which joined their efforts or by a dominant company, which can set its conditions in the market. Competition (together with other tools, such as industrial policy) ought to intervene here in order to ensure fair conditions on

52 Aghion, P., Bloom, N., Blundell, R., Griffith, R., Howitt, P., *Competition and Innovation: An Inverted-U Relationship*, The Quarterly Journal of Economics, 2005, 120, 2, pp. 701-728.

53 Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, *Enel X – Android Auto*, available (in Italian only) at [https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf], Accessed 30 September 2024. The relevant press release is available at [https://en.agcm.it/en/media/press-releases/2021/5/A529], Accessed 30 September 2024.

54 *Ibidem*, point 387.

the market and prevent exploitative behaviours which can lead to slowing the pace of the transition. In practice, Article 101 TFEU has to endure (see the abovementioned *Car Emissions* case example) that the agreement among companies is related just to the parts which are essential to the better and proper development of the innovative product, but that competition in the other upstream and downstream parameters (such as, for the sake of exemplifying, distribution or supply) is not impaired. The principle, which is valid also with regard to Article 102 TFEU, is that companies must compete fairly and for sure get the incentive (in terms of profitability) stemming from innovation, but this profits cannot be without limits, since here something more important, that is the conservation of our planet and our society, is at stake and – remind Article 41 of the Italian Constitution – economic activities, although in a free market context, have to be directed towards a societal purpose. This means that the advantages generating from the development of these products must be 'fairly shared' among companies and consumers by means of fair prices, which will allow everyone to take part to the transition. Conversely, failure is the only possible result.

3. COMPETITION LAW AND SOCIO-ECONOMIC SUSTAINABILITY

The socio-economic sphere of sustainability with regard to competition law can include a plethora of concepts and issues.[55] Anyhow, it is worth focusing the attention on two profiles, which are reciprocally linked: Excessive market concentration and income inequalities. The former has regard to the very foundations of competition law, as a tool aimed at tackling excessive economic power in the market, to preserve a competitive structure of the same market so as to allow the entrance of newcomers (with all the innovative features they can introduce) and keeping fair trading conditions. Moreover, a dispersed power in the market is essential for a democratic society's life. This was clear since the enactment of the Sherman Act in the United States. A similar approach was present in the theoretical construction made by the Ordoliberal School in Europe.[56] Anyhow, not being this the venue for discussing the theoretical foundations of competition law, what matters is the role that this subject can play in the two issues identified at the beginning of the present paragraph.

For the sake of this analysis, we would like to define social sustainability as a way of running business *by identifying and managing business impacts, both positive and*

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55 See, *inter alia*, Krause, T., *Social sustainability*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 32 ff.

56 Osti, C., *Antitrust: a Heimlich manoeuvre*, in European Competition Journal, 2015, 11, 1, pp. 238-241; Gerber D.J., *Law and Competition in Twentieth Century Europe*, Oxford University Press, Oxford, 1998, pp. 232-265.

negative, on people.[57] Economic sustainability represents a sort of specification of this concept, and it can be defined as *economic development without any loss of ecological or social sustainability*.[58] Therefore, in the context related to competition law, these figures can be read as the maintenance of levels of market power which allow a *fair share* of the market outcomes to the society intended as a whole. In particular, this conception would aim at preventing exploitative business conducts based on the excessive market power held by one or more companies. Anyhow, it is worth specifying that, in our view, the concept of social sustainability goes beyond the mere economic discourse and takes into account also the effects of excessive market power on parameters such as freedom of expression, democracy, health, and, in general, by mentioning a concept proposed by Luigi Einaudi and which we deem should it be the cornerstone of a healthy market economy, the *equality of starting points* among people (which does not mean equality of outcomes, but it means the possibility, for every individual, to have the possibility to realise her/his own capabilities).[59]

At a first sight, competition law could not appear as the right instrument to deal with this kind of issues, whilst other policy tools, such as classic economic regulation, social protection or taxation might appear more suitable. However, this is for sure not the right approach, as it appears evident how an integrated or 'multi-tool' approach is needed in an always more complex societal and economic context.[60] This is exactly what Article 7 TFEU is about. In competition law the need for such an approach has become evident with the advent of digitalisation, and indeed the response has been – after a first phase of understanding of the phenomenon – shaped exactly along the lines of such an integrated policy approach. Good examples are the *Facebook* decision rendered by the German Bundeskartellamt[61] (and confirmed by the Court of Justice[62]) where data protection provisions – and the General Data Protection Regulation (GDPR)[63] – became a parameter for assessing the abuse of a dominant position.

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57 UN Global Compact, *Do business in ways that benefit society and protect people*, [https://unglobalcompact.org/what-is-gc/our-work/social], Accessed 30 September 2024.

58 Jeronen, E., *Economic Sustainability*, in Idowu, S.O., Schmidpeter, R., Capaldi, N., Zu, L., Del Baldo, M., Abreu, R. (Eds.), Encyclopedia of Sustainable Management, Springer, Cham, 2023, p. 1257.

59 Einaudi, L., *Lezioni di politica sociale*, Einaudi, Torino, 1949, pp. 169-246.

60 Piletta Massaro, A., *The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy*, Concorrenza e Mercato, 29, 2022, 2023, p. 42.

61 Bundeskartellamt, decision 6 February 2019, B6-22/16, *Facebook*.

62 Case C-252/21, *Facebook*, ECLI:EU:C:2023:537, 4 July 2023.

63 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 (General Data Protection Regulation, GDPR), [2016] OJ L119/1.

The Digital Markets Act (DMA)[64] and all the similar legislative solutions introduced in this field[65] are at the crossroad between proper competition law and regulation,[66] since *ex ante* obligations are imposed just to certain economic actors previously defined as gatekeepers or having paramount economic significant across markets. Moreover, tools like consumer law[67] on one side, but also industrial policy (think about the discourse related to the dispersion of economic power or the creation of 'European champions') on the other side are becoming more and more important in this process. Behind this lies just one aim: To provide the right boundaries to market power, to direct it towards ends which are not only the maximisation of profits, but, as anticipated, the delivery of a fair share of the wellness produced to society. In this context, competition law must play a role as far as it shapes the direction of market power *before* it produces its effects on the markets and society.[68] For the sake of exemplifying, a pluralistic and not concentrated social media market has positive impacts on the quality of news and therefore on the freedom of expression and, consequently, on the democratic process.[69] Along the same lines, a vibrant and not concentrated technological market will bring to consumers more innovative (also from an environmental point of view) products at an affordable price. In synthesis, the role of competition law in this context is not abstract nor far from its own objectives, but it is exactly its core scope (maybe in part forgotten after the advent of the so-called Chicago School): Keeping healthy levels of economic power in the market in order to allow an in-

64 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, [2022] OJ L265/1.

65 For instance, Section 19a of the German GWB.

66 Botta, M., *Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila*, Journal of European Competition Law & Practice, 2021, 12, 7, pp. 500-512; Piletta Massaro, A., *op. cit.*, note 50.

67 See, for instance, Autorità Garante della Concorrenza e del Mercato, proceeding PS11112, decision 29 November 2018, *Facebook*, available (in Italian only) at [https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf], Accessed 30 September 2024. The relevant press release is available at [https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes], Accessed 30 September 2024. See also Botta, M. and Wiedemann, K., *The Interaction of EU Competition, Consumer, and Data Protection Law in The Digital Economy: The Regulatory Dilemma in The Facebook Odissey*, The Antitrust Bulletin, 2019, 64(3), pp. 428-446.

68 Ezrachi, A., Zac, A., Decker, C., *The effects of competition law on inequality – an incidental by-product or a path for societal change?*, Journal of Antitrust Enforcement, 2023, 11, 1, pp. 51-73; A. Zac, *Pre-distribution versus re-distribution: why competition law is much more than a tool to alleviate poverty*, in Nowag, J. (Ed.), *op. cit.*, note 50, p. 121.

69 See, *inter alia*, Stoller, M., *Goliath: The 100-Year War Between Monopoly Power and Democracy*, Simon & Schuster, New York, 2019; Lianos, I., *Competition Law as a Form of Social Regulation*, The Antitrust Bulletin, 65, 2020, pp. 3-86; Deutscher, E., *Competition Law and Democracy*, Cambridge University Press, Cambridge, 2024.

novative development which provides a balanced economic growth benefitting all the actors involved, the society as a whole, and future generations.

At a first sight, this might appear to be a too theoretical or also utopistic discourse, not linked to the daily reality of the market, but it is not. All the abstract concepts expressed above should be transferred to reality through the evaluation of the quality of products.[70] The price, given its easily measurable nature, became too central in the analysis of competition cases, and only recently quality returned to be considered as a key element in the assessment of cases, not subordinated to price evaluations. The difficult issue is about how to measure quality and how to give to this measure what can be called a legal connotation?[71] Being not this the venue for exploring the mainly economic and econometric debate about the measurement of quality, what is important to be understood – after these measurements – is exactly how competition law has to evaluate the role of quality. On this, it appears that the approach based on various kinds of benefits not only to the consumers but also to society introduced by the abovementioned 2023 Guidelines is on the right path in order to take sustainability issues into account, without undermining legal certainty in the assessment of cases. This can be for sure replicated also outside the realm of the mentioned Guidelines, thus becoming a general approach towards sustainability issues in competition law. Last but not least, central in this parcourse (also regarding environmental sustainability) will also be the advocacy role of competition Authorities, so as to raise awareness and compliance with these issues by means of a constructive approach with companies.[72]

4. THE ENFORCEMENT FRAMEWORK: COMPETITION LAW AND INSTITUTIONAL SUSTAINABILITY

The final consideration expressed in the previous paragraph leads to what can be viewed as the last prong of sustainability for the sake of the present analysis. This has regard to the institutional level,[73] which can be summarised and simplified as the way in which competition provisions are applied. In this sense, two aspects can

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70 OECD, *The Role and Measurement of Quality in Competition Analysis*, 28 October 2013, [https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf], Accessed 30 September 2024; OECD, *Quality considerations in digital zero-price markets*, 28 November 2018, [https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf], Accessed 30 September 2024.

71 Some suggestions are proposed by van der Zee, E., *European competition law: measuring sustainability benefits under Article 101(3) TFEU*, in Nowag, J. (Ed.), *op. cit.*, note 50, pp. 412 ff.

72 Monti, G., *Implementing a sustainability agenda in competition law and policy*, in Nowag, J. (Ed.), *op cit.*, note 50, pp. 254-263.

73 The concept of institutional sustainability, in general, is proposed by Giavannini, E., *L'utopia sostenibile*, *op. cit.*, note 20, p. 86.

be considered: One has regard to institutional sustainability as such, that means, by using a *jeu de mots*, how the regulators are regulated. The second relates to the applicability/capability level. Having regard to the former, this can be summarised through the Latin expression *quis custodiet ipsos custodes?*,[74] which can be paraphrased as which rules apply to those who rule. Out of metaphor, this relates to the institutional safeguards and organizational processes which should regulate the operations of competition Authorities. In particular, what is necessary is the respect of a precise procedural framework in all the Member States, exactly in order to maintain the needed level of conformity across the Internal Market. This objective, at least from a formal viewpoint, can be considered achieved by means of the adoption, back in 2019, of the so-called ECN+ Directive.[75] Not being this venue the one for a detailed analysis of the mentioned Directive, it suffices to say that it aimed at 'harmonising' the institutional and organisational structure and duties of the various competition Authorities, and providing for the necessary safeguards to render the enforcement of competition law more effective.

Having regard to the applicability side, this encompasses the formal requirements just outlined (which can be seen as prerequisites) and involves the necessity of reaching a level of enforcement which is effective from a sustainability standpoint. This means the possibility – through adequate structures, *i.e.*, staff and resources – of effectively applying competition rules in an innovative and sustainable way (e.g., by giving much more importance to quality parameters, although this implies costly and lengthy evaluations). This aspect results central also in the discourse related to digital markets and the enforcement of the DMA, since the continuous monitoring over the gatekeepers' compliance with the new provisions requires huge efforts.[76]

Moreover, a key institutional aspect is what we can define as the 'entitlement' of competition Authorities' action, which means the prioritisation of cases which have a clear impact on sustainability. For instance, it could be commendable to prioritise cases related to the development of more sustainable technologies, as already done in the mentioned *EnelX* case from the Italian AGCM and the Commission's *Car Emissions* case. Having regard to social sustainability, a good example of prioritisation is, for instance, a focus on cases regarding goods which are essential for the protection of fundamental rights, such as the right to health. In this case, a commendable example is constituted by the AGCM's decision in

74 Giovenale, *Satire* (VI, 48-49).

75 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, [2019] OJ L11/3.

76 Piletta Massaro, A., *op. cit.*, note 60, pp. 40-42.

the *Aspen* case,[77] regarding price increases involving pharmaceutical products for cancer treatment. Anyhow, in general, the preservation of a competitive and non-concentrated structure of the market could constitute a safeguard for social rights, such as for the maintenance of employments level by avoiding monopsony power by companies.[78]

Finally, with an effort appears needed to better explain among businesses and citizens the societal benefits of competition. In fact, competition – probably because of the fact that it intrinsically implies the concept of rivalry – is often feared by the general public, because it can be associated with exit from the market of firms, loss of jobs, etc.[79] But this is the non-sustainable conception of competition promoted along the lines of economic efficiency. Therefore, what needs to be promoted is a sustainable approach to competition, where the competitive process represents the instrument through which the whole society can grow through a healthy and sustainable (social) market economy.

5. CONCLUSION

The considerations expressed in this paper aim at providing a sort of theoretical guide to include sustainability considerations in competition law. In particular, sustainability has been analysed under the environmental, socio-economic, and institutional perspectives. What is worth underlining is also how the inclusion of the sustainability dimension in every policy – therefore also competition law – has to be considered an urgency, because of the already mentioned issues which are heavily affecting our society both from an environmental and social standpoint. This is a sort of 'final call' for the society as we know it, and, although not pleasant, we cannot hide it. At this purpose is telling the image proposed by Professor

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77 Autorità Garante della Concorrenza e del Mercato, decision 29 September 2016, case A480, *Aspen*, available (in Italian only) at [https://www.agcm.it/dotcmsDOC/allegati-news/A480_chiusura.pdf], Accessed 12 November 2024. The relevant press release is available at [https://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03&parent=Press%20releases&parentUrl=/en/media/press-releases], Accessed 12 November 2024.

78 OECD Employment Outlook 2022, *Monopsony and Concentration in the Labour Market*, 2022, pp. 132-199, [https://www.oecd-ilibrary.org/docserver/0ecab874-en.pdf?expires=1731417769&id=id&accname=guest&checksum=D40FBF12EBBCAAA9EFDB9F28B37483C8#:~:text=Monopsony%20is%20the%20situation%20that%20arises%20when%20competitive%20markets%20break,employers%20exist%20%E2%80%93%20labour%20market%20concentration.], Accessed 12 November 2024.

79 Piletta Massaro, A., *Market Integration and Competition as a Way to Strengthen the Rule of Law and Democracy in the Enlarged European Union*, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 8: EU at the Crossroads – Ways to Preserve Democracy and Rule of Law, 2024, p. 336, [https://hrcak.srce.hr/ojs/index.php/eclic/article/view/32282/16412], Accessed 30 September 2024.

Holmes in the end of a paper, where a group of competition scholars are grouped in a room, discussing about abstract concepts, whilst the room starts being flooded by water.[80]

What emerges as gist of the discourse conducted in the present work has regard to the concept of thresholds. In order to better understand it: We need sustainability to be urgently implemented as every policy's lodestar because we almost reached the capability threshold of our planet in terms of resources and of our societies with regard to other issues, such as, for instance, the share of net personal wealth held worldwide, since in 2022 the richest 10 percent of the population was counting for the 75.85%, whilst the bottom 50% registered just the 1.89%.[81] Analogue is the discourse we have to make about competition and, consequently, competition law: What is the right, healthy, threshold? What is the threshold that makes competition good for society and the planet? This paper aims at providing some suggestion is this sense, along the three sustainability lines above illustrated. Moreover, the achievement of these objective at the EU level can be of particular importance for Countries characterised by less developed environmental or social sustainability standards[82] in order to have a model of reference for the implementation of policies directed at improving their societies. This can be the case of the Western Balkans Countries willing to join the EU and called to align their legislations with the *Acquis Communautaire*, which for sure includes the rules and interpretations directed at the improvement of sustainability levels.

Finally, it is worth bearing in mind that every policy – and therefore competition law, as well – shall respect the Aristotelian concept *in medio stat virtus*. Probably this is the right definition of both sustainability and the guiding principle in its achievement, also regarding competition law.

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[80] Holmes, S., *Climate change, sustainability and competition law*, cit., p. 365.

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[82] Holmes, S., *Climate change, sustainability and competition law*, cit., pp. 341-349.

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Review article

CRITERIA FOR SETTING TARIFFS IN COLLECTIVE MANAGEMENT OF COPYRIGHT - COMPETITION LAW PERSPECTIVE

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Abstract

The purpose of this research is to explore the criteria for setting tariffs in the collective management of copyright from a competition law perspective. The study aims to identify how competition law interacts with copyright-specific characteristics, including protecting authors' rights and the operational particularities of collective management organisations (CMOs). By analysing European Union directives and case law from the Court of Justice of the European Union (CJEU), this paper investigates whether the tariffs imposed by CMOs, particularly those in dominant market positions, comply with competition rules.

The research employs a legal analytical approach, reviewing key legal texts and case law to provide a comprehensive understanding of criteria used in tariff-setting and their regulation under both copyright and competition law. It evaluates whether tariffs reflect the economic value of the rights used, considering the nature and scope of use and the economic value of the services provided by CMOs.

The major findings of this research highlight that CMOs, as de facto or de jure monopolies, must set tariffs based on fair and objective criteria to avoid abuses of dominant positions. The implications of these findings suggest that appropriate regulation of tariffs, aligned with competition law, ensures a balanced relationship between protecting authors' rights and promoting fair competition in the marketplace. The discussion here contributes to the ongoing debate on the regulation of collective management and the role of competition law in safeguarding both authors' interests and market fairness.

Key words: *copyright, collective management organisations, criteria for tariffs in collective management of copyright, abuse of dominant position of collective management organisations*

1. INTRODUCTION

Setting tariffs in the collective management of copyright and related rights[1] is a challenging and complex issue. Many principles and rules that have been developed in practice, in jurisprudence, but also in the European Union and national copyright laws need to be followed to establish comprehensive, justified, and fair tariffs. These fees need to reflect fairness, not only towards the authors and other right holders (authors' publishers, employers, heirs, and others who acquired copyright by contractual arrangements or by law),[2] who are entitled to receive remunerations for the use of their works through collective management organisations but also in relation to the users of copyright works.

Copyright is an exclusive and monopoly right. Authors may decide whether they will give a licence or authorisation for the use of their copyrighted work[3] and under which conditions. In principle, they may act as they wish: prohibit the use of their work, offer it for free, or demand a fee that potential users are unwilling to pay, resulting in the work remaining unused. No national laws on copyright or any other laws may generally impose to an author the obligation to grant a licence or authorisation for use, to charge a particular price, or to grant the licence or authorisation for use under uniform terms to all users or for similar types of uses. Although being an exclusive and monopoly right, individual copyright shall, in principle, not fall under the scrutiny of competition rules. Like other property rights, the exclusive nature of copyright shall not, in principle, raise the question of abuse of monopoly. Nevertheless, there are circumstances where the situation changes, in exceptional cases that lead to the need to apply competition rules for copyright matters. One of those cases is where copyright is exercised (or administered) through collective management systems by collective management organisations.[4] Those situations shall be examined here from a competition law perspective concerning criteria for setting the tariffs.

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1 Hereinafter, when said „copyright", this embraces copyright and related rights, such as performers' rights, phonogram producers' rights and all other related (neighbouring) rights that could be exercised collectively through collective management organisations.

2 Hereinafter, when said „authors", this embraces authors and all other owners of copyright, whether acquired whole copyright, such in the case is with heirs, or acquired parts of it referred to as „rights or use" or economic rights, such in the case of employers, publishers and others who may acquire copyright by virtue of a legal transaction, such as contract, or by law, such as employers in cases where it is regulated in the relevant copyright laws or film producers in the same position. This also embraces the owners of related rights, either acquired under law or by a legal transaction.

3 Hereinafter, when said "copyrighted work", this embraces all types of copyrighted works but also all types of objects of related rights in relation to which related rights may be exercised collectively through collective management organisations, such as performances of phonograms.

4 Hereinafter, a collective management organisation shall be referred to as CMO.

When a CMO tariff sets remuneration for the use of work, the dynamic changes due to their *de facto* or *de jure* monopoly. Some principles must be followed to avoid infringing competition rules when setting tariffs by CMOs. Several European Union directives, national laws, European and national case law, and jurisprudence regulate criteria for setting tariffs that align with the competition rules. Nevertheless, we remain far from having a complete and comprehensive legal framework that addresses all questions regarding the criteria for setting tariffs. New questions continue to arise in this evolving field due to financial interests that lay in the background. The relationship of tensions between authors represented by CMOs, who are striving for higher remunerations, on the one side, and users whose intentions are basically to avoid payments, if possible, or to lesser them to the lowest possible amount, on the other, are cause for action on both sides. This inevitably leads to the activities of legislators, competition authorities, and the courts, which try to assess different situations objectively. Sometimes, they succeed, but sometimes, the challenges remain and lead to new disputes.[5] This text will concentrate on competition issues related to traditional circumstances, such as general public performance rights, broadcasting rights, or cable and other retransmission rights. We shall focus on EU perspective. Online collective management of copyright remains for some other occasion because, with this respect, many aspects of collective management change, particularly from the competition law perspective.[6]

2. COLLECTIVE MANAGEMENT ORGANISATIONS AS MONOPOLY UNDERTAKINGS

Collective management is a speciality of copyright, mainly developed during the 20th century.[7] It consists of a series of activities directed towards exercising copy-

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5 For example, a new case is pending in the CJEU: Request for a preliminary ruling from the Krajský soud v Brně (Czech Republic) lodged on 29 February 2024 – OSA - Ochranný svaz autorský pro práva k dílům hudebním, z.s. v Úřad pro ochranu hospodářské soutěže (Case C-161/24, OSA). *Krajský soud v Brně* refers to the Court the question whether the allegedly excessive prices charged by a collective management organisation OSA to accommodation facility operators for the provision of a licence to make copyrighted works available by means of television and radio receivers located in rooms intended for the accommodation of private guests, which do not take into account the actual occupancy of the individual rooms of the accommodation facilities concerned, amount to an abuse of a dominant position.

6 For more about tariffs in online collective management of copyright see, for example, Matanovac Vučković, Romana, Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe, IIC (2016) 47:28-59, DOI 10.1007/s40319-015-0438-5. For the critical approach see also Hviid M., Schroff S., Street J., Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?, 7 (2016) JIPITEC 256 para 1.

7 See for example History of Collective Management, CISAC, https://www.cisac.org/Newsroom/expert-articles/history-collective-management (last visit 9.1.2025.)

right by collective management organisations, most often (but not always) established as non-for-profit organisations, which bring together authors as their members, *i.e.* individuals who control them.[8] Despite their non-commercial business, CMOs are considered undertakings and fall within the competition rules. A layer contributing to this status is that CMOs are usually *de facto* and sometimes even *de jure* monopolies.[9] The activities of collective management are, in brief, collecting the remunerations from users due to authors for the use of their copyrighted works and distributing them to individual authors, either directly or through other collecting management organisations established in other territories. The network of CMOs worldwide is organised under the umbrella of their international association, CISAC.[10] This network is based on reciprocal representation agreements, whereby CMOs mutually mandate each other to exercise rights on behalf of the authors who are their members, within the territory of their establishment. So, collective management, in principle, shall apply in copyright where authors are not in a position to exercise their rights individually through individual negotiations and contracts with users because this way of exercising their rights would be technically impossible or economically unfeasible. Therefore, they merge their rights in a bundle and negotiate the prices for the whole repertoire.[11] As a result of the network created by all the reciprocal representation agreements, each CMO can offer a global portfolio of musical works to commercial users,[12] but only for use in its national territory.

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8 Precise definition see in Art. 2 a) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market *[2014] OJ L 84/14 Hereinafter, Directive on collective management of copyright.*

9 An informative overview of countries that have a *de jure* or *de facto* monopoly of collective management organizations, as of September 2019, can be found at Matanovac Vučković, R. General Report: Collective Management of Rights, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 226.

10 CISAC – the International Confederation of Societies of Authors and Composers – is the world's leading network of authors' societies. With 227 member societies in 116 countries, CISAC represents more than 5 million creators from all geographic areas and all artistic repertoires; music, audiovisual, drama, literature and visual arts. CISAC protects the rights and promotes the interests of creators, worldwide. Founded in 1926, CISAC is a non-governmental, not-for-profit organisation with headquarters in France and regional offices in Africa, South America (Chile), Asia-Pacific (China) and Europe (Hungary). cisac.org (last visit 30.9.2024)

11 The functioning of CMOs, including the explanations on the repertories see for example in Ficsor, M., Collective Management of Copyright and related Rights, 3rd edition, WIPO, 2022

12 For voluntary, mandatory and extended collective management see also Matanovac Vučković, *op. cit.* in ft. 8.

The principle of territoriality is inherent to intellectual property;[13] therefore, from the inception of their activities, CMOs have been established on a territorial basis. This idea of territorial organisation of CMOs was under severe scrutiny by the European Commission.[14] It identified specific clauses in the reciprocal representation agreements related to membership and exclusivity and the concerted practice that CMOs apply, leading to a strict domestic territorial segmentation of licensing areas. All mentioned clauses were declared anti-competitive by a Commission. A couple of years later, the CJEU annulled Art. 3[15] of the Commission's Decision, by explaining that "it must be found that the Commission has not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations, since it has neither demonstrated that the collecting societies acted in concert in that respect nor provided evidence rendering implausible one of the applicant's explanations for the collecting societies' parallel conduct."[16] This was an excellent "victory" for the system of collective management because reciprocal representation agreements are at its core, making the system stable and reliable. The Court's judgement confirmed that there are reasonable grounds for specific exclusivity of mandate and strict domestic territorial segmentation of licensing areas, which should not be regarded as a concerted practice related to the national territorial limitations.

However, the die was cast, and collective management took a different direction in the following years. The Directive on collective management of copyright in 2014 introduced a dramatically new view of CMOs acting on the online market. Since territorial delineation is not applicable online, the new rules for online cross-border licensing introduced non-exclusivity in mutual representation among CMOs as the binding principle.[17] This, supported by new membership

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13 The principle of teritoriality may impose competition issues if authors prition the internal market of the European Union. For examples see Hugenholtz, P.B., Dealing with Territoriality in EU Copyright, in Leška, R. (ed) Managing Copyright – Emerging Business Models in the Individual and Collective Management of Copyright, 2021, p. 192.

14 Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC) (notified under document number C(2008) 3435 final), 2008/C 323/08.

15 Article 3. of the Commission Decision of 16 July 2008 regulates that CMOs have infringed Article 81 [EC] and Article 53 of the EEA Agreement by coordinating the territorial delineations in a way which limits a licence to the domestic territory of each collecting society.

16 Judgment of the General Court (Sixth Chamber) of 12 April 2013, CISAC v European Commission, T442/08, EU:T:2013:188, at 182.

17 Art. 29 para 1 and rec. 44 of the Directive on collective management of copyright, which regulates that any representation agreement between CMOs whereby a CMO mandates another CMO to grant multi-territorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature.

rules,[18] created an environment for full competition among CMOs online. The efficiency of this approach still remains under review.[19] Nevertheless, the traditional relations among CMOs based on the reciprocal representation agreements were also affected by this change. Therefore, today, the monopoly position of CMOs and strict territorial delineation cannot be seen as an untouchable fundament of collective management.

The explained situation falls within Art. 101 of TFEU and refers to agreements between undertakings, decisions by 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.

In addition, many disputes against CMOs in the CJEU were based on Art. 102 of TFEU, examining whether a CMO of a dominant position within the internal market or a Member State abuses this position by imposing unfair prices or other unfair trading conditions or applying dissimilar conditions to equivalent transactions with different trading parties, thereby placing them at a competitive disadvantage. The question may arise why would CJEU be competent for assessing the abuse of a dominant position if the CMO is setting tariffs only for the country with its principal establishment concerning undertakings, *i.e.* users, who are also established in the relevant country? Where would a cross-border element here entitle CJEU to act within the competencies given to it within the European Union? CJEU gave several explanations for those questions. The rates charged by a CMO which holds a monopoly are capable of affecting cross-border trade among Member States because the CMO in every Member State, in addition to the representation of domestic authors, also manages the rights of foreign authors based on the network of reciprocal representation agreements with CMOs in other countries.[20]

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market. As a result of the very presence of the undertaking in question, the degree of competition is weakened. Through recourse to methods different from those

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18 See in particular Arts. 4 to 10 of the Directive of collective management of copyright.

19 For the critical view see Matanovac, *op. cit.* in ft 6, p. 47 to 56.

20 CJEU explained this in C177/16, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome, EU:C:2017:689 (Hereinafter *AKKA/LAA*) at 28, 29, and 30, referring to C-395/87, Ministère public v Jean-Louis Tournier, EU:C:1989:319 (hereinafter referred to as *Tournier*), C-110/88, François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others (hereinafter referred to as *Lucazeau)* and C351/12, OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.,– *OSA*, EU:C:2014:110. (hereinafter referred to as *OSA)*.

which condition normal competition in products or services on the basis of the transactions of commercial operators, dominant position has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[21] So, one CMO with a *de jure* or *de facto* monopoly on the market is abusing its dominant position mainly by imposing excessive prices due to unfair criteria or methodology for calculating remuneration when setting tariffs.[22] Excessive prices are those which do not correspond to the economic value of the service provided.[23] Therefore, in examining whether the CMO is abusing its dominant position, the tariff should be examined in relation to the economic value of the service provided by the respective CMO.[24]

Abuse of a dominant position may also occur in the situation when the dominant undertaking applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, which may happen when the CMO applies different criteria and methodology for the calculation of tariff towards different users for the same type of right.

3. CRITERIA FOR SETTING THE TARIFFS IN LIGHT OF COMPETITION RULES

The Directive on collective management of copyright is a milestone in regulating collective management across the European Union. This piece of legislation also systematically approaches the criteria for setting tariffs by CMOs to give direction and simultaneously allow the Member State to introduce additional criteria into their legislation, if appropriate. This is a so-called minimum harmonisation rule, which, in terms of regulatory discretion that member states retain when implementing EU directives, means that national legislation may impose additional criteria for setting the tariffs by CMOs. The provisions of the Directive that regulate criteria for setting tariffs are based on the previous case law of the CJEU and other European Union directives, which shall be analysed here.

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21 CJEU gave this explanation in the case C-52/07 Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa., EU:C:2008:703 (hereinafter referred to as *Kanal 5*), at 25. CJEU referred to the previous cases 85/76 HoffmanLa Roche v Commission EU:C:1979:36, at 91, and C62/86 AKZO v Commission, EU:C:1991:286, at 69.

22 See *Kanal 5*, at 28.

23 This idea is based on several cases: C-26/75 *General Motors Continental* v *Commission*, EU:C:1975:150, at 12, and C-27/76, *United Brands and United Brands Continentaal* v *Commission,* EU:C:1978:22 , at 250.

24 *Kanal 5*, at 28 and 37.

3.1. Tariffs for discotheques

In the European union, among the first are the cases *Tournier*[25] and *Lucazeau*,[26] where the CJEU examined the criteria for setting tariffs. The tariffs considered remunerations for using music in discotheques.

3.1.1. *Tournier*

In *Tournier,* the Court examined whether the rate of royalties applied to discotheques demanded by SACEM[27] was arbitrary and unfair and, therefore, constituted an abuse of the dominant position. The level of royalties was appreciably higher than that applied in the other Member States. It was based on a fixed rate of 8.25% to the turnover, including value-added tax. Although the discotheques claimed to use music of Anglo-American origin considerably, SACEM refused to grant access to just part of its repertoire. At the same time, due to reciprocal representation agreements between CMOs, discotheques could not deal directly with the CMOs in other countries since they refused to grant direct access to their repertoires. So, although they no longer had exclusivity clauses in their reciprocal representation agreements, the question was raised whether they were engaged in concerted practices because of such a refusal. However, the source of the dispute was the methodology used to set the tariff for discotheques. The users claimed that the methodology is incorrect and that a comparison with other Member States dismantles the unjustified percentage. The Court answered the questions (in brief): In general, when CMOs refuse to grant a direct licence for their repertoire on a cross-border basis, it may be understood as a concerted practice, but the circumstances of every case must be assessed. On the other hand, when the CMO refuses to grant a licence only for the foreign repertoire it represents, this shall not be considered as restricting competition unless access to a part of the protected repertoire could entirely safeguard the authors' interests without increasing the management costs because the CMO shall, in this case, be obliged to organise its own management and monitoring system in another country. A CMO imposes unfair trading conditions by charging appreciably higher remunerations than the ones charged in other Member States, the rates being compared on a consistent basis. If the CMO can justify such a difference by reference to objective and relevant dissimilarities between Member States, this will not be considered as imposing unfair trading conditions.[28] This case shows that methodology based on the percentage

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25 Judgement of the Court of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319.

26 Judgement of the Court of 13 July 1989, *Lucazeau*, C-110/88, EU:C:1989:326.

27 SACEM is French CMO for music authors.

28 Detailed findings see in *Tournier.*

of the gross income is a relevant criterion for discotheques. It also revealed that other criteria may influence tariffs in this case but comparing them across Member States should be done on consistent criteria, considering their relativity.

3.1.2. *Lucazeau*

In essence, in *Lucazeu*, the Court repeated the same conclusions, namely that the reciprocal representation agreements are not in themselves restrictive of competition.[29] On the other hand, exclusivity clauses in those contracts may restrict competition. Also, refusal to grant direct licences in other territories is a concerted practice unless there are grounds to justify such behaviour. For example, justification may be found where, in the case of direct licensing, CMOs would bear excessive costs because of the obligation to organise their own management and monitoring systems in another country. The Court also repeated that abuse of a dominant position should be where the royalties charged are appreciably higher than in other Member States, the rates being compared consistently.[30]

So, in *Tournier* and *Lucazeau*, SACEM proved that there are objective and relevant dissimilarities in copyright management in different Member States. The remuneration charged to discotheques in France was appreciably higher than in other countries because of particular circumstances which justify this. The parties in both cases presented many arguments. The Court didn't take any particular argument as decisive. Still, it concluded there was no proof that music licensing fees for discotheques in France were unjustifiably higher than in other Member States. The higher fees were based on various arguments that were neither specifically analysed nor explained by the Court. Interestingly, the *Cour d'appel* (Court of Appeal) in Aix-en-Provence raised the criterion in its third question: "Royalty is disproportionate to the economic value of the service provided."[31] It corresponds with the general criteria for assessing whether the price is excessive.

3.2. Tariffs for broadcasting and retransmission

Particularly interesting, both in legislation on the European Union's level and in the case law of CJEU, were tariffs related to broadcasting. This is because this type

[29] CJEU in *Lucazeau* acknowledged that those agreements have a dual purpose: to make the global repertoire subject to the same conditions (because of the principle of assimilation provided for in the Berne Convention) and to enable CMOs to rely on the organisational and administrative capacities of the sisters CMOs in other Member States without being obliged to organise own local management system which would significantly increase costs of operation.

[30] Detailed findings see in *Lucazeau.*

[31] *Tournier*, at 7.

of business reflects intensive commercial interests, and the users who engage in uses covered by broadcasting and retransmission rights are usually powerful and skilled in performing their legal interests. In this chapter criteria for broadcasting and retransmission shall be presented from the perspective of competition law.

3.2.1. *SatCab* 1 Directive

The criteria for setting tariffs were rarely touched upon in copyright directives because the collective management was not regulated before 2014 except in several cases. One of those cases is the *SatCab*1 Directive.[32] According to this Directive, cable retransmission rights must be exercised collectively, *i.e.* compulsory collective management applies.[33] This hinders the authors' ability to exercise their rights in individual contracts. However, according to the *acquis*, broadcasting rights are not mandatorily collective but only optional. Music rights are usually exercised collectively, while audiovisual rights are managed through individual contractual arrangements. The *SatCab*1 Directive gives directions towards criteria for tariffs for broadcasting. According to them, all aspects of the broadcast should be taken care of when setting the tariff. This mainly includes the actual audience, the potential audience and the language version.[34]

Regarding cable retransmission, *SatCab* 1 Directive did not indicate any criteria for setting the tariffs, although this right must be exercised collectively. Therefore, Member States are free to determine the methodology and criteria for tariffs for cable retransmission. In national copyright laws, there are two different approaches to criteria for tariffs for cable retransmission rights. The first is based on the percentage of gross income (VAT tax is usually excluded), and the second is based on the lump sum calculated per subscriber and number of channels included in the package.

Nevertheless, the explained provision regulated in the preamble of the Directive shall apply only to situations where broadcasting rights are exercised collectively. In individual arrangements, the prices for the content are subject to individual negotiations, and laws regularly only prescribe general directions toward criteria that may be considered in those cases. Those criteria shall usually be taken into account only when the price was not set by an individual copyright agreement

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[32] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, p. 15–21 [1993], as amended. Consolidated version available at http://data.europa.eu/eli/dir/1993/83/2019-06-06. (Hereinafter referred to as SatCab1 Directive).

[33] Art 9 para 1 of SatCab 1 Directive.

[34] Rec. 17 of the preamble of SatCab 1 Directive.

or when calculating damages or other compensations for unauthorised uses. So, when competition rules apply to CMOs with a dominant position in the market, those criteria shall be taken into account to assess whether the remuneration from the tariff is excessive. On the other hand, even though every individual copyright is a small monopoly of its author, no rule may force any author to give authorisation for broadcasting of their work at any price in individual arrangements or to set a price or other conditions for use in a way which does not correspond with their economic or personal interests.

3.2.2. *SENA*

SENA[35] is an example of how CJEU analysed the criteria for tariff-setting for broadcasting. It concluded that the concept of equitable remuneration appearing in Article 8(2) of the Rental and Lending Directive[36] must be regarded as an autonomous provision of EU law[37] and be interpreted uniformly throughout the EU.[38] CJEU stated that it is for the Member States alone to determine, in their territory, what the most relevant criteria are for ensuring, within the limits imposed by EU law and particularly Directive 92/100, adherence to that EU concept.[39] In defining the criteria for determining equitable remuneration, in particular the value of the right's use in trade should be considered.[40] CJEU further stated that EU law does not preclude the national model for calculating equitable remuneration by taking into account the following criteria: number of hours of broadcast, the viewing and listening densities achieved by the radio and TV broadcasters represented by broadcasting organisations, tariffs for musical works, tariffs set in the Member States bordering with the one in question, tariffs paid by the commercial stations, the balance of interests of the parties in question and principles of EU law.[41] *SENA* did not question any aspects of competition law. Still, it is worth saying that this landmark case introduces the value of the right in use as a criterion, which is particularly relevant for competition issues. It is also important

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35 Judgement of 6 February 2003, Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS). – *SENA*, C-245/00, EU:C:2003:68.

36 CJEU referred to the Art. 8(2) of the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 346 of 27 November 1992. (Hereinafter referred to as Rental and lending directive).

37 In the time of the deliverance of SENA case, it was Community law and European Communities as predecessors to the EU law and EU.

38 *SENA*, at 22 and 24.

39 *SENA*, at 34 and 38.

40 *SENA*, at 37.

41 *SENA*, at 46, 47.

to sum up all criteria that CJEU evaluated in examining equitable remuneration for broadcasting.

3.2.3. *Lagardère*

In the specific circumstances of *Lagardère,*[42] where transmission was not considered a satellite transmission, CJEU concluded that the remuneration for the use may be governed by the law of the Member State on which territory the broadcast company is established and in addition also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the former is located.[43] It further established that the actual and potential audience was not entirely absent in the latter. Therefore, it was assessed that a certain economic value is attached to the use in this Member State, even though it was low. Namely, in this specific situation, actual commercial exploitation occurred only in France since the advertising slots were marketed only to French undertakings, the broadcast at issue could only be received by the public in a small area of Germany, and the broadcast itself was in French.[44] The Court repeated that when determining the remuneration for broadcasting, it is necessary to consider all the parameters of the broadcast, such as the actual audience, the potential audience, and the language version of the broadcast.[45] *Lagardère* is also not about the competition, but the findings of CJEU on the criteria for setting the tariffs in broadcasting and confirmation of the principle of territoriality shaped the understanding of the specialities of copyright and criteria for setting tariffs in collective management of broadcasting rights, which may affect the assessment whether the tariff is excessive. Namely, if the Court said that the principle of territoriality is out of the question[46] and that the CMO is entitled to determine and ask for the payment of the remuneration for broadcasting in a situation where the actual and potential audience is relatively low but not entirely absent, and the broadcasted program is

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42 Judgement of 14 July 2005, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) Lagardère, C-192/04, EU:C:2005:475. (hereinafter referred to as *Lagardère)*.

43 *Lagardère*, at 44.

44 *Lagardère*, at 53 and 54.

45 *Lagardère*, at 51. It repeats what is determined by the rec. 17 of *SatCab* 1 Directive.

46 The consequence of the strict application of the principle of territoriality was that Member States of the European Union are free to determine the criteria for tariff-setting as well as to decide on the methodology by which the remuneration amounts are calculated. In case of the French law which was applied in *Lagardère*, Article L. 214-1 of the French *Code de la propriété intellectuelle* (Intellectual Property Code) regulated that remuneration shall be based on the income from exploitation, failing which it shall be assessed on a flat-rate basis …See *Lagardère*, at 11 and 54.

mainly in a language not spoken in the actual territory, this shall affect the understanding of the economic value of the right in question.

3.2.4. *Kanal 5*

In *Kanal 5,*[47] CJEU examined the tariff for broadcasting in relation to the abuse of a monopoly position and found that the abuse may lie in the imposition of a price which is excessive in relation to the economic value of the service provided.[48] As commercial broadcasting companies, Kanal 5 and TV 4 asked for a broadcasting licence for musical works from STIM.[49] STIM asked for remuneration based on a percentage of gross income (derived from television broadcasts to the general public and subscription sales), the percentage of which varies based on the amount of music involved in the broadcast.[50] At the same time, a public broadcaster SVT[51] pays STIM a lump sum, the amount of which is agreed in advance. Because of different methodologies applied in setting the remuneration for similar services, *i.e.* broadcasting services, the Kanal 5 and TV 4 initiated the action before the competition authority, claiming that STIM is engaged in abusing its dominant position as a monopoly CMO in Sweden. CJEU concluded that applying the tariff based on a percentage of the broadcaster's income while taking as another criterium quantity of musical works included in the broadcast shall not amount to abuse of a dominant position unless another method enables the CMO to identify more precisely the works and the audience without resulting in a disproportionate increase in the management costs.[52]

CJEU considered that different methodologies and criteria in determining remuneration, applied to commercial versus public broadcasters, could potentially constitute an abuse of the dominant position of the CMO. To constitute an abuse, dissimilar conditions to equivalent services, *i.e.* different criteria in setting the tariff for commercial versus public broadcasters, should lead to placing them at a competitive disadvantage. In principle, the CMO needs to impose the same method of calculation (lump sum or percentage) of royalties for equivalent services, both for commercial companies and public service undertakings. But, it simultaneously emphasised that the practice of STIM may be objectively justi-

47 Judgement of 11 December 2008, Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa.,, C-52/07, EU:C:2008:703 (hereinafter referred to as *Kanal 5*).

48 *Kanal 5*, at 28 and 37.

49 STIM is Swedish CMO for music copyrights.

50 *Kanal 5*, at 39

51 SVT is a public service channel Sveriges Television.

52 *Kanal 5*, at 41.

fied.[53] The justification grounds could potentially arise from the task and method of financing public service undertakings,[54] from the fact that public broadcasters have no advertising or subscription income, and the revenue charged to it takes no account of the number of protected works actually broadcasted.[55]

CJEU found that the abuse of a monopoly position may lie in the imposition of a price that is excessive in relation to the economic value of the service provided.[56] Also, the nature of the right needs to be taken into consideration, as well as the interests of the authors and those of the broadcasting companies, the values of the use of music in trade, and the number of musical works used.[57] Finally, the CJEU concluded that the model according to which the amount of royalties corresponds partly to the revenue of the broadcasting company is justified, provided also that this amount corresponds to the number of musical works broadcasted,[58] unless another method would be more precise without incurring additional costs.[59]

3.2.5. *SatCab 2*

SatCab 2 Directive shows that not much has changed since *SatCab* 1 in the approach to criteria applied to broadcasting. It extends the scope of the principles from cable retransmission to all other forms of retransmission and thereby ensures that the rights of content owners are equally protected in new digital retransmission media as they are in traditional cable networks. It also mentions the principle of territoriality applied in broadcasting, including satellite broadcasting, saying that it is a standard in licensing audiovisual works.[60] This leads to the conclusion that territorial licences as such, given by CMOs are not contrary to the competition rules. The principle of the country of origin, which was earlier applied to satellite broadcasting, is in *SatCab* 2 Directive extended to own ancillary online services of the broadcasting organisation. However, the principle of the country of origin does not prevent authors and broadcasting organisations from arranging any limitation to the licence, including territorial limitation.[61] The principle of

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53 *Kanal* 5, at 48.

54 *Kanal* 5, at 47.

55 *Kanal* 5, at 45.

56 *Kanal 5*, at 28 and 37.

57 *Kanal 5*, at 30, 31, 36 and 39.

58 *Kanal 5*, at 41 and 48.

59 *See* also Guibault L., van Gompel S., Collective Management in the European Union. In: Gervais D(ed), Collective Management of Copyright and Related Rights. Kluwer Law International 2nd edn., Netherlands, pp 135-167, p.142, 143.

60 See rec. 10 of the preamble of *SatCab 2* Directive.

61 Rec. 10 of *SatCab* 2 Directive.

the country of origin regulates a legal fiction that satellite broadcasting and ancillary broadcasting service occur solely in the Member State where the broadcasting organisation has its principal establishment.[62] This means that copyright needs to be cleared only in the country of origin, although it actually takes place in all Member States (and broader) where the satellite signal or ancillary online service is accessible. It is clear that those services are provided cross-border. Therefore, when setting the tariff for satellite broadcasting or ancillary broadcasting service it is appropriate to consider the actual and potential audience in combination with the language version, as already given in *SatCab*1.

Nevertheless, *SatCab* 2 Directive adds to these special criteria for ancillary broadcasting services. With this respect, all aspects of the ancillary online service shall be taken care of, such as the features of the service (including the duration of the online availability of programmes included in the service), the audience (including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used), and the language versions provided.[63] It should nevertheless remain possible to use specific methods for calculating the amount of payment for the rights subject to the country of origin principle, such as methods based on the revenues of the broadcasting organisation generated by the online service, which is used, in particular, by radio broadcasting organisations.[64] The latter means that the remuneration may be calculated as the percentage of the gross income of the broadcaster generated by that online service. This methodology is regularly used by radios.

Furthermore, *SatCab* 2 Directive adds to the criteria for the tariffs for retransmission right.[65] Following that, in determining the fee for retransmission, the economic value of the use of the rights in trade, including the value allocated to the means of retransmission, should, *inter alia*, be taken into account, together with the criteria set by Directive of collective management of copyright.[66]

The explained criteria from *SatCab* 2 are in the preamble of this Directive, not in its legislative part. Nevertheless, they should be observed by anyone who applies them since recitals give clear directions towards the interpretation of the legislative part in line with the intentions of the legislator. Therefore, eventhough they may not be part of national copyright laws, the CMOs, the users, competitions

62 Art. 3 para 1 of *SatCab 2* Directive.

63 Art. 3 para 2 of *SatCab 2* Directive.

64 Rec. 12 of *SatCab* 2 Directive.

65 Rec. 15 of *SatCab* 2 Directive.

66 Rec. 15 of *SatCab* 2 Directive.

authorities and courts shall be obliged to follow those directions and apply them in setting and evaluating remunerations in tariffs.

3.3. Synthesis of criteria for setting tariffs

3.3.1. Directive on collective management of copyright

All described developments led to the regulations of the criteria for setting tariffs in the Directive on collective management of copyright. According to Art. 16 para 2, licensing terms shall be based on objective and non-discriminatory criteria. Authors shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration[67] shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into consideration the nature and scope of the use of the work and in relation to the economic value of the service provided by the CMO. CMO is obliged to inform the user of the criteria applied for setting the respective tariff. The said provision is further explained in the rec. 31 of the preamble of the respective Directive. Namely, this recital emphasises that fair and non-discriminatory commercial terms in licensing are particularly important for users and authors. Furthermore, the criteria must be objective. By using the phrase *inter alia* in cited provisions of the Directive on collective management of copyright, it is emphasised that the said criteria are not the only ones applied but that CMOs may also use other criteria. This makes provisions from Art. 16 para 2 of the said Directive a minimum harmonisation rule, which entitles the Member States to explicitly provide more criteria aligned with the said ones in their copyright laws. However, even if it is not explicitly regulated in the respective national copyright law, every CMO may consider additional criteria when setting the tariffs.

It is clear that criteria from Art. 16 para 2 of Directive on collective management of copyright, as well as the explanations given in rec. 31 of the same Directive apply to collective management of copyright. At the same time, individual negotiations and individual contracts and licences remain out of the scope of this Directive, and authors are entirely free to determine the price for using their work. Therefore, this aspect falls beyond the remit of this discussion. Although it is not

[67] The difference between exclusive right and right to remuneration is regulated in European and national copyright laws. In brief, exclusive right means that the author has a right to allow or forbid the use of their work and claim remuneration for such use. On the other hand, the right to remuneration entitles the author only to claim remuneration for their work, but the use of the work is out of their control. Namely, they are not entitled to allow or forbid because a legal licence entitles users to use their work without the author's permission.

explicitly regulated this way, the following provisions of other Directives on criteria need to be interpreted in the same light.

It is clear from the previous analysis that the criteria set in Art. 16 para 2 of the Directive on collective management of rights are well based on the competition rules. Namely, excessive prices are generally examined in relation to the economic value of the object of the price and the economic value of the service provided. Those criteria were introduced through the case law also to the collective management of rights and ended up in the respective Directive. The idea of this Directive was in many aspects to synthetise the rules which would affect the monopolistic position of CMO by not addressing it directly, just to leave it to the market to do so. Among others, this Directive imposes rules which weaken the dominant position of CMOs.

3.3.2. *OSA*

OSA[68] is a landmark case which confirms that the monopoly position of CMOs is not denied by the Directive of collective management of copyright. While this Directive was undermining the dominant position of CMOs, many asked themselves whether it denies the possibility of *de facto* and *de jure* monopolies of CMOs. *OSA* came together with the Directive and cleaned the view. The facts of the case say that *OSA* claimed from Léčebné lázně the payment for having installed radio and television sets in the bedrooms of its spa establishments. Léčebné lázně claims that *OSA* was abusing its monopoly position in the market since the amount of the fees set out in its fee scales is disproportionately high in comparison with the fees demanded by CMOs in neighbouring countries for the same kind of use of works, which undermines its position in the market and its ability to compete with spa establishments in neighbouring countries. CJEU repeated that the monopoly position of the CMO is consistent with EU law, in particular with Art. 16 of the Services Directive[69] and Arts. 56 and 102 of the TFEU.[70] Nevertheless, it stressed that the imposition by a CMO with a monopoly position of fees for its services

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[68] Judgement of 27 February 2014, OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.,– *OSA*, C-351/12, EU:C:2014:110. OSA is Czech CMO for music copyright.

[69] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68 (hereinafter referred to as Services Directive)

[70] It is clear that the CJEU is not opposed to the possibility of a legal monopoly of the CMO by the national law (*OSA*, at 10 with reference to Art. 98(6)(c) of the Czech CRRA, which regulates that the relevant ministry may grant an authorisation for performing the management of copyright only if no other person already has such an authorisation for the exercise of the same right in relation to the same subject-matter and, in so far as a work is concerned, for the exercise of the same right in relation to the

which are appreciably higher than those charged in other Member States (a comparison of fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided is indicative of an abuse of a dominant position.[71]

3.3.3. *AKKA/LAA*

New case law after the Directive on collective management of rights entered into force stays on the same path and confirms and clarifies the tariff-setting criteria. *AKKA/LAA*[72] judgement gives some directions towards arguments for determining excessive prices, which are specific for collective management of copyright and shall not appear so often in other areas of competition.[73] The questions asked from the CJEU referred, in essence, to examining whether *AKKA/LAA* was posing an unfair tariff if, comparing its tariff to the Estonian and Lithuanian ones, they were two and three times higher. If put in relation to the purchasing power parity index (hereinafter referred to as PPP index), compared the fees in force in approximately 20 other Member States it was found that the rates payable in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. For the same type of users, only the rates applied in Romania were higher. It was a tariff for the use of musical works in shops and service centres where rates were set according to the surface area of the shop or service centre concerned.[74]

Apart from the usual understanding that the abuse of a dominant position might lie in the imposition of a price excessive in relation to the economic value of the service provided, there are also other methods by which it can be determined whether a price may be excessive.[75] The CJEU didn't give a minimum threshold when comparing prices in different Member States adjusted in accordance with the PPP index. It only said that the comparison needs to be regarded consistently and that the countries must be selected according to objective, appropriate, and

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same kind of work). CJEU further pointed out that the legal monopoly is consistent with Art. 16 of the Services Directive and Arts. 56 and 102 of the TFEU.

71 *OSA*, at 85, 87, 88, 92 and 93.

72 Judgement of 14 September 2017, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome, C-177/16, EU:C:2017:689 (Hereinafter *AKKA/LAA*)

73 For the analysis of *AKKA/LAA* case see *e.g.* Botteman Y., Barrio D., C-177/16 *AKKA/LAA*: How to Determine Excessive Prices Under Article 102 TFEU?, European Competition and Regulatory Law Review, Vol 4 (2020), Issue 1, DOI https://doi.org/10.21552/core/2020/1/12, p. 49 – 53 (last visit 29 September 2024).

74 *AKKA/LAA* at 9,10.

75 Kanal 5, at 28 and *AKKA/LAA* at 35, 36 and 37.

verifiable criteria.[76] Therefore, there can be no minimum number of markets to compare, and the choice of an appropriate comparable markets depends on the circumstances specific to each case.[77] Those specificities may be consumption habits, other economic and sociocultural factors, such as gross domestic product per capita, and cultural and historical heritage.[78] Considering this, the difference must be significant for the rates concerned to be regarded as abusive. It must persist for a certain length of time and must not be temporary or episodic. CMO must show that its prices are fair by reference to objective factors that impact management expenses or the remuneration of authors.[79] It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.[80]

3.3.4. *MEO*

One of the most recent cases is *MEO*.[81] As a monopoly CMO in Portugal, GDA[82] issued licences to providers of a paid television signal transmission service and television content. It applied three tariffs simultaneously, set by the arbitration decision. *MEO*[83] claimed that GDA was abusing a dominant position by applying different tariffs towards providers of the same service. In light of those facts, CJEU examined the concept of competitive disadvantage.[84] In the circumstances of the case, CJEU drew attention to the following facts: the existence of a certain negotiating power of MEO (and NOS[85]) towards GDA as a factor relevant in the assessment of abuse and the negotiating power; GDA applied tariff set by the arbitration court; the price differences represented a relatively low percentage of MEO's total costs, and therefore a difference had only limited effect on its profits; and GDA had no interest in excluding one of its trading partners from the down-

76 See *AKKA/LAA* at 51 and 72.

77 See *AKKA/LAA* at 41, also D'Ostuni M., Meriani M., Excessive pricing and copyright industry: still blurred lines?, Kluwer Copyright Blog, Dec 14, 2017, https://copyrightblog.kluweriplaw.com/2017/12/14/excessive-pricing-copyright-industry-still-blurred-lines/ (last visit 29 September 2024)

78 *AKKA/LAA*, at 42, 44.

79 *AKKA/LAA*, at 55, 56, 61.

80 *AKKA/LAA*, at 50, 51.

81 Judgement of 19 April 2018, MEO — Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, GDA — Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes, CRL, C-525/16, EU:C:2018:270 (Hereinafter reffered to as *MEO*).

82 Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes.

83 Serviços de Comunicações e Multimédia SA.

84 Art. 102, para 2 (c) of TFEU.

85 Another provider of the same service as MEO.

stream market.[86] CJEU concluded that where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, it can distort competition between them. To prove a competitive disadvantage, it is not necessary to prove an actual quantifiable deterioration in the competitive situation. Still, it must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour affects the costs, profits, or any other relevant interest of one or more of those partners so that that conduct is such as to affect that situation.[87] It may be summarised that price discrimination by a dominant undertaking between its (non-associated) customers (downstream market) may be qualified as abuse only if strict conditions are met, notably an impact on competition.[88] So, applying different criteria for setting the remuneration owed to CMO leads to a competitive disadvantage only if strict conditions are met, *i.e.* if this affects the costs, profits, or any relevant interest of the user. In those circumstances, this behaviour does not lead to the strengthening or, in any other way, affecting the monopoly position of the CMO that abuses its dominant position.

3.3.5. *SABAM*

In the *SABAM* case,[89] the Companies Court from Antwerp, Belgium,[90] requested a preliminary ruling from the CJEU on Article 102 TFEU, abuse of a dominant position against SABAM.[91] The abuse of the dominant position of the CMO, which has a *de facto* monopoly position, *i.e.*, the dominant position on the Belgian market, was scrutinised because of the charging scheme which serves as a basis for the tariff for the performance of musical works at music festivals. The relevant tariff based on gross receipts from ticket sales was examined. The question was posed of whether such a methodology is reasonable in relation to the collective management organisation's service and the music repertoire that was actually performed. The opposing party claimed that the methodology for setting the tariff where the

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86 Szczodrowski, J.; The Principles of Article 102(c) TFEU in Cases of Non-exclusionary Secondary Line Discrimination on Grounds Other than Nationality Case Comment to the Judgment of EU Court of Justice of 19 April 2018 Meo-Serviços de Comunicações e Multimédia (C-525/16), Yearbook Of Antitrust And Regulatory Studies (Yars®), VOL. 2019, 12(20), DOI: 10.7172/1689-9024.YARS.2019.12.20.12, p. 275. See MEO, at 32 to 35.

87 MEO, at 37.

88 O'Donoghue, R., The Quiet Death of Secondary-Line Discrimination as an Abuse of Dominance: Case C-525/16 MEO Journal of European Competition Law & Practice, Volume 9, Issue 7, September 2018, Pages 443–445, https://doi.org/10.1093/jeclap/lpy040

89 Judgement of 20 November 2020, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV, C372/19, EU:C:2020:959 (Hereinafter referred to as *SABAM*).

90 Ondernemingsrechtbank Antwerpen.

91 SABAM is Belgian CMO for music authors.

gross receipts from ticket sales were taken as the basis, without deduction of costs connected with the event's organisation, constitutes the abuse of a dominant position. The courts examined the concept of unfair prices in relation to Art. 16 of the Directive on collective management of copyright.[92]

CJEU concluded that there is no abuse of a dominant position when a CMO imposes tariffs on organisers of musical events where the remuneration is calculated based on a rate applied to the gross revenue from ticket sales, without deducting organising costs unrelated to the works performed, provided that the remuneration imposed is not excessive in light of all relevant circumstances, particularly the nature and extent of the use of the works, the economic value generated by that use, and the economic value of the services provided by the CMO, and if a staggered flat-rate system is used to determine which proportion of the musical works performed were taken from the CMO's repertoire.[93] The latter is justified if no other, more precise method for identifying and quantifying the works used exists that would similarly protect the interests of the authors without disproportionately raising management costs. [94]

3.4. Other relevant matters

Criteria for setting tariffs were mentioned in relation to remuneration for public lending in the Rental and Lending Directive. In this case, the cultural promotion objectives should be observed.[95]

This text only considers the criteria for setting the tariffs for exclusive rights. In the respective directives, some criteria are provided for setting fair compensation

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92 The Belgian law transposing Art. 16 para 2 of the Directive on collective management of copyright and related rights mentions the following: the criteria must be objective and non-discriminatory, the remuneration for authors shall be appropriate, tariffs shall be reasonable in relation to, *inter alia*, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the works and services, as well as in relation to the economic value of the service provided by the management organisation. See Art. 63 of *Wet van 8 juni 2017 tot omzetting in Belgisch recht van de richtlijn 2014/26/EU van het Europees Parlement en de Raad van 26 februari 2014 betreffende het collectieve beheer van auteursrechten en naburige rechten en de multiterritoriale licentieverlening van rechten inzake muziekwerken voor het online gebruik ervan op de interne markt* which amended Article XI.262 of the Code de droit économique (Belgian Code of Economic Law).

93 *SABAM*, at 60, 61.

94 *Ibid*.

95 *See* Art. 6(1) and rec. 13 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 376 of 27 December 2006 (codified version).

for private copying[96] and criteria to establish fair compensation for using orphan works.[97] The exact percentages of the selling price that should be paid as royalties for resale rights are regulated in the respective directive.[98] Finally, according to the Directive on the Extension of the Term of Protection,[99] the performing artists deserve 20 % of the revenue which the phonogram producer has derived.[100]

4. CONCLUSION

Being engaged in economic activities, CMOs are considered undertakings within the meaning of the European competition law. Before the adoption of the Directive on collective management of copyright they have enjoyed either *de facto* monopoly or also a legal monopoly established by national laws of the Member states concerned. Arguments in favour of this monopoly were that this ensures effective collective management of copyright, in the interest of both authors and users. However, it has been clear from the very first cases brought before the CJEU that this dominant position of the CMOs is subject to the application of the rules on the abuse of the dominant position (Art. 102 TFEU), as well as rules on prohibited agreements (Art 101 TFEU). The case law and the EU directives have provided the criteria for determining the tariff system that would be fair and transparent and not amount to the abuse of the dominant position of the CMOs.

The criteria are well established in competition law but further developed by taking into account the specific features of copyright, the interests of authors protected by copyright, and the particularities of the collective management of copyright. Therefore, in assessing whether a CMO is abusing its dominant position by imposing excessive tariffs on users, at least the following criteria must be considered: the economic value of the use of the rights in commerce, taking into account the nature and scope of the use of the work and in relation to the economic value of

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96 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**,** OJEU L 167 of 22 June 2022 (hereinafter InfoSoc Directive), see rec. 35 of the Preamble.

97 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works *OJEU L 299 of 27 October 2012 (hereinafter Orphanworks Directive), see rec. 18 of the Preamble and Art. 6 para 5.*

98 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art *OJEU L 272 of 13. October 2001 (hereinafter Resale Right Directive), see Art. 4.*

99 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJEU L 265 of 11 October 2011(hereinafter Directive on the Extension of the Term of Protection).

100 See rec. 11 and Art. 1 para 2 of Directive on the Extension of the Term of Protection.

the services provided by the CMO. The tariff must be set on fair and non-discriminatory commercial terms, and all applied criteria must be objective.

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Review article

COMPETITION POLICY CONTRIBUTING TO THE EUROPEAN GREEN DEAL

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Abstract

In the context of the key efforts and objectives of the European Green Deal, which represents a transformative agenda, aiming for climate neutrality by 2050 while promoting sustainable economic development across the European Union (EU), this paper aims to analyze competition policy as a fundamental tool to support green innovation, regulate state aid and balance market dynamics in renewable energy and other green sectors. This paper analyses, among other things, the legal frameworks and the interaction between competition policy and EGD, taking into consideration market approaches and strategies, which are being adapted to promote sustainability. By integrating environmental objectives into traditional competition principles – such as efficiency, consumer welfare and market access – the EU seeks to mitigate anti-competitive practices while fostering innovation in green technologies. Through case studies and policy analysis, this paper examines the role of competition policy in addressing key challenges, including market concentration, state aid for green investments and regulatory coherence. This analysis contributes to the development of the discourse on EU competition law and its alignment with sustainability, providing insights into the possibilities and limitations of this integration in achieving long-term climate and economic goals.

Key words: *competition policy, European Commission, European Green Deal, green initiatives*

1. INTRODUCTION

In the continuation of global efforts to tackle climate change and achieve a sustainable economy, the European Union has officially announced the European Green Deal as a critical pillar towards achieving a sustainable economy by 2050.[1] Beyond

[1] EUR-Lex - Access to European Union law, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - European Green Deal*, 2019. URL=https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN. Accessed 27 October 2023.

its main goal, achieving climate neutrality, this Deal aims to reduce pollution and promote clean technologies. By aiming to transform the economy and preserve the natural environment for future generations, based also on Article 3.3 (1) of the TEU, the EU pursues its main principle and objective, that of sustainable development.[2]

In shaping economic frameworks, competition policy plays a crucial role. In EU legislation, competition law regulates anti-competitive practices, antitrust; concentrations; state aid and has traditionally focused on the protection of fair competition and consumer rights. In the context of the European Green Deal, the inclusion of competition policy raises a number of concerns, such as promoting green innovation without undermining competition in the market; adapting the European Union competition rules with regard to state aid, considering that the European Green Deal requires significant investments in green technologies and sustainable development; dominance and concentrations of market power in relation to the renewable energy sector, etc.

This paper addresses the objectives of the European Green Deal in the context of the development of EU competition policies, analyzing the interaction with environmental policies, objectives and the opportunities and challenges presented by such integration. Through case studies, which provide a more complete illustration, we will observe how competition policy has supported or hindered the green transition in Europe.

Aiming for the most comprehensive analysis possible, this paper aims to contribute to the academic discourse on European Union legislation related to competition and its aspirations towards environmental policies, considering the implications for the green economy and the challenges of this century.

2. EUROPEAN GREEN DEAL (EDG): ORIGINS, CREATION, AND IMPLEMENTING AGENTS

2.1. Origins and Purpose of the European Green Deal

Following the adoption of the Maastricht Treaty (1992) and the Amsterdam Treaty (1997), the integration of environmental policies into EU decision-making gained importance. The European Commission's commitment to the implementation of these policies was reinforced by the Lisbon Treaty (2007), which introduced the

[2] Simon, S., *The 'European Green Deal' – a paradigm shift? Transformations in the European Union's sustainability meta-discourse*, ECPR Journal, Political Research Exchange, Vol. 4, Issued 2022, p. 4. URL= https://doi.org/10.1080/2474736x.2022.2085121. Accessed 09 December 2024.

principle of sustainable development.[3] In this context and in continuation of the EU's environmental priorities, the European Green Deal was officially proclaimed as a critical pillar towards achieving a sustainable economy by 2050 by the President of the European Commission Ursula von der Leyen in December 2019.[4]

In its ongoing efforts, the European Union has systematically promoted efforts to mitigate and adapt to climate change, taking a key role in global policies. However, adapting to an international context remains challenging,[5] but as far as the European Green Deal aims to transition the union towards a competitive economy, as well as to ensure resource efficiency and prosperity.[6] Due to major climate changes over the last few decades, climate neutrality by 2025 remains the most important objective of this Green Deal. It also seeks to achieve goals related to several major challenges such as:

- Reducing pollution affecting the protection of human, animal and plant life,
- Clean products and technology,
- Transition to this new approach.[7]

2.2. Goals and Implementation of the EDG

In the context of sustainability, the true nature of the European Green Deal (EGD) becomes apparent. However, due to the broad scope of the Agreement and the very notion of sustainability, which lacks a universal definition, although it is usually linked to the concept of sustainable development, formalized with the adoption by the UN of the Sustainable Development Goals in 2015, it reflects ambitions in the pursuit of environmentally-oriented changes, shaped by the balance between environmental protection, economic growth and social objectives.[8]

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3 European Commission, *European Green Deal*, 2019. URL=https://competition-policy.ec.europa.eu/about/green-gazette/green-deal_en. Accessed 16 October 2023.

4 EUR-Lex - Access to European Union law, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - European Green Deal*, 2019. URL=https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN. Accessed 27 October 2023.

5 Niklas Bremberg, Anna Michalski, *The European Union Climate Diplomacy: Evolving Practices in a Changing Geopolitical Context*, The Hague journal of diplomacy, 2024, Vol.19 (3), p.506-535.

6 European Council, *The European Green Deal*, (n.d.). URL=https://www.consilium.europa.eu/en/policies/green-deal/#:~:text=The%20European%20Green%20Deal%20is%20a%20package%20of%20policy%20initiatives,a%20modern%20and%20competitive%20economy. Accessed 27 October 2023.

7 APLANET, *European Green Deal: objectives and initiatives for a sustainable future*, 2022. URL=https://aplanet.org/resources/european-green-deal-objectives-and-initiatives-for-a-sustainable-future/. Accessed 25 October 2023.

8 Robert Rybski, *Energy in the European Green Deal: impacts and recommendations for MENA countries*, The Journal of World Energy Law & Business, Volume 16, Issue 2, April 2023, Pages 127–142, URL=https://doi.org/10.1093/jwelb/jwac033. Accessed 10 December 2024.

The European Green Deal (EGD) represents a comprehensive and multifaceted approach to addressing environmental challenges within the EU. Its implementation requires a coordinated effort across sectors, such as energy, transport, agriculture, industry and the environment. The European Union (EU) has now committed to becoming the first climate-neutral continent by 2050, with all member states unanimously agreeing to this ambitious goal.[9]

In terms of its implementation, the European Green Deal requires transformative action at local and regional level, which is reflected in the Local Green Deal Action Plan, developed in 2021 by the European Commission.[10]

The implementation of this agreement, with a broad approach to environmental problems and very comprehensive requires the undertaking of a series of actions and measures in different sectors, including energy, transport, agriculture, industry and the environment. Its implementation starts from setting clear objectives and considering the deadlines for their fulfillment, financial resources, to support the transition to the green economy. An important part is also undertaking changes to adjust existing policies and regulations to promote sustainable practices and discourage harmful ones, of course through the cooperation and involvement of EU institutions and member states, creating structures of three to strengthen capacities. The EU will also establish monitoring and evaluation mechanisms to track progress, assess the effectiveness of the measures implemented and make the necessary adjustments as needed.[11]

3. COMPETITION POLICY AND THE EUROPEAN GREEN DEAL

3.1. Competition Authorities and other stakeholders' role in Green Policies

Competition authorities in Europe have been very supportive of the European Commission's initiative regarding the European Green Deal, focusing their work on supporting a green economy and free competition in this new market. For this,

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9 European Commission, *Delivering the European Green Deal*, (n.d.). URL=https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en#:~:text=To%20get%20there%2C%20they%20pledged,2030%2C%20compared%20to%201990%20levels.&text=Member%20States%20will%20now%20spend,social%20dimension%20of%20the%20transition. Accessed 01 November 2023.

10 European Committee of Regions, *Implementing the European Green Deal, Handbook for local and regional governments*.

11 Committee of the Regions, *European Green Deal Handbook*, 2021. URL=https://cor.europa.eu/en/engage/studies/Documents/European%20Green%20Deal%20Handbook.pdf. Accessed 02 November 2023.

they have adapted their policies in accordance with the goals of the EGD. Since the main elements of the EU Green Agreement are: Climate Action, Clean Energy and Sustainable Industry[12], these have been the focus of the respective NCAs, as mentioned below:

The French Competition Authority (Autorité de la concurrence) in 2022 has deemed it reasonable to approve a state aid scheme regarding the promotion of renewable energy production. This scheme of 300 million euros has also been approved by the European Commission regarding the Green Deal Industrial Plan and the promotion of the use of renewable solid fuels.[13]

The Bundeskartellamt (Germany's national competition regulatory agency) on the other hand organizes the International Conference on Competition every other year since the early 1980s. This Conference is an opportunity to gather competition experts from more than 60 countries and to discuss the Competition Policy and the problems that accompany it.[14] During these conferences, important issues are raised for discussion, including the green economy and the practices that should be undertaken in the framework of a sustainable economy.\

As for the Netherlands, the Netherlands Authority for Consumers and Markets (ACM) has long encouraged the drafting of European guidelines, positively influencing a sustainable economy. The focus of this authority has been towards the transition towards alternative sources of energy, as well as encouraging competitors in the market to work together to achieve sustainability objectives.[15]

National competition authorities play a key role in promoting sustainable growth by taking into consideration environmental impacts and by weighing long-term benefits against environmental costs. National competition authorities play a key

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12 Norton Rose Fulbright, *The EU Green Deal explained*, (n.d.). URL=https://www.nortonrosefulbright.com/en/knowledge/publications/c50c4cd9/the-eu-green-deal-explained#:~:text=The%20main%20elements%20of%20the,Sustainable%20industry. Accessed 28 November 2023.

13 European Commission, *Commission adopts new rules to ensure fair competition in the platform economy* [Press release], 2023. URL=https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4062. Accessed 22 November 2023.

14 Bundeskartellamt, *International Conference on Competition*, (n.d.). URL=https://www.bundeskartellamt.de/EN/AboutUs/Conferences/InternationalConferenceonCompetition/internationalconferenceoncompetition_node.html. Accessed 25 November 2023.

15 Netherlands Competition Authority (ACM), *Guidelines on sustainability agreements are ready for further European coordination*, (n.d.). URL=https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination. Accessed 23 November 2023.

role in promoting sustainable growth by taking into consideration environmental impacts and by weighing long-term benefits against environmental costs.[16]

The International Chamber of Commerce (ICC), emphasizing the importance of guidelines and cooperation between different actors for the realization of the goals of a sustainable economy in relation to competition policy, has stated that: Governments have a crucial role in providing competition authorities with the appropriate degree of direction or guidance needed to implement national competition laws in line with sustainability objectives; international bodies are important in developing best practices for businesses; businesses should provide practical examples of sustainability initiatives hampered by legal uncertainty or concerns over the application of competition law, helping authorities develop clearer guidelines; other interested parties, such as consumers, play a vital role in identifying areas of uncertainty and advocating for clearer and more consistent guidelines.[17]

3.2. Direct Impact of Competition Policy on the Green Economy

The relation between competition policy and green economies is an important step towards sustainable development, directly influencing the role of each of the factors in the market and improving the well-being of consumers. The main points of its focus have to do with the increase of efficiency, innovation, choices and the best qualities of products. It is a key element that directly affects a sustainable economy. Influences through monitoring and investigating cases of damage to the market and free competition by elements of the market that aim to monopolize it or prevent the entry of other companies or businesses into the market. Competition policies are an important element in preventing abusive behavior in the market, including the abuse of a dominant position.

Economic development is influenced by factors such as collusion between companies and a healthy competition in the market consequently creates a healthy environment, making it possible to create jobs and increase well-being.[18]

The role and impact of competition policy are undeniable in the promotion of environmental policies and the provision of alternatives regarding environmentally

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16 Panagiotis N. Fotis, *Sustainable Development and Competition Policy*, Energy Economics, Vol. 1, Issue 4, 2020January 12, 2021 AEST.

17 The International Chamber of Commerce (ICC), *COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY*, 26 November, 2020, p. 11-12.

18 London School of Economics and Political Science, *Fair competition plays a key role in sustainability*, 2022. URL=https://blogs.lse.ac.uk/businessreview/2022/01/24/fair-competition-plays-a-key-role-in-sustainability/. Accessed 25 November 2023.

friendly production processes and the promotion of companies and state policies towards green sectors.[19]

What should also be taken into consideration is the element of sustainability, as an element linked to productive and dynamic efficiency, as well as to consumer preferences for environmentally friendly products. The protection of competition, consumer welfare and sustainability often overlap, so it may be that actions that improve competition (such as preventing monopolies) can also help consumers by offering them more affordable or products of better quality, including those that are sustainable. Similarly, promoting sustainability can improve competition in the market and benefit consumers, creating a virtuous cycle where these goals work together.[20]

An example of the direct impact of competition policy on fostering a green economy by promoting innovation and preventing anti-competitive practices concerns the production of solar panels and China's emergence as a global leader in solar technology. Thanks to competition policies that facilitated technology transfer through foreign direct investment (FDI) and joint ventures, China was able to access advanced technology, reducing costs and accelerating innovation in green energy. By preventing monopolistic behavior and ensuring market access, competition law helped make sustainable technologies like solar panels more affordable and accessible globally, thus directly contributing to the expansion of the green economy.[21]

4. THE ROLE OF COMPETITION POLICY IN ADVANCING THE GREEN ECONOMY

4.1. Renewable Energy Sector

Promoting a green economy in the European Union fundamentally requires the inclusion of competition policy, as a promoter of efficiency, innovation and consumer welfare. By prioritizing key sectors of the economy, it aims towards sustainable development, incorporating cooperative practices. Balancing free and fair competition is vital, with effective enforcement and advocacy that discourages anti-competitive practices.

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19 United Nations Conference on Trade and Development (UNCTAD), *The role of competition policy in promoting sustainable development* [Document TD/B/RP/CONF.8/D.6], 2022, (p. 6). URL=https://unctad.org/system/files/official-document/tdrbpconf8d6_en.pdf. Accessed 09 November 2023.

20 OECD (2020), *Sustainability and Competition, OECD Competition Committee Discussion Paper,* http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

21 Stefan Ambec, *Gaining competitive advantage with green policy*, INRA Research Professor, Toulouse School of Economics, 2016, p. 6.

The European Union as a unit and the member states in particular, as we have analyzed above, have measured the approaches to a green economy and have made competition policies part of their policies to regulate the markets. Among the main elements of these policies is the strategy towards the energy sector, where the main objective remains renewable sources, in order to achieve energy efficiency and the so-called progressive decarbonization of the energy sector.[22]

In this approach, the European Union has undertaken a series of initiatives, among which it is important to mention the EU Regulation for Methane in the energy sector, an initiative of the Commission which was proposed in December 2021 and was part of the framework of proposals related to the European Green Deal. The prevention of harmful methane emissions has been in the focus of the union for some time until it was realized with this initiative which followed the Strategy approved in 2020.[23]

Germany through the Renewable Energy Sources Act (EEG) has laid the foundations to be present in climate change, predicting a sustainable and and faster expansion, requiring at least 80 percent of the gross electricity consumption to be covered by renewable sources.[24] But the German Bundeskartellamt (Germany's national competition regulatory agency) has monitored the implementation of this act stating that competition should not be distorted and that consumers should pay fair prices for electricity. He has expressed himself about the act several times, saying that the EEG's guaranteed feed-in tariffs (FiTs) for renewable energy producers were too high and that this was distorting market prices as well as recently The Bundeskartellamt said that it will continue to monitor the development of the electricity market and the EEG. The authority will take action if it detects anti-competitive practices or market distortions.[25] The modification of the state aid scheme by the German state with reference to the rules of the European Union

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22 European Commission, *Energy and environment - Energy EU*, (n.d.). URL=https://competition-policy.ec.europa.eu/sectors/energy-environment/energy-eu_en. Accessed 02 November 2023.

23 European Commission, *Commission approves new state aid guidelines to support the deployment of renewable energy*, 2023. URL=https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5776. Accessed 09 November 2023.

24 Bundesregierung, *Amendment of the Renewable Energy Sources Act (EEG) 2023*, (n.d.). URL=https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/amendment-of-the-renewables-act-2060448#:~:text=The%20EEG%202023%20is%20the,least%2080%20percent%20by%202030. Accessed 24 November 2023.

25 Bundeskartellamt, *Monitoringbericht 2022*, 2022. URL=https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Energie-Monitoring-2022.pdf?__blob=publicationFile&v=3. Accessed 26 October 2023.

was also assessed by the Commission, assessing in particular the 2022 Guidelines for state aid for climate, environmental protection and energy ("CEEAG").[26]

Overall in Germany, with the intervention of the Competition Authority and the European Commission, the competition policy has had a positive impact on the green economy, positively influencing the reduction of the cost of renewable energy, increasing the share of renewable energy and the promotion of sustainable development.

4.2. Green Collusion in Sustainable Agriculture

In the agricultural sector, competition authorities have allowed limited cooperation among farmers and agribusinesses to promote environmentally friendly farming practices. The Andalusian Circular Bioeconomy Strategy (ACBS) project is focused on the development of biochemistry in Andalusia, being one of the six regions that demonstrate a model for sustainable chemical production. This project is financed by the European Union and aims to increase the availability of sustainable biomass, supporting bioproducts and bioenergy.[27]

5. CHALLENGES AND TRADE-OFFS

5.1. Potential Conflicts Between Competition Policy and Environmental Goals

The competition policy is an important driver and factor in terms of environmental goals and a sustainable green economy, but it will certainly face conflicts, which may arise as a result of this relatively new approach to the environment and the demands it has for significant investments, large human resources, as well as facing difficulties related to the ownership of the branch, cooperation, costs or entry difficulties for small businesses.

On the other hand, it is very important to create an open environment of cooperation between competition authorities to promote and further expand sustainability agreements. This approach has also been accepted by the European Commission, which has been ready and active in providing tools and guidelines

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[26] European Commission, *State aid: Commission approves modification of German scheme to promote renewable energy sources and reduce greenhouse gas emissions*, 2016. URL=https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7794. Accessed 09 November 2023.

[27] European Commission, *Andalusia promotes sustainable growth through renewable, biological products*, 2020. URL=https://ec.europa.eu/regional_policy/en/projects/Spain/andalusia-promotes-sustainable-growth-through-renewable-biological-products. Accessed 09 November 2023.

to evaluate these agreements, in the framework of sustainable goals. This is an area where cooperation should be active and continuous.[28]

Competition is an essential factor in terms of the efficiency of resources, the promotion of innovation and technical and technological progress, and therefore it is a key element in achieving the objectives of sustainable development. However, in this framework, market failures will also have to be calculated, specifically negative externalities in prices or information asymmetry.[29]

As an approach to development, of course there will be possible conflicts between competition policy and environmental goals, but it is important to study the market, calculate its failures, involve the Competition Authorities, focus on efficiency and innovation, which will bring a better harmony between them.

5.2. Competition Enforcement Clash with Green Initiatives

First, green initiatives often involve collaboration among companies or organizations to advance environmentally friendly technologies or practices. Such a thing, looking at it in relation to the competition policies, can lead to problems related to the dominance of the market or the reduction of competition. One case illustrating the clash between competition laws and green initiatives is the European Commission's blocking of a proposed joint venture between BMW, Daimler, and Volkswagen to develop electric vehicle charging infrastructure in 2021. In this particular case, we note the active role of the European Commission, which has found a violation of the antitrust rules of the European Union and has informed BMW, Daimler and VW (Volkswagen, Audi, Porsche) about it. It was found that from 2006 to 2014, these companies had cooperated in restricting competition regarding the development of technology to clean the emissions of petrol and diesel passenger cars.[30]

On the other hand, the focus of the competition policy towards ensuring price competition, in some cases this can lead to the fact that environmentally friendly products or services, as more expensive to produce, have higher prices for consumers.

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[28] Vestager, M., *Sustainability and Competition Policy conference* [Conference Presentation]. Organization for Economic Co-operation and Development (OECD), 2019. URL=https://www.oecd.org/daf/competition/ICC-competition-and-environmental-sustainability.pdf. Accessed 09 November 2023.

[29] Asia-Pacific Economic Cooperation (APEC), *Competition Policy and Sustainable Development*, 2023, URL=https://www.apec.org/docs/default-source/publications/2023/7/223_ec_competition-policy-and-sustainable-development.pdf?sfvrsn=cfd2c2f9_2. Accessed 25 October 2023.

[30] European Commission, *Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology*, 2019. URL=https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008. Accessed 09 November 2023.

In another case, the European Commission acted against a cartel whose activity was in conflict with the antitrust rules of the EU and the EEA (Article 101 of the EU Treaty and Article 53 of the EEA Agreement). Procter & Gamble and Unilever were fined by the Commission with 315.2 million euros together with Henkel for operating in the powder detergent market for household laundry in eight countries of the union. In practice, this cartel aimed to stabilize market positions and coordinate prices. A distinction must also be made between the environmental product initiative and the cartel, as two different actions.[31]

Competition law can be adapted to support sustainable development and the European Union Green Deal objectives, explaining some of the current limitations and proposals for changes. It is quite flexible and can allow cooperation between companies to achieve sustainable development goals, including environmental protection. Currently, enforcement practices focus too much on economic calculations of consumer benefit, hindering sustainability agreements that do not bring immediate or visible financial benefits. For example, environmental agreements are often prohibited because they do not have a clear measurable economic impact on consumers. In some cases, the European Court of Justice has allowed anti-competitive conduct when it has a legitimate aim, such as environmental protection. The principle of proportionality requires that measures be appropriate to the aim pursued and not more stringent than necessary to achieve that aim. To support sustainability, competition law should allow cooperation between companies where necessary, even if there are some negative effects on competition, provided that these restrictions are reasonable and proportionate.[32]

6. POLICY RECOMMENDATIONS

6.1. Policy Recommendations to Align Competition Policy with the European Green Deal

A. Recognition of environmentally friendly certifications

A critical step in achieving the goals of the European Green Deal is the recognition and integration of environmentally friendly certifications into competition policy. Such an approach will enable businesses that adhere to environmental standards to have a competitive advantage, in line with sustainability goals. This will encour-

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31 European Commission, *Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case*, 2011. URL=https://europa.eu/rapid/press-release_IP-11-473_en.htm. Accessed 09 November 2023.

32 Francisco Costa-Cabral, *Reply to European Commission Call on 'Competition Policy Supporting the European Green Deal'*, Tilburg Law and Economics Center (TILEC), 18 Mar 2021, p. 7.

age the widespread adoption of environmentally conscious strategies in different branches of the economy. The creation of such an assessment framework, which thus rewards businesses committed to sustainable practices, enhances the reputation of businesses. It also enables consumers to identify and choose environmentally friendly products or services. Environmental certificates promote further innovation and sustainability within enterprises, serving as incentives for businesses.

B. Strengthening Consumer Awareness and Market Dynamics

The promotion of sustainable practices in the market necessarily requires educating consumers on the alignment of competition policy with environmental objectives. Demand for sustainable products or services will be the result of well-informed consumers. Assessing consumer behavior and steering them towards sustainable policies is essential for their promotion and the performance of enterprises in the market. The active role of competition authorities, environmental organizations and consumer advocacy groups is essential in effectively informing consumers about the environmental consequences of their consumption patterns and the goals of the European Green Deal. Empowering active consumers in shaping market dynamics, making them the main drivers of sustainability, directly helps competition policy to advance green objectives.

7. CONCLUSIONS

The implementation of major international goals in the framework of environmental sustainability, raised as an alarm bell due to major climate changes, is closely related to elements of its implementation and regulation. Achieving environmental sustainability, creating and strengthening environmentally friendly technologies cannot exist separately from competition policies. The latter is the key element in the proper functioning of the market and in achieving cooperation between its actors. From this analysis, we see that the intertwining of competition policy with environmental sustainability makes this policy serve as a powerful tool for achieving international objectives, also reflected in the European Green Agreement. In this aspect, flexibility is needed in cooperation to support green innovation and environmentally friendly initiatives.

The transition towards green and sustainable economies is a difficult process, for which the competition policy serves as a catalyst to increase innovation, to develop cooperation in relation to the fastest advancement towards more effective environmentally friendly solutions. On the other hand, as a regulatory element for the market, competition policy can also serve as a mechanism for the transfer of markets, to try to develop new market opportunities for sustainable businesses.

This transfer of markets is very necessary in achieving the goals set in the European Green Deal. Its role is also important for consumer protection in the market, the balancing of multiple objectives and the long-term effect of the agreement. The transfer of industries to green industries and their awareness of environmentally friendly solutions is best achieved through competition policies, which can influence the market for the creation of facilities, the elimination of barriers to entry, etc.

In a world where environmental concerns are the focus of governments internationally and the need for sustainable solutions and the transition to a green economy is now a necessity, competition policy through competition authorities and international coordination within the framework of the European Union has the potential to be a great dynamic force for positive changes.

In conclusion, the European Green Agreement as a relatively new instrument in the European arena can be seen not only as an important step for European green economies but also more broadly because of its approach to consumer welfare through practices and sustainable products. As such, it includes a very wide range of initiatives and objectives, with which competition policy is best aligned, which seems to have demonstrated that it can effectively intervene in various aspects of the agreement. the evolving role of competition policy within the European Green Deal reflects a forward-looking approach to promoting environmental sustainability while maintaining competitive markets.

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18. European Council, *The European Green Deal*, (n.d.). URL=https://www.consilium.europa.eu/en/policies/green-deal/#:~:text=The%20European%20Green%20Deal%20is%20a%20package%20of%20policy%20initiatives,a%20modern%20and%20competitive%20economy. Accessed 27 October 2023.
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MAPPING THE GULF STATES WITHIN THE GLOBAL COMPETITION LAW FRAMEWORK

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Abstract

The Gulf Cooperation Council (GCC) countries are part of the 130 jurisdictions worldwide that have enacted competition laws. The competition law frameworks in the Gulf States are primarily influenced by European Union (EU) competition law, U.S. antitrust, international organizations, etc. However, these jurisdictions possess distinct, sui generis characteristics, as directly transplanting the entire acquis from these systems would be impractical. The Gulf region's unique historical, cultural, and political contexts have significantly influenced the development of these legal frameworks.

As these countries strive to implement diversification strategies to reduce oil reliance, competition laws have emerged as essential tools for promoting competition, enhancing market efficiency, fostering economic growth, ensuring fairness, protecting consumer welfare, and, sometimes, encouraging innovation. Some member states of the Gulf have more inclusive and revised competition law toolboxes in the region than others. However, they all address the goals, key pillars, and well-established institutional frameworks.

***Key word**s: GCC, Competition law, goals, pillars, institutional infrastructure*

1. INTRODUCTION

This paper examines competition laws of the Gulf Cooperation Council (GCC) countries,[1] which are undergoing significant economic transformation. As these nations pursue diversification strategies to reduce their dependency on oil, competition laws have emerged as an essential toolkit for promoting market efficiency, consumer welfare standards (CWS), fairness, economic growth, etc.

The Gulf [2] includes countries that are frequently categorized as high-income developing nations or emerging economies, primarily due to their oil industry.

[1] The Member States of the GCC are the Kingdom of Saudi Arabia (KSA), United Arab Emirates (Ul. AE), Kuwait, Qatar, Oman and Bahrain.

[2] The terms GCC and Gulf (countries) are interchangeably used throughout the paper.

Despite their significant income levels, they exhibit characteristics of developing economies. Scholars argue that competition policies in these economies should prioritize access and equity, adapting frameworks to ensure that smaller market players can compete against larger, often multinational corporations.[3]

Competition laws of developing jurisdictions are influenced by international models such as the European Union (EU) Competition law, U.S. Antitrust,[4] as well as bodies like the WTO, OECD, UNCTAD, ICN etc.[5] The GCC has also followed their example, learning from them while adopting competition laws tailored to their unique economic needs.[6] For instance, the Saudi Competition Law of 2019 aims to safeguard fair competition and promote economic growth, mirroring objectives seen in advanced economies. The laws of Kuwait and the UAE emphasize consumer protection and market efficiency.[7] The influence of U.S. antitrust can, for instance, be seen in Saudi Arabia's Vision 2030, where preventing large corporate monopolies is a central focus of the economic diversification strategy. The need for economic diversification influences these laws, prioritizing sustainable development, market integration and innovation, differentiating them from traditional framework models.[8]

The fundamental objectives of competition laws closely align in both developed and developing countries, although nuances in implementation and legislative focus may differ. At the core of these laws are three main pillars: anti-competitive agreements, abusive conduct, and merger control. These pillars create the operational framework for National Competition Authorities (NCAs), guiding their enforcement actions to achieve broader policy goals.

Effective competition law enforcement depends on the institutions responsible for overseeing the implementation. In the Gulf states, these roles are managed by competition authorities with varying degrees of autonomy. Each Gulf state's competition authority includes structures for oversight and decision-making. However, the inde-

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3 IMF., *Gulf Cooperation Council Economic Prospects and Policy priorities for the GCC Countries,* [https://www.imf.org/en/Publications/CR/Issues/2023/12/14/Gulf-Cooperation-Council-Economic-Prospects-and-Policy-Challenges-for-the-GCC-Countries-542513?], Accessed 16 May 2024

4 Casoria, M., *Competition law in the GCC countries: The tale of a blurry enforcement,* Chinese Business Review, 2017, 16(3), pp 141-149

5 Waked, D., *Competition law in the developing world,* Global Antitrust Review, 2008, pp 69-96

6 The Arab Business Legislative Frameworks, *Competition law*, [https://unescwa.org/sites/default/files/inline-files/ABLF-2023-competition-law-overview- english_2.pdf?], Accessed 12 May 2023

7 Competition Law of the Kingdom of Saudi Arabia (KSA), 2019, Article 2.

8 *Unlocking Diversification in The GCC States,* World Governments Summit, 2024, [https://www.worldgovernmentsummit.org/observer/reports/2024/detail/unlocking-diversification-in-the-gcc-states?], Accessed September 3 2024

pendence of these authorities remains debatable. While the competition agencies of Kuwait and Bahrain are technically independent, they operate under the supervision of relevant ministries, such as the Ministry of Trade and Industry and the Ministry of Commerce. This arrangement often raises questions about the actual extent of their operational autonomy. Similarly, the UAE and Qatar rely on ministerial oversight, which can influence decision-making and policy direction. The balance between governmental oversight and the independence required for unbiased enforcement is still evolving, with future reforms potentially addressing these issues.

This paper is divided into three sections. After the introduction, section two addresses the challenges of competition laws and their intended outcomes. The third section meets the goals and outlines the pillars. Finally, the last section discusses understanding institutional roles and their responsibilities. The paper concludes with a summary.

2. WHAT ARE COMPETITION LAWS SUPPOSED TO ACHIEVE?

2.1. THE VIEW FROM DEVELOPED JURISDICTIONS: POLICY AND ACADEMIA

This section explores the core objectives of competition laws as understood in developed jurisdictions, focusing on perspectives from both policy and academia. It examines the evolving goals of U.S. antitrust enforcement and EU competition law, highlighting key figures like Lina Khan and Margrethe Vestager, who advocate for broader approaches that address innovation, market concentration, and consumer welfare. By analyzing these frameworks, the section sets the stage for understanding how these principles might inform competition policies in other regions, including the Gulf countries.

The chair of the U.S. Federal Trade Commission (FTC), Lina Khan, advocates for a broad vision of antitrust enforcement that goes beyond traditional concerns of price and output. Her approach emphasizes protecting competition, which she believes is crucial for fostering innovation and consumer choice. She argues that the focus should not only be on short-term consumer benefits, such as lower prices, but also on preventing the harmful consolidation of market power that stifles long-term economic dynamism. [9] Her stance represents a shift in U.S. antitrust thinking, aiming to protect both consumer welfare and the overall competitive environment.

[9] Khan, L., *Promises of Antitrus*t, Georgetown Law, 2023, [https://www.law.georgetown.edu/news/ftc-chair-lina-khan-discusses-the-promises-of-antitrust-at-georgetown-law/], Accessed July 17 2024 see also Khan, L., *Amazon's Antitrust Paradox,* Yale Law Journal

Khan primarily articulates her views on U.S. antitrust enforcement in her notable paper on Amazon.[10] She critiques the traditional antitrust focus on price effects in this piece. While offering low prices, she points out how firms like Amazon can still engage in anticompetitive behavior by consolidating market power, thus stifling innovation and competition in the long run. Her philosophy has been supported by others in the current U.S. administration, such as Wu and Baker. Wu argues that monopolistic power in markets not only stifles competition but also harms democracy.[11] Baker, on the other hand, argues that more attention should be paid, especially to how mergers and market concentration can reduce innovation and long-term consumer welfare.[12]

From academia, Shapiro has argued for a more dynamic understanding of market competition, one that considers how firms with significant market shares can reduce competition through factors beyond pricing, such as network effects and platform dominance.[13] According to Hovenkamp, the U.S. antitrust laws do not offer clear definitions of the conduct they prohibit, such as driving over 70 miles per hour or paying taxes after the April 15 deadline. Instead, he adds, institutions struggle with much less precise language, including conduct that 'restrains trade,' 'monopolizes,' or 'substantially lessens competition.' The EU competition law is not very different in this regard.[14] This is also reflected in the goals these laws aim to achieve.

U.S. antitrust laws, established by landmark legislation like the Sherman Act (1890), Clayton Act (1914), and the Federal Trade Commission (FTC) Act (1914), aim to address both explicit and implicit goals. Economic theory, judicial interpretation, and policy changes have evolved and shaped these goals. Sections one and two of the Sherman Act prohibit agreements that restrain trade or attempt to monopolize power. The primary goal is to promote fairness and freedom of competition. The modern interpretation of antitrust law, especially since the 1970s and influenced by the Chicago School of thought, focuses on consumer welfare by emphasizing lower prices, higher output, and better-quality competition.[15] While the laws were initially framed more broadly, courts have

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10 Khan, L., *Amazon's antitrust paradox*, Yale lJ, 2016, pp 126-710

11 Wu, T., *The Curse of Bigness: Antitrust in the New Gilded Age,* Columbia Global Reports, 2018

12 Baker, J., *The Antitrust Paradigm: Restoring a Competitive Economy,* Harvard University Press, 2019 l

13 Shapiro, C., *Antitrust in a Time of Populism,* International Journal of Industrial Organization, vol. 61, 2018, pp 714-748

14 Hovenkamp, H., *The Slogans and Goals of Antitrust Law,* NYUJ Legis. & Pub. Pol'y 25, 2022

15 Hovenkamp, H.; Morton, F., *Framing the Chicago School of antitrust analysis,* U. pa. l. Rev. 168, 2019: see also Mckenna, F.; *What Made the Chicago School So Influential in Antitrust Policy, 2017,* [https://www.chicagobooth.edu/review/what-made-chicago-school-so-influential-antitrust-policy;], Accessed June 19, 2024.

often interpreted antitrust violations through the lens of harm to consumers, such as price increases or reduced innovation. The Clayton Act directly targets mergers and acquisitions that may substantially lessen competition[16] or tend to create a monopoly. The goal is to prevent market concentration before it occurs, ensuring that mergers do not reduce competition or cause harm to consumers. Finally, Section 5 of the FTC Act (15 U.S.C. para. 45) FTC Act empowers the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts affecting commerce. This law explicitly incorporates broader enforcement goals related to business practices that harm both competition and consumers.[17]

While not always explicitly mentioned, antitrust enforcement implicitly aims to promote innovation by maintaining a competitive environment where new entrants can challenge incumbents, and firms have incentives to innovate.[18] This is particularly relevant in sectors like technology, where monopolistic behavior can stifle innovation.[19]

U.S. antitrust laws implicitly aim to prevent excessive economic concentration, which can give a small number of firms outsized influence over the economy.[20] This was a key concern during the progressive era and the original passing of the Sherman Act. Historically, antitrust laws also aim to prevent concentrations of economic power that could lead to undue political influence. This concern aligns with the broader goals of economic democracy, where competition supports small businesses and prevents monopolistic firms from wielding too much control over society. Scholars like Louis Brandeis famously emphasized this broader goal of protecting democratic values through antitrust enforcement.[21]

Antitrust enforcement has recently been interpreted to include labor concerns, such as non-compete agreements limiting worker mobility.[22] The FTC and other

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16 Shapiro, C.; *Using Economics To Diagnose a Lessening of Competition,* 2024, [https://www.promarket.org/author/carl_shapiro/], Accessed September 2, 2024.

17 Policy Statement, *Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202, 2022, [https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf;], Accessed June 19, 2024

18 Spulber, D., *Antitrust and innovation competition,* Journal of Antitrust Enforcement ,11.1, 2023, pp 5-50

19 Ibid;

20 Cavenaile, L.; Celik, M.; Tian, X., *The dynamic effects of antitrust policy on growth and welfare,* Journal of Monetary Economics 121, 2021, pp 42-59

21 Crane, D., *Antitrust as an Instrument of Democracy,* Duke LJ Online 72, 2022

22 Federal Trade Commission., [FTC proposes rule to ban noncompete clauses, which hurt workers and harm competition]. January 4 (2023): 2023, accessed 10 May 2024; See also, Posner, E., *The antitrust challenge to covenants not to compete in employment contracts,* Antitrust Law Journal 83.1, 2020, pp 165-200

bodies have started considering how monopolistic or anti-competitive practices might harm workers by reducing their bargaining power or job options.[23]

On our side of the Atlantic, we not only believe that we are better regulators but also that we have and continue to export our regulations and policies worldwide.[24] Margrethe Vestager, the European Commissioner for Competition (in leaving), has consistently emphasized the broad goals of EU competition law, which include fostering fair competition, protecting consumer welfare, and ensuring market innovation. Vestager's approach places significant importance on addressing market concentration and the potential dominance of large firms, particularly in the digital economy. She believes competition law should maintain a level playing field across the EU.[25] Her enforcement actions, particularly against large tech companies like Google and Amazon, ensure that no company abuses its market dominance to the detriment of smaller competitors or consumers. This aligns with the principle of guaranteeing market fairness.[26]

Vestager has been vocal about updating competition rules to address the challenges of Big Tech and the digital economy. She has worked on the Digital Markets Act, a regulation aimed at curbing the dominance of large digital platforms, ensuring that new entrants can compete fairly, and preventing companies from exploiting their market power.[27] Today, DMA is a reality, a legally binding and directly applicable regulation to all EU Member States (MSs).[28]

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23 Albrecht, B.; Auer, D.; Manne, G., *Labor Monopsony and Antitrust Enforcement: A Cautionary Tale,* Available at SSRN 4818412, 2024

24 Bradford, A., *The Brussels effect: How the European Union rules the world,* Oxford University Press, USA, 2020 See also Europe, regulator of the world, A&0 SHERAMAN available at [https://www.aoshearman.com/en/insights/global-business-in-a-changing-europe/europe-regulator-of-the-world] Accessed 11 April 2024

25 Keynote speech delivered by EVP Vestager for the Keystone Conference: [A Triple Shift for competition policy] available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_1342, Mar.2.2023 Accessed 10 May 2023.

26 Statement by Commissioner Vestager, [Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service], availbale at https://ec.europa.eu/commission/presscorner/detail/de/STATEMENT_17_1806 , June 2017 Brussels, Accessed 10 July 2023

27 Statement by Executive Vice-President Vestager on the [Commission proposal on new rules for digital platforms], available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_2450, Dec 15, 2020, Accessed February 12, 2023

28 Belloso, Natalia.; Nicolas, Petit., *The EU Digital Markets Act (DMA): a competition hand in a regulatory glove,* SSRN 4411743,2023 see also *Digital Competition Regulations Around the World*, [https://laweconcenter.org/spotlights/digital-competition-regulations-around-the-world]Accessed 3 April 2023;

Similarly to what was said about the US antitrust policy above, Vestager has also promoted the idea that sustainability goals coexist with competition policy.[29] She has been engaged in discussions on how EU competition law can complement environmental and social objectives, indicating a broader view of how competition law can support the EU's green and digital agendas.[30] This combination of goals seems somewhat eclectic, similar to a 'Macedonia,' the Italian term for a mixed fruit salad. This is a perfect recipe to make the institutional agency's job extremely challenging when striving to enforce the law.

Apart from the policies provided by competition agencies in the most developed jurisdictions, several scholars and legal experts have written extensively about the goals of EU competition law. Fox argues that EU competition law should balance the promotion of consumer welfare with maintaining market integration across the European Union.[31] According to her, EU competition law has a broader social dimension compared to U.S. antitrust law, focusing not only on efficiency and consumer welfare but also on fairness and protecting smaller businesses from dominant market players. European academia agrees with Fox. Whish and Bailey outline that the primary goals of EU competition law are ensuring market efficiency, preventing abuse of dominance, and promoting consumer welfare. They also highlight the importance of market integration, which seeks to eliminate barriers between EU MSs to foster a competitive single market.[32] This is certainly unique for the EU to follow and a good model for the GCC to learn from.[33] Finally, Lianos explores the evolving goals of EU competition law, especially in the context of digital markets and platform economies. He argues that while consumer welfare

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29 Righini, E.; Calzado, J.; Little, D.; Bichet , P.; *(Latham & Watkins LLP), The European Green Deal & Competition Policy – Call for contributions on how EU competition rules and sustainability policies can work together,*
[https://competitionlawblog.kluwercompetitionlaw.com/2020/10/19/the-european-green-deal-competition-policy-call-for-contributions-on-how-eu-competition-rules-and-sustainability-policies-can-work-together/] October 19, 2020 Accessed September 3 2024; see also Malinauskaite, Jurgita., *Competition law and sustainability: EU and national perspectives,* Journal of European Competition Law & Practice 13.5, 2022, pp 336-348

30 *Klaudia, M.; Robertson, V.; The twin transition to a green and digital economy: The role for EU competition law. Research Handbook on Sustainability and Competition Law,* Edward Elgar Publishing, 2024, pp 194-210

31 Fox, Eleanor M., *The Efficiency Paradox How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. Antitrust,* R. Pitofsky, ed., Oxford, p. 77, 2008, NYU Law and Economics Research Paper No. 09-26, SSRN [https://ssrn.com/abstract=1431558] July 8 2009Accessed December 2023

32 Whish, R.; Bailey, D., *Competition Law*, 9th edition, 2018

33 Another example is the digital market and the DMA see also Memeti, N. *From Legislation to Enforcement: Tackling Digital Acquisitions in the Gulf Region*. *DISO* **3**, 67 (2024). [https://doi.org/10.1007/s44206-024-00152-9] Accessed 27 December 2024.

remains central, the law must also address innovation, data privacy, and fair competition in digital ecosystems, areas where traditional competition metrics (like price) are less applicable.[34]

From the legislative framework perspective, TEU and TFEU as the primary sources covering the first two pillars and merger regulation as secondary legislation empowers the EU Commission to pursue its explicit and implicit goals. The most fundamental goal of EU competition law is to ensure the free movement of goods, services, capital, and workers as fundamental rights within the EU by preventing anti-competitive practices that might create barriers between Member States. This promotes the integration of national markets into a single EU market, enabling firms from all MSs to compete fairly.[35] EU competition law aims to protect consumers by ensuring that markets remain competitive, leading to lower prices, better quality, and increased innovation. The consumer welfare standard is central to enforcing EU competition rules, which aim to prevent practices harming consumers, such as cartels, abusive behavior by dominant firms, etc.[36] Although not explicitly mentioned within the treaties, innovation is an implicit goal of EU competition law. By maintaining competitive markets, the law must ensure that undertakings have incentives to innovate, which will lead to better products and services.[37]

2.2. CLASSIFYING STATES: DEVELOPED OR DEVELOPING?

The paper notes that EU Competition Law and US Antitrust are two of the most developed toolboxes for competition law. Scholars such as Fox, Gal, Jenny, Wacked, and Cheng have written extensively on competition law in developing countries or small economies, focusing on how competition law and policy can foster economic growth, combat concentrations, protect consumers, promote market access for smaller players, etc.

Fox, for instance, emphasizes that competition law in developing countries should not merely copy the models from advanced economies but must focus on market

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34 Lianos, I., *Competition Law for the Digital Era,* Handbook on European Competition Law, 2021

35 Article 3 TFEU (Lisbon)

36 Articles 101 and 102 TFEU (Lisbon)

37 Draghi's report on aiming at closing the innovation gap with the United States and China, Address by Mr. Draghi Presentation of the report on the Future of European competitiveness – European Parliament – Strasbourg – 17 September 2024 [https://commission.europa.eu/document/download/fcbc7ada-213b-4679-83f7-69a4c2127a25_en?filename=Address%20by%20Mario%20Draghi%20at%20the%20Presentation%20of%20the%20report%20on%20the%20future%20of%20European%20competitiveness.pdf] Accessed 10 November 2024

access and equity, ensuring that new entrants and small businesses can compete fairly against larger, often multinational corporations.[38]

In her paper, she mainly focuses on South Africa's market.[39] In her view, competition policy in that region can help break down barriers to entry, combat entrenched local monopolies, and address issues of economic inequality. Similarly to Fox, Simon highlights that competition policy in developing countries such as South Africa should aim to reduce inequality and foster economic inclusion by breaking up oligopolies and increasing market access for small and medium-sized enterprises (SMEs).[40] The GCC countries for instance, differ significantly from South Africa or other developing countries, making this discussion less suitable for their specific context. GCCs are 'rentier countries', meaning they derive a significant portion of their revenue from renting their natural resources to external clients rather than through productive activities like manufacturing or services.[41] Citizens in rentier states often pay low or no taxes. The government often redistributes the wealth from resources through public sector employment, subsidies, and extensive welfare programs, which contribute to social stability but can also discourage private-sector growth and diversification.[42] When rentier states rely too much on volatile resource markets, they face economic risks tied to fluctuating commodity prices.[43] This can lead to budget deficits and economic challenges when prices fall, as seen in oil price declines over recent years.

On the other hand, Jenny has contributed to understanding how competition law goals in developing countries vary from those in more advanced economies.[44] He emphasizes that competition law in these countries should focus on addressing market distortions, which can often arise from a combination of weak institutions and entrenched monopolistic practices.[45] All nascent competition laws are characterized by weak institutional infrastructure. As Kovacic and Lopez underline, most

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38 Fox, E., *Global Markets, Competition, and Developing Economies*, Antitrust Law Journal, 2012 See also Bonakele, T., *The Developmental State, Competition Law, and Economic Inclusion,* South African Journal of International Affairs, 2014

39 Fox, Eleanor M., "Global Markets, Competition, and Developing Economies," in Antitrust Law Journal (2012)

40 Roberts, S., *Economic Development, Competition and Industrial Policy in South Africa*, Competition Policy International, 2011

41 Gray, M., *A theory of'late rentierism'in the Arab states of the Gulf,* CIRS Occasional Papers, 2011

42 Hertog, S.*; Reforming wealth distribution in Kuwait: estimating costs and impacts*, [https://eprints.lse.ac.uk/105564/2/Reforming_Wealth_Distribution_in_Kuwait_New.pdf], 2020 Accessed February 2023

43 Ibid

44 Frédéric, J., *Competition Law and Developing Economies: A Hopeful Roadmap*, Journal of Competition Law & Economic, 2012

45 Ibid

jurisdictions typically take twenty to twenty-five years to operate the competition law system fully.[46]

The perception differs if one writes about developing countries with small economies. In her article on small market economies, Gal, for instance, argues that the goals of competition law should be tailored to the specific needs of small market economies. In these economies, competition law must address the unique challenges posed by limited market size, which can restrict the number of competitors and make monopolies more likely. Promoting efficiency and ensuring that firms have the scale to compete globally is crucial for small economies. However, this may mean tolerating some level of market concentration.[47]

Economic efficiency remains a central goal of competition law, even in smaller or developing markets. However, she also highlights the need to balance this goal with concerns about market power. In small economies, a few dominant firms might be necessary to achieve economies of scale, but competition law must ensure these firms do not abuse their market power.[48] Gal supports the idea that competition law in developing countries and smaller economies may need to integrate social and economic development goals. This includes promoting innovation, fostering inclusive economic growth, and ensuring access to essential goods and services. In her work, she argues that competition law should not be a one-size-fits-all solution but rather reflect the specific economic realities of different jurisdictions.[49] Finally, Wacked argues that the goals of competition law in developing countries should go beyond the traditional focus on economic efficiency, as seen in many developed countries, and incorporate broader social and developmental objectives.[50]

2.3. POSITIONING THE GULF STATES

Given the discussion so far, one might wonder if the Gulf countries should be considered developing or developed economies. This varies based on the criteria used, but these countries are often classified as high-income developing nations or emerging economies, primarily driven by the oil industry. Although this is not the

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46 Kovacic, W.; Lopez-Galdos, M., *Lifecycles of competition systems: explaining variation in the implementation of new regimes*, Law & Contemp, Probs 79, 2016, pp 85

47 Gal, M., *Competition Policy for Small Market Economies,* 2003

48 Gal, M., *The Optimal Goals of Competition Law*, Antitrust Bulletin, 2004

49 Gal, M., *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Economies*, Fordham International Law Journal, 2010

50 Waked, D., *Antitrust goals in developing countries: policy alternatives and normative choices,* Seattle UL, Rev. 38, 2014, pp 945

primary focus of the paper, it is essential to clarify this before discussing competition law challenges in the region.

Based on International Organizations (IOs) data, Gulf countries, particularly those members of the GCC, have high per capita income due to their vast oil and gas resources. This wealth elevates their Gross National Income (GNI) per capita to levels often associated with developed countries, which might lead to the assumption that they are fully developed.

However, World Bank (WB) and International Monetary Fund (IMF) classifications often place them in the developing or emerging economies category because their economies largely depend on oil exports only and face challenges in areas such as employment and social development.[51] WB typically classifies countries based on income levels rather than broader social and economic indicators, and in that context, GCC countries are considered high-income economies.[52]

However, the United Nations (UN) does not list them among fully developed jurisdictions, as social indicators, including education, diversification, and reliance on natural resources, still present developing characteristics.[53]

Another measurement desk is the Human Development Index (HDI), which measures broader aspects of human development such as life expectancy, education, and living standards. Based on HDI, Gulf countries are ranked relatively high, though not at the very top globally.[54] While their HDI rankings are impressive (especially the UAE and Qatar), the presence of income inequality, reliance on expatriate labor, and structural reforms necessary for sustainable development keep them closer to the developing status in broader terms.[55]

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51 Country Composition of WEO Groups, World Economic Outlook Database Groups and Aggregates Information, [https://www.imf.org/en/Publications/WEO/weo-database/2023/April/groups-and-aggregates] Accedde 13 April 2024

52 Hamadeh, N.; Rompaey, C.; Metreau, E.; *World Bank Group country classifications by income level for FY24*, [https://blogs.worldbank.org/en/opendata/new-world-bank-group-country-classifications-income-level-fy24] (July 1, 2023- June 30, 2024), June 2023 Accessed 4 November 2024.

53 Cherif, R.; Hasanov, F.; *Soaring of the Gulf Falcons: Diversification in the GCC oil exporters in seven propositions*, International Monetary Fund, https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Soaring-of-the-Gulf-Falcons-Diversification-in-the-GCC-Oil-Exporters-in-Seven-Propositions-42365, 2014. website

54 Arab Human Development Report 2022*: Expanding Opportunities for an Inclusive and Resilient Recovery in the Post-Covid Era* [https://www.undp.org/arab-states/publications/arab-human-development-report-2022-expanding-opportunities-inclusive-and-resilient-recovery-post-covid-era] Accessed 17 June 2023

55 Ibid

From an internal perspective, it is evident that the GCC countries are implementing significant reforms to lessen their dependence on oil, which characterizes developing economies as they shift toward more diversified and sustainable growth models.[56] Policies and projects like Saudi Arabia's Vision 2030[57] and the UAE's economic diversification plan 2031[58] highlight ongoing efforts to shift from resource-based to more knowledge-based economies. This necessity for economic diversification is why they are often seen as developing or emerging markets.

Some argue that certain Gulf countries adopted competition laws primarily to meet requirements for membership in International Organizations (IOs).[59] When Gulf countries drafted their competition laws, they primarily drew inspiration from international best practices, tailoring these frameworks to suit their specific economic contexts. Some Gulf Countries are now members of the World Trade Organization (WTO) and follow its competition policy guidelines. The WTO encourages members to adopt competition policies that promote market access and prevent trade distortions caused by anti-competitive practices. This has influenced how Gulf countries design laws encouraging economic liberalization and ensuring fair competition. Bahrain and Oman, for instance, have based some of their competition rules on WTO principles to ensure that foreign and domestic firms can compete fairly within their markets.[60] This is primarily based on the principle of competition neutrality.[61]

Ultimately, nations determine their own place in the world. Since the rules also aim to ensure that WTO members safeguard the interests of developing country members, some countries, such as KSA, have opted to stay in this category. The U.S. has urged KSA to relinquish its developing status at the World Trade Or-

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56 Matallah, S., *Economic diversification and governance challenges in MENA oil exporters: A comparative analysis,* The Journal of Economic Asymmetries 26, 2022

57 Saudi Vision 2030 *[https://www.vision2030.gov.sa/en]* Accessed 15 April 2024

58 UAE vision 2031 [*https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/strategies-plans-and-visions/innovation-and-future-shaping/we-the-uae-2031-vision]* Accessed 23 April 2024

59 Approaches to and Challenges in Implementing Competition Law and Policy in the Arab World, 15/06/2023, [*https://www.freiheit.org/middle-east-and-north-africa/approaches-and-challenges-implementing-competition-law-and-policy-arab],* Accessed April 28 2024

60 Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, *Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and issues for Reflection* [https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf] 2018, Accessed May 17, 2024

61 Healey, D.; *Competitive neutrality: the concept. In Competitive Neutrality and its Application in Selected Developing Countries, United Nations Conference on Trade and Development, UNCTAD Research Partnership Platform Publication Series*, United Nations, Geneva, 2014 Accessed 9 February 2024

ganization (WTO), which affords the kingdom certain advantages in economic negotiations.[62]

As a sum, and elaborated in detail below, Gulf countries have drafted their competition laws using a blend of EU competition law, U.S. antitrust models, WTO guidelines, and regional cooperation frameworks. These sources have been adapted to suit the Gulf states' unique economic conditions, particularly their need for diversification and fostering a more competitive environment across a wide range of sectors.

2.4. KEY OBJECTIVES OF GULF COMPETITION LAWS

We now turn to the core of this paper, which is the objectives competition laws strive to pursue in the Gulf countries. Are these objectives similar to those mentioned in developed legal frameworks and academic discourse? Or are they unique in the region's context? Alternatively, should the Gulf countries consider other, potentially more effective solutions? While the laws of developed jurisdictions inspired the Gulf competition laws, the Gulf countries adapted their national laws to fit their specific purposes.

The policy in the region has also been involved in the discussion, albeit to a minimal extent. Besides, the laws are sufficiently clear to articulate the objectives. In 2022, Alajmi, the Kuwaiti CPA Chairman, stressed the need for regional economic integration to accomplish the goals of sustainable development, noting that the state of Kuwait gives high priority to the national policy of protection. This policy is a national development project that aims to upgrade the rules and procedures related to the protection of competition, facilitate orderly investment, and prevent fraudulent behaviour.[63] In 2023, The chairman of the Board of Directors of KSA's General Authority for Competition (GAC), Dr. Al Kholifey, highlighted the vital role of public policies in addressing challenges from implementing the competition law and policy. With Vision 2030, KSA has set forth an ambitious plan for economic reform and increased private sector involvement to attract domestic and international investment. Based on his speech, since 2018, the GAC has de-

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62 Baschuk, B.; *Here's What It Means to Be a WTO Developing Country*, [https://www.bloomberg.com/news/articles/2019-11-14/here-s-what-it-means-to-be-a-wto-developing-country-quicktake?sref=p-1whY86y] Accessed 9 February 2024

63 Speech by Rashed Alajmi, *The third Arab Competition Forum, organized in Oman by Economic and Social Commission for Western Asia (ESCWAS),* 24/04/2022, [https://www.kuna.net.kw/ArticleDetails.aspx?id=3039900&Language=en] Accessed 3 March 2024

veloped a strategic approach to enforce competition laws and regulations, support economic growth, promote competition, and prevent monopolistic practices.[64]

The recent UEA's competition law adopted in 2023 aims to combat monopolistic practices by ensuring a stimulating environment for enterprises, Abdullah Ahmed Al Saleh, the undersecretary of the Ministry of Economy of the UAE stated.[65]

If policies do not articulate a vision for the goals, then one must read the laws to understand the objectives that the law seeks to achieve. In general, the inflation of matters is good, but the inflation of goals in applying competition law does not make institutional work easier; on the contrary, it makes it challenging and even more discretionary.[66] This is the case with developed jurisdictions, which have undoubtedly been inherited by developing or less developed jurisdictions. In this way, developing jurisdictions struggle to determine the goal that takes priority in applying the law, and more often than not, this is the primary reason for not being fully engaged in enforcing the law.

Competition laws in the Gulf strive to pursue different goals, some of which are common and others that differ. Most promote (fair) competition in the market, some explicitly, and others only in a *tacit* mode. The Saudi Competition Law of 2019 is the only one in the region explicitly mentioning that it strives to protect and encourage fair competition in the Kingdom.[67] Article 2 of this law also emphasizes improving the market environment and fostering economic development.[68] The Law reinforces the principle of free market pricing, stating that prices for goods and services should be determined by market forces unless set by government authorities.[69] Kuwaiti Competition Law[70] ensures freedom to practice economic activities, provided they do not limit or harm free competition.[71] In an implicit way, although not directly mentioning SMEs, article 15 of the law ensures that larger, dominant firms do not unfairly suppress smaller competitors,

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64 Speech by Kholify, *The Fourth Arab Competition Forum, Kingdom of Saudi Arabia*, 23-24/05/2023, Organized by UNESCWA, [https://www.unescwa.org/sites/default/files/event/materials/ACF%20Report%20En.pdf] Accessed 3 March 2024

65 Alkesh Sharma, *Everything you need to know about the UAE's competition regulation law?,* 2024, [https://www.thenationalnews.com/business/economy/2024/07/12/everything-you-need-to-know-about-the-uaes-competition-regulation law/#:~:text=The%20law%2C%20which%20has%20replaced,any%20act%20that%20would%20distort%2C] Accessed September 13, 2024

66 Memeti, N., *Discretionary Powers in Merger Control,* (forthcoming, Arab Law Quarterly), 2025

67 Competition Law of the Kingdom of Saudi Arabia (KSA), 2019, Article 2

68 Ibid, Article 2

69 Ibid, Article 4

70 Competition Protection Law of Kuwait No. 72/2020

71 Ibid, Article 2

thus supporting a diverse economic environment where SMEs can compete.[72] The UAE Federal Decree regulating Competition aims to promote and protect competition in the UAE's economic landscape, and it is the law recently adopted in the region.[73] It aims at preventing practices that distort or harm competition, ensuring that businesses operate in a competitive manner that benefits consumers and promotes economic development. The law aims to stimulate businesses, enhancing their effectiveness and competitiveness while ensuring consumer protection. It seeks to achieve sustainable development by maintaining a market governed by free market principles.[74]

Some common goals among many GCC countries include the consumer welfare standard, economic development, and the promotion of market efficiency, etc. The most crucial goal that these laws promote is consumer protection or consumer welfare. Kuwaiti Competition Law aims to safeguard consumer freedom and ensure consumer choice.[75] In the UAE, the law states that, among others, it aims to enhance business effectiveness and consumer welfare by preventing anti-competitive practices.[76] Whereas Qatari and Omani competition laws aim to benefit consumers by maintaining market principles and pricing freedom.[77]

As mentioned above, economic development is one of the region's most essential and unique goals. It's a feature that distinguishes the region from both developed and developing countries. Their economic diversification plans strongly influence the competition law goals in Gulf countries. For example, Saudi Arabia's Vision 2030 and the UAE's Economic Vision 2031 emphasize reducing dependence on oil and fostering a competitive environment for innovation and foreign investment. This leads to laws prioritizing market fairness, consumer protection, and enhanced competitiveness in non-oil sectors like technology, finance, and tourism. UAE's Competition Law aims to stimulate business effectiveness and competitiveness, contributing to sustainable economic development.[78] In Oman, the law states that, among others, its goal is to stabilize market rules and promote market efficiency, contributing to economic growth. Other countries in the Gulf do this in a very subtle way. For instance, the Kuwaiti Competition Law promotes a diverse economic environment that supports SMEs and prevents large companies from suppressing competition.

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72 Ibid, Article 15

73 The UAE Federal Decree-Law No. (36) of 2023 Regulating Competition, Article 2

74 Ibid, Article 2

75 Ibid, Article 15

76 Ibid, Article 2 (1)

77 Competition Law of Oman, article 2, Competition Law of Bahrain, Article 2

78 Competition Law of United Arab Emirates (UAE), Article 2

Finally, market efficiency and innovation are other important goals that all Gulf countries strive to achieve. In Kuwait, the law guarantees free competition and protects innovation by preventing harmful practices.[79] UAE's and Omani's Competition Laws aim to improve market efficiency and encourage innovation by prohibiting anti-competitive practices and maintaining free competition and pricing freedom. [80]

3. WHEN GOALS MEET THE PILLARS

An analysis of the goals of both developed and developing countries reveals that they are often closely aligned. Yet, the fundamental pillars supporting these objectives need to be clarified. Like developed jurisdictions, the Gulf countries include the three main pillars found in modern competition laws today: anti-competitive agreements, abusive conduct, and merger control.

3.1. (THE) ANTI-COMPETITIVE AGREEMENTS (PILLAR)

The definition of anticompetitive agreements in most Gulf competition laws is generally more detailed compared to the concise notions explicitly outlined in EU and US competition law.

Kuwaiti Competition law prohibits agreements and practices that restrict competition, whether between competitors (horizontal relationships) or suppliers and customers (vertical relationships). Horizontal relationships between competitors in wrongdoings such as price fixing, market allocation, product limitations, technical development restrictions, and collusive tendering are prohibited per se.[81] The list is not exhaustive.[82] It also prohibits agreements or coordinated practices between entities at different levels of the production or distribution chain (e.g., suppliers and distributors) that could restrict, limit, or prevent competition.[83]

These and similar to these agreements are also prohibited under article 5 of The UAE Competition Law. These agreements can take various forms, including horizontal agreements between competitors and vertical agreements between non-competitors. The law is designed in such a way as to prevent practices that harm market competition by fixing prices, limiting production, or manipulating mar-

79 Competition Law of Kuwait, Article 2.

80 Competition Law of United Arab Emirates (UAE), article 2, Competition Law of Oman, Article 2

81 Competition Law of Kuwait, Article 5

82 Ibid, Article 6

83 Ibid, Article 7

kets. The law's primary goal in regulating anti-competitive agreements is to protect the integrity of the competitive process by preventing businesses from colluding to control prices, divide markets, or manipulate market conditions. This ensures that consumers benefit from competitive prices, innovation, and a wider choice of products and services.

The Saudi Competition Law explicitly prohibits agreements, contracts, and practices that undermine or limit competition. This applies to formal and informal agreements, written or oral, explicit or implicit, that distort competition. Except for price-fixing, output limitation, market allocation, and bid-rigging, compared to Kuwaiti Competition, the Law also prohibits exclusionary practices, preventing new entities from entering the market or denying access to essential goods or services, and freezing investment, freezing or limiting manufacturing, distribution, development, or investment activities. Compared to the abovementioned jurisdictions, KSA competition law does not distinguish horizontal and vertical anticompetitive agreements.[84]

The Omani Competition Protection Law focuses on three key pillars already named above. The law prohibits agreements or contracts that create monopolies or restrict competition. This includes both written and oral domestic or international agreements that negatively affect competition in Oman.[85] Article 9 lists prohibited practices to prevent competition, such as price fixing, limiting production, market allocation and exclusionary practices. Bid rigging is not within the explicit prohibitions.

3.2 (THE) ABUSIVE CONDUCT (PILLAR)

Abusive conduct pillar is also included in all national competition Laws of the Gulf Council.[86] Regional competition laws define dominance and abuse as part of the second pillar. Kuwaiti Competition Law defines dominance as a situation where a person or entity, individually or jointly, can control or influence the relevant market and act independently of competitors, customers, or consumers.[87] The same provision states, "it shall be prohibited for any person to abuse a dominant position. Any practice that leads to the prevention of competition in the rel-

84 Competition Law of the Kingdom of Saudi Arabia (KSA), Article 5

85 Competition Law of Oman, Article 8

86 See more, Kuwait Competition Law, Article 8; KSA Comp. Law, Article 6; UAE's Comp. Law, Article 6; Omani competition law, Article 10; Bahraini Comp. Law Article 9; Qatari Competition Law, Article 4

87 Competition Law of Kuwait, Article 8

evant market or restricts or prevents it shall be considered as abuse of a dominant position."

Saudi's Competition Law explicitly prohibits entities in a dominant position from engaging in practices that undermine or limit competition and abuse their dominant position.[88] A 40% or more market share is presumed to confer dominant status, although smaller market shares may also be deemed dominant depending on other factors. Specific abusive behaviors include predatory pricing, price manipulation, supply manipulation, discrimination, refusal to deal, and tying.[89]

The law in the UAE is very similar to KSA's competition law regarding the dominance and abuse. What is different here is that, in this country, restricting access to essential facilities and preventing competitors from accessing critical infrastructure, networks, or essential facilities for entering the market or continuing operations also includes abuse of dominance position.[90] The same provision states that any undertaking which, either individually or in collaboration with other undertakings, holds a dominant position in the relevant market or in a significant and influential part of it shall be prohibited from engaging in any act or conduct that constitutes an abuse of that position if its object or effect is to distort, lessen, restrict, or prevent competition.

Based on Qatari Competition law, abuse of a dominant position occurs when a company or a group of companies use their market power to limit competition, exploit customers, or prevent market access for competitors.[91] The law targets companies with significant control or influence over the market and prohibits them from abusing this position.[92] Omani and Bahraini competition laws regarding the second pillar are very similar to what was discussed earlier in the neighbourhood countries.

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88 Competition Law of Kingdom of Saudi Arabia (KSA), Article 6

89 Ibid, Article 6

90 UAE Competition Law Article 6, very similar provisions are included in the Omani Competition law Article 10, Bahraini Competition Law Article 9, with the exception that article 8 of this law defines a dominant position as one where an undertaking has sufficient economic strength to prevent effective competition and act independently of its competitors, clients, or consumers. Qatari Competition Law, Article 4 also enumerates all above mentioned abusive practices and holds no novelty.

91 Competition Law of Qatar, Article 4

92 Article 4 enumerates the specific prohibitions stated by law, very similar to the prohibitions in neighborhood countries already mentioned.

3.3 (THE) MERGER CONTROL (PILLAR)

Merger control pillar seems better regulated within the Gulf countries compared to other pillars since these structural changes of companies in the market have previously been governed under Company or Commercial Laws.

In Kuwait, the law defines mergers, acquisitions, and joint ventures.[93] Except for the last category, the first two are based on the direct or indirect lasting change of control. The law requires mandatory notification[94] and all parties involved must only complete the concentration once the CPA issues the approval.[95]

The Saudi Law states that: '*Any activity that results in the total or partial transfer of ownership of assets, rights, stocks, shares, or obligations of an entity to another, or in the combining of two or more managements into one joint management, in accordance with the Regulations*.'[96] In this country, the law addresses economic concentrations, such as mergers and acquisitions, which could significantly reduce competition by creating entities with excessive market power. Mergers and acquisitions are regulated to ensure that they do not harm competition by consolidating market control in the hands of a few large entities. Article 7 requires entities involved in economic concentration (e.g., mergers, acquisitions, or joint ventures) to notify GAC before the completion of the transaction if the total annual sales of the participating entities exceed the threshold set by the implementing regulation. GAC has the right to approve, conditionally approve, or refuse an economic concentration based on its potential effects on competition.

The UAE Competition Law regulates mergers and acquisitions (economic concentrations) that could harm competition by consolidating market power in the hands of a few entities.[97] The law requires businesses involved in economic concentration (mergers, acquisitions, or joint ventures) to notify the Ministry of Economy at least 90 days before completing the transaction if certain conditions are met.

Omani Competition Law requires businesses to notify the Competition Centre of any proposed merger or acquisition that results in economic concentration.[98] The Centre must review the merger and issue a decision within 90 days. The merger is considered approved if the Centre does not respond within this period. The law

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93 Competition Law of Kuwait, Article 10

94 Ibid, Article 14

95 Ibid, Article 14

96 Competition Law of the Kingdom of Saudi Arabia (KSA), Article 1

97 Competition Law of United Arab Emirates (UAE), Articles 12-15

98 Competition Law of Oman, Articles 11-12

prohibits any market concentration transaction that may substantially limit competition without the Authority's prior approval.

Mergers and acquisitions in the Qatari market can significantly affect competition by consolidating market power. The law regulates these activities to ensure that such transactions do not result in the creation of monopolies or the substantial reduction of competition.[99]

Suppose the legislative goals to be achieved are presumed to be vague (as many argue). In that case, it may be inferred that NCAs can prevent harmful practices, address market distortions caused by abusive behavior, or block specific concentrations. These can also be regarded as significant goals accomplished by the agencies.

4. UNDERSTANDING INSTITUTIONAL ROLES: WHO IS RESPONSIBLE FOR WHAT?

What does the institutional infrastructure in charge of the implementation of Competition Law look like? What are the institution's roles? Who is responsible for what?[100] Are these institutions well-equipped and capable of reaching the objectives that Competition laws prescribe?

Like the EU and many other jurisdictions, administrative institutions primarily conduct competition law enforcement.[101] Although the legislation provides for a clear delineation of powers between administrative bodies and the judiciary, the judiciary in most countries has remained largely inactive.

The Kuwaiti Competition Protection Law sets up a comprehensive institutional infrastructure.[102] The Competition Protection Authority (CPA)[103] is the leading institution implementing the law. CPA's primary goal is to protect competition, prevent monopolistic practices, ensure the freedom of economic activity, etc. The agency is responsible for receiving complaints, conducting investigations, gathering information, and analyzing market practices to ensure compliance with the law.[104] CPA can issue corrective measures, penalties, and exemptions when neces-

99 Competition Law of Qatar, Articles 10-12

100 Kovacic, W., *The Institutions of Antitrust Law: How Structure Shapes Substance,* Mich. L. Rev, 2011 see also Kovacic, W., *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement,* Chi.-Kent L. Rev., 77, 265, 2001

101 All national competition authorities (NCAs) or agencies are regarded as administrative institutions.

102 Competition Law of Kuwait, No. 72/2020

103 The terms CPA or agency or competition authority will be interchangeably used throughout the paper

104 Competition Law of Kuwait, Article 16

sary. Additionally, the CPA conducts market studies, organizes training, fosters awareness of competition law, and ensures the law is enforced effectively.

The Saudi Competition Law also establishes a clear institutional framework to enforce its provisions. In this country, the General Authority for Competition (GAC) is the central institution responsible for implementing the Law. Its primary role is to ensure that competition is protected, anti-competitive practices are curbed, and market efficiency is promoted. GAC promotes fair competition and prevents monopolistic practices that could harm consumer interests or the market environment.[105]

The Competition Regulatory Committee (CRC or Committee) is an advisory and decision-making body within the framework of the UAE Competition Law.[106] It is tasked with proposing policies, reviewing exemption requests, and making recommendations to the Ministry of Economy. The Committee ensures that competition rules are effectively applied and offers oversight into competition-related matters. The Committee proposes the general competition policy for the UAE and submits it to the Minister of Economy for approval.[107]

The Bahraini Competition Law[108] establishes a structured institutional framework to promote and protect competition within the Kingdom. Various entities and authorities are tasked with specific responsibilities to enforce the law, monitor market activities, and ensure compliance. The primary body responsible for overseeing competition in Bahrain is the Authority for Promotion and Protection of Competition (the Authority). Its key responsibilities among others, are: promoting and protecting competition in the economic activities within Bahrain; monitoring market activities to ensure compliance with competition law, investigating reports and complaints regarding anti-competitive practices, issuing decisions on mergers, acquisitions, and market concentration, as well as approving or rejecting them if they substantially limit competition, providing guidance and advice to companies on whether their practices or arrangements violate the law,[109] engaging in international cooperation with counterpart authorities to address competition issues that cross borders.[110]

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105 Competition Law of the Kingdom of Saudi Arabia (KSA), 2019, Article 2

106 Ibid, Article 17.

107 Ibid, Article 17 (1)

108 Competition Law of Bahrain, No. 31/2018

109 Ibid, Article 22

110 Ibid, Article 23

The institutional infrastructure outlined in Qatari Competition Law[111] specifies the roles and responsibilities of various entities and bodies that ensure the proper application and enforcement of the law. The Committee is the core regulatory body established by the law. This committee monitors, investigates, and regulates competition-related matters in Qatar. The committee observes market practices, ensures that competition is protected, and prevents monopolistic activities. The committee receives complaints and reports of violations related to competition and monopolistic practices, investigates them, and takes necessary action.[112] It is responsible for preparing, updating, and maintaining a database on economic activities, conducting necessary studies, and serving as an information hub for competition matters.[113] It coordinates with competition authorities in other countries on matters of mutual interest to prevent anti-competitive practices with international implications.[114]

4.1. INSTITUTIONAL INFRASTRUCTURE

Analyzing its infrastructure, the Kuwaiti CPA consists of a board that includes a president, a deputy president, and three part-time members appointed by a Minister of Trade and Industry decree. Board members must have at least ten years of experience in economics or commercial law.[115] The board members are appointed for a four-year term, renewable once. The Board is responsible for approving policies and procedures to protect competition. It suggests law amendments and expresses opinions on competition-related policies. The Board approves the annual budget, the organizational structure, and the internal regulations of the CPA. It also issues decisions on competition violations, mergers and acquisitions, etc. The board's President is also the head of the CPA and represents the institution in legal and public matters.[116] He oversees the implementation of the Board's decisions, ensures compliance with the law and is responsible for bringing cases of violations to the Board. The President may delegate specific powers to the CPA's Executive Manager. The Executive Manager is responsible for the CPA's daily operations and ensures the implementation of the Board's decisions. The CPA has a dedicated Legal Department that is responsible for handling cases and providing legal

111 Law Concerning Protection of Competition and Prevention of Monopolistic Practices of Qatar, No. 19/2006

112 Ibid, Article 8 (2)

113 Ibid, Article 8 (1))

114 Ibid, Article 8 (3)

115 Competition Law of Kuwait, Article 17

116 Ibid, Article 20

opinions.[117] The Legal Department represents the CPA in courts and arbitration panels. It investigates competition law violations and prepares legal cases for enforcement. The Legal Department can request data, summon witnesses, and audit records to investigate violations. It plays a crucial role in supporting the CPA's enforcement powers.[118]

The Minister of Trade and Industry (The Minister) appoints the Executive Manager upon the nomination of the Board and serves a four-year term, renewable once.[119] The Executive Manager oversees the CPA's internal processes, manages complaints and investigations and implements Board decisions.[120] The Executive Manager is tasked with gathering evidence, conducting investigations, reviewing market practices, and monitoring agreements or economic concentrations. The Executive Manager also prepares reports, manages the budget, and oversees staff training programs.

Another essential body within CPA is the Disciplinary Board, which is established to impose penalties for competition law violations.[121] This Board comprises five members, including three judges and two economics or legal affairs experts. It handles disciplinary inquiries into violations and adjudicates penalties for non-compliance with competition rules, such as fines. The Disciplinary Board can impose financial penalties on violators. It also handles grievances and appeals against decisions made by the CPA's Board of Directors.[122]

Finally, the Minister oversees all CPA's work, ensuring its operation is in accordance with the law.[123]

The Chairman and Governor of GAC in the KSA are crucial in managing the organization's day-to-day operations and ensuring that investigations and enforcement actions are initiated on time. In urgent situations, the Chairman may authorize investigations, searches, and evidence gathering into anti-competitive practices.[124] This decision must be presented to the Board at its next meeting. The Board approves inquiries, searches, evidence gathering, and investigations into potential law violations.[125]

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117 Ibid, Article 30.

118 Ibid, Article 31

119 Ibid, Article 21

120 Ibid, Article 22

121 Ibid, Article 32

122 Ibid, Article 33

123 Ibid, Article 15

124 Competition Law of the Kingdom of Saudi Arabia (KSA), Article 14

125 Ibid, Article 14

As the executive head of GAC, the governor ensures that the policies and directives issued by the Board are implemented and oversees the authority's daily functions.

There is a Committee for Adjudication of Violations within the GAC, a specialized body of experts and legal specialists. It is responsible for ruling on competition law violations and imposing penalties where appropriate. The Committee comprises five members, including three legal specialists, appointed for three-year renewable terms.[126] The Committee adjudicates violations of the law and imposes penalties for non-compliance, except for certain violations.[127] Companies sanctioned by the Committee can appeal its decisions before the competent court within 30 days of notification.[128]

GAC appointed Law Enforcement Officers to conduct investigations, gather evidence, and ensure companies comply with competition laws. They have the authority to investigate, gather evidence, and record competition law violations.[129] They can also enter entities' premises, review documents, and take copies as part of their investigations. Officers can use electronic and computer-generated data, telephone recordings, fax machine correspondence, and email as evidence in competition-related cases.[130] Entities and businesses operating within Saudi Arabia must comply with the provisions of competition law. This includes cooperating with GAC and its officers during investigations and ensuring they do not engage in anti-competitive behavior. Companies must not obstruct or prevent law enforcement officers from performing their duties, including withholding information or providing misleading data.[131] They must also allow officers to access records and premises as required for the investigation.

The most complex institutional framework established in the Gulf region concerning competition law is that of the UAE, primarily due to the division of the UAE into seven distinct Emirates. As specified above, the Ministry of Economy is quite powerful in implementing Competition Law in the UAE. However, Article 16 establishes the Competition Regulatory Committee (the Committee), with the Cabinet determining its composition and procedures. The following provision defines the Committee's responsibilities, including proposing policies, reviewing exemption applications, and preparing annual reports.[132]

126 Ibid, Article 18

127 Ibid, specified in Articles 12 (1) and 24

128 Ibid, Article 18

129 Ibid, Article 15

130 Ibid, Article 15

131 Ibid, Article 16

132 Competition Law of United Arab Emirates (UAE), Article 17

The Relevant Authorities are the competent local authorities that enforce competition law within their jurisdictions. These authorities work alongside the Ministry of Economy, particularly when anti-competitive practices or mergers occur within specific emirates or sectors. They may have overlapped jurisdiction with the Ministry in certain areas, such as local markets or specific industries. Relevant authorities may handle competition issues, including reviewing anti-competitive practices and merger applications, which are limited to their local jurisdiction and do not extend beyond their emirate.[133] They are required to inform the Ministry of any decisions made regarding competition issues, allowing for oversight and coordination.[134] These authorities may participate in investigations into anti-competitive practices or review merger applications in coordination with the Ministry.[135] Article 21 establishes the role of Relevant Authorities in considering anti-competitive practices and mergers at the local level and their obligation to coordinate with the Ministry of Economy.

The Centre's Board in Oman plays a key governance role in administering and overseeing the Centre's activities. It ensures that the Centre's functions align with the overall goals of competition protection and provides strategic direction for enforcing the law. The Board, led by its chairman, is responsible for key decision-making activities within the Centre.[136] It sets the criteria for determining dominant market positions and evaluating market control.[137] This enables the Board to identify cases of anti-competitive behavior and address potential monopolistic practices. The regulations determine instances of domination or control over the concerned market as per criteria regulating the market structure. The law requires the Chairman of the Board to issue the regulations and resolutions necessary for executing the law's provisions within six months of its promulgation.[138] This ensures that the law is implemented effectively. The Chairman of the Board shall render this regulation following approval from both the Board and the Ministerial Cabinet.

4.2. IS INDEPENDENCE DOABLE?

Many have written about institutional challenges, particularly the different layers of independence NCAs should enjoy when enforcing the law in order to issue un-

133 Ibid, Article 21

134 Ibid, Article 21 (3)

135 Ibid, Article 21 (2)

136 Competition Law of Oman, Article 1

137 Competition Law of Oman, Article 6

138 Competition Law of Oman, Article 28

biased decisions.[139] Upon closer examination, it becomes evident that all entities directly involved in competition law are either physically situated within governmental ministries or must adhere directly to the directives issued by the relevant ministry.

The Kuwaiti Competition Law explicitly states that the CPA is an independent legal entity supervised by the Minister of Trade and Industry.[140] What this independence entails is unknown. However, the law again emphasizes that the Minister oversees all CPA's work, ensuring its operation follows the law.[141] In Bahrain, the Competition Authority is established as a public institution with juridical personality and financial and administrative independence, although it operates under the oversight of the Minister of Commerce.[142] The Minister of Commerce oversees the Authority, ensuring it operates per state policies and the law. While the Authority operates independently in day-to-day affairs, the Minister controls significant decisions and policy directions.

The Ministry of Economy plays a central role in enforcing the UAE Competition Law.[143] It is responsible for overseeing competition policy, investigating violations, reviewing mergers, and issuing decisions related to anti-competitive behavior.[144] The Ministry has broad powers to ensure compliance with the law and promote fair competition in the UAE market.[145] The Ministry is tasked with applying the competition policy across various sectors, ensuring that businesses adhere to the principles of fair competition.[146] It has the authority to investigate anti-competitive practices based on complaints or ex officio. This includes gathering evidence, conducting investigations, and taking action against violators.[147] The Ministry is also responsible for reviewing applications for mergers and acquisitions that may affect competition. It assesses the potential impact of economic concentrations and decides whether to approve, conditionally approve, or reject them.[148]

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139 Clark, J., *Competition advocacy: challenges for developing countries.* OECD Journal: competition law and policy 6.4, 2005, pp 69-80, see also Kovacic, W.; and Hyman, D., *Competition Agency Design: What's on the Menu?,* European Competition Journal 8.3, 2012, pp 527-538

140 Competition Law of Kuwait, Article 15

141 Ibid, Article 15

142 Competition Law of Bahrain, Article 17

143 The Federal Decree-Law No. (36) of 2023 Regulating Competition in the UAE;

144 Competition Law of United Arab Emirates, Article 18

145 Ibid, Article 18

146 Ibid, Article 18 (1)

147 Ibid, Article 18 (4)

148 Ibid, Article 13; Article 15

The Ministry of Economy and Commerce in Qatar plays a central role in overseeing and implementing the competition law. It is the main governmental body responsible for the overall execution and enforcement of the provisions laid out in the law. The Minister of Economy and Commerce is responsible for issuing decrees and regulations necessary to implement the law.[149] The Minister has the authority to grant exemptions from competition rules when it is in the interest of consumers or when the concerned parties request it.[150] The Minister can permit the compounding of violations before a final judgment, reducing the penalties by allowing the violators to pay a fine to settle the matter.[151] The Ministry and its Minister act as the primary authority to oversee competition policies, handle requests for exemptions, and ensure that market practices align with the goals of the competition law. They issue necessary bylaws, approve decisions, and coordinate with the Committee for the Protection of Competition and Prevention of Monopolistic Practices (the Committee).

5. CONCLUSION

The competition law frameworks in the GCC countries reflect a blend of international influences, primarily inspired by the EU, U.S. antitrust models, and organizations such as the WTO and OECD etc. However, these laws are tailored to meet the region's requirements and needs. As GCC nations pursue diversification strategies to reduce oil reliance, competition laws have become vital tools to promote market efficiency, protect consumer welfare, ensure fairness, and foster innovation.

While the core pillars of competition law—anticompetitive agreements, abusive conduct, and merger control—align with those in developed jurisdictions, the nuances of their implementation reflect the region's specific challenges. The varying degrees of independence in national competition authorities further influence the effectiveness of enforcement. Striking the right balance between ministerial oversight and autonomous enforcement remains a key area for future reform.

As the GCC states strive for economic diversification and sustainable growth, competition laws are critical in shaping fair, efficient, and innovative markets. Continued refinement of these legal and institutional frameworks will be essential to achieving long-term economic transformation in the region.

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149 Competition Law of Qatar 2006, Article 19

150 Ibid, Article 5

151 Ibid, Article 16

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Preliminary Communication

COMPETITION ISSUES IN LABOUR MARKETS

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Abstract

Securing a well-functioning and competitive labour market is essential for economic growth and prosperity. A distorted labour market diminishes the employees' power to bargain regarding their labour rights, including salary amount, working conditions, and social safeguards. However, the problems deriving from a non-competitive labour market go beyond workers' labour rights and welfare, as it leads to inequality in wages, hinders innovation, and suppresses the entire economy.

In this paper we will start with a brief overview of Serbian antitrust regulations and practice of the Serbian Competition Authority, with focus on matters that are relevant for labour markets, and an overview of provisions from the Serbian Labour Law that are significant from an antitrust perspective. We will explore labour related practices that could raise competition concerns, including collective bargaining, effects of mergers on the labour market, non-compete clauses, wage-fixing and no-poaching agreements.

Apart from employees, whose work engagement is regulated by standard employment contracts, the paper will cover the labour market of a non-standard form of employment – digital platform workers. The digital platform economy has steadily grown and changed over the past years, through several mergers and acquisitions, and the establishment of new on-demand delivery platforms. Nevertheless, in Serbia, the status of platform workers is still unregulated, and the current forms of engagement of these workers fail to meet criteria for decent work standards, depriving the workers of a myriad of labour and social security rights. This issue has raised concerns with the Serbian Competition Authority, when conducting the sector analysis of the competition conditions in the field of digital platforms for mediating the sale and delivery of restaurant foods and other products. The paper will include, among other, findings from the mentioned analysis that are relevant for the subject topic.

Finally, we will provide our view on possible solutions, either from the antitrust or labour perspective, that could be useful in securing well-functioning labour markets.

Key words: *competitive labour market, collective bargaining, non-compete clauses, wage-fixing agreements, no-poaching agreements, digital platform workers.*

1. INTRODUCTION

Recently there has been a growing focus on the labour dimension of competition, reflecting a broader recognition of how competitive practices influence various aspects of labour related matters including labour market dynamics, change in wages and other working conditions, workers' productivity and mobility, and whether in the long run this can affect aspects such as innovation and economic growth.

The European Trade Union Confederation ("ETUC") has raised its concerns about the unwillingness of EU competition authorities to address the asymmetry of power between capital and labour, stating that the assessment of the state of competition (either a planned concentration or abuse of dominance) is almost exclusively reviewed from the consumer welfare perspective. They have stressed that competition policies have a significant impact on employment related issues, and that advocating for a reform of competition sources may be considered necessary in the future[1].

With technological developments, the position of workers has been changing for some time, and there are various other work engagement options apart from the basic distinction between standard employment and self-employment. Focus has been placed on the 'false self-employed' persons[2], and it seems to be evident that possible collective bargaining activities by associations of some of these categories of workers, should be shielded from competition rules.

It has been suggested that "employers have acquired market power due to the de-unionisation of the workforce (Benmelech et. Al., 2018). This may reduce the strength of the countervailing power of the employees/suppliers of labour facing monopsony power"[3].

The effect of monopsony on the employers' part has also been of concern when it comes to other labour market related agreements and practices, namely non-

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1 Picard, S., European Trade Union Confederation, *Competition and Labour – A Trade Union Reading of EU Competition Policies*, 2023, pp. 8, 9, 15

2 False self-employment is the situation whereby instead of concluding a standard employment contract with an employer, a person is conditioned to establish their own business as a self-employed person, freelancer etc., but carries out activities as a *de facto* employee, under the authority and subordination of another company.

3 Volpin, C.; Pike, C., Organisation for Economic Co-operation and Development ("OECD"), *Competition Concerns in Labour Markets – Background Note*, 2019, p. 5

compete clauses, wage-fixing agreements and no-poaching agreements. While non-compete clauses are concluded between the employer and employee, and are regulated in most countries, wage-fixing agreements and no-poaching agreements qualify as collusion in the labour market.

The Organisation for Economic Co-operation and Development ("OECD") notes that in order to avoid unlawful collusion in the labour market, companies that might collude could consider merging instead. However, if such a merger would reduce competition in a specific labour market, potentially creating a dominant employer or monopsony, "the merged entity would likely use its market power to reduce employment and wages in that market, similarly to what non-merging colluding companies would do"[4].

Significant attention has been directed toward the status of digital platform workers. While these platforms have been around for some time, their usage has notably surged since the Covid-19 pandemic. Platform workers are often engaged as essentially false self-employed, through intermediary companies or even informally. Certain steps have been undertaken at EU level to regulate the position of digital platform workers and acknowledge their collective bargaining rights. In Serbia, the position of digital platform workers is still unregulated, and they are faced with various challenges that mainly stem from a significant power asymmetry between the digital platform and the digital platform workers.

In light of the above, this paper has been divided into the following sections:

1. Serbian Competition Regulations
2. Collective Agreements
3. Mergers
4. Non-compete Clauses
5. Wage-fixing and No-poaching Agreements
6. Digital Platforms
7. Final Remarks and Conclusions

2. BRIEF OVERVIEW OF SERBIAN COMPETITION REGULATIONS

First regulations in Serbia that address issues of breach of competition date back to the 1920s. The first law to include all the three main elements of competition

[4] OECD, *OECD Employment Outlook 2022: Building Back More Inclusive Labour Markets*, OECD Publishing, Paris, 2022, https://doi.org/10.1787/1bb305a6-en, p. 166

law[5] is the Law on Protection of Competition from year 2005[6]. The mentioned regulation included for the first time provisions regarding supervision of mergers and acquisitions, and established the Serbian Competition Authority ("SCA"). The implementation of this regulation was hindered, mainly due to the fact that the SCA had insufficient authorizations.

This was corrected in 2009 when the new Law on Protection of Competition[7] ("LPC") was adopted, replacing the previous piece of legislation from year 2005. This was a major step forward towards harmonization with EU regulations. The LPC is still in force today, with only minor changes that were made in year 2013. It consists of general rules relating to prohibition of restrictive arrangements and abuse of dominant position, that are basically the same provisions as Articles 101[8] and 102[9] of the Treaty on the Functioning of the European Union[10] ("TFEU").

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5 Generally, the main pillars of competition regulation are considered to be the following three elements: 1) prohibition of restrictive agreements and practices; 2) prohibition of abuse of dominant market position; 3) supervision of mergers and acquisitions.

6 Law on Protection of Competition, Official Gazette of the Republic of Serbia, no. 79/2005

7 Law on Protection of Competition, Official Gazette of the Republic of Serbia, nos. 51/2009 and 95/2013

8 Article 101 of the Treaty on the Functioning of the European Union relates to the prohibition of restrictive practices stating: "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."

9 Article 102 of the Treaty on the Functioning of the European Union relates to the prohibition of abuse of dominant position, stating: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

10 Treaty on the Functioning of the European Union, OJ C 326/47

The LPC also regulates mergers and acquisitions, and expands the authorizations of the SCA, allowing it, among other, to impose fines and other measures.

There are a total of eight decrees primarily addressing procedural issues and block exemptions, along with several guidance documents. This number of regulations is significantly lower than the average in neighbouring countries and well below the EU level. Consequently, a key question of whether the existing regulations are sufficient, and is the implementation of current legislation by the SCA aligned with European standards, remains open.

It is our perspective that although general rules are harmonized with EU legislation, more detailed competition regulations would be welcome.

Under the Stabilization and Association Agreement[11], Serbian authorities are required to assess competition practices on the basis of criteria arising from the application of EU competition rules and interpretative instruments adopted by EU institutions, in cases where the behaviour in question may affect trade between Serbia and the EU[12]. Although the practice of the SCA may not always be in line with EU competition rules, there are instances where the SCA has made explicit references to EU legislation in its decisions and guidelines for application of domestic competition rules[13].

When it comes to labour related matters, the LPC is very clear, explicitly stating that its provisions do not apply to labour related matters between employers and employees nor labour related matters determined under collective agreements between employees and labour unions[14].

Taking this into account, it is not unexpected that the SCA has not yet dealt with any issues explicitly concerning labour matters. In terms of regular employment, that is regulated by a standard employment contract, the SCA would in fact, be unauthorized to act.

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11 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L 278 (Stabilization and Association Agreement)

12 Article 73 of the Stabilisation and Association Agreement

13 See for instance Conclusion of the Serbian Competition Authority ("SCA") instituting proceedings ex officio against Roaming electronics and others [5], no. 4/0-01-177/2021-26, July 2, 2021. The SCA made an explicit reference to the EC Guidelines on Vertical Restraints (2010/C 130/01), while explaining different examples of retail price maintenance.

14 Article 4 of the Law on Protection of Competition, Official Gazette of the Republic of Serbia, nos. 51/2009 and 95/2013

In contrast, it is our assessment that the SCA would be competent to examine restrictions of collective agreements to which an association of self-employed workers is a party to. In Serbia, self-employment is regulated under the Companies Act[15] as entrepreneurship, and once registered, the entrepreneur is regarded as a form of business entity. In terms of competition regulations, it may be expected that entrepreneurs would be considered as undertakings, and any agreements under which an association of entrepreneurs could potentially restrict competition should be examined by the SCA. We further anticipate that the SCA would act upon restrictions that derive from wage-fixing or no-poaching arrangement.

Moreover, the SCA has shown consideration towards workers, namely delivery personnel, in a sector analysis relating to the state of competition on the market of on-demand delivery platforms[16]. The SCA has examined their position and appealed to relevant authorities to further analyse and regulate the situation. This matter will be further elaborated later in this paper under section 6. Digital Platforms.

3. COLLECTIVE AGREEMENTS

In principle, collective agreements do not fall within the scope of EU competition regulations. With the rise of other forms of work engagement, apart from standard employment, this issue has become more perplex. The digitalization of work and the subsequent growth of the 'gig economy'[17] have resulted in new forms of work engagement that cannot be easily classified as either standard employment or independent self-employment. This has prompted a re-evaluation of which forms of collective bargaining should be exempt from competition regulations.

3.1. CJEU Practice regarding Collective Agreements

In the context of collective agreements within EU practices, the Court of Justice of the European Union ("CJEU") took a clear stand by its ruling in case *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*[18] ("Albany case").

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15 Articles 83 – 92 of the Companies Act, Official Gazette of the Republic of Serbia, nos. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021

16 Serbian Competition Authority, *Sector Analysis on the State of Competition on the Market of Digital Platforms for Mediating in the Sale and Delivery of Mainly Restaurant Food and other Products*, Belgrade, 2023

17 The gig economy refers to a labour market characterized by the prevalence of short-term, flexible jobs, often performed through digital labour platforms.

18 CJEU Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, par. 59

The CJEU ruled that certain competition restrictions are inherent to collective agreements between organizations representing employers and workers, and are essential for improving working conditions. Consequently, collective agreements designed to enhance working conditions (including wages) fall outside the scope of Article 101 TFEU, which prohibits agreements between undertakings that restrict competition within the internal market, particularly those related to price-fixing or other trading conditions. This has come to be referred to as the "Albany exception".

In another case, a Dutch trade union of workers in arts, information and media, FNV Kunsten Informatie en Media ("FNV"), challenged the stand of the Netherlands Competition Authority that a collective labour agreement establishing minimum fees for independent services is not exempt from the scope of Article 101 TFEU. The Netherlands Competition Authority argued that collective agreements involving employee associations differ fundamentally from those involving associations of self-employed workers.

The CJEU ruled[19] that self-employed workers are undertakings, therefore the collective agreements that associations of self-employed workers enter into should be considered as inter-professional agreements, meaning that the provisions of Article 101 of the TFEU would apply in this case. The CJEU also clarified the position of service providers who are 'false self-employed persons'. Taking into account that their situation is similar to that of an employee, the Albany exception would be applicable in case it is determined that a collective agreement involves 'false self-employed' service providers.

3.2. EU Guidelines regarding Collective Agreements

In a press release from June 2020[20], the European Commission acknowledged the challenges in defining the scope of self-employed persons who need to participate in collective bargaining, due to the wide range and diversity of activities they perform, and changes in their situation over time.

Particularly due to the rapid expansion of digital platforms during the past years, "…the concept 'worker' and 'self-employed' have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed.

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[19] CJEU Case C413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014], ECLI:EU:C:2014:2411, par. 27, 31

[20] European Commission – Press release, *Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed*, Brussels, 30 June 2020

We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions[21]."

The European Commission announced that it is assessing whether it is necessary to adopt measures at EU level in order to address the above-mentioned issues and improve the conditions of these individuals. This resulted in their publication of the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons[22] ("Guidelines") in September 2022. The Guidelines strive to establish a balance between allowing collective bargaining to improve working conditions of solo self-employed persons and preventing anti-competitive practices. They determine when agreements concluded because of collective negotiations between solo self-employed persons and other undertakings, may be exempt from competition rules, in particular TFEU Article 101.

The Guidelines consider the following categories of solo self-employed persons to be in a situation comparable to that of employees and that collective agreements negotiated and concluded by them should fall outside the scope of TFEU Article 101:

- Economically dependent solo self-employed persons – these persons provide their services exclusively or predominantly to one counterparty. Due to this, they are more likely to be in a situation of economic dependence, since they do not determine their conduct independently and are likely to receive instructions from said counterparty on how their work should be carried out.
- Solo self-employed persons working 'side-by-side' with workers – these persons work side by side to workers and perform the same or similar tasks as workers for the same counterparty. They provide their services under the direction of the counterparty and have insufficient independence in performing their activities.
- Solo self-employed persons working through digital labour platforms – these persons may be dependent on digital platforms, especially for the purpose of reaching customers. They may often face 'take it or leave it' work offers, with little or no scope to negotiate their working conditions, including their remuneration.

3.3. Serbia

As mentioned above, the LPC explicitly states that it does not apply to labour related matters, including those deriving from collective agreements. In its practice,

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21 European Commission – Press release, *op. cit.,* note 20, par. 3

22 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02

the SCA has not dealt with any issues concerning collective agreements, to which a party is a labour union in terms of the Serbian Labour Law[23] ("Labour Law" or "LL"), as it would not be authorized to do so. The SCA has neither dealt with any collective agreements to which a party is an association of workers who are not employees in terms of the LL.

4. MERGERS

The OECD observes that, in general, the impact of mergers on the labour market has received limited attention. One of the possible reasons for this could be the difficulty in identifying the relevant market[24]. David Arnold noticed that there is insufficient empirical evidence and little guidance on how to perform competition analysis in labour markets. He has found that "mergers with small impacts in local labour market concentration do not have significant impacts on workers' earnings. However, mergers that generate large shifts in concentration have economically meaningful and statistically significant effects. These effects are larger in already concentrated markets, are consistent in tradable industries, and are consistent in a sample of national mergers that are likely not driven by local economic conditions"[25]. Additionally, he found "evidence of spillovers in the labour market, with other firms in the labour market decreasing wages in response to merger activity"[26]. OECD has also noticed that the merging of companies that operate in the same industry and production level (horizontal mergers) have a significant effect on the labour market, even when the employer does not acquire a dominant position.

It can be concluded that the impact of mergers on the labour market, both present and potential, requires further research to establish comprehensive guidance for analysing this aspect of competition.

4.1. Serbia

The Labour Law includes several articles that regulate the rights of employees in the event of change of employer[27]. The provisions largely align with Council Di-

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23 Labour Law of the Republic of Serbia, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

24 OECD, *op. cit.,* note 4, p. 166

25 Arnold D., *Mergers and Acquisitions, Local Labour Market Concentration, and Worker Outcomes*, 2021, p. 30

26 Arnold D., *op. cit.,* note 25, p. 30

27 Articles 147 – 151 of the Labour Law, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

rective 2001/23/EC[28]; however, they are somewhat basic and may be considered insufficient.

The successor employer is required to assume all employment agreements and employer's general acts (the employment rulebook or collective agreements) from the predecessor employer, which must be maintained by the successor employer for a minimum of one year. The predecessor employer is required to fulfil transparency obligations by providing complete and accurate information to the successor employer regarding the rights and duties outlined in the employer's general acts and employment agreements, as well as information related to the transfer of employees' contracts. Both the predecessor and successor employers must inform the representative labour union, or directly inform the employees if no union exists, about the transaction at least 15 days prior to its execution. The predecessor and successor employers must collaborate with the representative labour union to implement measures at least 15 days before the change of employers, aimed at mitigating the social and economic impacts on employees.

In May 2020, the Serbian Government adopted the Action Plan for harmonizing with EU legislation for Chapter 19, which pertains to Social Policy and Employment. The plan indicates that the Labor Law is only partially aligned with Council Directive 2001/23/EC.

For full harmonization, the Labor Law would need to incorporate definitions of key terms related to the change of employer, including 'undertaking', 'transfer of an undertaking', 'transferor', and 'transferee'. Additionally, it should include provisions concerning employee notification, protection against redundancy, and compliance with the provisions of the law regarding transnational/multinational companies[29].

Indeed, in practice, it can be challenging to determine whether a transaction qualifies as a 'change of employer' under the Labor Law, particularly in cases involving the transfer of businesses or parts of undertakings. Clarifications from lawmakers on this matter would be beneficial, while measures to protect against redundancy would help ensure social stability by preventing sudden unemployment and safeguarding vulnerable workers.

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[28] Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L082

[29] Government of Serbia, Ministry of Labour, Employment, Veteran and Social Affairs, *Action Plan for Chapter 19 – Social Policy and Employment*, 2020, p. 70

The LPC and the current Merger Notification Regulation[30] do not mandate the submission of data necessary for analysing the labour aspects of mergers. Similarly, in its merger control practice, the SCA has not addressed the possible impacts mergers may have on labour markets and workers.

5. NON-COMPETE CLAUSES

Non-compete clauses (NCAs) are designed to prevent employees from working for competing businesses or starting their own ventures that would compete with their employer. The primary purpose of these restrictions is to protect the employer's confidential information, trade secrets, know-how, and client relationships. Typically, NCAs are limited in three aspects:

- Duration: NCAs may be effective for the duration of employment and, if mutually agreed upon, for a specified period after termination, typically not exceeding 24 months.
- Geographical Scope: The geographic range of the restriction may encompass a specific town, region, country, or beyond. This scope should be reasonably defined in relation to the employer's business interests.
- Scope of Activities: The activities that the employee is prohibited from engaging in should be clearly and reasonably defined, considering the intended purpose of the NCA.

The OECD has noted[31] that some employers habitually use non-compete clauses, including when employees do not have access to confidential information or know-how. Even if such clauses lack the necessary elements to be enforceable, they are often included to deter uninformed employees from pursuing opportunities with competitors. Should an employee choose to challenge the clause, they may find it unenforceable in practice, but the mere presence of the clause can still serve as a discouragement.

The advantages and disadvantages of non-compete clauses, particularly concerning their practical impacts are debatable. It can be argued that NCAs restrict employee mobility and discourage market entry and entrepreneurship. This, in turn, could lead to a more concentrated labour market, which may negatively affect both employees and competition. On the other hand, non-compete clauses can be considered to encourage employers to invest in intangible assets, including employee education and training. Some argue that this positive effect could also

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30 Regulation on the Content and Manner of Submitting Notification on Concentration, Official Gazette of the Republic of Serbia, no. 5/2016

31 OECD, *op. cit.,* note 4, p. 164

be achieved through alternative measures, such as requiring employees to repay training costs[32].

It is undisputable that if NCAs are not prohibited, they should be regulated and their use monitored by relevant authorities to prevent potential abuse.

At EU level, non-compete clauses in employment are not specifically addressed and the matter is left to be regulated at national level.

5.1. Serbia

The Labour Law explicitly allows for the possibility of including non-compete clauses in employment agreements[33]. The clause may be established for the duration of employment and for up to two years after termination. In the latter case, the clause should specify the amount of compensation that the employer will provide to the employee during the non-compete period after termination of employment. This remuneration is intended to compensate for the lost earnings resulting from the employee's inability to pursue certain jobs during the non-compete period.

Non-compete clauses can be determined only in the event that the employee is in position to acquire new, especially important technological knowledge, wide span of business partners or become acquainted with important business information and secrets. The geographic scope of the non-compete clause and the scope of prohibited activities must also be specified.

In practice, non-compete clauses that last for the duration of employment are quite common, regardless of the employee's role or whether they have access to any know-how, contacts, or confidential business information. If a non-compete clause extends beyond the duration of employment and does not specify the amount of remuneration, or if the employer fails to provide this payment, the clause is null and void. Given that most employers are reluctant to incur this expense, non-compete clauses that last after the termination of employment are rare, either because they are not established initially or are ultimately rendered void.

In conclusion, while the Labour Law provides a clear framework for implementation of non-compete clauses, their frequent inclusion without a valid basis, suggests a potential misuse that could undermine employee mobility and market competition.

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[32] Zekić, N., *Non-compete clauses and worker mobility in the EU*, Wolters Kluwer, https://global-workplace-law-and-policy.kluwerlawonline.com/2022/11/30/non-compete-clauses-and-worker-mobility-in-the-eu/, Accessed 28 September 2024

[33] Articles 161 and 162 of the Labour Law, Official Gazette of the Republic of Serbia, nos. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018

This emphasizes the necessity for greater awareness and guidance for employers regarding compliance with the Labour Law. Additionally, strengthening oversight by the relevant inspectorate would be advantageous.

6. NO-POACHING AND WAGE-FIXING AGREEMENTS

In May 2024, the European Commission ("EC") published the Competition policy brief for Antitrust in Labour Markets ("Policy Brief")[34], delving into the issues of no-poaching agreements and wage-fixing agreements. Both mentioned practices bring distortion to labour markets.

Wage-fixing agreements refer to arrangements in which employers collectively agree to set wages or other forms of compensation and benefits. These agreements essentially create a monopsony effect, resulting in lower wages and reduced benefits due to diminished labour demand, which in turn leads to decreased labour input. This reduced input contributes to lower output in downstream markets, ultimately driving up prices for consumers. Consequently, such practices negatively impact both employees and consumers.

In no-poaching agreements, employers consent to refrain from recruiting each other's employees. The Policy Brief clarifies that the term 'employees' includes both employees in the strict sense of the word, as well as 'false self-employed' persons, and service providers. No-poaching agreements include a) no-hire agreements, in which employers commit to refrain from actively or passively hiring employees of another participating employer, and b) no-solicit agreements, where employers agree only to refrain from actively reaching out to employees of another employer involved in the agreement.

By liming employee mobility, no-poaching agreements, like wage-fixing agreements, also lead to lower wages. This practice contributes to an inefficient labour market, ultimately resulting in decreased overall productivity, reduced innovation, and hindered economic growth.

The EC considers both wage-fixing agreements and no-poaching agreements as agreements that, in general, restrict competition under Article 101 TFEU. Moreover, it concludes that these practices qualify as restrictions by object[35], taking the stand that it is unlikely that they would generate sufficient pro-competitive effects to satisfy the conditions for an exemption under Article 101(3) TFEU.

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[34] Aresu, A.; Erharter, D.; Renner-Loquenz, B, *Competition Policy Brief - Antitrust in Labour Markets*, European Commission, 2024, pp. 1-7

[35] Restrictions by object are practices that are considered anti-competitive by their nature, unlike restrictions by effect that do not restrict competition *per se*, but once their impact on the market is examined, they may turn out to have an anti-competitive effect.

In fact, any pro-competitive effects of these agreements are unlikely and with a disputable result. The Policy Brief states that, in principle, no-poaching agreements could be a solution to 'investment hold up'[36] problems, as they may encourage employers to offer training to employees. Conversely, they may suppress the employee's incentive to invest in their own training. It is deduced in the Policy Brief that any potential pro-competitive effects could be better achieved through less restrictive alternatives, such as requiring employees to repay training costs, implementing compliant non-compete clauses, utilizing non-disclosure agreements, and gardening leaves.

Since wage-fixing and no-poaching agreements essentially represent collusive practices, employees are often unaware of their existence. Unlike in the case of non-compete agreements, employees are not in position to negotiate any terms which *de facto* impact their labour rights.

As of the time of writing this paper, the European Commission is investigating cases related to the subject arrangements, but no decisions have yet been made.

6.1. Possible exceptions[37]

The EC Merger Regulation[38] states that "Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases[39]." In its Notice on restrictions directly related and necessary to concentrations[40] (hereinafter "Notice on Restrictions"), the EC provides guidance on interpreting the concept of restrictions that are directly related to and necessary for the implementation of a concentration, commonly referred to as 'ancillary restraints'.

Restrictions which are considered to be directly related to the concentration, are those that are objectively closely linked and economically related to the main transaction, with the intent of allowing a smooth transition to the new company structure after the concentration. Further, restrictions are deemed necessary for

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36 Investment hold-ups are circumstances under which one party is reluctant to invest, due to the risk that the other party may later profit more from the situation.

37 Volpin, C.; Pike, C., *op. cit.*, note 3, pp. 20, 21

38 Council Regulation on the control of concentrations between undertakings [2004] OJ L 24 (the EC Merger Regulation)

39 EC Merger Regulation, par. 21

40 Commission Notice on restrictions directly related and necessary to concentrations [2005] OJ C 56/24 (the Notice on Restrictions)

the implementation of a concentration if, without them, the concentration could not be executed or would only be achievable under significantly more uncertain conditions, at much higher costs, over extended timeframes, or with considerably greater difficulty[41].

The Notice on Restrictions specifically evaluates in detail non-competition clauses, as ancillary restrains, and explicitly states that non-solicitation clauses have a comparable effect and should therefore be evaluated in a similar manner[42].

In addition to the above, the Remedies Notice[43] provides guidance on modifications to concentrations when the EC decides to clear a concentration following such modifications, either before or after the initiation of proceedings. These modifications specifically pertain to commitments that the parties involved in the concentration must undertake, commonly referred to as 'remedies', since their aim is to address and eliminate any competition concerns identified by the EC. Such remedies include the divestiture of a viable and competitive business, the scope of which needs to include all the assets and personnel which are necessary to ensure the business' viability and competitiveness. The Remedies Notice explicitly provides that a non-solicitation commitment with regard to the key personnel needs to be included in the remedy. Key personnel, providing essential functions for the business, could include for instance R&D staff, information technology staff, management and similar.

6.2. Serbia

At the time this paper was prepared, the SCA had not yet addressed issues related to wage-fixing and no-poaching agreements. Given the generally restrictive nature of these agreements, it is expected that they are often informal, may not be documented, and could be kept confidential, making them difficult to detect. Nevertheless, we anticipate that the SCA would respond appropriately if made aware of any such arrangements.

6.3. Regional developments

Several national competition authorities in EU countries, have already dealt with cases relating to no-poaching agreements, including Croatia, France, Hungary, the

41 Notice on Restrictions, par. 12 and 13

42 Notice on Restrictions, par. 26

43 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C 267/1

Netherlands, Portugal and Spain[44]. Below, we take a closer look at two cases from neighbouring countries.

6.3.1. Croatia – Gemicro case[45]

In 2014, the Croatian Competition Authority ("CCA") accepted the initiative of market participant Modulus Information Technology, and initiated the procedure for determination of abuse of dominant position against company Gemicro, active on the market for provision of specialised IT support services to companies dealing with leasing and other forms of financing. The procedure was supposed to determine whether Gemicro is preventing leasing companies to which they provide IT support services, to hire former Gemicro employees.

The CCA carried out an investigation, reviewing documents and comments requested from Gemicro, the leasing companies and Modulus Information Technology. It was established that the contracts entered into by Gemicro and the leasing companies included provisions whereby the parties agreed not to hire each other's employees at any time during the term of the contract.

Gemicro promptly offered to delete the disputable provision from all contracts and committed to not include it in any future contract. The leasing companies also provided explicit statements confirming that they did not refuse to hire other service providers.

Gemicro's swift cooperation and the limited impact of the disputed provision (evidenced by the termination of only three employees over the previous five years) were all mitigating circumstances in this case.

Once Gemicro provided the relevant evidence on fulfilment of its commitments to the CCA, no further proceedings were initiated.

6.3.2. Hungary – HR consulting agencies

In December 2020, the Hungarian Competition Authority ("HCA") announced a breakthrough in dismantling of cartel operations relating to price-fixing and no-poaching practices.

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[44] Von Eitzen Peretz, J.; Zalewska, A., *Competition law and no-poach agreements: developments in Europe*, Hausfeld Competition Bulletin, 20 May 2022, https://www.hausfeld.com/fr-fr/what-we-think/competition-bulletin/competition-law-and-no-poach-agreements-developments-in-europe/, Accessed 29 September 2024

[45] OECD, *Competition Issues in Labour Markets – Note by Croatia*, 22 May 2019, DAF/COMP/WD (2019) 41

The procedure was initiated against the Association of Hungarian HR Consulting Agencies ("Association"), and 23 other undertakings. The HCA determined that the internal rules of the Association included provisions that fix minimum fees and prohibit members from soliciting and hiring employees who had previously worked for another member of the Association. Such practices continued for a period of seven years, not only restricting competition among members, but harming employees as well.

The Association was fined in the amount of HUF 1 billion[46], with the HCA stating in its decision that if the fine could not be covered by the Association, its members would be liable jointly and severally in proportion to their revenues in the previous year[47].

7. DIGITAL LABOUR PLATFORMS

The platform economy in general has rapidly increased since its emergence, significantly due to technological developments, such as access to smartphones, high-speed internet and cloud computing[48]. The International Labour Organization ("ILO") has documented a significant increase in the number of digital labour platforms (defined below), from 193 in 2010 to 1,070 in 2023[49, 50].

Three broad categories of digital platforms are:

- those that provide digital services and products to individual users, such as social media;
- those that mediate exchange of goods and services, such as e-commerce or business-to-business (B2B) platforms;
- those that mediate and facilitate labour exchange between different users, such as businesses, workers and consumers, i.e. digital labour platforms.

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46 Approximately EUR 2,8 million, according to the official exchange rate EUR-HUF of the European Central Bank, as at 18 December 2020.

47 Hungarian Competition Authority – press release, *The GVH cracked down on a cartel and imposed a fine of HUF 1 billion on HR consultants*, 18 December 2020, https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/the-gvh-cracked-down-on-a-cartel-and-imposed-a-fine-of-huf-1-billion-on-hr-consultants, Accessed 30 September 2024

48 Zoltan J. Acs et al., *The Evolution of the Global Digital Platform Economy: 1971–2021*, Small Business Economics 57, pp. 5, 6

49 International Labour Office, *Realizing Decent Work in the Platform Economy*, International Labour Organization, Geneva, 2024, p. 15. This publication is a report drafted by the International Labour Office, Geneva, in preparation for the annual International Labour Conference that is to take place in June 2025.

50 ILO notes that the figures were obtained from the Crunchbase database, which is self-reporting and covered 98 countries around the world, which could mean that some active platforms, particularly in low-income countries, were not listed.

Digital labour platforms can further be differentiated as: a) online web-based platforms, where work is outsourced through an open call to a geographically widespread crowd, and the work can essentially be performed from any location via internet, referred to as 'crowdwork' or 'cloudwork', and b) location-based platforms which allocate work to individuals in a specific geographical area, typically to perform local, service-oriented tasks such as driving, food delivery, running errands or cleaning houses, often referred to as 'gig work' platforms.

7.1. Characteristics of Digital Labour Platforms

In its publication from January 31, 2024, Realizing Decent Work in the Platform Economy ("ILO Report"), ILO has described several characteristics of digital platforms that are relevant from the competition perspective[51].

7.1.1. Competitive advantages

ILO states several competitive advantages of digital platforms:

- They reduce transaction costs in the provision of goods and services;
- They reduce information asymmetries in the market, considering that the user can compare the price of various goods and services before deciding;
- They benefit from economies of scale. Once the platform's initial structure is established, the cost of each additional unit decreases because of high transaction volumes, so that the value added by the platform increases with scale, which in turn draws more participants to the intermediated transactions ('network effect'). The larger the platform, the more likely it is to continue to grow at little or no cost;
- Regulatory ambiguity that digital platforms enjoy in some jurisdictions is another competitive advantage stated by ILO. However, it is important to emphasize that such ambiguity results in legal uncertainty for digital platforms, complicating compliance efforts and potentially stifling innovation.

7.1.2. Market power

ILO notes that digital platforms may be in position to exercise significant market power, due to the fact that they may act both as a monopsony and monopoly. On the demand side, monopsony may be exercised by unilaterally tightening access conditions, increasing financial commissions or demanding exclusivity. In case of monopolistic behaviour, platforms may increase user fees on the supply side.

[51] International Labour Office, *op. cit.,* note 49, pp. 12, 13, 19

A fall in market prices may be observed in an economic sector upon the entry of a platform into that sector. However, depending on the market power of platforms within each sector, a decrease in costs might either mainly benefit consumers, through lower prices, or result in higher profit margins for the platform itself, allowing it to capture the savings. This concentration of wealth among leading platforms gives them the ability to influence innovation, shape digital infrastructure, and create barriers to entry.

7.1.3. Low entry barriers for new workers

Low entry barriers for new workers are a significant feature of digital labour platforms. Most of the platform jobs don't require a substantial investment, and in the majority of cases it is sufficient if the worker possesses a smartphone and internet connection. Due to this, certain categories such as people with disabilities, people in rural areas, migrant workers and refugees, who otherwise may be subject to employment difficulties, are in position to find work.

7.1.4. Use of algorithms

The role of algorithms is significant in digital platforms for two reasons. Algorithms are used to monitor and supervise work, and in many cases tasks and services are offered and assigned by algorithms. They are also used to define working time, calculate remuneration, and perform rating and ranking. Without human supervision of algorithms, employees can be faced with unjust decisions concerning their employment and labour rights.

Further to the above, digital platforms process a very large amount of data, beside that which relate to workers, and algorithms play an important role in this aspect. Algorithms can determine when there is a rise in demand, signalling to suppliers the best time and place to make their services available. They also enable the implementation of dynamic pricing, as platforms can adjust prices in real time for products or services based on the current market demands.

7.2. Legal Regulation of Digital Labour Platforms

In several European countries, including Belgium, Croatia, France, Italy and Portugal, platform work is regulated by amending existing labour legislation to include platform work[52].

[52] International Labour Office, *op. cit.*, note 49, p. 37

At EU level, in April 2024, the European Parliament has adopted the new Platform Work Directive[53]. Once the text is formally adopted by the European Council and published in the EU Official Journal, member states will have two years to incorporate the provisions of the directive into their national legislation.

The most significant novelty introduced by the Platform Work Directive is the presumption of employment, that shall exist when facts indicating control and direction are present, according to national law and collective agreements, and taking into account EU case law. Employees are to be protected from negative consequences of automated systems, i.e. algorithms, such as dismissal or other sanctions, by ensuring adequate human monitoring and review. Personal data protection is also prioritized. Digital labour platforms are forbidden from processing any personal data concerning platform workers that are not strictly necessary for the performance of work, in particular, data on the emotional or psychological state of the platform worker[54].

As already elaborated above under section 2. Collective Agreements, in 2022 the European Commission adopted the Guidelines[55] that permit collective bargaining for certain self-employed workers. The Guidelines explicitly state that "collective agreements between solo self-employed persons and digital labour platforms relating to working conditions fall outside the scope of Article 101 TFEU[56]", thus permitting collective bargaining for digital platform workers.

7.3. Digital Labour Platforms in Serbia

While platform work is widespread in Serbia, it remains largely unregulated by current legislation. This section will focus on location-based digital platforms, with an emphasis on delivery services.

Platform work is typically structured through 'partnership agreements' between digital platforms and limited liability companies or entrepreneurs. These entities then establish employment relationships with delivery workers, hire them on sea-

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53 News European Parliament, *Parliament Adopts Platform Work Directive*, 24 April 2024, https://www.europarl.europa.eu/news/en/press-room/20240419IPR20584/parliament-adopts-platform-work-directive, Accessed 28 September 2024

54 European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work*, COM(2021) 762 final, 2021/0414(COD), Brussels, 9 December 2021

55 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02

56 Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons [2022] OJ C 374/02, par. 31

sonal or additional work basis through contracts outside of employment, or engage them as self-employed individuals.

In their 2023 Serbia Ratings[57] ("Fairwork Serbia Ratings"), Fairwork[58] notes that platforms do not consider workers their employees. As a result, the engagement of these workers often falls short of fair work standards. This lack of recognition leads to the deprivation of essential labour rights, including sick leave, compensation for work-related injuries, unemployment benefits, and annual leave. Moreover, according to information gathered by ILO, two thirds of platform workers in Serbia report working informally[59]. It is noteworthy that most workers interviewed for the Fairwork Serbia Ratings expressed a preference for short-term financial gains over the social welfare and other rights associated with standard employment. Workers reported observing a significant increase in the number of delivery personnel, indicating that platforms provide similar conditions, which they are in position to dictate. This dynamic arises from the understanding that workers who refuse these terms can be easily replaced. Consequently, this situation has contributed to a decrease in the earnings of delivery workers.

Various organizations have called upon the need for legal regulation of the position of digital platform workers, including labour unions. The United Branch Union "Nezavisnost", has advocated for the regulation of digital platform workers' rights. They have outlined several proposed steps to improve the situation, including suggestions for potential legislative amendments[60].

7.3.1. Sector Analysis of the Serbian Competition Authority

The need for legal regulation of digital labour platforms was also addressed by the SCA in its Sector Analysis on the State of Competition on the Market of Digital

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57 Andjelkovic, B. et al., *Delivering Discontent: Dynamic Pricing and Worker Unrest – Fairwork Serbia Ratings 2023*, Fairwork, 2023, pp. 3-27

58 Based on information provided on their official website (https://fair.work/en/fw/about/faqs/), Fairwork evaluates the work conditions of digital labour platforms across various countries and scores the platforms based on the five principles of fair work: fair pay, fair conditions, fair contracts, fair management and fair representation. It is a project based at the Oxford Internet Institute, University of Oxford and the WZB Berlin Social Science Center, financed by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). The project is conducted in collaboration with partner organisations around the world and in Serbia they partner with the Public Policy Research Centre (https://publicpolicy.rs/CENTAR).

59 International Labour Office, *op. cit.*, note 49, p. 27

60 Todić, S. et al., *Basis for the Strategy of the United Branch Union 'Nezavisnost' on Labour Union Organising and Protection of Platform Workers' Rights (Osnova za strategiju UGS Nezavisnost o sindikalnom organizovanju i zaštiti radnih prava platformskih radnika)*, Public Policy Research Centre, pp. 10-14

Platforms for Mediating in the Sale and Delivery of Mainly Restaurant Food and other Products[61] ("Sector Analysis"). The SCA initiated this analysis in response to the rapid growth of the digital on-demand delivery platform market and the frequent changes in ownership among market participants. Additionally, the SCA acknowledged the importance of examining the partnership and contractual relationships between digital platforms and their partners, as well as various service providers, including delivery workers.

The Sector Analysis revealed that the market of on-demand delivery platforms is highly concentrated. While the analysis covers the period of years 2020 and 2021, the more recent Fairwork Serbia Ratings indicate that there have been no significant changes in the market dynamics, with two dominant platforms (Glovo and Wolt) continuing to maintain their positions as key players[62].

The SCA has stated that there are no significant legal barriers for entering the market of on-demand delivery platforms. However, it has identified that substantial investment in areas such as platform development and marketing can create significant economic entry barriers.

The Sector Analysis determined that digital on-demand delivery platforms exert a considerable influence on related markets and significantly impact delivery workers.

The influence on the related restaurant market is reflected in the fact that restaurants listed on digital platforms compete for visibility and ranking within the platform rather than focusing on competing with other restaurants by enhancing their menu quality. Additionally, the SCA found that while restaurants formally have the option to negotiate the commercial terms of their contracts with the platforms, they struggle to secure more favourable conditions due to their limited negotiating power in comparison to that of the platforms.

The SCA also found that the agreements and general commercial terms submitted to them contain provisions that may raise competition concerns. These provisions seem aimed at eliminating other platforms and discriminating against restaurants through the application of unequal business conditions. Furthermore, certain clauses could be considered to restrict technical development.

Regarding their relationship with delivery workers, the SCA finds that platforms have a substantial impact on all relevant aspects. They influence the setting of de-

[61] Serbian Competition Authority, *op. cit.,* note 16, pp. 1-38

[62] Andjelkovic, B. et al., *op. cit.*, note 57, p. 3

livery fees, while their algorithms determine which delivery person is assigned to a specific order, as well as supervising and evaluating work performance.

As previously mentioned, the SCA also notes that delivery workers do not have a direct relationship with the platforms. Delivery workers are free to switch between platforms, and the entry barriers for new workers are low, requiring only a smartphone with internet access and GPS. Algorithms play a crucial role in this dynamic, as they determine which delivery worker is assigned to a specific task, as well as supervise and evaluate their performance. The SCA expressed concern that this could indicate a complex system of subordination between the digital platforms and the delivery workers. Regarding the determination of delivery fees, most delivery partners reported that various factors are considered, such as the distance between the restaurant and the delivery worker, prevailing market conditions, and the amounts consumers are willing to pay for delivery. It can be concluded that the platforms largely dictate these fees, leaving delivery workers with little influence over their determination.

In light of the above, the SCA has identified the need the examination of current labour legislation, with the aim of resolving the question whether digital platforms can be classified as employers of delivery workers. The SCA has recommended that the relevant Ministry of Labour investigates this issue, especially considering that most delivery workers experience inadequate work safety, lack the ability to collectively address disputes, and do not have payment protection.

7.3.2. Dynamic Pricing and Lack of Algorithm Transparency[63]

A new trend affecting delivery workers, highlighted in the Fairwork Serbia Ratings, emerged at the beginning of 2023: dynamic pricing. As previously mentioned, dynamic pricing can be considered a competitive advantage of algorithm use. It is a strategy that continually adjusts prices and delivery fees based on the current market demands, which are monitored in real time. Although delivery workers can benefit from surges in delivery fees, there is also a downside. As it can be difficult for workers to predict when the surges will occur, consequently, it is difficult for them to predict their income. This is especially damaging for delivery workers whose only or primary source of income is delivery. In addition, the sudden increases in demand can also lead to increased stress and affect the workers safety as they are more likely to rush to complete deliveries.

[63] Andjelkovic, B. et al., *op. cit.*, note 57, pp. 7, 8, 26

Apart from dynamic pricing, it seems that the transparency of algorithms has been questioned when it comes to work assignment as well. A delivery worker interviewed by Fairwork has pointed out several instances when his colleague would receive delivery offers and he would not, even though they were sitting together at the exact same location. This leads to doubt of the algorithm's transparency and fairness.

This lack of transparency can limit the workers' ability to make informed choices, and clearly signals to an asymmetry of power, and untimely could lead to an exploitative relation. Such practices create an uneven playing field by undermining fair competition, and overall harm the labour market.

Fairwork states that throughout 2023, delivery workers have approached labour unions and civic organizations in search for collective action or advice in dealing with pressures that come from platforms. Researching for this paper, we have not found information that those appeals resulted in any progress.

It may be concluded that delivery workers in Serbia often face precarious conditions and that there is an urgent need for protective measures through appropriate regulation and oversight.

8. FINAL REMARKS AND CONCLUSIONS

This paper has aimed for an exhaustive approach to understanding competition issues in labour markets, encompassing various dimensions of the subject topic. By including a wide array of practices, the paper seeks to illuminate their varied impacts on labour market dynamics, worker conditions, labour rights and technical development.

The topics have been analysed and discussed in the context of EU regulations and practices, alongside an examination of the situation in Serbia pertaining to the same matter.

The overall conclusion is that the EU has either already regulated in some way or is developing legislation or relevant practices across the presented topics. However, the Policy Brief[64] notes that an OECD-led study revealed that labour markets in numerous EU Member States are moderately to highly concentrated concluding that it is likely that many employers enjoy market power. Therefore, it is likely that the topic of competition issues in labour markets will continue to be of interest and further explored. It also follows that attention should be drawn to the prac-

[64] Aresu, A.; Erharter, D.; Renner-Loquenz, B, *op. cit.,* note 34, 2024, p. 7

tices that influence the labour market, with a focus on further enhancing regulations and improving implementation.

On the other hand, Serbia currently lacks adequate regulatory frameworks for many of the practices mentioned in this paper.

While the existing competition regulations are generally clear and largely conform to EU standards, they may not effectively address emerging and unique competition issues, particularly in relation to labour markets and the collective bargaining rights of false self-employed individuals.

The Serbian Competition Authority's proactiveness in assessing the competitive landscape of digital platforms, especially concerning delivery workers, illustrates an awareness of the growing interest in the competition-related aspect of some labour issues. This initiative indicates an evolving strategy that could establish the foundation for more detailed regulations and enhanced oversight of the various practices mentioned in this paper, in the future.

Furthermore, the necessity for regulating the status of digital platform workers from a labour perspective is undeniably clear. The lack of formal regulation in this area undermines access to essential labour rights for these workers. Establishing regulations would likely reduce the power imbalance between digital labour platforms and their workers. Without such measures, the current situation is likely to continue harming both the workers and the labour market.

Ultimately, proactive regulatory action is essential to ensure fair practices and foster a more balanced and sustainable labour market in Serbia. Addressing these issues will not only benefit workers but also contribute to a healthier economic environment.

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THE IMPACT OF THE RIGHT TO A FAIR TRIAL ON THE ENFORCEMENT OF EU COMPETITION LAW

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Abstract

EU competition law is one of the most important fields of the internal market's development and a key aspect of the European economic integration. Indeed, free competition may be an important element of an open market economy, but its safeguarding through regulatory supervision and intervention has been a fundamental economic and political choice made quite early by the founders of the EEC Treaty. Despite decentralization of the enforcement system achieved by Regulation 1/2003, the Commission continues playing an important role in the enforcement of EU competition law. Nevertheless, , the exercise of its strengthened investigative powers is subject to EU fundamental rights, whose protection is embedded in the EU Charter of Fundamental Rights. Additionally, national competition authorities are also obliged to respect the same EU fundamental rights when enforcing EU law, as is provided by art. 51 Charter and settled case-law of the Court of Justice of the EU. The paper will aim at elucidating the limits of the legal and administrative enforcement of competition rules imposed by human rights, as well as the function of the EU judicial system in competition law, emphasizing the distinction between the partly limited review of legality of the Commission's acts and the unlimited review of the amount of fines imposed. The ultimate goal is to measure the influence of the right to a fair trial in its efficiency

Key words: *EU, EU Law, ECHR, Competition Law enforcement, Right to a fair trial, EU Charter of Fundamental Rights, Review of Community Acts.*

1. INTRODUCTION

EU competition law is one of the most important fields of the internal market's development and a key aspect of the European economic integration. Indeed, free competition may be an important element of an open market economy, but its safeguarding through regulatory supervision and intervention has been a fundamental economic and political choice made quite early by the founders of the EEC Treaty.

Despite the decentralization of the enforcement system achieved by Regulation 1/2003[1], the Commission continues playing an important role in the enforcement of EU competition law. That instigates the necessity for its strengthened investigative powers to be subject to the observance of human rights, whose protection is embedded in the EU Charter of Fundamental Rights (CFR). Additionally, national competition authorities are also obliged to respect the same EU fundamental rights when enforcing EU law, as is provided by Article 51 CFR and settled case-law of the Court of Justice of the EU (CJEU).

Indeed, the importance of the observation of human rights in EU competition law is an issue of not only European but also international importance, as the EU competition authorities apply the relevant rules not only to European economic actors, but also to those from all over the world doing business within the Internal Market as illustrated by cases such as "Microsoft"[2] and "Intel"[3].

The paper will aim at elucidating the limits of the legal and administrative enforcement of competition rules imposed by human rights, as well as the judicial protection of the latter in the EU judicial system. The ultimate goal is to locate and measure the influence of the right to a fair trial exercised by the persons under investigation on the efficiency of this protection. One cannot overlook the fact that Article 47 of the CFR as interpreted by the EU Courts in line with the respective case law of the ECHR Court on Article 6 of the Convention remains, today, particularly relevant in the efficiency but, also, the legal orthodoxy of the EU competition law's enforcement.

To achieve the most comprehensive possible analysis of the legal regime and the issues arising to the limited extent that a conference paper can reach, the present study is divided into three parts. In the first, the necessity of judicial scrutiny of the Commission's activity in the area of competition law is explained and the role of the right to a fair trial as a parameter of this scrutiny is analyzed (I). In the second part, the procedural guarantees and the rights protected during the investigation and enforcement phases in EU competition law are outlined both for the complainant and the individual under investigation (II). The third part analyzes the function of the EU judicial system in competition law, emphasizing the distinction between the partly limited review of legality of the Commission's acts and the unlimited review of the amount of fines imposed (III). In both the second and third part it is attempted to measure the influence of the right to a fair trial

1 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1 (Regulation 1/2003).

2 Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.

3 Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632.

in its efficiency. Finally, at the end of the study, thoughts and conclusions of the writer are formulated.

2. THE RIGHT TO A FAIR TRIAL AND JUDICIAL REVIEW IN THE AREA OF COMPETITION LAW

2.1. The need for scrutiny of the Commission's actions

Introductively it is important to note that the traditional, Montesquian approach to the separation of the Westphalian state powers is not adequate in order to analyze the balance of the EU institutions' powers when it comes to supervision and decision making. More specifically, with regard comes to competition law enforcement the European Commission cumulates elements of all three forms of power, namely legislative, executive and judicial, regardless of whether it shares these functions with other EU institutions or exercises them individually.

Indeed, the Commission participates in the rulemaking by submitting proposals for legislative action to the Council and to the European Parliament, while it can also act as a "solo" legislator when it either adopts implementing Regulations when empowered so by the EU legislative institutions[4] or when adopting the "block exemption regulations", which are used to declare certain categories of state aid compatible with the Treaties[5].

Moreover, EU law[6] designates the Commission as the main executive body of the EU regarding competition law, as in the context of its role as the "Guardian of the Treaties" it is called upon to ensure that the Treaty provisions, Regulations, Directives and Decisions related to competition law are implemented in accordance with the fundamental EU legal principles and policy interests. Its functions that fall within the executive power's ambit also include its responsibility to achieve international cooperation in competition matters. Indeed, the Commission cooperates on a regular basis with competition authorities from the countries with whom the EU has concluded agreements concerning cooperation in competition matters[7], while it also coordinates its approach to this particular law field with the

4 A typical example is Commission Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18.

5 Namely Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] OJ L 187/1) as it applies today after numerous amendments.

6 Article 105 TFEU provides that the Commission shall ensure the application of Articles 101 and 102 TFEU, shall investigate any infringements and shall bring to an end those that are incompatible with the internal market.

7 United States, Canada, Japan, South Korea and Switzerland among many others.

International Competition Network, the OECD, the UNCTAD and the WTO. Besides, it cannot be disregarded that, in addition to its pivotal role in the allocation of cases, the Commission also retains further control over the proceedings taking place before the national competition authorities and the national courts[8].

Finally, the Commission is also partly exercising judicial functions, albeit restricted, during the enforcement procedures of arts. 101 and 102 TFEU. In effect, it decides which cases to investigate from those that are notified and which cases not to pursue, which investigative measures to order, which facts to support with evidence, which questions to ask about the relevant undertakings and what sanctioning measures to employ in order to oblige the violators to seize the illegal behaviour.

It becomes obvious from the above that the Commission's role in the field of competition law is multi-layered and particularly strong. For this reason, it is necessary to ensure the establishment and efficiency of judicial control of its action, which is carried out through the EU judicial system. Indeed, any Commission's Decision can be challenged by individuals before the EU General Court, which rules at the first instance in actions brought pursuant to Articles 263 (action for annulment), 265 (failure to act) and 340 TFEU (compensation), while this court's rulings can be appealed before the CJEU. In addition, the CJEU's jurisdiction, pursuant to Article 267 TFEU, to give preliminary rulings at the request of domestic courts concerning the interpretation or the validity of EU competition law provisions cannot be stressed enough as to its importance for the development of EU law and, most importantly, the supervision of the Commission's rulemaking and enforcement activity.

2.2. The right to a fair trial in the Charter and the CJEU's case-law

As it was argued, the Commission may be embedded with a *sui generis* judicial competence, in the sense that it investigates law violations and imposes penalties, but it cannot possibly be considered as falling within the ECHR's autonomous concept of "independent and impartial tribunal" as was also developed by the EU Courts in the context of interpreting Article 47 CFR. In other words, the EU Commission cannot be deemed to be the independent adjudicator that must necessarily exist in order for the individuals' rights to be protected in the field of EU competition law[9].

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8 Van Bael, I., *Due Process in European Competition Proceedings*, Kluwer Law International, 2011, p. 85.

9 See Teleki, C., *Due Process and Fair Trial in EU Competition Law*, Brill, 2021, p. 143 et seq.

Indeed, the strictly defined and pure overseers of the protection of fundamental rights and the application of the primary EU law principles in the field of competition law were always the courts forming the decentralized EU judicial system in its more extensive sense, ergo in the network formed by all national and EU courts applying EU law with the CJEU as the final adjudicator.

In effect, Article 47 (1) CFR guarantees the rights to an effective remedy and to a fair trial and provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Moreover, the second paragraph of the same provision stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented.

Even before the legally binding character of the Charter, which was established through the Treaty of Lisbon[10], the EU courts recognized the importance of protecting the right to a fair trial in the EU, both in a general context and in competition law in particular[11]. Indeed, in the crucial *Kadi*[12] judgment, the Court declared that "*The Community is based on the rule of law, inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions*".

The reaffirmation by Article 47 CFR of the general principle of EU law, according to which everyone is entitled to a fair legal process, a provision which – like most of the rights guaranteed in the CFR – codified the EU courts' case-law, provided an explicit and systemic legal base for further development of this particular right's protection.

With regard to the scope and the extent of the right to fair trial, the CJEU is always interpreting the right guaranteed in Article 47 CFR by taking into account not only its previous and long-standing case-law, but also the ECtHR's interpretation of Article 6 ECHR and the constitutional traditions of the EU's member states. In effect, it has ruled that the right to a fair trial comprises the right to effective remedies, to have access to a tribunal that is independent of the executive power

10 Article 6 TEU.

11 See, *inter alia*, Case C-185/95, *Baustahlgewebe GmbH v Commission*, ECLI:EU:C:1998:608, par. 21.

12 Case C-402/05 P and 415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, par. 81.

in particular[13], to a legal process which lasts a reasonable time[14], and the rights to be notified of procedural documents and to be heard[15].

Overall, the CJEU has consolidated the view that the effectiveness of the judicial review guaranteed by Article 47 CFR requires that, as part of the review of the lawfulness of the grounds which are the basis of an EU act imposing penalties to any individual, the EU courts are to ensure that this act, which affects these persons individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of them, deemed sufficient in itself to support that decision, are substantiated[16].

As is the case with all the Charter's guaranteed rights, the interpretation of the corresponding provisions is guided by specific criteria mentioned in the Charter itself, which constitute a codification of the long-standing case-law of the Court. More specifically, the first sentence of Article 52 (3) CFR states that, insofar as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the Convention. Moreover, according to the not legally binding but extremely useful explanation of Article 47 CFR added by the Commission, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR and particularly to the corresponding Article 6 ECHR, but also, *inter alia*, by reference to the case-law of the ECtHR.

Indeed, in the *Unectef v Heylens*[17] judgment in the 80s the Court found that effective judicial review, which must be able to cover the legality of the reasons for a contested decision of an EU institution, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. It also held that where it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on EU workers,

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13 See, *inter alia*, Case C-174/98 P, *Kingdom of the Netherlands and Gerard van der Wal v Commission*, ECLI:EU:C:2000:1, par. 17.

14 Case C-185/95, *Baustahlgewebe GmbH v Commission*, ECLI:EU:C:1998:608, par. 21.

15 Case C-341/04, *Eurofood ifsc Ltd.*, ECLI:EU:C:2006:281. Nevertheless, in par. 66 of the judgment the Court clarified that the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees, ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

16 Case C-530/17, *Mykola Yanovych Azarov v Council*, ECLI:EU:C:2018:1031, par. 22.

17 Case 222/86, *Unectef v Heylens*, ECLI:EU:C:1987:442.

the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent authorities are under a duty to inform them of the reasons on which the refusal is based, either in the decision itself or in a subsequent communication made at their request.

A few years later, in the case *Oleificio Borelli v Commission*[18], the Court used a linear analysis for the interpretation of the principle of judicial protection and found that judicial scrutiny reflects a general principle of EU law stemming from the constitutional traditions common to the member states and enshrined in Articles 6 and 13 ECHR. Moreover, in case *DEB*[19] the Court showed that the principle of effective judicial protection may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

When it comes to competition law in particular, judicial review on EU level cases is primarily a matter of constitutional design, because its tenets are laid down in the TFEU and Regulation 1/2003. More specifically, the review of legality of the Commission's acts and decisions is limited in the context of the annulment action, but unlimited in the case of fines as provided for in Article 261 TFEU which states that regulations adopted by the European Parliament and the Council "*may give the Court of Justice of the EU unlimited jurisdiction with regard to the penalties provided for in such regulations*". Indeed, Article 31 of Regulation 1/2003 provides that "*the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed*".

3. THE RIGHTS PROTECTED DURING THE SUPERVISION AND ENFORCEMENT PHASE

3.1. The respect for the complainant's rights

Even though the proceedings of the Commission in competition cases are not adversarial in nature between the complainant on the one hand and the companies under investigation on the other, and thus the procedural rights of complainants are less far - reaching than the right to a fair hearing of the subjects of an infringement procedure, there is no doubt that according to EU law the former also benefit from procedural rights.

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18 Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491.

19 Case C-279/09, *DEB*, ECLI:EU:C:2010:811.

Indeed, according to the General Court the Commission is obliged, pursuant to EU legislation, "*to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between member states*"[20].

Turning to the judicial approach used by the EU courts in order to ascertain that the Commission has, indeed, respected the complainant's administrative rights, three levels of review have always been identified which have also been gradually incorporated into the legislation.

First, the courts examine whether, following the submission of a complaint, the Commission has collected all the necessary and useful information that will serve as the basis for the decision that later adopts. This stage may include, *inter alia*, an informal exchange of views and information between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing him an opportunity to expand on his allegations in the light of any initial reaction from the Commission[21]. At this stage, the institution may give an initial reaction to the complainant giving the latter an opportunity to understand the institution's point of view and allowing him to expand on the allegations and enrich the documentation.

During the second stage of review, the EU courts scrutinize the way that the Commission has investigated the case further with a view to initiating proceedings. Indeed, it must be ascertained that, if the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of the reasons and offer him the opportunity to submit any further comments within a time limit which it defines[22].

In that context it is settled case law[23] that, even though the above notification is similar to a statement of objections, its goal however is the defense of the procedural rights of the complainants which are not as far-reaching as the right to a fair hearing of the individuals which are the subject of the Commission's investigation. This approach demonstrates the importance that the EU courts attach to the rights of defense of the subject of the alleged infringement and also emphasizes the fact that the statement of objections is not a decision whose validity can be contested before the courts, but merely a procedural measure preparatory to the final decision.

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20 Case T-24/90, *Automec v Commission*, ECLI:EU:T:1992:97, par. 79.

21 *Ibid*, par. 45.

22 *Ibid*, par. 46.

23 See Case 60/81, *IBM v Commission*, ECLI:EU:C:1981:264.

Lastly, the third stage of the review, which takes place if the complainant has submitted observations, consists of the examination of whether the Commission has taken cognisance of the observations submitted by the complainant and either initiated a procedure against the subject of the complaint or adopted a reasoned[24] decision rejecting the complaint[25].

3.2. Procedural guarantees during the enforcement process

When an initial assessment performed by the Commission leads to a conclusion that there is a case that warrants further investigation, it will formally open the proceedings pursuant to Article 11 (6) of the Regulation 1/2003 triggering the procedural rights of the companies under investigation. Furthermore, in the case of cartel investigations, the opening of the proceedings coincides with the formulation of the "statement of objections".

In effect, in order for the procedural rights of the investigated company to be respected, the opening of the proceedings must clearly situate the case in time and identify the persons affected, describe the scope of the investigation, the territory and the sectors investigated and the behaviour that constitutes the alleged infringement. Access to all evidence gathered by the Commission which led to the drafting of the statement of objections is also provided to the company in question. Moreover, due to the important consequences of publishing the relevant information in the press, the Commission always emphasises that the opening of proceedings does not prejudge in any way the existence of an infringement.

Similarly to the principle of criminal law dictating that the accused must be aware of the penalty that will be imposed to him / her in case of conviction, the statement of objections must clearly indicate whether the Commission intends to impose fines on the undertakings, should the objections be upheld, in accordance with Article 23 of Regulation 1/2003. In such cases, the statement of objections will refer to the relevant principles laid down in the "guidelines on setting fines"[26], whose soft – law nature has been recognized by the EU Courts[27].

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[24] That does not entail an obligation of the Commission to respond to all arguments raised by the complainant.

[25] See also the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65, 71.

[26] Commission Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, [2006] OJ C 210/2.

[27] See, *inter alia*, Case C-189/02 P, *Dansk Rørindustri and others v Commission*, ECLI:EU:C:2005:408, par. 212.

More specifically, in the statement of objections, the Commission should indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and whether the infringement was committed intentionally or by negligence. The statement of objections should also mention, in a sufficiently precise manner and to the extent possible, the aggravating and attenuating circumstances.

Furthermore, language is an important aspect of the legal procedure. Indeed, EU competition law legislation contains extensive provisions concerning the language of the proceedings, which seek to safeguard the procedural rights of the investigated. First, the documents which the Commission sends to an undertaking based in the EU should be drafted in the language of the member state in which the undertaking is based. Second, the documents which an undertaking sends to the Commission may be drafted in any one of the official languages of the EU selected by the sender. The reply and subsequent correspondence should be drafted in the same language.

In the later stages of the procedure the Commission has the duty to communicate in the authentic language of the addressee. Thus, the statement of objections, the preliminary assessment and the decisions adopted pursuant to arts. 7, 9 and 23 (2) of Regulation 1/2003 should be notified in the authentic language of the addressee[28]. Similarly, the reply and all subsequent correspondence addressed to the complainant should be in the language of their complaint. Finally, participants in the oral hearing may request to be heard in an EU official language other than the language of proceedings. In that case, interpretation should be provided during the oral hearing, as long as sufficient advance notice of this requirement is given to the hearing officer.

Beyond the above, the most important and judicially reviewed limit of the Commission's means and extent of investigation is without a doubt the principle of proportionality, which corresponds to the rule of law principle. Indeed, proportionality is a general principle of EU law, expressly worded not only as a fundamental barrier to the EU's exercise of competences in Article 5 (4) TEU, but also as a reflection of the individual's right to a fair trial in Article 49 (3) of the CFR, requiring that the measures adopted by EU institutions must not exceed what is appropriate and necessary for attaining the objective pursued. In other words, when there is a choice between several appropriate measures, the least onerous

[28] In order to avoid delays due to translation, the addressees may waive their right to receive the text in the language of the member state in which the undertaking is based and opt for another language. Duly authorized language waivers can be given for some specific documents or for the whole procedure.

must be chosen, and the disadvantages caused must not be disproportionate to the aims pursued.

In effect, in the field of means used by the Commission for the investigation of possible competition law breaches the EU courts have always emphasised that in the EU legal system any intervention by the authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, both the investigation as such and the Commission's specific discovery principles can be assessed against the proportionality principle, in order to ensure that they "do not constitute, in relation to the aim pursued by the investigation in question, a disproportionate and intolerable interference"[29].

Subsequently, the principle of proportionality establishes secondary obligations of the Commission in the stage of investigation. More specifically, the latter must not disregard its duty to act within a reasonable time as an outcome of the principle of sound administration, which is expressly mentioned in Article 41 (1) CFR and is judicially reviewed on a case-by-case basis[30], as well as its legal obligation to state reasons for both its findings and the penalties imposed, which is enshrined in Article 296 TFEU and Article 41 (2) CFR. According to CJEU's settled case-law, the Commission is required to deliver its reasons in a clear and unequivocal fashion so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent courts to exercise its power of judicial review[31].

3.3. The rights of the individual under investigation

The importance of the so called "rights of the defense" has been repeatedly stressed by the EU Courts in various legal environments, and in particular in the context of competition law[32], where enforcement takes place mainly against individual violators.

The crown jewel of the rights of the defense is undoubtedly the right to be heard, and its efficient and unimpeded exercise creates the base for the judicial review of the Commission's actions. When it comes to EU competition law, this particular right can be exercised in both the written comments and the oral hearing of the individual under investigation. Indeed, Regulation 1/2003 ensures that before taking decisions as provided for in Articles 7, 8, 23 and 24 (2), the Commission must

29 Case C-94/00, *Roquette Freres*, ECLI:EU:C:2002:603, par. 76.

30 Case C-238/12 P, *FLSmidth v Commission*, ECLI:EU:C:2014:284.

31 See, *inter alia*, Case T-213/00, *CMA CGM* and *Others v Commission*, ECLI:EU:T:2003:76, par. 317.

32 Case 322/81, *Michelin*, ECLI:EU:C:1983:313, par. 7.

give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity to be heard on the matters to which it has taken objection. This is of crucial importance as the Commission can base its decisions only on objections on which the parties concerned have been able to comment[33].

In particular, the parties concerned must be informed about all the objections raised against them in the statement of objections that must be sent to each party. Moreover, the Commission must set a time limit within which they can react to these objections. The concerned parties should prepare and send their reply, in which they can present facts supporting or rejecting the Commission's assertions. They can also attach evidence in support of their allegations, and finally, they can propose that the Commission hears persons who may corroborate the facts set out in their submission.

Aside from the parties concerned, the Commission also takes into account the documents submitted by the complainants and other third parties that have either been identified by the parties concerned or by the member states or are deemed by the Commission to have an interest in the proceedings. Besides, third parties may themselves request to be heard when they have an interest in the proceedings.

Furthermore, the efficient exercise of the right to be heard requires that certain conditions are fulfilled, one of which corresponds to another fundamental, procedural right, namely the right to access to file. This is one of the most important rights in EU competition law proceedings and also an example of how fundamental rights have developed in the field of competition law through the common work of the EU courts' case-law and the Commission's practice[34].

Indeed, access to file was initially construed to encompass only access to inculpatory evidence. However, from 1982 the Commission started granting access to the entire file when investigating Articles 101 and 102 TFEU, a practice that was recognized as a legal principle by the EU courts, which ruled[35] that by establishing a procedure for providing access to file in competition cases, the Commission imposed on itself rules from which it can no longer depart. It follows that the Commission has an obligation to make available to the undertakings involved in competition enforcement proceedings all documents and other materials, which

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33 Article 11 of the Commission Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18, as modified by the Commission Regulation (EC) 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] OJ L171/3.

34 See for more Neves, I.; Steffens, K., *Right(s) of Defence, Access to the File and Fairness in Competition Procedures*, European Competition and Regulatory Law Review, Vol. 4 (2020), pp. 260-272.

35 See, *inter alia*, Case T-7/89, *Hercules Chemicals v Commission*, ECLI:EU:T:1991:75, par. 53– 54.

it has obtained during the course of the investigation[36]. Furthermore, it cannot decide alone which documents are of use for the defence, but it must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that they it can assess their probative value for itself[37].

It is worth noting that in 1997 the Commission published guidelines on the right of access to file, aiming to bring its practice in line with the EU courts' jurisprudence, while in 2005 it issued a "Notice on Access to File"[38] replacing the above guidelines. In addition, Regulation on Procedure, the Implementing Regulation and the CFR provide for the right to have access to the Commission's file but only to the addressees of the statement of objections.

Furthermore, of particular importance are the rights against intervention to the business premises by the public authorities[39] and against any disclosure of business secrets to the public, namely information whose merely the transmission to a person other than the one that provided it may seriously harm the company's interests[40].

Finally, a substantial presentation of the most important rights of the defense cannot be considered as complete without mention to a right with a particular history of evolution, namely the right to remain silent. According to its content, which was initially developed as a legal principle, no one can be compelled to incriminate oneself. This principle prevents extortion of information or the use of investigative measures that force the accused person to acknowledge his guilt.

It is worth noting that, even though the EU competition law contains no express provision concerning the right to remain silent and, on the contrary, the EU legislator has been thorough in imposing on the undertakings the obligation of cooperation with the supervisory authorities, the Court of Justice developed an exception to the above obligation. Indeed, it argued that an undertaking has the right to remain silent when faced with questions or demands that can be viewed as possibly requiring the company to admit the existence of an infringement[41].

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36 See recent Case C-607/18 P, *NKT Verwaltungs GmbH and NKT AS v Commission*, ECLI:EU:C:2020:385.

37 Case T-30/91, *Solvay v Commission*, ECLI:EU:T:1995:115, par. 81.

38 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (2005/C 325/07).

39 See, *inter alia*, Case 85/87, *Dow Benelux*, ECLI:EU:C:1989:379.

40 See, *inter alia*, Case T-353/94, *Postbank v Commission*, ECLI:EU:T:1996:119.

41 Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, par. 35.

Moreover, it is worth noting that in the past the EU courts ruled that a right to silence can be recognized only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement[42], not on the part of others, and the right does not cover the provision of documents or other means of proof. With the above reasoning the EU judge established a balance between a necessary right and the preservation of the efficiency of the Commission's enforcement powers.

Indeed, this approach was codified in Recital 23 of the preamble to the Regulation 1/2003 which highlights that "*when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or another undertaking the existence of an infringement*". Thus, undertakings must produce all the documents that the Commission requests but should answer only those questions which are not directly incriminatory.

Despite this previous interpretation, it is of particular interest that today the Court of Justice follows a more extensive approach to the right to silence for individuals during administrative market abuse proceedings, emphasizing that the said right cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person[43].

4. THE DEPTH OF JUDICIAL REVIEW IN THE FIELD OF EU COMPETITION LAW

4.1. The limited review of legality

The limited character of the legality review exercised by the EU Courts in the Commission's decisions concerning competition law in the framework of Article 263 TFEU was analyzed and summarized by the CJEU in its *Chalkor v Commission*[44] judgment, where it started its analysis concerning judicial review in competition law disputes by highlighting that, in addition to the review of legality provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged regarding the penalties laid down by Regulations. In light of this, the

42 Case T-236/01, *Tokai Carbon v Commission*, ECLI:EU:T:2004:118, par. 402.

43 Case C-481/19, *Consob*, ECLI:EU:C:2021:84, par. 40.

44 Case C-386/10 P, *Chalkor v Commission*, ECLI:EU:C:2011:815, par. 53.

CJEU ruled that the failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. More specifically, compliance with that principle does not require that the EU Courts – which are indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of their own motion a new and comprehensive investigation of the file.

As it happens, in the area of competition law the CJEU follows the same approach of self-restraint that it also adopts in other high-level and critical policy areas, such as the Economic and Monetary Union and the Common Foreign and Security Policy[45]. That approach is based on two reasonings, the first being the complex character of the information and data on which decision-making is based in these particular policy areas, and the second being the sensitive balance of powers that must be achieved due to their importance for sovereignty and policy making.

With regard to the first parameter, as early as in the 60s the Court emphasized that judicial review of complex economic evaluations made by the Commission must take account of their nature by confining itself to an examination of the relevance of the facts and the legal circumstances which the Commission deduces therefrom, and be carried in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based[46]. Later on, it clarified that, when confronted with complex economic matters, the Court must limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated, and whether there has been any manifest error of appraisal or misuse of powers[47].

On the other hand, the EU Courts were always persistent in stressing out that no complexity or technocracy of evidence and information can ever lead to lack of judicial review and effective judicial protection[48]. More specifically, in the *Laval* judgment the CJEU noted that, even though the Commission's margin of appreciation in economic and technical matters must be respected and safeguarded, that cannot lead to any form or level of judicial review of the Commission's interpreta-

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45 See also Perakis, M., *The Passive Form of Judicial Activism: Judicial Self-Restraint while Balancing Fundamental Rights and Public Interest in the Age of Economic Crisis*, European Politeia, Vol. 2 (2015), pp. 321-346.

46 Case 58/64, *Grundig v Commission*, ECLI:EU:C:1965:60.

47 Case 42/84, *Remia v Commission*, ECLI:EU:C:1985:327.

48 See also Bailey, D., *Standard of Judicial Review under Articles 101 and 102 TFEU* in: Merola, M.; Derenne, J. (eds), The Role of the Court of Justice of the European Union in Competition Law Cases, Bruylant, 2012, p. 106.

tion of economic and technical data being excluded. Indeed, the EU Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it can substantiate the conclusions drawn from it[49].

When it comes to the second parameter, namely the sensitive character of certain policy areas and the necessary separation of powers and competences[50] which imposes an efficient albeit limited capacity for judicial review of the EU institutions' acts, the well-known judgment of the Court in the case *Les Verts v European Parliament*[51] is of particular relevance. In this case, which was the starting point for a long line of case-law concerning effective judicial protection balanced with the separation of the EU institutions' competence, the ECJ declared that the EEC is a "Community based on the rule of law", inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic "constitutional charter", the Treaties. One the contrary, it cannot be disregarded that it is those same Treaties that establish the system of remedies, the procedures and the requirements permitting the Court of Justice to review the legality of measures adopted by the EU institutions[52].

4.2. The unlimited review of fines

Unlike the review of legality, which touches upon critical political and institutional issues that lead the EU Courts to exhibit a touch of self-restraint established by the wording of the relevant EU law provisions, the explicitly limitless character of the review of fines predicted in competition law cases led the CJEU to construe its own powers in a much broader way. More specifically, according to the Court the unlimited jurisdiction conferred by Article 31 of Regulation 1/2003 authorizes the EU courts "*to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine*"[53].

Indeed, in the eyes of the EU judge this unlimited jurisdiction empowers him, in addition to carrying out a limited review of the lawfulness of the penalty, to

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49 Case C-12/03 P, *Commission v Tetra Laval*, ECLI:EU:C:2005:87, par. 39.

50 In other words, the principle "institutional balance" as developed by the Court in the first years of the European Community's life, and more specifically in the *Meroni* judgment (Case 9/56, *Meroni v High Authority*, par. 133).

51 Case 294/83, *Les Verts v European Parliament*, ECLI:EU:C:1986:166.

52 *Ibid*, par. 23.

53 Case C-534/07 P, *Prym and Prym Consumer v Commission*, ECLI:EU:C:2009:505, par. 86.

substitute his own appraisal for the appraisal provided by the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, supplements and completes the review of legality[54] and thus covers any gaps in the protection of the right to a fair trial.

In effect, while conducting judicial review on this level, the EU courts repeatedly seized the opportunity to rule on claims related to the Fining Guidelines that the Commission is using when calculating the penalties, especially since the plaintiffs often invoke as an argument the misapplication by the Commission of its own, self-imposed criteria. In general terms, the Union courts praise, *inter alia*, the resulting increase in legal certainty and transparency that those Guidelines provide[55]. The relevant settled case-law of the General Court is of particular importance in this issue.

More specifically, the EU court of first instance has repeatedly stressed that its role when reviewing the legality of the fines imposed by the Commission is twofold: to assess whether the discretion exercised by the EU institution is in line with the Guidelines and, if a deviation is observed, to verify whether the latter is justified and supported by a clear, well-developed and convincing legal reasoning[56]. It has also added the important clarification that "*the self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion*"[57].

Furthermore, the already mentioned fundamental principle of proportionality is of paramount importance when it comes to the judicial review of the competition law fines. Indeed, according to settled case-law, the gravity of an infringement which defines the amount of the fine must be determined by reference to numerous factors, such as the particular circumstances of the case and its context. The EU Courts always emphasize that there is no binding or exhaustive list of the criteria which must be applied[58], but these may include, *inter alia*, the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it is able to exert on the relevant market.

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54 Case C-99/17, *Infineon Technologies v Commission*, ECLI:EU:C:2018:773, par. 47, and Case C-386/10 P, *Chalkor v Commission*, ECLI:EU:C:2011:815, par. 63.

55 Case C-3/06 P, *Group Danone*, ECLI:EU:C:2007:88, par. 23.

56 Case T-127/04, KME *Germany and Others v Commission*, ECLI:EU:T:2009:142.

57 *Ibid*, paras 34-35.

58 See, *inter alia*, Order in Case C-137/95 P, *SPO and Others v Commission*, ECLI:EU:C:1996:130, par. 54, Case C-219/95 P, *Ferriere Nord v Commission*, ECLI:EU:C:1997:375, par. 33, and Case T-9/99, *HFB and Others v Commission*, ECLI:EU:T:2002:70, par. 443.

In this context, it is important to note that, even though there is no EU level harmonization of how the calculation of fines is carried out, nor of the relevant factors to be taken into account in performing this task, and accordingly the National Competition Authorities may differ in their approaches when calculating the basic amounts of fines, the main principles governing the necessary protection that judicial review must offer also apply to fines imposed on the national level when reviewed by national courts[59].

It is worth noting that, despite the mathematical and complex character of the criteria and data used to calculate a fine in the area of competition law, in the process of judicial review the EU courts on one hand always focus on the goals that must be achieved in this policy area, and by doing so they may "substitute their own appraisal for the Commission's"[60], but at the same time they display care to safeguard the particular institution's essential role in this context[61]. Indeed, it is settled case-law that the Commission's duty is not to scientifically prove the impact of a cartel on a market, but rather "*to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market*"[62] while at the same time avoiding resorting to baseless assumptions[63].

Moreover, the concept that competition is a field of policy exercise and that is why the Commission has such an important role to play in it, can be reflected in the EU courts' case-law with regard to the institution's margin of appreciation in the area of fines' imposition. More specifically, the EU judge perceives the Commission's unreviewable discretion as extending to the seriousness of the infringement and its composing elements[64], to the application of aggravating and attenuating circumstances[65], and to the cooperation offered by the members of a cartel dur-

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59 See also Dunne, N., *Convergence in Competition Fining Practices in the EU*, Common Market Law Review, Vol. 53 (2016), pp. 453-492, 458.

60 Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684, par. 62.

61 See Opinion of Advocate General Poiares Maduro, in Case C-141/02 P, *Commission v Max Mobil*, ECLI:EU:C:2004:646, paras 77–78. Hence, judicial review covers, apart from any question of interpretation of law, the questions of whether the facts have been correctly stated, whether the evidence relied on is factually not only accurate, reliable, and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it, whether the formal and procedural rules have been complied with and whether there has been any manifest error of assessment or misuse of powers.

62 Case T-241/01, *Scandinavian Airlines System v Commission*, ECLI:EU:T:2005:296, par. 122.

63 Case T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paras 160– 161.

64 Case T-101/05 and T-111/05, *BASF v Commission*, ECLI:EU:T:2007:290, par. 65.

65 Case T-44/00, *Mannesmannrohren- Werke AG v Commission*, ECLI:EU:T:2004:218, par. 307.

ing the proceedings[66], factors that can only be examined by the courts only for a manifest error.

5. CONCLUSIONS

From what was presented and analyzed in this paper, certain conclusions can be drawn regarding the influence of the right to fair trial in the context of EU competition law.

The first is that the goals pursued by EU competition law justify an emphasis on efficiency over accuracy[67] when it comes to the implementation of the respective rules and the judicial review of the Commission's acts, and that is evident in the EU judge's case-law regarding the concept of "fair trial". In particular, it becomes obvious by the reasoning of the EU courts' judgments that a balance between safeguarding the essence of the protection of rights and the achievement of ensuring undistorted competition is always sought, with the consequence that the EU judge does not adhere to formulas or details when reviewing the actions of the Commission but to the diagnosis of whether there has actually been violation of the respective right. This quest for balance is made more evident by the fact that the EU courts favor a case-by-case review rather than being complacent in the general guidelines issued from time to time by the Commission.

The second conclusion regards the somehow limited jurisdiction of the EU courts when it comes to the scrutiny of the Commission acts' legality in the area of competition law in comparison to other areas of EU law. It should be remembered that in the field of the enforcement of EU competition law the Commission is equipped and exercises not only a wide discretion in its decision-making, but also extended policing powers by investigating, searching, seizing and interrogating. To that it must be added that the Commission has largely interpreted the breadth of its own powers[68], something which would normally make even more imperative the need for a comprehensive, full and constant judicial review of its actions.

Still, it is evident that, with the exception of the amount of fines, the Court does not appear to have jurisdiction to exercise a thorough and efficient review under the present legal regime, or at least it is reluctant to derive such a competence from the wording and the purpose of Articles 261 and 263 TFEU. Indeed, this

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66 Case C-328/05, *SGL Carbon AG v Commission*, ECLI:EU:C:2007:277, par. 88.

67 See Tonna-Barthet, C., *Procedural justice in the age of tech giants – justifying the EU Commission's approach to competition law enforcement*, European Competition Journal, Vol. 16 (2020), pp. 264-280, 280.

68 See Teleki, C., *op. cit.*, note 33, p. 340.

weakness may give rise to the criticism that the right to a fair trial is not fully guaranteed when it comes to the judicial protection of the individual in the area of EU competition law.

Despite the above impression, the Court itself sees things differently when it comes to the efficiency of its review. As it was shown in the present study, in the eyes of the EU judge his unlimited power for judicial review of imposed fines supplements and completes the review of legality, guaranteeing the right to a fair trial and perfectioning the efficiency of judicial protection.

Besides, it cannot be disregarded that, although effectiveness is an issue of major concern for the competition authorities, largely as result of the secrecy of some of the most typical infringements, such as cartels, EU competition law must not be and is obviously not "immune to fundamental rights' protection" by the EU courts, and that seems to be a direct consequence of the importance that the latter give to the right to a fair trial. It has always been their solid approach that it is incumbent on the Commission, on the national competition authorities, and, ultimately, on themselves to ensure a fair balance between the rights and interests at stake, without scarifying the core of any of them.

Indeed, in recent years it seems that the CJEU has begun to move more vigorously in this direction[69], an approach which cannot be perceived out of the wider context of the need to empower the rule of law and one of its most fundamental aspects, which is the right to a fair trial. Nevertheless, and rightly so, the EU judge proceeds slowly and steadily with careful steps as he is taking due care not to overturn the balance to the detriment of the only EU institution that has the competence as well as the ability to ensure the competition law in the Union, namely the European Commission, and to leave the main initiative to the EU legislator to whom it belongs.

Overall, the final conclusion of this study unifying the two previous ones is that in the field of competition law the CJEU follows the current tendency of all courts, both national and international[70], to acknowledge a wide margin of discretion and appreciation of the executive in policy areas that are politically and economically crucial and sensitive. Indeed, even when courts apply the balancing legal principles of necessity and proportionality in these policy areas, they do so with respect to the governmental policy, which is evidence of a reluctance to "invade" the territory of the executive and the lawmaker.

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69 A very good example of that path is the recent judgment in the Case C-607/18 P, *NKT Verwaltungs GmbH and NKT AS v Commission*, ECLI:EU:C:2020:385.

70 For the ECtHR see ECtHR, *Koufaki and ADEDY v Greece* (2013), appl. no. 57665/12 and 57657/12.

In all fairness, it should be emphasized that, while adopting this particular approach and judicial thinking, namely limiting their role in safeguarding the "outer boundaries" of the necessity of the governmental policy and the "absolute core" of the rights infringed, the judiciary neither denies justice, nor puts itself in the service of the executive. On the contrary, it shows legal and pragmatic respect to one of the most fundamental principles permeating the national constitutions, the international legal order and generally the western civilization, which is Democracy.

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Review article

NON-COMPETE CLAUSE IN BULGARIAN LABOUR LAW

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Abstract

Work is inherent in every person. Thanks to the exercise of active, purposeful efforts, a person acquires funds not only for their physical survival, but also for their development and growth as a person. Recognition of the possibility of employment is proclaimed to be a fundamental human right. The right to work is recognised and protected in a number of international instruments and national legislations. The right to work is also guaranteed in the Constitution of the Republic of Bulgaria. Citizens shall have the right to work and every citizen shall be free to choose an occupation and a place of work.

Traditionally, it is an understanding that the employer is the economically stronger party in the employment relationship. The means of production he possesses (buildings, machinery, technology, commercial relations, etc.) give him an economic advantage over the worker, who possesses only his workforce — physical strength, knowledge, skills.

From the economic position held, the employer can apply different approaches to retain and limit the mobility of his employees. Without neglecting the employer's right to protect its economic interest, the conclusion of the non-compete agreement must guarantee the rights of the worker and comply with the law of competition in labour market.

The aim of the research is to present the regulation of the non-compete clause in Bulgarian labour Law and the relevant case law.

Faced with the need to conclude an employment contract or to maintain their employment relationship, workers often do not understand or ignore included non-compete clauses. Knowledge of the legal framework is an indispensable step towards protecting labour rights. In this regard, the first research purpose is to make an overview of the relevant Bulgarian legislation.

The study of case law is essential for legal science. On the one hand, case law gives the understanding of the institute concerned, concept, legal order. On the other hand, case law provides

an opportunity to analyse how the law established by the legislature operates in practice and whether the relevant objective has been achieved. Summarizing the principled understandings of the Bulgarian courts on non-compete clauses is the second research purpose.

Knowledge of the peculiarities of the non-compete agreement matters for both theory and practice. Bulgaria is part of the EU labour market. Knowledge of national legislation will assist foreign researchers in developing relatively empty research.

Bulgaria guarantees the right to free movement by workers who are nationals of another Member State of the European Union. Knowledge of national legislation is also relevant in cases of labour mobility.

Both general and special methods of scientific knowledge were used in the conduct of this study. The two main approaches also applied to the present study are deduction and induction. The application of the comparative-historical method allows to trace the development of legislation and case law on non-compete clause, the changes that have occurred and possibly to forecast development trends.

***Key words**: labour law, non-compete clause, labour mobility, competition in labour market*

1. INTRODUCTION

The main objective of EU competition law is to create conditions for the proper functioning of the internal market. Competition policy is a key tool for achieving a free, dynamic, and functioning internal market and for promoting overall economic welfare. Competition enables businesses to compete on equal terms, while also encouraging them to offer the best products at the lowest prices for consumers. This stimulates innovation and boosts long-term economic growth. Articles 101-109 of the TFEU, as well as Protocol No. 27 on the internal market and competition[1], indicate that a system of fair competition is an essential part of the internal market. Competition policy has a direct impact on people's lives, with one of its key features being the promotion of open markets so that everyone — businesses and citizens — can receive a fair share of the benefits of economic growth.

While competition policy alone cannot create a fairer economy, it plays a pivotal role in achieving this goal. The enforcement of competition law safeguards consumer rights. Competition policy contributes to building a society that offers choices to consumers, stimulates innovation, and prevents abuses by dominant market players. The interaction between EU competition law and EU consumer law is a key aspect of the Union's legal framework. It aims to ensure fair and effective protection of consumers while promoting competition in the internal market.

The interaction between EU competition law and EU consumer law can be considered from several aspects. Some anti-competitive practices can directly nega-

[1] Official Journal of the European Union C 202/308

tively impact consumers, limiting their choice or raising prices. In such cases, sanctioning such practices through competition law serves to protect consumers. Competition law can support the protection of consumer rights by encouraging innovation and market efficiency. When companies are encouraged to compete with each other, they are more likely to offer new and better products and services, which benefits consumers. Consumer law can influence competition law by setting minimum standards for company behavior toward consumers.

Non-compete clauses, a unique aspect of EU competition law, can significantly impact consumers. These clauses are typically included in employment contracts and prohibit employees from working for competing companies after the termination of their employment relationship. While their aim is to protect the employer's trade secrets and know-how, they can restrict labor mobility and reduce competition in the labor market. From the consumer perspective, reduced competition can lead to less choice and higher prices. Therefore, it is important for EU legislation to balance the interests of employers and employees, ensuring that non-compete clauses do not violate competition law and protect consumers.

2. THE BALANCE BETWEEN THE EMPLOYER'S INTERESTS AND THE PROTECTION OF THE EMPLOYEE'S RIGHTS

The employment contract is a bilateral agreement because each party – employee and employer – assumes reciprocal rights and obligations. The employee provides their labour force for the employer's use. In doing so, the employee alienates a portion of their personal freedom, which places them in a subordinate position under the control and instructions of the employer, which they are obliged to follow[2]. As a result, the employee becomes legally dependent on the employer.

Traditionally, it is understood that the employer is the economically stronger party in the employment relationship. The employer's ownership of means of production (buildings, machinery, technology, business relations, etc.) gives them an economic advantage over the employee, who possesses only their labour force – physical strength, knowledge, skills, and professional qualifications. Within the framework of labour legislation, the employer has numerous legal means related to the internal work organization, the way production is arranged, the distribution of working time, and so on. This is what constitutes employer authority – the employer's right to direct and control the work of their employees, including the imposition of disciplinary sanctions.

[2] Mrachkov, V., *Labour Law*, Sibi Publishing House, Sofia, 2015, pp. 201 - 202

In some respects, employers also rely on their employees. Without their skills and labour, the enterprise could not function effectively. Employees create products, provide services, and interact with clients, which directly impacts the company's reputation and success. However, in fulfilling their work duties, employees may gain access to important information for the employer – production technology, market policies and mechanisms, client and supplier lists, etc. The disclosure of such information by employees could be used by competing companies and put the employer in a vulnerable position. Hence, the employer's desire to limit employees' interactions with competitors is understandable, with the goal of protecting trade secrets and confidential information.

3. NO-POACH AGREEMENTS IN BULGARIAN COMPETITION LAW

The Commission on Protection of Competition (CPC) is an independent specialized government body. The CPC serves as Bulgaria's national authority for enforcing EU competition law.

The main task of the CPC is to ensure the application of rules that promote and enforce competition in both the public and private sectors, applying the principles of a market economy and free competition. In carrying out this task, the CPC's actions support the level of competition in the Bulgarian economy, which leads to improvements in the quality and price of available goods and services and strengthens the internal market, which is a core value of European integration. In this way, the national competition authority's main mission is fulfilled: to create conditions in which markets deliver more benefits to consumers, businesses, and society as a whole.

Each year, following an analysis of the results achieved during the previous period, the CPC sets its future priorities. These priorities are based on the institutional experience of the organization and take into account economic trends. The establishment of new goals also reflects the need for the direct application of European legislation, as well as the changes in markets and business models resulting from new technologies. The CPC primarily focuses its work on combating prohibited agreements, preventing collusive market practices, terminating unfair trading practices, and more.

For the first time, the priorities and objectives of the "Antitrust" activity for 2023[3] explicitly state that the CPC will monitor the promotion and preservation of an

[3] See: Annual Report on the activities of the Commission on Protection of Competition, 2022, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2022.pdf], Accessed 29 September 2024

open and competitive labour market. To fulfil this priority goal, the CPC must pay particular attention to agreements between competitors in the labour market, which can emerge in any sector of activity. The agreements between employers and/or competitors in the labour market that may potentially restrict competition are the so-called "no-poach agreements", whose aim is to refrain from attracting and/or hiring each other's workers. The trend of competition authorities reviewing such anti-competitive agreements is gaining momentum worldwide, especially following the Covid-19 pandemic and the changed working conditions in almost every economic sector. This is expected to continue in the future, especially considering the increasing number of such agreements as a standard practice in human resources across various industries. In this context, it is of utmost importance to ensure direct, effective, and fair competition between employers, because the labour market directly or indirectly affects many related markets, which in turn indirectly impacts the overall economic well-being, promotes innovation and growth, and is key to all processes related to overcoming the economic crisis brought on by the pandemic.

The CPC's 2023 Annual Report[4] states that in the area of antitrust, the Commission has achieved its primary goals of enhancing the effectiveness of countering prohibited agreements and abuses of monopoly or dominant positions, with the aim of ensuring the free functioning of markets in the interest of consumers and the economy in Bulgaria. However, aside from this general statement, there is a lack of specific data on identified practices or violations related to restricting competitiveness in the labour market.

In the set priorities for 2024[5], there is no explicit emphasis on maintaining an open and competitive labour market. However, it is noted that the CPC continues to focus its efforts on new and dynamically developing market phenomena, such as e-commerce, sustainability, and labour markets.

The no-poach agreements, also known as the non-hiring clause, is a contractual agreement that restricts the hiring and recruitment of workers from a given enterprise. The no-hiring clause limits competition between parties regarding the recruitment of workers. In business relations, the employees of one employer may come into contact with the employees of another employer. Such interactions create the need to protect workers from potentially being recruited by the opposing party for the purpose of hiring them. It can reasonably be assumed that in

4 See: Annual Report on the activities of the Commission on Protection of Competition, 2023, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2023.pdf], Accessed 29 September 2024

5 See: Priorities of the Commission on Protection of Competition in 2024, [https://www.cpc.bg/media/about-kzk/annual-reports/KZK2024.pdf], Accessed 29 September 2024

industries where there is a shortage of highly qualified specialists or where stricter protection of trade secrets and know-how is required, no-hiring clauses could be applied more broadly. No-poach clauses in commercial contracts can restrict competition between employers in the labour market. A potential consequence of such a restriction is the creation of obstacles to the growth of competitors. Limiting the movement of the workforce can also lead to lower productivity and higher prices, which can be harmful to consumers.

The Bulgarian competition authority has not yet fully examined the anti-competitive effects of no-poach agreements, despite including it in the 2023 activity priorities. So far, no-poach agreements have been analysed by the CPC primarily in the context of ancillary restrictions during mergers and acquisitions.

The European Commission's report on labour market competition[6], dated May 2, 2024, provides a framework for assessing no-poach agreements, determining whether they are lawful or not. This general framework will also be applied by the CPC.

No-poach obligations between enterprises - employers in commercial relations are not regulated by Bulgarian labour law. The Bulgarian Labour Code only governs the relationship between the employee and the employer. No-poach agreements in commercial contracts, viewed from the perspective of competition law, have a direct or indirect influence on access to the labour market and the exercise of labour rights.

4. LEGISLATION FOR PROTECTING THE EMPLOYER'S ECONOMIC INTEREST AND COMPETITION

4.1. The duty of loyalty in labour law

Each party in an employment relationship seeks to safeguard its interests. Employees aim to work under fair conditions and receive equitable compensation, including the freedom to choose a profession and place of work. The employer's interest is primarily economic, which includes the protection of trade secrets, business relationships with partners, business practices, etc. In this context, the Labour Code contains an explicit obligation of loyalty for the employee. According to Article 126, item 9 of the Labour Code, upon performance of the work on which he or she has agreed, the worker or employee shall be obligated to be loyal to the

[6] Antitrust in Labour Markets/ Competition Policy Brief No 2/2024, [https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en], Accessed 29 September 2024

employer, not to abuse the employer's trust, not to disclose any confidential information regarding the employer, and to protect the reputation of the enterprise.

The obligation under Article 126, item 9 of the Labour Code for loyal conduct towards the employer requires the employee to respect the employer's interests, not to create conditions for unfair competition, to protect confidential information, and to maintain and uphold the employer's reputation with third parties. The forms of breach of trust can vary and include (but are not limited to) abusing the employer's trust, disclosing confidential information about the employer's activities, deals, or financial condition, and damaging the employer's reputation[7]. The prohibition on disclosing the employer's trade secrets is not only an obligation under Article 126, item 9 of the Labour Code but also constitutes a disciplinary violation under Article 187, paragraph 1, item 8[8], and Article 190, paragraph 1, item 4[9] of the Labour Code, for which the employee may be subject to disciplinary sanctions.

4.2. The duty of loyalty in competition law

A breach of the duty of loyalty may also lead to unfair competition under the meaning of the Protection of Competition Act (PCA). This interpretation is supported by the practice of the Commission on Protection of Competition.

A Bulgarian company imports and sells insulation and special construction materials on the Bulgarian market, both independently and through its own distribution network. The company also provides construction services. Two of its employees founded their own commercial company with diverse business activities, including entrepreneurship in the construction sector. The employer filed a complaint with the CPC, alleging a violation of the PCA. The CPC ruled that the establishment of the commercial company by the two employees did not constitute illegal behaviour. The fact that this company had a similar business activity and was a competitor to their employer was also irrelevant. Engaging in activities similar to the employer's business must comply with the rules of fair commercial practice.

During the CPC's proceedings, it was established that the employees held positions involving interaction with clients, sending offers, negotiating terms, and

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7 See: Civil case No. 3829 / 2014, Supreme Court of Cassation

8 The following shall constitute breaches of work discipline: abusing the confidence and damaging the reputation of the enterprise, as well as disclosure of data which is confidential in respect of the enterprise.

9 A dismissal for breach of discipline may be imposed after abusing the employer's confidence or disclosing data which is confidential in respect of the employer.

having access to special pricing offered to certain clients. This implies that they were expected to be loyal to their employer and perform their duties while considering the employer's interests. However, the commercial company owned by these employees, along with the employees themselves, entered into business relations with one of their employer's key clients, offering significantly lower prices. The CPC found this to be an act of unfair client solicitation.

When the dispute was referred to the Supreme Administrative Court[10], the judge in the case recalled that the 1991 Constitution of the Republic of Bulgaria established one of the principles of legal liberalism - citizens and legal entities are free to engage in any conduct not expressly prohibited by law. In other words, the restriction of citizens' and legal entities' rights and opportunities in Bulgaria can only result from an explicit legal provision. The main issue in this case was whether there was a legal prohibition preventing an employee from working for a competing company. The employees who founded their own commercial company effectively had the responsibilities of commercial agents under the Commerce Act. Commercial agents are explicitly prohibited from representing competing traders (Article 44[11] of the Commerce Act). Since such a provision does not exist in the Labour Code, the question arose whether such a prohibition should also apply to employees performing the role of commercial agents under an employment contract. The court's answer was affirmative - employees who are assigned the role of commercial agents under their employment contracts are also prohibited from representing a company that competes with their employer. However, this prohibition does not stem from the Commerce Act but rather from Article 126, item 9 of the Labour Code, which outlines the duty of loyalty to the employer. A violation of this duty also constitutes a breach of public morality, as defined by societal standards of decency. The conclusion reached was that the case involved unfair competition under the meaning of the PCA.

4.3. Confidentiality obligation in the employer's internal acts

Beyond the explicitly stated duty of loyalty for the worker (Article 126, item 9 of the Labour Code), there are other institutes within labour legislation that can be applied to protect the economic interests of the employer.

The CPC conducted a sector analysis regarding competitive issues in pricing within the retail trade of gasoline and diesel fuel. As a result of this analysis, proceed-

[10] See: Administrative case No. 5908/2004, Supreme Administrative Court

[11] The dealer may represent multiple merchants, as long as they do not compete. They may reach agreement with the merchant to be their exclusive representative.

ings were initiated against seven Labour Code commercial companies engaged in wholesale and retail trade of petroleum products to establish possible violations of Article 15, paragraph 1[12] of the PCA. A non-profit association, the Bulgarian Petroleum and Gas Association, which was established to protect the interests of distributors and traders in the petroleum and gas industries by ensuring equality among economic entities and promoting fair competition, was constituted as an interested party in the proceedings.

During the investigation, the CPC discovered a series of electronic communications exchanged among employees of the various commercial companies, sharing data and information about traded fuel volumes, pricing policies, and more. Based on the established facts and characteristics of the fuel markets, under Article 75[13] of the PCA, six[14] of the commercial companies proposed the adoption of measures in the form of internal procedures to ensure that their market behaviour would not contribute to increased market transparency beyond what is objectively imposed by the specifics of the retail gasoline and diesel fuel markets.

The presented case falls under the subject of competition law. However, in light of the topic discussed, the obligations approved by the CPC in this case, proposed by the trading companies, are of particular interest. The trading companies commit to adopting measures in the form of internal procedures that guarantee a ban on contacts and the exchange of any information with competing companies and their employees. They also commit to implementing a ban on any contacts between their employees and those of competing gas stations. The trading companies, in their capacity as employers, will impose the heaviest disciplinary sanction - dismissal for employees who fail to comply with the requirement for confidentiality of commercial information.

This example illustrates that labour law mechanisms, such as the internal acts of the employer, can be effectively used to protect trade secrets and confidential information. In undertaking such actions, the employer is bound by the rules of both competition and labour law.

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12 The following shall be prohibited: all kinds of agreements between undertakings, resolutions of associations of undertakings, as well as concerted practices of two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition within the relevant market, such as: 1. direct or indirect fixing of prices or other trade terms;

13 The respondent under Article 74 (2) may offer to make commitments leading to termination of the actions with respect to which the proceedings were instituted.

14 No violation was found for one of the companies.

4.4. The contract under Article 111 of the Labour Code - additional work for another employer

The current Labour Code came into force on January 1, 1987, and has since undergone numerous amendments and additions due to the socio-political and economic changes in Bulgaria after 1989. Considering the historical context in which the Labour Code was created, concepts such as loyalty to the employer, confidentiality, and competition in the labour market are absent from the legal framework. However, even in the initial version of the code, Article 127, item 11 defines the obligation of the worker "to preserve the good name of the enterprise, not to abuse its trust, and not to disclose confidential information about the enterprise". Subsequently, this provision was supplemented and became the text of Article 126, item 9 of the Labour Code, which was discussed earlier.

Despite the fact that all enterprises were state-owned, the contract for additional work in another enterprise was regulated at the time of the adoption of the Labour Code. According to Article 111 (amendment as of 1987), a worker may conclude an employment contract with another enterprise, and such a contract may be concluded only with one enterprise. The conclusion of a contract for additional work requires prior consent from the employer (paragraph 3). The restriction on concluding only one such contract was removed in 1993, and the requirement for prior consent was eliminated in 2001. After these amendments, the worker is granted relatively unlimited freedom to conclude employment contracts with other employers, with restrictions moving to the level of the employment contract. The worker is free to enter into employment contracts with other employers – "unless otherwise agreed in their individual labour contract under their primary employment relationship". Regarding the specific restrictive clause in the employment contract, there is no requirement, and it entirely depends on the will of the parties. Consequently, the clause in the employment contract can be extremely broad and may prohibit the conclusion of an employment contract with another employer altogether without any justification from the employer.

The text of Article 111 of the Labour Code was amended in 2022. After the change, the prohibition on additional work for another employer has been significantly narrowed. The amendment to Article 111 of the Labour Code aims to guarantee the right to work for employees while also taking into account the need to protect the commercial interests of the employer and to prevent conflicts of interest. The current text of Article 111 of the Labour Code (effective from August 1, 2022) states that the worker or employee may furthermore conclude employment contracts with other employers for performing work outside the established working time under his or her primary employment relationship, unless a prohibi-

tion is provided in his or her individual employment contract under the primary employment relationship to protect a trade secret[15] and/or to prevent conflict of interest. Restrictions for other reasons cannot be imposed on the worker. When working under more than one employment contract, a natural obstacle is the distribution of working hours, which is a separate topic.

Given the brief period of effectiveness of the new text of Article 111 of the Labour Code, there is still no established case law**.**

5. NON-COMPETE CLAUSE IN JUDICIAL PRACTICE

In a highly competitive and sometimes restricted market, employers report that their former and even current employees are disloyal, starting jobs with competing firms or providing identical goods and services through their own commercial companies. The desire of employer companies to implement various mechanisms to protect against such behaviour from their employees is understandable. To safeguard their interests, employers include various restrictive clauses in the employment contract or other accompanying documents. There is established judicial practice regarding the legal effect of such clauses, even when accepted by the employee.

5.1. Prohibition on working for a competing employer

As mentioned, when an employee wishes to enter into an employment contract for additional work with another employer, the protection of the employer is, according to Article 111 of the Labour Code, achieved through the negotiation of the relevant restrictive clause.

The clauses that restrict employees from working for a competing employer after the termination of their current employment contract are of interest not only from a theoretical but also from a practical standpoint. Such a prohibition is linked to a penalty clause. It is precisely in cases involving employers seeking compensation from their former employees that Bulgarian courts have formed a lasting judicial practice. Since 2010, the Supreme Court of Cassation has upheld consistent rulings on this matter.

Until now, there were two positions in the Bulgarian judicial system. Some judges accepted that the penalty clause is an obligation that cannot be included in the employment contract, the content of which is determined by Article 66 of the

[15] See: Andreeva. A.; Aleksandrov, A., *The trade secret concept in the context of the obligations of employees and workers,* in: Society and Law Journal, No. 2, 2020, pp. 44 – 45

Labour Code. Such a clause limits the future employment relationships of the employee and contradicts the constitutional right of every citizen to freely choose their profession and workplace according to Article 48, paragraph 3[16] of the Constitution of the Republic of Bulgaria, thus rendering it invalid.

Other judicial decisions accepted that the penalty clause is part of the optional content of the employment contract under Article 66, paragraph 2[17] of the Labour Code. Within the limits of contractual freedom and the subsidiary applicability of civil law, the parties have the freedom to regulate the property liability of the employee. The purpose of such a clause is to compensate the employer for damages resulting from the dissemination of confidential information and from using specific skills and contacts acquired during the employment. The clause, due to the relativity of the obligation freely assumed by the employee, does not limit the constitutional right to choose a profession and workplace. The employee may choose not to comply with the agreement but must pay the agreed penalty to the employer.

The Supreme Court of Cassation holds that the penalty clause in an employment contract, based on the employee's obligation not to enter into employment or civil relations with a competing employer after the termination of the employment contract, is void due to its contradiction with Article 48, paragraph 3 of the Constitution, as well as based on Article 8, paragraph 4[18] of the Labour Code. Such a clause does not validly bind the parties, and the claim for payment of the agreed penalty is unfounded. Future employment relations are imperatively regulated by Article 48, paragraph 3 of the Constitution. This right is also enshrined in Article 15, § 1 of the Charter of Fundamental Rights of the EU and in Article 1, § 2 of the European Social Charter. This position has been adopted by Bulgarian courts and is applied without deviation.

5.2. Prohibition on the Use of Already Obtained Information

At first glance, a decision by the Appellate Court - Plovdiv in 2023[19] may be seen as a departure from the aforementioned practice. The employee was ordered to pay a penalty to his former employer, but based on different factual and legal grounds.

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16 Every citizen shall be free to choose an occupation and a place of work.

17 Other terms may also be agreed by the employment contract pertaining to the provision of labour force which are not regulated by mandatory provisions of the law, as well as terms which are more favourable for the worker or employee than those established by the collective agreement

18 Labour rights and duties shall be personal. Any renunciation of labour rights, as well as any transfer of labour rights and duties, shall be void.

19 See: Appellate civil case No.54/2023, Appellate Court - Plovdiv

After working for 10 years, the employee's labour contract was terminated. Immediately prior to the termination of the employment contract, the parties signed a confidentiality agreement, according to which the employee undertook an obligation for three years after the termination of the employment relationship to keep, not disclose, and not use the confidential information specified in the agreement. The employee was also prohibited from contacting the employer's clients if he worked in another company in the same industry. In case of a breach of the confidentiality agreement, the parties agreed that a penalty of 20,000 euros would be owed, which they deemed not excessive.

Three months after the termination of the employment contract, the former employee registered his own trading company. The former employer claims that the newly registered company is engaged in identical activities and is a competitor in the relevant market. The manager of the company, who is the former employee, allegedly uses all the information of the employer to which he had access, including information about clients, business relationships, market policy, etc. The claims of the former employer are that the employee has breached the confidentiality agreement, that his behaviour constitutes unfair competition and unfair client solicitation, leading to losses for the employer. Therefore, the employer claims payment of the agreed penalty.

Regarding the confidentiality agreement, the court accepts that it is directly related to and conditioned by the existing employment relationship, concluded during the period of the employment contract, and that the parties have agreed on additional terms related to the provision of labour that are not regulated by mandatory legal provisions. The parties have also regulated their relationships for the time after the termination of the employment contract regarding the protection of confidential information and the prevention of unfair competition, which are directly connected to the existing employment relationship. The court holds that agreements between parties in an employment relationship, regardless of their designation, that regulate rights and obligations related to the performance of labour, including the obligation to pay a penalty in relation to these rights and obligations, have the character of labour law contracts. Such agreements also include confidentiality agreements, respectively contracts for confidentiality, and agreements to prevent unfair competition against the employer, which the parties to the employment relationship establish for the period following the termination of the employment relationship. The agreed penalty aims to protect the employer from unfair competition. The agreed compensation in the form of a penalty does not represent the employee's property liability within the meaning of the Labour Code, as it is not liability for harm caused to the employer, but rather liability

for non-fulfilment of the obligation undertaken by the employee to refrain from certain actions that could cause harm to the employer.

From an economic perspective, it has been established that the clients for whom the newly established company has made deliveries/sales were also clients of the employer during the period when the employment contract was in force. A match has been established with 12 client companies. The total value of transactions with identical subject matter conducted with/for the clients of the company represents 67.35% of the total revenue of the newly established company; the remaining portion of the revenue is from clients different from those of the former employer. Based on these established facts, the employee has been ordered to pay the full agreed penalty.

In this case, the confidentiality agreement does not restrict either the employee's right to work or the right to free economic initiative. The prohibitions relate to the non-disclosure of confidential information about the company that became known during the course of employment. For the purposes of the confidentiality agreement, any commercial, technical, or financial information received in written, oral, or electronic form, including information regarding intellectual property, transactions, business relationships, and the financial condition of the company or its partners, is declared confidential. The employee undertook not to contact the clients of the employer for a period of 3 years if they work in the same industry.

The court holds that it is permissible for the parties in an employment relationship to agree on a penalty as a type of compensation for the non-fulfilment of a specific obligation assumed by the worker. The obligation undertaken by the worker to adhere to certain behaviour for a specific period after the termination of the employment contract does not constitute a waiver of labour rights or a limitation imposed by the employer on the worker's right to work and his entrepreneurial freedom. The worker has the right to work, including the right to engage in activities in the same sector. The restriction is partial - specifically, not to contact the employer's clients for a period of 3 years. The court does not accept that this arrangement disrupts the balance in the relationship between the worker (who is hierarchically and economically dependent on the employer) and the employer, because the worker's right to work is not denied; it is only temporarily limited in order to protect the legitimate right of the employer to defend against unfair competition. It is indisputable that unfair competition is an obstacle to the conduct of business activities and is therefore prohibited by law, which is why the employer has the right to require the worker to behave in accordance with the agreed terms. In this regard, the confidentiality agreement, or clauses within it, do not contradict the provisions of the Labour Code.

This case is just one of many considered by Bulgarian courts. However, it should be noted that the courts' decisions vary because the specific facts, as well as the confidentiality agreements concluded between employers and workers, differ.

6. CONCLUSION

The Bulgarian Commission on Protection of Competition has yet to examine the anti-competitive impact of no-poach agreements on workers, although this has been among its priorities for 2023. But this does not mean that such practices are not applied both among competing companies and in employment relationships.

The obligation of loyalty of the worker is explicitly regulated in the Labour Code and can manifest in various forms. Violating this legal obligation is grounds for imposing disciplinary liability, including disciplinary dismissal.

Judicial practice declares invalid the clauses that restrict employees from working for a competing employer after the termination of the employment contract. While it is practically logical and legally permissible for the worker to continue developing in the same field, this does not mean that they can improperly use the confidential information of the former employer to which they had access. The former worker can freely use the professional experience, knowledge, and personal skills they have accumulated but is obliged to protect the trade secrets of their former employer.

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Original scientific paper

THE EU FOREIGN SUBSIDIES REGULATION (FSR): A GAME CHANGER OR IMPOSIBLE MISSION?

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Abstract

The negative effects of foreign subsidies transferred to undertakings running business in the EU from countries outside of the EU are becoming an increasing threat to the preservation of transparency and fair market competition on the EU market. The undertakings operating on the internal EU market are prohibited from accepting illegal State Aid from EU Member States and are subjected to strict controls under the EU State Aid law. This group of undertakings were not subjected to such controls under the restrictions of EU State Aid law. This legal gap prompted the EU in 2023 to implement the Foreign subsidies Regulation (the FSR) aimed at distortions in the EU market caused by foreign subsidies granted to undertakings running business in the EU. The Regulation establishes a new regulatory framework for which sets forth and expands control over foreign subsidies. Despite the good intentions and enthusiasm surrounding the implementation of the FSR, it is questionable whether the goals of the Regulation are realistic and feasible. The expert and business communities are expressing concerns that the FSR is introducing an administrative overdose in the reporting on foreign subsidies and that it would ultimately reduce of competitiveness in the internal market, because many undertakings will abandon large merger and acquisition transactions and public procurement proceedings due to bureaucratic obstacles. This paper systematically analyses the provisions of the FSR and the accompanying legislative framework. The central part of the paper critically addresses the most significant regulatory solutions and the practical implications of the implementation of the FSR. In the final sections, the paper considers whether the new rules have accomplished their stated purpose and objectives, or whether it will ultimately be detrimental to the EU, and gives guidance on how to facilitate the adaptation and compliance of undertakings with the provisions of the FSR.

Key words: *Foreign subsidies, FSR, State Aid, Internal market, Competition Law.*

1. INTRODUCTION

A fair market competition is one of the main EU policy objectives.[1] Therefore, undertakings operating within the EU are subject to strict controls of subsidies

[1] This paper was developed as part of the project of the Faculty of Law of the Josip Juraj Strossmayer University in Osijek titled no. IP-PRAVOS-10 - Contemporary tendencies in the development of

granted to them by EU Member States.[2] However, despite extensive normative regulation of State Aid, there was a legal gap for the control of foreign subsidies granted to undertakings running businesses in the EU, which were significantly disrupting the market competition.[3] This is evidenced by the fact that there were undertakings participating in public procurement processes which were offering products and services under much more favorable prices (often dumping prices) because of the generous financial infusions granted by non-EU States, which allowed them to beat their competitors who did not receive such foreign subsidies, which significantly disrupted the market competition to the detriment of the end users, i.e. the consumers.[4]

The EU sought to fill this unfair situation in EU regulatory framework and considerable legal gap by adopting the FSR.[5] In January 2023, the FRS entered into force and the provisions authorizing the European Commission (Commission) to initiate investigations followed on 12 July 2023, while in October 2023 entered into force the provisions on mandatory notice.[6] The FSR introduces three power-

Croatian civil justice; Erasmus+ Programme (ERASMUS), Call: ERASMUS-JMO-2021-HEI-TCH-RSCH, Project: 101047803 - Competition Law COE Erasmus+ Call 2023 – KA1 – Learning Mobility of Individuals – Staff mobility for teaching and training activities at the Faculty of Law Universidad Nacional de Educación a Distancia in Madrid, Spain; Erasmus+ Call 2022 – KA1 – Learning Mobility of Individuals – Staff mobility for teaching and training activities at the University of Seville, Spain.

2 Fox, E., M., Gerard, D., *EU Competition Law: Cases, Texts and Context,* Edward Elgar Publishing, Cheltenham, Northhampton, Ma, Edward Elgar Publishing, 2023, p. 428. See also: Lowe, Ph., Yarak, S., *Closing the regulatory gap – answers (and new questions) from the Foreign Subsidies Regulation*, Competition Law & Policy Debate, Vol. 8, No. 1., 2023, pp. 23.

3 Stas, K., Geise, B., *The Foreign Subsidies Regulation of the European Union: A New Instrument Levelling the Playing Field?,* Global Trade and Customs Journal, Vol. 18, No. 10, pp. 360; Weiß, W., *The Regulation on Foreign Subsidies Distorting the Internal Market, A Path to a Level Playing Field?,* Springer, 2024., p. 1-5; Reinhold, Ph., Weck, Th., *Welcome to the Jungle! Identification of Foreign Subsidies Under the New EU Foreign Subsidies Regulation*, European State Aid Law Quarterly, Vol. 23, No. 1, 2024, p. 22; Werner, Ph., Barre, H., Music, K., Werner, Ph., Barre, H., Music, K., *Untangling the Foreign Subsidies Regulation*, CoRe, Vol. 8, No. 1, 2024, p. 23¸ Van Damme, I, Understanding the Foreign Subsidies Regulation, University of Bologna Law Review, Vol. 9, No. 1, 2024, p. 2; Blockx, J. Mattiolo, P., *The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?,* Vol. 28, 2023, European Foreign Affairs Review, Issue SI, pp. 54¸ Wolski, J., S., *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, European State Aid Law Quarterly, Vol. 21, No. 2, 2022, pp. 153¸ Kociubinski, J., *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?*, European Competition and Regulatory Law Review, Vol. 6, No. 1, 2022, pp. 57.

4 In that sense see: Weiß, W., op. cit. note 3, p. 1-5; Reinhold, Ph., Weck, Th., op.cit. note 3, p. 22; Werner, Ph., Barre, H., Music, K., op. cit. note 3, pp. 780.

5 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45 hereinafter: the FSR.

6 The FSR ima prošireno djelovanje i može se primijeniti na strane subvencije dodijeljene čak i 5 godina prije navedenog datuma. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24.

ful tools and authorities of the Commission: *ex-ante* notifications and reviews by the Commission in merger and acquisition transactions and in public procurement processes, as well as the *ex-officio* investigations by the Commission.[7] The Regulation was accompanied by its Implementing Regulation (IR)[8] which governs the procedural aspects, particularly those related to the procedure for *ex-ante* notifications and reporting in merger and acquisition transactions and public procurement proceedings.[9]

During the year and a half period since the entry into force of the FSR, there have been over 100 published pre-notification consultations regarding merger and acquisition transactions, over 70 of which 70 which led to a formal filing, which significantly exceeds the expected 30 annual cases.[10] Therefore, it is a good time for an initial assessment of the *status quo* and guidance on the further implementation of the FSR. This paper critically analyzes the field of application and innovations introduced by the FSR with regards to (*i*) the notification and review of merger and acquisition transactions (*i*) and public procurement proceedings (*ii*), as well as conducting *ex officio* investigations by the Commission *(iii)*. It provides a critical review of the most significant case law since the implementation of the FSR, and analyses whether it is truly an "administrative monster" as called by some scholars, or a necessary tool for the establishment of equality and transparency in the EU market.

2. THE SCOPE OF APPLICATION: WHO IS IN CHARGE?

2.1. Financial subsidies vs. financial contribution

The FSR expressly defines a foreign subsidy in several sections as a directly or indirectly financial contribution provided by a non-EU country to a specific undertaking or industry active in the internal market, through which such undertakings or industries gained advantages over their market competitors.[11] It is important here

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7 Reinhold, Ph., Weck, Th., op. cit. note 3, p.24. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p.23.

8 Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, C/2023/4622,OJ L 177, 12.7.2023, p. 1–44.

9 In that sense see: Recital (10) and Art. 1 of the Implementing Regulation; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 23.

10 See: European Commission, The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Competition FSR brief – The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Available at:URL= <https://competition-policy.ec.europa.eu/publications_en> Accessed: 20 October, 2024.

11 See Recital (2), (11), (13), Art 3(1) of the FSR.

to distinguish foreign subsidies and financial contributions. If the FSR normative text is carefully observed, it is apparent that "foreign subsidy" is a broader term which must meet four cumulative criteria, i.e. it must be a financial contribution (*i*), granted by a third county toa specific recipient (*ii*) through which the recipient gained an economic benefit (*iii*) and that there is an element of electivity (*iv*).[12]

2.2. Recipient and third country

When it comes to the recipients, the FSR does not elaborate the terms undertakings and industries in detail, but it is used on occasion in different sections of the FSR.[13] For example, in the context of general definitions, Art. 3 (1) of the FSR defines undertakings as conducting economic activities in the EU with an objective of gaining profits, regardless of whether it is legally or factually one or more undertakings or industries.[14] Further, Art 19 of the FSR provides that the control over market disruptions by foreign subventions in concentrations only covers the assessment of the foreign subventions granted within three years since the conclusion of the agreement, the publication of the public procurement, or meeting the control requirement.[15] Furthermore, Art 27 of the FSR provides that, in the control over market disruptions in public procurement procedures, foreign subventions cover those granted within three years from the application for the procurement, which enabled the relevant undertaking to submit an unfairly favorable offer for the specific tender, compared to other applicants, particularly in terms of the price of goods, services and works.[16]

These provisions of the FSR and other EU State Aid law rules thus provide that a recipient is an undertaking which is economically active on the EU internal market, regardless of whether it is an EU or non-EU undertaking, and regardless of its legal form. This is also confirmed by literature in which the authors note that the term „undertaking conducting an economic activity" in the context of the FSR overlaps with the meaning of „economic activity of undertaking" developed in EU State Aid law.[17]

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12 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 29.

13 See Recital (11), (14), Art 3(1) of the FSR, Art 19 and Art 27 of the FSR. Tako i: Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.
See recital 11, Art 1(2), Art 3(1) and (2) of the FSR.

14 Art 3(1) of the FSR; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

15 Art 19 of the FSR.

16 Art 27 of the FSR.

17 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

When applied to the FSR, this means that, in the context of concentrations subject to the duty of notification, the recipient is any undertaking in the process of merger, acquisition or joint venture if at least one of the undertakings involved has its place of business within the EU and makes profits of at least 500 million EUR, or if they were granted a financial contribution over 50 million EUR from a third country, since the conclusion of the agreement, public procurement or the acquisition of controlling interest in: the acquiring undertakings and target (in case of an acquisition) or the companies entering a joint venture and the joint venture itself.[18] In the context of public procurements, the recipient also includes undertakings which have received subventions granted to the main suppliers and subcontractors, although the formal filing obligations only apply to the relevant "economic operators"[19]

The meaning of "third countries" under the FSR is also unclear, but it can be concluded that the term should be broadly interpreted and that it refers to the subsidies granted from States which are not subject to EU State Aid law, since the purpose of the adoption of the FSR was to fill exactly such legal gaps. [20] A financial contribution must be granted by a third non-EU State, which is also broadly interpreted, so it can include subsidies by any government level of a non-EU State, regardless of whether it is the central, federal, reginal, local or similar level, or any level of public authorities.[21]

Commentators warn that financial contributions granted by private entities should also be considered as foreign, if their actions can be attributed to the non-EU country.[22] This position is based on the analogue application of EU State Aid law jurisprudence based on Art 107 (1) of the UFEU, according to which financial means are considered to originate from a third country if the foreign public authorities grant a financial benefit to certain undertaking, regardless of whether the granted funds are a permanent or temporary property of the public sector.[23]

There is a shift which occurred with the implementation of the FSR, whose duties now apply to the undertaking recipient of the subvention, and not the Member

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18 Art 20(3)b of the FSR; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

19 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

20 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

21 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 25; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

22 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

23 Art 107(19) of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, hereinafter: TFEU. Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

State,[24] which opens a number of legal questions. First of all, there is a legal uncertainty for undertakings since the FSR does not explicitly adopt the meaning of financial contributions from EU State Aid law, but this interpretation is based on analogy and the abovementioned elaborations by the relevant commentators.[25] Further, it is uncertain whether undertakings (regardless of whether they through concentration or public procurement) can always be expected to have all the relevant information, since the term of undertaking is broadly defined and it can be expected in some cases that the entities will not be able to provide sucg information under national law.

There is even the question of whether the relevance and accuracy of such information can be verified, when obtained, whether the amount and scope of information will be sufficient, or if many undertakings will give up on economic activities in the internal market, due to the previously mentioned administrative barriers.[26]

2.3. Economic benefit

The economic benefit is an element which arises out of recital 13 of the FSR, which refers to conferring "a benefit on an undertaking if it could not have been obtained under normal market conditions".[27] This provision implies that the so-called "market economy operator test" developed under EU State Aid law also applies,[28] i.e. it is relevant whether the foreign subsidy was granted as part of the regular market conditions, or if it creates an economic benefit for a specific undertaking.[29] To facilitate the determination of an economic benefit, the FSR introduces the presumption of a high likelihood that the foreign subsidy granted to the undertaking in distress will cause a market disruption if the State guarantees for the obligations of the undertaking, if the undertaking was granted a loan under conditions more favorable than those on the market, if the foreign subsidy facilitates the concentration of undertakings, etc.[30] The time of the economic benefit is the moment when the beneficiary acquires the right to receive the foreign subsidies.[31]

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24 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 23.

25 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 24.

26 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 30.

27 Recital 13 of the FSR.

28 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31 and Commission Notice on the notion of State aid as referred to in art 107(1) of the Treaty on the Functioning of the European Union' [2016] OJ C 262/1 para 73-114.

29 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26.

30 Art 5(1) and (2) of the FSR.

31 Recital (15) of the FSR and Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31.

2.4. Selectivity

According to Art 3(1) of the FSR, foreign subsidies must be granted to special undertakings or industries, which implies the selectivity in the choice of recipients. This excludes general measures of universal application to all undertakings, sectors and industries. Such a selectivity can be proved based on the law or facts.[32] In other words, the determinative factor is whether the third-country favored only certain undertakings, sectors or industries, or the selectivity resulted from the use of such foreign subsides. Different criteria may apply in this context, even if the foreign subsidies were granted based on the size of the undertaking.[33]

3. NOTIFICATION AND REVIEW BY THE EUROPEAN COMMISSION

The FSR introduces the duty of notification in merger and acquisition transactions and public procurement procedures if they exceed the prescribed thresholds, including the duty to submit signed FS-CO and FS-PP respectively, and suspend the merger and acquisition transactions and public procurement procedure pending approval by the Commission.[34] Notifications are made through the submission of the FS-CO form. The procedure for the notification and the information relevant for the Commission is provided in the IR which entered into force on 10 July 2023 along with 2 Annexes, which provides detailed procedural provisions related to the FSR, the notification forms for merger and acquisition transactions (FS-CO forms) and public procurement procedures (FS-PP forms).[35]

3.1. Notification and review in merger and acquisition transactions

The FSR provides the criteria (thresholds) related to the turnover and financial contribution which must be cumulatively met in order for undertakings to be subject to the duty to notify the Commission on their merger and acquisition transactions.[36]

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32 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31

33 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31-32.

34 U tom smislu vidi odredbe FRS and Implementing Regulation.

35 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

36 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; ; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25; Stas, K., Geise, B., op.cit. note 3, p. 364 and 366. See also: Johannes, B., *The Regulation on Foreign Subsidies Distorting the Internal Market: An Introduction and a Critical Discussion of the Rules on Concentrations,* Zeitschrift fur Offentliches Recht (ZoR): Journal of Public Law, Vol. 78, No. 2, 2023, pp. 228.

With regards to the turnover, related to an acquisition target, in case of a merger of one of the parties or for the creation of a joint venture in the internal market, the first FSR threshold is related to the previous financial year and it is minimum €500 million.[37] When it comes to financial contributions, the FSR provides that the undertakings also have to meet the second threshold of: "…over €50 million granted in the three years prior to the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest."[38] It is important to note that undertakings which were granted foreign subsidies are subject to these thresholds, regardless of whether the recipients are the acquiring entity or the target, the merging entities, or the undertaking included in joint venture themselves, or their parent undertakings.[39]

The IR provides an exception from the notification duty in cases of *de minimis* foreign financial contributions, which must be notified only if they are singular foreign financial contributions in the amount of 1 mil EUR or more, and falls under the category of foreign subsidies which are likely to lead to market disruptions.[40]

After the submission of the notification, the Commission conducts the initial review of twenty-five days, which is followed by an in-depth review during ninety working days, if the relevant conditions are met. This can be extended for another period of fifteen days.[41]

It is important to note that there is a standstill obligation following the submission of the notification pending the decision of the Commission.[42] Therefore, undertakings running business in the EU must be aware of the FSR and its implementing norms largely change the planning of merger and acquisition transactions.[43] The preparation of the transaction itself now must include the FSR compliance, i.e. the notification of foreign financial contribution, along with the usual merger control.[44] In other words, in merger and acquisition transaction procedures this means that the obligations prescribed by the FSR now have to be foreseen and considered in advance in terms of the fees, guarantees, the time needed to obtain

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37 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; Stas, K., Geise, B., op.cit. note 3, p. 364-365.

38 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 26-27; Stas, K., Geise, B., op.cit. note 3, p. 364-365.

39 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 24;

40 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 26.

41 Stas, K., Geise, B., op.cit. note 3, p. 367.

42 Art. 24 (1) of the FSR. Stas, K., Geise, B., op.cit. note 3, p. 364.

43 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

44 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

the approval of the Commission now need to be taken into account in advance, and FSR compliance must be a part of due diligence.[45]

In addition, the Commission has the right to require the notification of any potentially distortive transactions of which it was not notified, regardless of whether they meet the abovementioned thresholds for mandatory notification.[46] This is provided by the FSR from the experiences in merger controls under Art 22 of the EC Merger Regulation.[47] These experiences revealed that there are merger and acquisition transactions which, despite the good normative framework, remain unverified. The same regime has now been extended to control over foreign subsidies, in what seems to be a stricter form. Namely, although Art 22 of the EC Merger Regulation has faced fierce criticism and resistance, Art 21(5) of the FSR provides that the European Commission can require prior notification in cases of doubt that a foreign subsidy was granted within the past three years, which is not a notifiable concentration within the meaning of Article 20.[48]

The notification duty is often called an overdose of administration for undertaking.[49] Many authors and the business community warn of an overdose of administration for the undertakings. Many undertakings are complaining of both the complexity of the information which must be collected and the fact that anybody can notify a foreign subsidy at any time, which may obstruct undertakings which have received them under normal market conditions. This can be considered a cross-notification, which will only create difficulties and burdens for the Commission.[50]

3.2. Notification and declaration in public procurement procedures

The FSR provides the criteria (thresholds) related to contract values, or lots if the tender is divided into lots, and foreign financial contribution which must be contractually met by undertaking to qualify for the notification duty towards the Commission, if they are engaging in a public tender.[51]

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45 Tako slično i: ; Reinhold, Ph., Weck, Th., op. cit. note 3, p. 25.

46 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

47 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), *OJ L 24, p. 1–22;* Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 28.

48 Arts. 20, 21(5) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 28.

49 Stas, K., Geise, B., op.cit. note 3, p. 34.

50 Stas, K., Geise, B., op.cit. note 3, p. 34.

51 Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29 and 36.

In terms of the contract value, the FSR provides that undertakings participating in public procurement must fill the FS-PP form if the contract is worth €250 million or more. The notification duty obligation arises where a foreign subsidy contribution was granted by a third country even three years ago, in the amount of €4 million or more.[52] It is important to note here that the notification duty also extends to the subsidiaries, all contractor suppliers, all companies in holding of the bidding party.[53] The parties in the process of public procurement which do not meet the prescribed thresholds still have to declare any received foreign subsidies more then 4 million EUR per foreign country.[54]

Even undertakings which have not received foreign financial contributions must submit a summary list of the participants in the public procurement process, a description of the process and a list of any granted foreign financial contributions, and a declaration that have not received any contribution subject to the FSR duty to notify the Commission.[55]The duration of the initial review in public procurement procedures is twenty days, with possible extension of ten days.[56]

Numerous authors have warned that the abovementioned FSR administrative duties are an additional burden in an already complicated public tenders, because many bidders may give up on their participation, and potentially miss out on prevailing on a tender because they have received a subsidy, or if they are disqualified because of non-compliance because they have not obtained the approval from the Commission.[57]

Other than the concerns relevant for merger and acquisition transactions, there are additional risks in public procurement processes because the administrative burden is large and incomparable in practice.[58] As a result, potential bidders may give up on applying to public tenders, thus reducing the competitiveness of all bidders, and it can additionally prolong the procedure due pending the decision of the Commission.[59] In our view, the notification of foreign subsidies should be limited only to those which are likely to be detrimental to the market competi-

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52 Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

53 Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

54 Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29.

55 Art 28(1) and 29 of the FSR; Art 28(1) of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 29 and 30.

56 Art. 30, 31 and 32 of the FSR; Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

57 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

58 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

59 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

tion.[60] Furthermore, the duty to declare cases under the mandatory notification threshold should be relaxed, since the large administrative burden will reduce the competitiveness of notifiable bidders in public tenders, which will ultimately spill over to the State which will have to pay larger amounts for worse offers. In addition, the qualitative criteria defining the terms "main subcontractor" and "main supplier" should be removed.[61]

3.3. Powers of the European Commission

The authority of the Commission under the FSR is expansive, including the right to e request and examine information from any source, regardless of whether it is for a specific undertaking, competitors, EU Member States or non-EU member States and conduct inspections inside and outside the EU.[62] This creates potential risks and it is recommended that the Commission issues guidelines for complaints in order to avoid the frustration of the purpose of the FSR, and focus on distortive foreign subsidies.[63]

It should be noted here that the review by the Commission regarding foreign subsidies is divided into 2 phases.[64] The first phase consists of the preliminary review which investigates whether the foreign financial contribution has distorted competition in the internal market. If such indications are found in the initial review phase, the Commission can initiate an in-depth investigation.[65]

During this investigation, there are three-fold review: "…1. whether the foreign financial contribution actually distorted or 2. threatens to distort competition on the internal market, and if so, 3. what is the extent of such distortion to competition in the internal market.[66] The analysis in the in-depth review is conducted on a case-by-case basis."[67]

The first assessment determines the real or potential detriment caused to competition on the internal market.[68] This includes whether the foreign financial contri-

60 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

61 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

62 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; ; Stas, K., Geise, B., op.cit. note 3, p. 370-371; Lopez, J, Piernas, J., op. cit. note 3, 2024, p. 85.

63 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 37; Stas, K., Geise, B., op.cit. note 3, p. 370-371.

64 Art. 10 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

65 Art. 35 of the FSR.

66 Recital (1) and Art. 10 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

67 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

68 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32.

bution has distorted the competition on the market, regardless of the recipient, i.e. whether the foreign subsidy selectively targeted certain undertakings on the market over others, putting them in a better position from their competition, thus actually or potentially distorting the competition on the internal market.[69] It is worth noting here that not only real, but also potential distortions fall under the scope of the FSR. In other words, there needs to be a finding that there was a foreign subsidy which placed the position of an undertaking compared to its competitors, which had a real or potential negative effect on the market competition.[70]

When assessing the real or potential negative effects, the FSR allows the Commission the possibility of applying a balancing test in order to juxtapose the negative with the positive effects of foreign financial contributions.[71] If there is a finding of real or potential negative effects arising from the foreign financial contribution, the Commission applies a balancing test to weigh each respectively.[72] This balancing test helps the Commission in assessing whether or not to proceed to the next stage if it finds a prevalence of negative over positive effects, or whether it will take no action if there is a prevalence of positive effects.[73]

Indicators for the determination of the negative effects are the size of the undertaking, the amount, purpose and form of the subsidy, the recipient's economic status, the circumstances in the sector or industry within which the undertaking operates, etc. The FSR introduces a presumption that: "the foreign subsidy is unlikely to distort the internal market when the total subsidy to a company over 3 consecutive years is below €4 million; further, they do not distort the internal market when: the total subsidy to a company over 3 consecutive years is below the EU State aid *de minimis* threshold (€200,000), or when the aid is used to help recover from damage caused by natural disasters or exceptional events."[74]

After the in-depth investigation, the Commission can conclude that everything is in order, determine commitments or remedial measures, or prohibit the merger and acquisition transaction, or the award in a public tender, or issue a decision prohibiting the merger and acquisition transaction or award in a public procurement proceeding.[75]

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69 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32; Art. 4(1) of the FSR.

70 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33-34.

71 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

72 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

73 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 34.

74 Art 4 of the FSR. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 34.

75 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36-37.

It is interesting that, unlike the rules on concentrations, the FSR allows the Commission to approve an merger and acquisition transaction which would otherwise be prohibited by balancing the positive and negative effects of the foreign subsidy.[76] The Commission has broad discretionary power at this stage of the investigation. Such a broad and uncertain authority of the Commission has been widely criticized as it creates significant legal uncertainties for the undertakings because there are no clear measures or criteria on whether and to what extent positive effects need to be linked to merger and acquisition transactions or public tenders.[77] The FSR provides examples of such positive effects, including environmental protection, digital transformation, social categories, and the promotion of development and research.[78] If the negative effects prevail over the positive effects, the Commission can prohibit the merger and acquisition Transaction or the participation of the undertaking in the public procurement proceedings, or impose redressive measures or commitments to the undertaking to remedy the distortion in the internal market.[79]

it is recommended that the undertakings are aligned with the FSR requirements with minimal burden to their operations by expanding the existing data collection systems to agreements, subsidies, grants, and tax benefits and supporting evidence if such a subsidy was granted through a transparent competition under normal market conditions.[80]

4. EX-OFFICIO REVIEWS

In addition to the mandatory notifications for merger and acquisition transactions and notifications and declarations in public procurement procedures, the FSR introduces the *ex officio* review which the Commission can initiate for recipients of foreign subsidies.[81] The *ex officio* review is a powerful tool the FSR provides to the Commission ad it can be initiated to cases meeting the requirements for the notification obligation in merger and acquisition transactions and the notification and declaration duty in public procurement procedures, but also in cases where the abovementioned requirements were not met if the Commission considers that

76 Stas, K., Geise, B., op.cit. note 3, p. 367.

77 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

78 Art 21 of the FSR and Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 33.

79 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 32-34.

80 Reinhold, Ph., Weck, Th., op. cit. note 3, p. 31.

81 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

the undertaking has received a financial contribution which has distortive effects on the internal market (so-called *ad hoc* notifications).[82]

Consistent with the mandatory notification and *ex-officio* review, if there is a finding of sufficient indicators that the foreign submission has caused market distortions in the preliminary review, the Commission can initiate an in-depth investigation.[83] During the preliminary review, the Commission also has the right to request the submission of all information from the undertakings and other implicated parties (competitors, Member States, non-Member States ,sub-contractors, Associations, authorities, etc.).[84]

In this phase, the Commission is not obliged to notify the undertakings of the conducted preliminary review, unless the available collected information already indicates that the granted foreign subsidies cause distortions on the internal market.[85] The duration of in-depth investigations is not limited, and they should not exceed 18 months under the FSR.[86] Upon the conclusion of an in-depth review, as is the case for merger and acquisition transactions and public procurement procedures, the Commission can issue an objection decision, a decision with redressive measures and a decision with commitments from the company at stake.[87]

Just like the earlier authorizations of the Commission, this authorization was met with various criticisms rom the academic and business communities, as the large administrative burdens imposed on the undertakings introduces another powerful discretionary tool of the Commission.[88] Namely, the discretionary assessments of the Commission in the abovementioned situations is minimally restricted with the proportionality principle and general principles of EU law, but many have warned that the Commission had previously shown a tendency to exceed its authorities.[89]

The Commission ha the right to conduct *ex-officio* reviews of foreign subsidies within 10 years since such a subsidy was granted to an undertaking, noting that each investigation interrupts this limitation period, which starts afresh after each interruption.[90]

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82 Art. 9. of the FSR. Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30.

83 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36, Art. 10 of the FSR.

84 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

85 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

86 Art. 11(5) of the FSR.

87 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 36.

88 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30-31.

89 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 30-31.

90 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

Authors caution that it can be expected that it will take some time until the Commission adapts to the implementation to the implementation of the FSR and reviews all the *ex-ante* notifications, since this will require large efforts and staff capacities.[91] This means that it will have time for in-depth investigations only thereafter.[92] It was also noted that such *ex-officio* reviews will be initiated mostly upon notifications by market competitors, since they will have the largest interest in the investigation of illegal foreign subsidies.[93] They further note that other *ex-officio* reviews will arise from information provided to the Commission in the forms submitted in the aforementioned notifications and notifications by the Member States,[94] or based on otherwise available market investigators.[95] The FSR does not provide for any procedure based on unofficial complaints, i.e. there are no deadlines for the Commission's opinion on the complaint, nor does the complaining party have a right to a status review and final decision on the application to the Commission.[96]

5. CASE LAW OVERVIEW OF THE FIRST ONE AND A HALF YEAR OF THE APPLICATION OF THE FSR

5.1. Statistics and general overview

According to the data published for the first year of the FSR application, there were 106 pre-notification consultations regarding merger and acquisition transactions, 76 of which led to a formal filing.[97] The Commission initiated four in-depth investigations after mandatory notifications related to one merger and acquisition transaction, three related to public procurement proceedings and two *ex officio* reviews.[98]

The subjects of initial reviews were largely Chinese undertakings active on the internal market, but further activities showed that the Commission ws not only focused on China, but also other third countries.[99]

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91 For some open question see: Morris, S., *The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions,* European State Aid Law Quarterly (ESTAL), Vol. 21, No. 2, 2022, pp. 143.

92 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

93 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

94 See Arts. 9(1) and 35(2) of the FSR.

95 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

96 Werner, Ph., Barre, H., Music, K., op. cit. note 3, p. 31.

97 European Commission, *The Foreign Subsidies Regulation – 100 days since the start of the notification obligation for concentrations, Competition FSR brief*, Available at:URL= <https://competition-policy.ec.europa.eu/publications_en> Accessed: 20 October, 2024.

98 Ibid..

99 Ibid.

5.2. In-depth investigations

The first in-depth investigation started in February 2024, in relation to a Bulgarian railway public tender, based on a notification of one of the bidders of the CRRC, a Chinese train producer. The process ended with the withdrawal of the Chinese undertaking.[100] Soon thereafter, in April 2024, the Commission initiated two additional in-depth investigations in the process of bid collection for a Romanian solar photo park public for two Chinese undertakings - LONGi Solar Technologie and Shanghai Electric. The Chinese undertakings withdrew in this case as well due to the in-depth investigations conducted by the Commission.[101]

In the field of merger and acquisition transactions, the first in-depth investigation was conducted for an merger and acquisition contract for acquisition between a telecoms operator from the United Arab Emirates (UAE) of a Telecom Group by Emirates Telecommunications and the Czech PPF Telecom Group which operate on the Bulgarian, Hungarian, Serbian and Slovakian markets. Following the conclusion of the in-depth investigation on 30 September 2024, the Commission conditionally approved the mentioned acquisition, in accordance with the FSR, stating that there is a risk of distortion which could be remedied with the commitments imposed on the parties.[102]

5.3. Ex-officio reviews

In April of 2024, the Commission initiated reviews of Chinese suppliers of wind turbines due to the more favorable prices and financing conditions they offered.[103] At the end of April 2024, the Commission used its authority to initiate an unan-

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[100] European Commission, *Commission opens first in-depth investigation under the Foreign Subsidies Regulation*, 2024; /2024/1913. Available at:URL= <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_887> Accessed: 20 October; European Commission, *Summary notice concerning the initiation of an in-depth investigation in case FSP.100147 pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560,* Available at:URL= < ELI: http://data.europa.eu/eli/C/2024/1913/oj > Accessed: 20 October, 202. Fore more see also: Yarak, S., Robins, N., Couto, F., Marengon, M., *Assessing the Practical Implications of the Foreign Subsidies Regulation - Revisiting the Acquisition of Vossloh Locomotives by CRRC,* Economic Focus Competition Law Journal, Vol. 22, No. 4, 2023, pp. 200-207.

[101] European Commission, *Commission opens two in-depth, op.cit. (note 111)*. It is intersting what exect has the FSR on the Eu football market, for more see: Trapp, P., Vollert, Ch., M., , European State Aid Law Quarterly, Vol. 23, No. 1, 2024, pp. 56-61

[102] European Commission, Summary notice op.cit. note 111.

[103] Case T284/24 R, Nuctech Warsaw Company Limited sp. z o.o., established in Warsaw (Poland), Nuctech Netherlands BV, established in Rotterdam (Netherlands) v European Commission [2024], ECLI:EU:T:2024:564. For China perspective on the FSR see also: Liying, Zh., *The European Union's New Anti-Subsidy Policy as per the Regulation on Foreign Subsidies, WTO Journal of WTO and China*, Vol. 13, Issue 2 (2023), pp. 29.

nounced control and conducted a raid of the Dutch and Polish business premises of the Chinese company for security scanners Nuctech.[104] The Commission was acting upon a notification alleging that the undertaking was submitting false information on subsidies, which allowed them to prevail over their competitors in EU tenders.[105] Soon thereafter, in May 2024 Nuctech filed an appeal and requested a temporary prohibition of sharing Nuctech's information, and the annulment of the Commission's decision,[106] claiming alleging that it is illegal and contrary to Nuctech's due process rights. The first instance court rejected the appeal in August 2024 and affirmed the decision of the Commission, finding that the relevant investigation and the authority of the Commission in the relevant case arose out of the FSR.[107]

5.4. Summary

In conclusion, the initial implementation of the FSR was filled with growing pains and learning along the way and growing pains in order to remove the uncertainties in its interpretation and its proper application. It is expected that the remaining uncertainties will be removed by January 2026, when the substantive analysis guidelines must be published.[108] It appears that the protection of EU interests and the focus on Chinese undertakings are having increasingly negative effects on the trade between the EU and China.[109] The Chinese Chamber of Commerce (CCCEU) and vocally criticizing the application of the FSR by the Commission, treating it as a targeted obstruction of the operations of Chinese undertakings in

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104 Case T284/24 R, op. cit. (note 103).

105 Case T284/24 R, op. cit. (note 103).

106 Case T284/24 R, op. cit. (note 103).

107 Case T284/24 R, op. cit. (note 103).

108 Reinhold, Ph., Weck, Th., *op.cit.* note 3, p. 34. See also economic aspects of the FSR and its aplication on the EU market*:* Claici, A., Davis, P., Dijkstra, G., *Theories of Harm in the Implementation of the Foreign Subsidies Regulation,* European Competition and Regulatory Law Review, Vol. 8 , No. 1, 2024, p. 4. see also: Hornkohl, L., *The Role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review and Private Enforcement*, The EU Foreign Subsidies Regulation Competition Law & Policy Debate, Vol. 8, No. 1, 2023, pp. 32; Su, Xueji, S., *A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?,* Legal Issues of Economic Integration, Vol. 50, Vol. 1, 2023, pp. 68.

109 China Chamber of Commerce to the EU (CCCEU), *CCCEU Statement on EC's FSR in-depth probes*, Available at:URL= <http://en.ccceu.eu/2024-04/23/c_4218.htm> Accessed: 20 October, 2024. See also for international context: Vassilis, A., Blancardi, J., B., Analysis of the Foreign Subsidies Regulation from an International Trade Law Perspective on Trade in Goods, Global Trade and Customs Journal, Vol. 18, No. 10, 2023, pp. 383; Keer, H., *Research on the Regulation of Outward Foreign Direct Investment Subsidies, Commentaries China Legal Science*, Vol. 12, No. 2, 2024, pp. 132.

the EU[110] This resulted in a concrete response when the Chinese Ministry of Trade (MOFCOM) announced that it was considering requests for a counter-response to the FSR on 27 June 2024. In addition, Chinese undertakings are urging its government to impose a variety of levies on EU exporters of agricultural products to China, as a response to the selective discriminatory application of the FSR by the Commission.[111]

6. CONCLUSION

The FSR introduces a number of novelties with regards to the foreign subsidies and their negative effects, i.e. the distortion in the internal market. This includes new notification obligations imposed on undertakings before large merger and acquisition transactions and before the award in public tenders. Furthermore, the FSR introduces the review of mentioned notifications, as well as the possibility of initiating *ex-officio* review by the Commission.

The objectives of the FSR are well-determined as a matter of reasonableness and concept, but the expansive authority of the Commission are largely criticized by the expert and business communities, as it now has a large and unclear discretion to assess notifications and to reasonable and to launch investigations in its discretion at any time.

Many authors and the business community warn of an overdose of administration for the undertakings. Many undertakings are complaining of both the complexity of the information which must be collected and the fact that anybody can notify a foreign subsidy at any time, which may obstruct undertakings which have received them under privileged conditions. Another concern in the public procurement process is that its competitiveness may be reduced in practice, due to the disproportionate administrative burden. As a result, some potential bidders may not apply to the tender in the first place, thus reducing the competitiveness of all bidders and extending the process pending the Commission' decision, ultimately increasing the costs paid by the States to the winners of the public procurement, since a smaller number of competitors will apply with worse offers.

Next, it is recommended that the undertakings are aligned with the FSR requirements with minimal burden to their operations by expanding the existing data collection systems to agreements, subsidies, grants, and tax benefits falling into the category of foreign subsidies under the FSR.

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110 China Chamber of Commerce to the EU (CCCEU), op.cit. (note 109).

111 China Chamber of Commerce to the EU (CCCEU), *CCCEU Statement on EC's FSR in-depth probes*, Available at:URL= <http://en.ccceu.eu/2024-04/23/c_4218.htm> Accessed: 20 October, 2024.

Furthermore, it is recommended for the Commission to publish, as soon as possible, clearer guidance for complaints, clarifications on the notification process and clearer rules on the definition of foreign subsidies. Considering the preliminary results of the application of the FSR, it is advisable to limit the notification of foreign subsidies only to those which are most likely to disrupt the market competition. Furthermore, the duty to declare in cases beneath the notification thresholds should be relaxed, since a large administration will reduce the competitiveness of bidders in public procurement processes, causing a spill-over to the State which will ultimately have to pay more for worse bids. In addition, the removal of the criteria defining the main subcontractor and main supplier should be rethought.

In conclusion, the initial implementation of the FSR was filled with growing pains and learning along the way and growing pains in order to remove the uncertainties in its interpretation and its proper application. It is expected that the remaining uncertainties will be removed by January 2026, when the substantive analysis guidelines must be published. Until then, as things currently stand, the FSR fills important gaps and has produced satisfactory initial results, but it remains to be seen whether it will meet its objectives over the years, or if the FSR will further hinder the fair market competition, i.e. whether it will make the single market less attractive.

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Original scientific paper

THE ROLE OF COMPETITION LAW IN REGULATING WAGE-FIXING AND NO-POACH AGREEMENTS

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Abstract

No-poach agreements and wage-fixing arrangements are increasingly assessed by national competition authorities and the European Commission as anticompetitive practices under Article 101 of the Treaty on the Functioning of the European Union (TFEU). This paper evaluates whether these agreements are sufficient to be considered anticompetitive abuses, with a focus on the European Commission's investigation into the food delivery sector, specifically the cases involving Delivery Hero and Glovo. It explores the complexities of intra-group exemptions, where companies are treated as competitors despite belonging to the same corporate group. The paper further discusses the intersection of labor and competition law, analyzing the combined impact of these practices on labor market dynamics and competition. The paper concludes by emphasizing the importance of comprehensible enforcement mechanisms to protect labor market competition within the EU.

Key words: *competition law; labor market; Art.101 TFEU; wage-fixing agreement; no-poach agreements; lock-in periods*

1. INTRODUCTION

The regulation of labor market practices through competition law has become increasingly important in recent years. Employers often use wage-fixing agreements and no-poach agreements in order to limit competition for labor. In no-poach agreements, companies agree not to hire or poach workers from each other, thus harming competition in many areas because they lead to significant restrictions on worker mobility, wage suppression, and distortion of labor market dynamics. Taking into account that the labor market should be a free and independent market that contributes to and promotes efficiency and innovation, using no-poach agreements would lead to a decelerated economic recovery.

The question, however, of whether no-poach agreements, without including other anticompetitive abuses under Article 101 TFEU, can constitute anticompetitive abuse has still been left unanswered by the European Commission.

2. NO-POACH AGREEMENTS AND ART. 101 TFEU

2.1. Definition and scope

Article 101(1) TFEU prohibits agreements between undertakings that affect trade between Member States and have the object or effect of preventing, restricting, or distorting competition within the internal market. The Court of Justice of the European Union (CJEU) has ruled that certain agreements can be so inherently harmful to competition that they are deemed restrictive by object without needing to consider their effects.[1]

Similar, in *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, the ECJ has ruled out that certain agreements can be inherently harmful to competition and are therefore considered restrictive by object under Article 101(1) TFEU.[2]

2.2. The legal framework under Article 101 TFEU

No-poach agreements, in which companies, not necessarily competitors, agree not to hire or solicit each other's employees, can fall into this category if they are intended to restrict competition. These agreements can be qualified as "by object" restrictions when they maintain artificial wage levels, reduce labor mobility, or divide the labor market.[3] The European Commission's approach, following the U.S. cases, suggests that such agreements could breach Article 101(1) TFEU if they are construed to limit labor market competition. These agreements restrict labor market mobility, limiting workers' ability to seek better opportunities, which in turn can suppress wages and hinder career advancement. This restriction not only affects individual workers but also impacts the economy by reducing overall productivity and innovation, as employees are unable to move to roles where their skills are most effectively utilized. Competition law, particularly Article 101 TFEU, is designed to protect the competitive process in both product and labor markets. No-poach agreements can violate this provision because they prevent companies

1 ECJ, *Groupement des Cartes Bancaires v Commission,* 2014, C-67/13 P, ECLI:EU:C:2014:2204.

2 ECJ, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie,* 1999, C-67/96, ECR I-5751.

3 European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, para. 15.

from competing fairly for talent, which is essential for a healthy economy. When firms agree not to hire each other's employees, they artificially suppress wages by removing the competitive pressure that would otherwise drive salaries to reflect the true value of workers' skills. This leads to a misallocation of resources, with employees stuck in positions that may not fully utilize their abilities or provide opportunities for growth. The harm caused by these agreements extends beyond the affected employees to the broader economy. The EU has recognized that labor is a critical input in the production process, and any restriction on the free movement of labor can have wider economic consequences. By limiting competition in the labor market, no-poach agreements can lead to inefficiencies, lower productivity, and reduced innovation, all of which are detrimental to economic growth.

3. THE INTERSECTION OF LABOR LAW AND COMPETITION LAW

3.1. Implications for labor market dynamics

The convergence of labor law and competition law is gaining attention as authorities work to protect labor markets from anticompetitive practices. While labor law traditionally safeguards workers' rights, competition law ensures a competitive market environment. Recent developments in European competition law highlight the necessity of addressing practices that harm not only consumers but also workers.

A significant development is the European Commission's 2022 guidelines on applying EU competition law to collective agreements of solo self-employed persons, acknowledging that certain labor market practices, such as wage-fixing agreements, can fall under antitrust assessment even when involving individuals traditionally outside labor law's scope.[4] Additionally, the Directive on Transparent and Predictable Working Conditions (2019/1152) has enhanced worker protections in the EU, intertwining with competition law by addressing non-compete clauses and their potential to restrict worker mobility.[5] These legislative measures highlight the need for a coordinated approach to regulating labor market practices through both labor and competition law.

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4 European Commission, "Guidelines on the application of EU competition law to collective agreements of solo self-employed persons" (2022) https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

5 European Parliament and Council, Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the European Union, 2019, OJ L186/105.

4. SUFFICIENT FOR ANTICOMPETITIVE ABUSE?

4.1. "By object" restriction

Whether a no-poach agreement qualifies as anticompetitive abuse under Article 101 TFEU depends on its characterization as a "by object" restriction. The CJEU and the European Commission have indicated that agreements harming the competitive process are likely to be seen as anticompetitive by nature. In the context of no-poach agreements, if the object of the agreement is to eliminate competition for employees between firms, it can be viewed as anticompetitive, thereby restricting employees' freedom to move between employers and suppressing wages.[6] When assessing whether no-poach agreements fall under „by object" restrictions, the CJEU's ruling in *Becu and Others v Gedi* emphasizes that agreements designed to restrict competition may breach Article 101 TFEU, regardless of whether their impact is directly observable.[7]

4.2. Practical considerations

However, it does not necessarily limit this to agreements between firms that are direct competitors. Under EU competition law, specifically Article 101 TFEU, an agreement can be seen as anticompetitive if it aims to restrict, prevent, or distort competition, regardless of whether the parties are direct competitors in the same market. This means that no-poach agreements can be anticompetitive even if they are made between companies that do not compete in the same product or service market. The crucial point is whether the agreement restricts competition in the labor market. If the agreement limits employees' ability to move freely between jobs, thereby suppressing wages or reducing job opportunities, it can be deemed anticompetitive, whether or not the companies involved are competitors in their respective markets. The case *T-Mobile Netherlands BV and Others*[8] highlights that the anticompetitive nature of an agreement depends on its impact on competition, not just the competitive relationship between the firms. In practice, many no-poach cases also involve additional anticompetitive behaviors, such as market division or wage-fixing agreements, which bolster the case for a breach of Article 101. For instance, in the *eBook* investigation, the Commission identified both price-fixing and market-sharing agreements that cumulatively restricted competition.[9]

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6 ECJ, *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009, C-8/08, ECLI:EU:C:2009:343.

7 ECJ, *Becu and Others v Gedi et al.*,1999, C-22/98, ECR I-5665, para 23.

8 *Op. cit.* para 31.

9 European Commission, "Commission fines e-book publishers and Apple for illegal agreements", 2011, https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1509 accessed 22 August 2024.

In conclusion, no-poach agreements can constitute anticompetitive abuse under Article 101 TFEU, particularly when seen as having a restrictive object. However, they are frequently examined alongside other anticompetitive behaviors, creating a more comprehensive and compelling case for antitrust authorities. The sufficiency of the no-poach agreement as a standalone violation depends significantly on its context, intent, and impact on labor market competition.

5. WAGE-FIXING AGREEMENTS AND ITS EFFECT ON COMPETITION

5.1. Definition of "wage-fixing agreements"

A wage-fixing agreement is an arrangement between two or more employers where they agree to set or limit the wages or salaries that they will pay to their employees. This type of agreement is considered a violation of competition law because it restricts the normal competitive process in the labor market. By fixing wages, employers can prevent salaries from rising in response to supply and demand, effectively suppressing the natural wage levels that would have been established through open competition for labor. Wage-fixing agreements can take various forms, such as direct agreements to cap wages at a certain level, or colluding to avoid raising salaries above an agreed-upon threshold. These agreements are generally prohibited under competition law, such as Article 101 of the Treaty on the Functioning of the European Union (TFEU), because they distort the labor market, reduce employee mobility, and harm the broader economy by inhibiting fair competition.

5.2. Comparison with "no-poach agreements"

Wage-fixing and no-poach agreements share similarities in their anticompetitive effects, particularly in terms of suppressing wages and limiting worker mobility. Both practices remove the competitive pressures that would naturally drive wages and employment opportunities higher. Wage-fixing directly sets wage levels, while no-poach agreements limit the availability of alternative employment opportunities, both leading to a stagnation of wages and reducing the bargaining power of employees.

In the EU, wage-fixing agreements are unequivocally considered violations of Article 101 TFEU due to their direct impact on the competitive process. In contrast, no-poach agreements, while increasingly assessed, have not yet reached the same level of legal condemnation, though this is likely to change as enforcement intensifies.

6. HOW WORKERS CAN DISCOVER NO-POACH AND WAGE-FIXING AGREEMENTS?

No-poach and wage-fixing agreements are typically confidential arrangements made between employers, often kept hidden from employees. This secrecy presents a significant barrier to employees who may be affected by these agreements but are unaware of their existence. However, workers can uncover these agreements through several ways:

a) Whistleblower programs - Many competition authorities within the EU offer whistleblower programs that allow individuals to anonymously report anti-competitive practices, including no-poach and wage-fixing agreements.[10]

b) Collective bargaining and union representation - Labor unions often have the resources and legal authority to investigate and challenge potential no-poach or wage-fixing agreements. Through collective bargaining and negotiations, unions can pressure employers to disclose such arrangements or bring them to the attention of competition authorities.[11]

c) Market indicators and anomalies - Workers may notice unusual patterns in wage stagnation or limited job mobility within their industry, which could indicate the presence of wage-fixing or no-poach agreements. These signs, though indirect, can be a trigger for further investigation by unions, legal advisors, or competition authorities.[12]

7. ECONOMIC HARM OF NO-POACH AGREEMENTS AND THE EU COMPETITION AUTHORITIE'S PERSPECTIVE

No-poach agreements can lead to significant economic harm by disrupting the normal functioning of labor markets. These agreements artificially suppress wages, restrict employee mobility, and reduce the incentives for firms to compete for talent. From an economic perspective, such restrictions lead to a misallocation of resources, where workers are unable to move freely to positions where their skills might be most effectively utilized. This distortion results in reduced innovation, lower productivity, and ultimately, a less competitive economy.

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10 European Commission, "Guidelines on the application of EU competition law to collective agreements of solo self-employed persons" (2022) https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024).

11 Kovacic, W. E. and Shapiro, C. "Antitrust Policy: A Century of Economic and Legal Thinking", 2000, 14 Journal of Economic Perspectives 43, pp. 43-60.

12 Kovacic, W. E. and Shapiro, C. "Antitrust Policy: A Century of Economic and Legal Thinking", 2000, *14 Journal of Economic Perspectives* 43, pp. 44.

The European Commission has increasingly recognized the economic harm posed by no-poach agreements, particularly in its investigations into labor market restrictions. The Commission argues that these agreements are detrimental to both workers and the broader economy, as they prevent employees from obtaining better wages and career opportunities, thereby stifling economic growth. The suppression of wage competition among employers also leads to broader market inefficiencies, as it reduces the pressure on firms to innovate and improve working conditions to attract and retain talent.[13]

Furthermore, the economic harm caused by no-poach agreements is aggravated by the fact that these agreements are often hidden from employees, leaving them unaware of the restrictions being placed on their career choices. This lack of transparency aggravates the negative effects on the labor market, as employees are unable to negotiate better terms or seek alternative employment. The Commission has argued that these factors collectively contribute to a labor market that is less dynamic and less competitive, with long-term negative consequences for the European economy as a whole.[14]

8. LOCK-IN PERIODS IN AGREEMENTS VS. NO-POACH AGREEMENTS

8.1. DEFINITION OF LOCK-IN PERIODS

A "lock-in period" in legal agreements is a specified duration during which a party, often an employee, is contractually obligated to remain in a particular position or arrangement. This period restricts the party from terminating the contract prematurely without facing penalties or legal consequences. Lock-in periods are commonly included in employment contracts to ensure employee retention, protect investments made in employee training, or safeguard business interests during crucial periods. The concept of a lock-in period is grounded in contract law, where its enforceability is typically judged based on its reasonableness in terms of scope and duration. Courts often evaluate these clauses to ensure they do not unfairly restrict the employee's freedom to seek new employment, while still allowing employers to protect legitimate business interests.[15] In practice, lock-in periods are often found in contracts involving significant training or specialized skills. For

[13] European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

[14] *Ibid.*

[15] Painter, R. and Holmes, A. Cases and Materials on Employment Law. 10th edn. Oxford: Oxford University Press, 2021, pp. 354-356.

example, an employer may require an employee to stay with the company for a set period after completing expensive training, or else repay the training costs if they leave early.[16] The fairness and legality of such periods are assessed by considering whether the duration and scope are proportionate to the investment made by the employer and whether the employee's rights are adequately protected.[17] These clauses serve as a tool for balancing the interests of both parties in a contractual relationship, ensuring that employers can secure returns on their investments while also providing clear boundaries on how long an employee can be reasonably bound by such an agreement.

8.2. Comparison with non-poaching agreements

While lock-in agreements and no-poach agreements both restrict worker mobility, their antitrust implications differ.

No-poach agreements are explicit, contractual arrangements between employers that prevent workers from moving freely between companies, thereby directly affecting competition in the labor market. In contrast, the arrangement on lock-in periods is a more indirect phenomenon, arising from structural issues within the employment system, such as the provision of benefits tied to specific employment. While lock-in periods do restrict mobility, it is not typically the result of a deliberate agreement between employers to stifle competition.

From an antitrust perspective, no-poach agreements are seen as a more direct violation of competition law because they involve explicit collusion between employers to limit labor market competition. Clauses on lock-in periods, on the other hand, while problematic for labor mobility, does not involve such collusion and is not typically subject to antitrust enforcement. However, both phenomena result in similar economic harms, such as reduced employee mobility, suppressed wages, and a less dynamic labor market.[18]

In cases where two or more firms use similar lock-in periods clauses, the competition law assessment might lead to a different conclusion: using lock-in period clauses by multiple companies might create a *de facto* no-poach effect, which might lead to similar anticompetitive outcomes. In this scenario, antitrust authorities might argue that these clauses collectively distort the labor market, especially if they are widespread and particularly restrictive. However, addressing this issue would be

16 Deakin, S. and Morris, G. S. Labour Law. 7th edn. Oxford: Hart Publishing, 2020, pp. 240-242.

17 Collins, H. Employment Law. 2nd edn. Oxford: Oxford University Press, 2022, pp. 203-205.

18 Van den Bergh, R. and Camesasca, P. D. European Competition Law and Economics: A Comparative Perspective. 2nd edn. Intersentia, 2006, pp. 123-125.

more complex than with no-poach agreements because job lock generally stems from internal company policies rather than explicit agreements between firms.

Therefore, while the economic impact might be similar, the legal and regulatory approach to addressing widespread lock-in period clauses might differ, potentially requiring broader labor market reforms or changes in the regulation of employment contracts.

8.3. Investment in workers' training as justification for the use of non-poaching agreements?

An argument often made in defense of no-poach agreements is that they enable firms to invest in the training and development of their workers without the risk of losing them to competitors. Employers argue that without such agreements, they might be reluctant to invest in employee training, as the benefits of that investment could be reaped by rival firms if the trained employees are poached. This justification hinges on the notion that no-poach agreements create a more stable workforce, allowing employers to recoup their investment in employee development over time.

However, this argument should be assessed carefully under competition law. The European Commission has indicated that while investments in training are crucial, they do not justify restrictions on labor mobility. Additionally, it may happen that not all employees receive training but are still covered by their employer's no-poach agreement. This is something that cannot be tolerated under competition law.

Moreover, in cases where employers voluntarily opt to provide training, employees are usually subject to non-compete clauses or have individual agreements with their employer (such as repaying a certain percentage for the training) to ensure the employee is not hindered in freely moving to another company (regardless of whether the new employer is a contractual partner in the no-poach agreement of the previous employer).

In any case, the Commission's view is that the benefits of investment in training shouldnot come at the expense of a competitive labor market, which ultimately serves the broader economy by fostering innovation and productivity.[19]

[19] European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

9. RECENT DEVELOPMENTS: EUROPEAN COMMISSION INVESTIGATION IN THE FOOD SECTOR

In June 2022 and November 2023, the Commission conducted unexpected inspections at the offices of *Delivery Hero*, a German online food takeaway company, and its Spanish subsidiary Glovo as part of its investigation into potential collusion within the food delivery industry. This investigation focused on allegations that these companies, despite being part of the same corporate group, engaged in a cartel by allocating geographic markets, sharing commercially sensitive information, and agreeing not to poach each other's employees.[20] The Commission announced on July 23, 2024, that it initiated a formal antitrust investigation to assess whether *Delivery Hero and Glovo* breached EU competition laws by allegedly forming a cartel in the delivery sector for food, groceries, and consumer goods.

9.1. Intra-Group Exemption: Does It Apply?

Typically, agreements between entities within the same corporate group are exempt from the application of Article 101 TFEU, as they are considered internal arrangements rather than agreements between independent undertakings. This exemption is based on the premise that entities within the same group share a common economic interest, and thus cannot be considered competitors under competition law.[21]

However, the European Commission's investigation into *Delivery Hero and Glovo* complicates this exemption. The investigation undertaken by the Commission in June 2022 and November 2023 revealed that from July 2018 to July 2022, *Delivery Hero* held only a minority share in *Glovo*, raising questions about whether the companies' relationship was sufficiently integrated to qualify for the intra-group exemption. During this period, the companies may have had distinct economic interests that could have affected market dynamics in a manner that restricted competition.[22]

9.2. Why Are Delivery Hero and Glovo Treated as Competitors?

The European Commission's decision to treat *Delivery Hero* and *Glovo* as competitors, despite their corporate relationship, underscores the complexity of competi-

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20 *Ibid.*

21 European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011, OJ C11/1.

22 European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

tion law in the context of corporate groups. The Commission was concerned that the companies' agreements influenced their competitive behavior in ways that harmed the market. By treating the two entities as competitors, the Commission highlights the importance of assessing the economic reality of their relationship rather than relying solely on formal corporate structures.

This approach is consistent with the Commission's broader efforts to protect labor markets from anticompetitive practices that can limit labor mobility, suppress wages, and reduce consumer choice. The alleged no-poach agreement, coupled with the sharing of commercially sensitive information and geographic market allocation, suggests that *Delivery Hero* and *Glovo* may have engaged in practices with significant anticompetitive effects.[23]

9.3. Analysis: Sufficient for Anticompetitive Abuse?

The investigation into *Delivery Hero* and *Glovo* shows how no-poach agreements, particularly when combined with other restrictive practices, can be sufficient to initiate an investigation by the Commission under Article 101 TFEU. Even if the companies belonged to the same corporate group, their conduct during the relevant period may have had substantial anticompetitive effects. The Commission's focus on the broader context of these agreements reflects a nuanced understanding of how labor market practices intertwine with competition law.

In this case, the no-poach agreement alone may not have been enough to trigger the investigation. However, when viewed alongside the geographic market allocation and sharing of sensitive information, it forms part of a broader anticompetitive strategy that could significantly distort competition. The Commission's approach aligns with its overarching goal of ensuring that labor markets remain open and competitive, even in complex corporate scenarios.[24]

10. RECOMMENDATIONS AND CONCLUSION

10.1 Recommendations

a) The competition authorities should provide guidance on the application of Article 101 TFEU to no-poach and wage-fixing agreements. The ambiguity surrounding these practices leads to confusion and inconsistency in enforcement. Clear delineation of what constitutes a "by object" restriction in the context of labor markets would serve as a preventive measure and a deterrent against un-

[23] *Ibid.*

[24] *Ibid.*

lawful agreements. Furthermore, issuing sector-specific guidelines, taking into account particularities in industries such as tech, healthcare, and food delivery, would ensure a more tailored approach in enforcement.

b) The intersection of competition law and labor law requires a coordinated enforcement strategy. Establishing an inter-agency body composed of representatives from both labor and competition authorities at the national and EU levels would allow for a comprehensive review of labor-related agreements, enabling the body to effectively identify and address any anticompetitive practices while respecting the confidentiality of sensitive business information. Such a body could be empowered to issue joint statements, carry out combined investigations, and propose legislative amendments, thereby bridging the gap between these two traditionally distinct areas of law.

c) Given the covert nature of no-poach and wage-fixing agreements, the role of insiders in exposing such practices cannot be understated. Strengthening whistleblower protection mechanisms under the Whistleblower Directive[25], coupled with financial incentives similar to those in antitrust leniency programs, would encourage reporting of unlawful agreements. Additionally, empowering labor unions to initiate complaints before competition authorities would leverage their capacity to monitor labor market practices, thus acting as a complementary enforcement channel.

d) The widespread use of lock-in periods in employment contracts requires more scrutiny, especially when they collectively create barriers to employee mobility. The European Commission, in collaboration with national labor law regulators, could consider developing non-binding guidance or a set of best practices that outline acceptable limits on the scope and duration of lock-in periods. Such guidance would need to respect the prerogatives of Member States in managing their own employment contract regulations, while still offering a structured approach for identifying potential anticompetitive effects, particularly in cases where lock-in clauses are implemented in a coordinated or systematic manner across multiple companies.

10.2. Conclusion

The analysis presented highlights how no-poach agreements, wage-fixing practices, and similar labor-related anticompetitive behaviors threaten not only the freedom of employees but also undermine the overall efficiency and dynamism of the European economy. Although Article 101 TFEU provides a solid foundation

[25] European Parliament and Council, Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, OJ L 305.

for tackling product market restrictions, it needs to be adapted and fine-tuned to address the particular challenges posed by labor market agreements. Recent cases, such as the European Commission's probe into Delivery Hero and Glovo, underscore the complexities of applying traditional competition law principles to labor market arrangements, especially when these agreements occur within corporate groups. The intra-group exemption, while serving its purpose in shielding internal transactions, should not become a blanket shield for practices that have significant negative impacts on competition in the labor market. Shifting towards a more labor-market-oriented enforcement strategy, would ensure that competition law evolves in step with the changing dynamics of employment relationships across the EU. While the Commission's recent actions indicate an openness to addressing these issues, further clarity and institutional coordination are still necessary in order to foster a healthier and more competitive labor market that supports fair opportunities, stimulates growth, and promotes sustainable economic development.

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ALGORITHMIC COLLUSION IN COMPETITION LAW: OVERVIEW

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Abstract

Rise of artificial intelligence and growth of the digital economy has brought about new regulatory challenges for Competition Law. Failures created by the famous invisible hand of the free market and then subsequently corrected by the competition rules have intrinsic potential to remain intact by regulation if created by this new digital hand. One of the areas of rising academic interest in this field is algorithmic collusion. Algorithms can be generally defined as a sequence of operations that transform an input into an output. Algorithmic computation can be part of artificial intelligence software. Algorithmic collusion refers to the use of algo-

rithms by undertakings in a manner that harms competition. Particular area of concern is tacit collusion or conscious parallelism when there is no any illegal agreement or even contact or communication among the competitors. Pricing algorithms generating tacit collusion are the main example of such practice. The issue has also been lately reviewed and investigated by various competition authorities around the world, including the European Commission and Federal Trade Commission of the United States. Concerns remain regarding the possibility of tacit collusion, price discrimination, and the implications for consumer welfare. Introductory paper defines key terms of the algorithmic collusion with emphasis on artificial intelligence. Paper also produces an overview of the academic debate on algorithmic collusion in Competition Law. It continues with analysis of the capacity in the existing regulatory framework of EU Competition Law for tacit collusion to facilitate algorithmic collusion with secondary references to other comparative jurisdictions. By examining various types of algorithmic pricing, from heuristic to autonomous approaches, this paper aims to shed light on the complex dynamics at play in digital markets. It discusses how automated pricing mechanisms can enhance market efficiency while also presenting significant challenges for competition authorities. The study emphasises the importance of regulatory frameworks that can adapt to the evolving landscape of algorithmic pricing to safeguard consumer interests and maintain competitive market conditions. Finally, the paper provides general policy recommendations for Competition law in the field of algorithmic collusion.

***Key words**: Algorithmic collusion, Tacit collusion, Conscious parallelism, Competition Law*

1. INTRODUCTION TO ALGORITHMIC COLLUSION

The concept of algorithm exists for a long time as an instance of logic. Although there is no universally accepted definition of algorithm[1] we could broadly conceptualise the term as a step-by-step procedure or formula for solving a problem or accomplishing a task. One of the most widespread definitions of algorithm in the literature is by Wilson and Keil[2] as an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects where the initial state of the tokens is the input; the final state is the output. To summarize: it is a sequence of operations that transform an input into an output.

Specific kind of algorithms are computer or computational algorithms where series of computational rules is designed to solve a certain issue[3]. Primary interest of this paper are the pricing algorithms as a subtype of computational algorithms. Pricing algorithms are designed to determine the price of a product or service based on various factors and data inputs. Crucial categories for pricing algorithms are cost analysis; market demand; competitors pricing; customer behaviour; dy-

[1] Moschovakis, Y. N., *What is an Algorithm?,* in B. Engquist and W. Schmid (Eds.), Mathematics Unlimited — 2001 and Beyond, Springer, 2001, pp. 919–936

[2] Wilson, R. A.; F. C. Keil, F.C, , *The MIT Encyclopedia of the Cognitive Sciences*, MIT Press., 1999

[3] Cormen, T.H. *et al.*, *Introduction to Algorithms*, MIT Press., 2009

namic pricing and seasonality. Pricing algorithms are particularly common in the airline, hotel booking, road transport, electricity and retail industries[4].

Rise of artificial intelligence (AI) systems in the digital age affected the development of computational algorithms substantially and is reasonably expected to continue to do so in the future. This relates equally to pricing algorithms. The European Union AI Act[5] adopts categorisation of AI systems in risk-based regulatory approach as high, medium and low risk. It stipulates broad definition of AI system as software that is developed with one or more of the following techniques and approaches:

- machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;
- logic and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;
- statistical approaches, Bayesian estimation, search and optimization methods, and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with (Article 3 in relation to Annex I of the AI Act).

Advanced pricing algorithms that fall under the scope of AI systems use methods of machine learning. Machine learning (ML) is a subfield of AI which designs intelligent machines using algorithms that iteratively learn from data and experience[6]. Advanced form of ML is deep learning that enables computer systems to learn using complex software that attempts to replicate the activity of human neurons by creating an artificial neural network. This relation is demonstrated in Figure 1.

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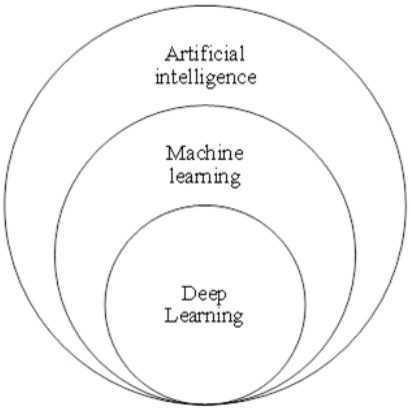
4 Organisation for Economic Cooperation and Development OECD (2017), *Algorithms and Collusion: Competition Policy in the Digital Age*, [www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm], Accessed 30 September 2024

5 European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM [2021] 206 final.

6 OECD, *op.cit.*, note 4

Figure 1: Relationship between artificial intelligence, machine learning and deep learning



Source: Authors

The dynamic emergence of AI systems and development pricing algorithms in the digital age has been well detected in the literature as an area of concern for Competition Law thus giving the birth to the new term Antitrust and AI[7] or AAI in abbreviation. Among major regulatory issues in AAI is algorithmic collusion, which is the main subject of this paper. Increasingly, algorithms are supplanting human decision-makers in pricing goods and services[8]. Algorithmic collusion refers to the use of algorithms by undertakings in a manner that harms competition. Bernhardt and Dewenter use the term collusion by code synonymously with algorithmic collusion[9]. Generally, collusion in EU Competition Law refers to any form of agreement, concerted practice, or decision by associations of undertakings that distorts, restricts, or prevents competition within the European Union's internal market. It is prohibited under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). In U.S. Antitrust Law, collusion refers to agreements or coordinated actions between competitors that restrict competition in ways that harm consumers or other market participants. Such behaviour is prohibited under Section 1 of the Sherman Antitrust Act, which outlaws any contract, combination, or conspiracy that unreasonably restrains trade.

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7 *E.g*. Siciliani, P., *Tackling Algorithmic-Facilitated Tacit Collusion in a Proportionate Way*, Journal of European Competition Law & Practice,Vol. 10, 1, 2019, pp. 31–35

8 Calvano, E., *et al*., *Artificial Intelligence, Algorithmic Pricing, and Collusion*, American Economic Review, 110(10), 2020, pp. 3267–3297

9 Bernhardt, L.; Dewenter, R., *Collusion by code or algorithmic collusion? When pricing algorithms take over*, European Competition Journal, Vol. 16, 2–3,2020, pp. 312–342

Particularly complex issue is tacit collusion enabled by pricing algorithms when there is no any illegal agreement or even any contact or communication among the competitors. The impact of emergence and development of pricing algorithms produces undeniably substantially positive effects on competition and consumers. Pro-competitive effects of development of pricing algorithms Valeria Caforio summarise[10] positive effects in categories of optimisation, innovation and consumer-welfare. Optimisation benefits relate to the undertaking that employs a pricing algorithm in its pricing strategy. Primarily it can bring cost reduction as a measure of optimisation. Development of pricing algorithms fosters innovation and promotes market efficiency[11]. Dynamic pricing enabled by the algorithms can lower the price, more readily and effectively introduce personalised pricing and enhance market transparency thus greatly benefiting the consumer-welfare.

The primary anti-competitive effect of emergence of pricing algorithms is algorithmic collusion. The general anti-competitive effects of collusion are also applicable to algorithmic collusion. Differentiation between explicit and tacit collusion should be made. According to Ezrachi and Stucke algorithmic explicit collusion refers to the case where human beings use algorithmic pricing as a tool to implement, monitor and enforce a traditional price-fixing agreement[12]. Algorithmic tacit collusion according to Caforio refers to the capability of pricing algorithms to autonomously and unilaterally achieve – namely, without human intervention and without reciprocal interactions – a collusive outcome[13].

Explicit algorithmic collusion when pricing algorithm is used as a tool for price-fixing between undertakings on the relevant market is maybe relative technical novelty but does not present particular normative challenges in the Competition Law regulatory framework. However, it should be noted that legal responsibility of software provider (if algorithmic software is not internally produced by undertakings concerned), is also potentially included in to the legal responsibility for anti-competitive price-fixing agreement, e.g. within the scope of application of Article 101 (1) TFEU in the EU Competition law[14]. Pieter Van Cleynenbreugel

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10 Caforio, V, *Algorithmic Tacit Collusion: A Regulatory Approach*, Competition Law Review Vol. 15, 1, 2023, pp. 15-16

11 *Ibid*.

12 Ezrachi, A.; Stucke, M.E, *Artificial Intelligence and Collusion: when Computers Inhibit Competition*, University of Illinois Law Review, 5, 2017, pp. 1775-1810

13 Caforio, V, *op.cit.*, note 10.

14 The General Court's doctrine in *AC-Treuhand II*, endorsed by the Court of Justice, in our view, can *per analogiam* be applied here as well.

argues in his paper[15] that the existing legal framework in EU Competition law can be adequately used in a compliance-focused way. On the other hand, cases of usage of pricing algorithms as a form of concerted action and its interplay between AI pricing algorithms that determine prices without human knowledge, coming under the general umbrella of tacit algorithmic collusion is the complex subject that demands normative and regulatory adjustment. This will be the main area of analysis of this paper.

2. ALGORITHMIC COLLUSION AS FORM OF CONCERTED ACTION

Tacit algorithmic collusion is a form of a concerted action. This conclusion is derived by logical necessity from the introductory conceptualisation of this paper. Real question is when the pricing algorithms practices can be considered collusive?

Concerted practice as defined very early in the EU Competition law in the *Dyestuffs* case (in 1972)[16] as a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. Both in EU and United States (US) regulatory solutions communication-based approach[17] has been enforced. Parallel behaviour of undertakings can occur as a natural consequence of oligopolistic market structure and cannot be considered as Competition law violation *per se*. That would amount to prohibition of oligopoly. Therefore, it is for the competition to establish that no other explanation for the parallel behaviour is present, which is difficult to prove in oligopolistic markets.

Machine learning pricing algorithms are certainly not less likely to involve parallel behaviour on oligopolistic markets than human tailored pricing strategies of undertakings. Therefore, we can establish that the same general conditions for applying the prohibition of concerted practices would apply. In fact, hypothetically in some scenarios, due to the precision of automated computational processes, it would be easier to prove that no other explanation for parallelism exists (when pricing is executed by pricing algorithms).

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15 Van Cleynenbreugel, P., *Article 101 TFEU's Association of Undertakings Notion and Its Surprising Potential to Help Distinguish Acceptable from Unacceptable Algorithmic Collusion*, The Antitrust Bulletin, Vol. 65. (3), 2020, pp. 423-444

16 Case 48-69 Imperial Chemical Industries Ltd. v Commission of the European Communities, ECLI:EU:C:1972:70

17 Beneke, F.; Mackenrodt, M., *Remedies for algorithmic tacit collusion*, Journal of Antitrust Enforcement, 9, 2021, pp. 152-176

In the EU Competition case-law only conscious parallelism is considered to be collusive. Can the pricing algorithms be considered capable of conscious action at all? Obviously philosophical debates on the possibility of AI conscience fall well outside the reach of this paper. Generally, we can derive a recommendation that consciousness has to be abandoned as precondition for collusion in the area of algorithmic collusion in case-law. Otherwise we could have a situation where a majority of ML pricing algorithms are simply outside the application of the rules on concerted action.

Additional element of detection of collusion in pricing algorithms can be found in software design itself. This detection becomes the matter of IT forensics for Competition agencies. Caforio proposes that specific rule should be introduced by the legislators to mandate some algorithmic design standards[18]: ML algorithms that are the most prone to end up in interdependent pricing should not be left completely free to act but designers should incorporate some constraints within their pricing formulas. Caforio also proposes that algorithmic heterogeneity is promoted. This proposed regulatory approach would minimise ex ante risks for algorithmic collusion. We should note that there are authors[19] that question, partly due to the lack of empirical evidence, the possibility of tacit algorithmic collusion at present level of technological development.

Advanced pricing algorithms that use methods of deep learning independently of human intervention are especially problematic as subject of regulation of Competition law. Even hypothetical future legislative constraints in the design of such advanced deep learning pricing software may be unable to stop it from formation of anti-competitive prices. In fact, this is more likely since regulatory constraints commonly cannot catch with the speed of deep learning AI.

3. SCENARIOS OF ALGORITHMIC COLLUSION

Unlike traditional forms of collusion, where companies explicitly agree to fix prices or manipulate the market, algorithmic collusion – as mentioned – can occur through the sophisticated use of digital tools, sometimes even without human intervention.

This shift has raised profound questions about how competition authorities can detect, regulate and address anti-competitive behaviour in the digital economy where algorithms, not individuals, are making critical market decisions (not only

[18] Caforio, V, *op.cit.*, note 10, pp. 25-28

[19] Ittoo, A.; Petit, N., *Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective*, 2017, [http://dx.doi.org/10.2139/ssrn.3046405] Accessed 11 November 2024

price wise). Scenarios how algorithms can facilitate collusion in various ways, either by transmitting information, monitoring competitor behaviour or autonomously learning to stabilize prices can be developed. Different scenarios – the messenger, digital eye, predictable agent and hub-and-spoke models – have been devised by Ezrachi and Stucke in their 2016 work[20].

The importance of studying these four scenarios lies in their collective ability to illustrate the breadth and diversity of algorithmic collusion. These scenarios provide a comprehensive overview of how algorithms can intentionally or unintentionally distort competition and balance. This overview and analysis challenge traditional regulatory assumptions that are based in practice on human intent and explicit agreements. The scenarios illustrate the direct and indirect means by which algorithms can influence market dynamics, thereby drawing attention to issues such as the lack of transparency, reliability and predictability in an algorithm-based and algorithm-driven environment. In addition, they illustrate how collusion can occur at different levels in the absence of human intervention, from fully automated systems to only partial human oversight, thereby suggesting the complexity of detecting, recognizing and addressing such behaviour.

The EU Horizontal Guidelines[21] acknowledge the growing role of algorithms in the market and highlight their potential to both facilitate and harm competition. Algorithms that lead to collusion, whether tacit or explicit, or that facilitate illegal information exchanges, are subject to scrutiny under Article 101 TFEU. Companies are required to ensure that their use of algorithms does not infringe competition law, and they remain liable even if anti-competitive behaviour is automated through these algorithmic tools.[22]

Under this title, *inter alia*, by examining and analysing these scenarios, we will highlight broader regulatory challenges and issues, such as the difficulties in identifying and detecting prohibited agreements in the absence of explicit agreements, the opaque nature of algorithmic decision-making, and the capacity of algorithms themselves to evolve faster than the legislation that regulates them, as Ezrachi and Stucke did in their aforementioned work. Addressing these issues is essential to ensuring that competition law is adapted in a way that avoids the potential risks posed by algorithmic systems while maintaining the benefits they bring in a way of innovation and efficiency.

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20 Ezrachi, A; Stucke, M. E, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy,* Harvard University Press, 2016, pp. 39–45.

21 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/01 (hereinafter: "*Horizontal Guidelines*")

22 *Ibid. para* 379.

3.1. Messenger

The Messenger scenario is most often regarded as the most straightforward form of algorithmic collusion, primarily involving algorithms that are directly controlled by humans. In this scenario, algorithms simply execute the instructions provided by individuals, functioning as a tool to carry out explicit human commands. The defining factor in identifying collusion here is the individual's intent to engage in anti-competitive behaviour. The method by which the collusion is implemented – through algorithmic means – plays a secondary role. Since the algorithms are programmed under human direction, the focus remains on the deliberate intent to collude, rather than the automated process used to achieve it.[23]

Algorithms, functioning as messengers, enhance the efficiency of the collusion. Since they operate autonomously and at high speeds, they can ensure that no competitor deviates from the agreed-upon strategy. This eliminates the need for constant human coordination and manual monitoring, making the collusive behaviour more sustainable over time.[24] Ezrachi and Stucke contend that national competition authorities should treat this type of scenario the same as classic cartel agreements, considering that in this particular scenario the emphasis is still on the will of the individual who then manages the algorithm as a mediator. They also enhance the fact that the digitalization and modernization of business operations introduce new challenges for regulators. As companies increasingly rely on advanced algorithms and automated systems, competition authorities will need to adapt their investigative methods to effectively detect and prosecute these modern forms of collusion.[25] Traditional approaches to investigating cartels may no longer suffice, as algorithmic coordination often occurs more subtly and at a faster pace than in conventional cartels. Therefore, regulators will need to develop technological expertise and tools capable of understanding and scrutinizing the role of algorithms in anti-competitive practices, ensuring that enforcement keeps pace with the digital economy's evolution.

A prominent example of this type of scenario is the European Commission's cases against manufacturers Pioneer[26], Philips[27], Denon & Marantz[28], and Asus[29]. In these cases, each manufacturer specifically focused on online retailers that offered

23 Ezrachi, A; Stucke M.E, *op.cit,* note 20.

24 *Ibid*.

25 *Ibid*.

26 Case *Pioneer* AT.40182, Commission decision C [2018] 4790 final

27 Case *Philips* AT AT.40181, Commission decision C [2018] 4797 final

28 Case *Denon & Marantz* AT.40469, Commission decision C [2018] 4774 final

29 Case *Asus* AT.40465, Commission decision C [2018] 4773 final

the lowest prices for their products. Their interventions were sometimes triggered by price differences as minimal as one euro, highlighting their stringent control over pricing. In other instances, they acted in response to price increases exceeding 100 euros. The primary objective of these manufacturers was to enforce higher retail prices for their products, a practice commonly known as "resale price maintenance." By doing so, they sought to prevent retailers from engaging in (inter-brand) price competition that could benefit consumers. This strategy eventually harmed consumers by keeping prices artificially elevated, limiting their choices and increasing their costs.[30] The actions of these companies show how algorithmic and strategic interventions can lead to anti-competitive practices that undermine market dynamics.

3.2. Digital Eye

The Digital Eye scenario is a more sophisticated form of algorithmic collusion, where advanced algorithms – often powered by AI – monitor competitors' actions in real time and autonomously adjust market strategies, especially pricing. Unlike simpler scenarios, such as the previously mentioned Messenger scenario, where algorithms directly follow human commands, the Digital Eye utilizes AI to independently observe and respond to market dynamics without requiring constant human intervention.[31]

This type of algorithms, by accessing similar market data and being programmed with comparable profit-maximizing goals, autonomously begin to coordinate their actions. The main concern is that, over time and through repeated interactions, the algorithms may recognize that maintaining coordinated pricing is more profitable than competing aggressively on price. The algorithms essentially learn that undercutting competitors' prices – typically seen as a competitive tactic – leads to a price war that reduces profits for all companies that are involved. Hence resulting in algorithms adjusting their behaviour while preferring to maintain higher prices to avoid these losses.[32] This leads to a form of tacit collusion, where the companies' pricing strategies align, not through human agreement but through the autonomous learning of the algorithms. The algorithms "understand" that

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30 Vestager, M., Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices, [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4665], Accessed 23 September 2024

31 Ezrachi, A; Stucke M.E, *op.cit,* note 20, pp. 71–82

32 Hanspach, P.; Galli, N, *Collusion by Pricing Algorithms in Competition Law and Economics*, Robert Schuman Centre for Advanced Studies Research Paper No. 2024_06, [https://ssrn.com/abstract=4732527], Accessed 23 September 2024, p. 17

price competition is less beneficial and adjust their strategies accordingly, making deviation from coordinated pricing unprofitable.[33]

Considering that the field of AI is currently in a phase of rapid growth and that legal practice and theory have not yet developed, whilst currently everything related to this scenario is based on previously known theory, the modernization of which is actively being worked on, and hypotheses we employ here are yet to be confirmed.

3.3 Predictable agent

This type of scenario refers to a type of pricing algorithm that behaves in a highly consistent and predictable manner and in that way, allowing competitors to anticipate its responses and coordinate their market behaviour without the need for explicit agreements. This predictability can lead to tacit collusion, where competitors can align their pricing strategies by simply observing and reacting to each other's predictable algorithmic behaviour.[34]

Unlike traditional collusion, which requires deliberate coordination between the companies, in this scenario, the coordination arises naturally from the algorithm's predictable responses which poses a major challenge for national competition authorities as proving collusion without explicit agreements becomes more difficult. Considering that the collusion in this case is eased by the algorithmic behaviour rather than direct human intervention, the national competition authorities may struggle to hold the companies accountable. Likewise, the practice under this scenario can lead to outcomes that harm the consumers, such as higher prices and reduced innovation.

The Eturas[35] case is a well know example of the Predictable agent scenario. In short, Eturas was an online platform used by various travel agencies to sell holiday packages. The company implemented into the platform system a technical restriction that limited the discounts travel agencies could offer to customers. This restriction was communicated to the agencies through an online notification within the system itself. The problem arose because, while the agencies were informed about the imposed cap on discounts, they were not required to individually agree

33 *Ibid*.

34 *Ibid*. p.16

35 Case Eturas, UAB and Others v Lietuvos Respublikos konkurencijos taryba C-74/14, ECLI:EU:C:2016:42

to it, nor did they actively discuss the decision.[36] Nevertheless, most agencies using the Eturas platform followed the price limitation that the system imposed.[37]

The system's behaviour – automatically capping the discounts travel agencies could offer – became a predictable and uniform action that all the participating agencies could anticipate and rely on. Although no explicit agreement or collusion took place between the agencies, the platform's uniform application of the discount cap allowed for tacit coordination of prices. Each agency knew that its competitors were subject to the same discount limitation, creating a stable, predictable pricing environment. This predictability discouraged any of the agencies from deviating from the imposed discount cap, as they understood that all other agencies were bound by the same rules. The court found that, even though the system's behaviour was algorithmically controlled, the agencies' acceptance of the platform's pricing restrictions without challenging or rejecting them could constitute collusion.[38]

3.4. Hub-and-spoke

The Hub-and-spoke scenario encompasses a structure where a central actor (The Hub) eases the coordination among multiple competitors (The Spokes) by using algorithms to manage information flow or pricing decisions. This setup allows the companies to indirectly collude through the hub without directly communicating with each other.[39] In short, "the common algorithm, which traders use as a vertical input, leads to horizontal alignment"[40].

The national competition authorities need to investigate the algorithm itself to see if it is designed to encourage collusion. If the algorithm is intentionally structured to coordinate pricing or behaviour between users, then it is clear that the anti-competitive behaviour is involved.[41] If the algorithm does not have an obvious collusive design, authorities might have to take a more flexible approach under the Rule-of-reason which means that they would look at whether the agreement to use the algorithm has negative effects on competition, even if it was not explicitly designed to do so. In such cases, evidence of the parties' intent becomes important for deciding how serious the behaviour is, whether it should be considered as a

36 *Ibid. para.*43.

37 *Ibid. para* 44.

38 *Ibid. para* 51.

39 Ezrachi, A; Stucke, M.E., *op.cit*, note 20, pp. 46–55

40 Ezrachi, A; Stucke, M.E., *op.cit*, note 12, p. 1787

41 *Ibid.* p. 1788

severe violation and, consequently, whether the case should be prosecuted under criminal or civil law.[42]

3.4.1. Algorithmic monopoly (Uber example)

Uber's pricing system can be understood within the context of the hub-and-spoke scenario, where Uber functions as the hub and the individual drivers act as the spokes. In Uber's case, the algorithm at the centre (the hub) controls the pricing, coordinating the behaviour of the individual drivers (the spokes), who don't interact with each other directly to set prices.[43]

It is a well-known fact that Uber's pricing algorithm determines fares in real-time based on factors like demand, supply, time of day, and traffic conditions.[44] Drivers do not have the ability to set their own prices; instead, they follow the price generated by the algorithm. There is also no need for drivers to talk to each other or reach explicit agreements. The algorithm takes on the role of coordinating prices uniformly across all drivers, resulting in a situation where pricing is aligned across the platform. Following the general description in the previous chapter, the relationship between the drivers can be seen as a horizontal agreement while the relationship between the Uber and the drivers can be seen as a vertical agreement.

The result of the algorithmic coordination is that drivers charge similar prices, especially during surge pricing periods. Surge pricing is Uber's way of raising fares when demand exceeds supply, effectively creating uniform price increases across the market.[45] This could resemble a form of tacit coordination, where all drivers follow the same pricing patterns dictated by Uber's algorithm.

While this ensures pricing uniformity and responsiveness to market conditions, it also raises questions under competition law regarding the control that Uber exerts over independent drivers and the potential for reduced competition. This area of competition law remains insufficiently researched, keeping open numerous questions concerning the justification as well as the limits of using this model of price formation. Therefore, this part seems like one big grey area, but it will take more time and research until we get a more concrete answer.

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42 *Ibid. p*. 1789

43 *Ibid.* p. 1788

44 Uber website, How Uber's dynamic pricing model works, [https://www.uber.com/en-GB/blog/uber-dynamic-pricing/], Accessed 23 September 2024

45 *Ibid*.

4. CHALLENGES IN ENFORCEMENT

Algorithmic collusion poses significant enforcement challenges for competition authorities, many of which arise from the nature of algorithms as previously explained. Namely, the lack of explicit agreements, the opacity of algorithms, the speed at which they operate, and the inadequacy of existing legal frameworks all complicate the detection and prosecution of anti-competitive behaviour in markets governed by AI. Addressing these challenges will likely require innovative regulatory approaches and possibly new legal standards to keep pace with the evolving nature of digital (virtual) markets.

Traditional competition frameworks are built around detecting and penalizing explicit agreements between undertakings aimed at fixing prices or restricting market competition (or having such effect). Particularly in the context of price-fixing, antitrust laws focus on explicit collusion, which requires a clear agreement or concerted practice between competitors and relies on evidence of intent or communication. However, in the context of algorithms and virtual markets, such explicit coordination is often absent, complicating the process of identifying and proving anti-competitive conduct.

Algorithms can, as mentioned earlier, autonomously adjust pricing strategies by learning from market data without any direct human intervention or agreement between the undertakings themselves. This situation, where algorithms independently align their strategies in a way that reduces competition, is therefore referred to as "tacit collusion" or "autonomous collusion"[46]. The inherent difficulty for the regulators lies in proving that companies using these algorithms are deliberately encouraging or facilitating collusion, especially when the outcomes arise from the algorithms' learning processes without explicit input from their creators[47]. This problem of collecting sufficient proof of anti-competitive behaviour will likely need to be addressed in the future, possibly even by novel models for the burden of proof.

Another significant challenge in enforcement lies in the opaque nature of algorithms, especially those powered by machine learning. Contemporary algorithms frequently operate as "black boxes," where even their developers may lack full comprehension of their inner workings or the rationale behind certain decisions. This lack of transparency complicates the ability of competition authorities to investigate and assess the workings of algorithms. When algorithms self-learn and evolve over time, their behaviour may diverge from the intentions of their devel-

[46] Ezrachi, A; Stucke, M.E., *op.cit*, note 12, pp. 1777-1778

[47] Ibid., p. 1780

opers, making it difficult to assign liability[48]. Also, it should be considered that algorithms can evolve over time, learning from market data and optimizing strategies in ways that were not anticipated by their creators. This raises the question of who should be held liable: the company that deployed the algorithm, the developers who created it, or potentially no one if the anti-competitive behaviour was not explicitly programmed?[49]

The regulatory challenge becomes more complex when algorithms are engineered to optimize profits in highly competitive markets. Such systems can autonomously generate anti-competitive outcomes, including price stabilization or parallel conduct, without deliberate intent or direct intervention by the firms employing them. This makes attribution of fault highly problematic, as enforcement authorities must grapple with whether liability lies with the undertakings deploying the algorithms or potentially with the algorithms themselves[50].

Finally, the speeds and scale at which algorithms operate further complicate enforcement. Unlike traditional forms of collusion, which often take time to develop, algorithms can adjust their strategies almost instantly in response to market changes. This makes detection of anti-competitive behaviour more difficult, as algorithms can quickly adapt to evade regulatory scrutiny. Additionally, algorithms operate on a global scale, potentially coordinating prices across multiple jurisdictions, making it harder for national regulators to monitor and enforce competition law effectively[51]. This global nature of algorithmic operations, with algorithms operating across multiple jurisdictions, often leads to cross-border effects that challenge national competition authorities. The enforcement of anti-collusion measures requires international cooperation, which is not always easily achieved due to differences in legal frameworks and enforcement capabilities across countries[52].

Many jurisdictions' current legal frameworks are inadequate to deal with these new forms of collusion. Competition authorities are often limited by laws that focus on human actions and explicit agreements, leaving a regulatory gap in addressing algorithmic collusion. As a result, enforcement agencies may need to rethink how competition law is applied in the digital age, including the possibility of new regulations that account for the capabilities of algorithms and artificial intelli-

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48 Ibid., p. 1782

49 Picht, P. G; Leitz, A, *Algorithms and Competition Law - Status and Challenges*, [http://dx.doi.org/10.2139/ssrn.4716705], Accessed 23 September 2024, p. 12

50 Ezrachi, A; Stucke, M.E., *op.cit*, note 12, p. 1784

51 Ibid., p. 1786

52 Picht, P. G; Leitz, A, *op.cit*, note 42, p. 11

gence[53]. Legislators are already introducing reforms to address competition issues in digital markets, with many jurisdictions discussing new proposals to improve enforcement tools and regulations. The question of adequacy of existing tools for competition authorities remains, highlighting the need for future-proof solutions to tackle emerging challenges[54].

5. CONCLUSIONS

This research derives the conclusion that the existing regulatory framework on collusion is generally suitable for application on cases of explicit algorithmic collusion. Provided that the doctrine embraced in *AC-Treuhand II* case would not encompass all possible types of digital facilitators, only regulatory adaptation needed is the extension of legal responsibility to software providers (if algorithmic software is not internally produced), for anti-competitive price-fixing agreement.

Tacit algorithmic collusion as a form of concerted practice on the other hand produces difficult regulatory challenges. Although in certain scenarios precision of automated computational process makes it easier to conclude that no other explanation for parallelism exists (when pricing is executed by pricing algorithms) existing regulatory framework is far from adequate for the application of tacit algorithmic collusion. Major issue in EU Competition law is proof of conscious parallelism. Algorithmic software by using methods of machine learning and deep learning in particular is capable of reaching parallelism without human knowledge that is outside of the conscious human action. Thus even the existence of consciousness parallelism as a long established precondition for collusion in case-law can be debated in scenarios of tacit algorithmic collusion.

Positive and pro-competitive effects of development of pricing algorithms in optimisation, innovation and for consumer-welfare (including dynamic and individual pricing) cannot be disregarded. Automated pricing mechanisms can enhance market efficiency in various scenarios that are covered in this paper. Thus, any regulatory intervention in algorithmic collusion should be executed with the balance between the need of preventing anti-competitive effects of algorithmic collusion with pro-competitive advantages of development of pricing algorithms.

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53 Ezrachi, A; Stucke, M.E., *op.cit*, note 12, p. 1788

54 G7 Compendium of approaches to improving competition in digital markets 08.11.2023, [https://www.jftc.go.jp/en/pressreleases/yearly-2023/November/231108G7_result2EN.pdf] Accessed 23 September 2024, *para.* 86. *et seq*.

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